Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

SPRING 2017

A History of Integrity Drives Primerus into the Future

Primerus, A Look Back Over 25 Years

Why Clients Turn to Primerus – Time and Again

+

Current Legal Topics:

Asia Pacific

Europe, Middle East & Africa

Latin America & Caribbean

North America

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

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

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

About Our Cover

In 2017, Primerus celebrates its 25th anniversary. The society was founded to restore honor and dignity to the legal profession and to help rebuild the public's trust in lawyers and the judicial system, represented on our cover by the scales of justice.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

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

John C. Buchanan

A History of Integrity Drives Primerus into the Future

One of my favorite things to do as president of Primerus – and there are many things I enjoy – is to travel around the world to meet with law firms who are considering joining the society. In these meetings, I hear one question over and over: Why did you create Primerus? It's a question I have reflected upon numerous times as Primerus celebrates its 25th anniversary this year.

In those meetings with law firms, I often mention Atticus Finch, the lawyer in Harper Lee's 1960 Pulitzer Prize-winning novel *To Kill a Mockingbird*. When I think of Atticus Finch, various qualities come to mind: upstanding character, highly moral, honest, willing to fight for justice even in the face of great personal costs.

When we founded Primerus 25 years ago, it was at a time when myself and a group of other attorneys were watching sadly as the ideals Atticus Finch embodied for the legal profession were deteriorating. So we formed Primerus to do something about it. We sought out principled lawyers in small and medium-sized law firms who were shaped in the mold of Atticus Finch – those who were standing up for what was right and holding themselves to the highest standards of the profession. At Primerus, we call these standards the Six Pillars: integrity, excellent work product, reasonable fees, continuing legal education, civility and community service. They have been at our core from day one.

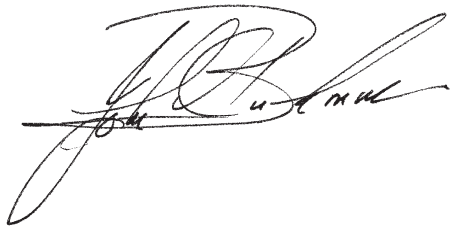
After years of slowly and carefully selecting only the best lawyers in the world as Primerus members, we now have 180 member firms with 2,500 lawyers in nearly 50 countries around the world, as well as 48 U.S. states. I am confident we will grow in the future, while still holding true to the values we hold dear.

As we search the world for the finest law firms, we are doing this for you, our clients – so that you don't have to. We search for high quality boutique law firms who are committed to performing excellent work for reasonable fees, and to following our high ethical standards. We submit potential firms to careful screening before they are admitted to the society, and then continue to review their performance every year they remain members. We bring these firms together into a society to work for you.

In this issue, you will hear from several clients who have benefitted from this service. They're clients who now come to Primerus first when they need a lawyer.

When we founded Primerus 25 years ago, it was at a time when myself and a group of other attorneys were watching sadly as the ideals Atticus Finch embodied for the legal profession were deteriorating. So we formed Primerus to do something about it.

As I reflect on 25 years with Primerus, I am grateful and proud that I am surrounded by the highest quality lawyers available today – the Atticus Finches of the legal world. We strive to adhere to the highest professional standards and offer excellent service to clients. Together, we have accomplished more than I dreamed, and yet, there is still work to do.



Primerus, A Look Back Over 25 Years

In the early 1990s, a trial lawyer from Grand Rapids, Michigan, was becoming increasingly concerned about the future of his profession.

Standards of professionalism among some lawyers declined, prompting distrust from the public. Lawyer jokes were rampant on late night television and in most social settings. Law firm advertising became more common, causing the law firms with the biggest ad campaigns to attract clients, regardless of their reputation and quality.

This lawyer decided he needed to do something. So he set out to use advertising of a different kind – ads which reminded the public about the nobility of the justice system and educated them about the importance of lawyers. He wanted to teach people what makes a quality lawyer and how to find one.

Ultimately, he would create a society filled with these high-quality lawyers from small to medium-sized firms around the world and hold them to the highest standards of professionalism in the industry – so clients could know where to find the best lawyers, wherever and whenever they needed one.

The lawyer is John C. "Jack" Buchanan and the society he founded in 1992 is Primerus.

Twenty-five years later, Primerus has grown to include 180 small to medium-sized law firms in nearly 50 countries. Clients around the world turn to Primerus when they need a quality lawyer for reasonable fees.

In the Beginning

In the late 1980s, Buchanan watched as more and more law firms ran ads. They were emboldened by the 1977 case Bates v. State Bar of Arizona, in which the United State Supreme Court upheld the right of lawyers to advertise their services. But Buchanan wondered if there was a way for law firms to embrace advertising in a way that helped the reputation of the firm and the legal industry, rather than hurting it.

"I wanted to do an ad that did nothing but tell the public about our great legal system," Buchanan said. "The public was hearing nothing but bad things, so I wanted to do something educational."

In 1990, he did just that. Buchanan's small litigation firm began running a 30-second television commercial and accompanying print ads in local newspapers and magazines – designed to defend the American legal system. The ad featured photos of tyrannical leaders Hitler, Stalin and Ayatollah Khomeini, along with the headline "Three leaders who really knew how to streamline a

legal system." The ad asked the viewer to imagine what that was like to live under leaders without regard for the justice system.

Members of the public, other attorneys and judges noticed, and they responded. So in 1991, Buchanan presented his ad campaign to the American Bar Association (ABA), under the name of Primerus. He received positive response and request for reprints. ABA executives invited him to Chicago to discuss producing similar materials for the national organization. Unfortunately, the ABA did not have funding to back their interest. The following year, the ABA sponsored its first national Dignity in Advertising competition, and the "Three Leaders" advertisement took first place.

The advertising effort planted the seeds which would result in the founding of Primerus in September 1992. Meanwhile, Buchanan continued to pursue his own ad campaign back in Grand Rapids, and published a brochure called "How to Judge an Attorney."

Law firms in the United States took notice and wanted to be part of Primerus. Word really spread when on July 15, 1993, *The Wall Street Journal* published an article referring to Primerus as a "sort of Good Housekeeping Seal of Approval for lawyers."

A lawyer from Oklahoma, Fletcher Handley, Jr., is among the lawyers who read the article with interest.

"It sounded like something I would like to be involved in," Handley said. "The idea of an ethical organization intent on restoring the image of the legal profession appealed to me."

He joined Primerus and continues to be involved today as a member of the accreditation board. His hope for the next 25 years is that Primerus "remains what is was intended to be – an organization composed of the very best lawyers, operating like a world-wide boutique law firm."

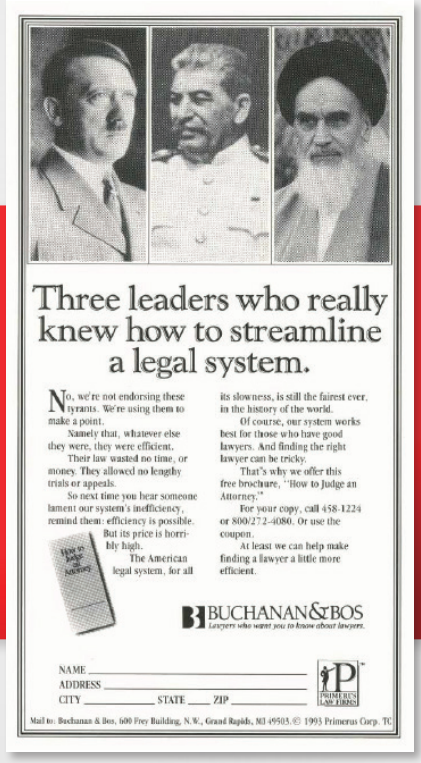
Al Ferris, founding principal of Ferris & Britton in San Diego, California, also saw the article.

"I had been growing more and more concerned with certain developments in the practice of law throughout the 1970s and 1980s," Ferris said. "An article in *The Wall Street Journal* about a lawyer in Grand Rapids who was also concerned caught my attention. He was trying to start up an organization to turn things around."

He called Buchanan, who within days was on a plane to California, along with Primerus' first employee, Scott Roland.

Within weeks of their meeting, Ferris' law firm joined Primerus. "What sold me more than the 'Good Housekeeping Seal of Approval' was Jack's outlining of what he thought the practice of law ought to be, the principles of being a good lawyer," Ferris said.

In November 1994, Handley and Ferris were among the dozen lawyers who attended the first Primerus National Conference in Scottsdale, Arizona. The annual event is now called the Primerus



Three leaders who really knew how to streamline a legal system.

No, we're not endorsing these tyrants. We're using them to make a point.

Namely that, whatever else they were, they were efficient.

Their law wasted no time, or money. They allowed no lengthy trials or appeals.

So next time you hear someone lament our system's inefficiency, remind them: efficiency is possible.

But its price is horribly high.

The American legal system, for all its slowness, is still the fairest ever, in the history of the world.

Of course, our system works best for those who have good lawyers. And finding the right lawyer can be tricky.

That's why we offer this free brochure, "How to Judge an Attorney."

For your copy, call 458-1224 or 800/272-4080. Or use the coupon.

At least we can help make finding a lawyer a little more efficient.

BUCHANAN & BOS
Lawyers who want you to know about lawyers.

NAME _____
ADDRESS _____
CITY _____ STATE ____ ZIP _____

Mail to: Buchanan & Bos, 600 Frey Building, N.W., Grand Rapids, MI 49503. © 1993 Primerus Corp. TC

1992: An ad created by John C. "Jack" Buchanan called "Three Leaders" takes first place in the American Bar Association's first Dignity in Lawyer Advertising competition.

July 15, 1993: *The Wall Street Journal* publishes an article referring to Primerus as a "sort of Good Housekeeping Seal of Approval for lawyers." Attorneys around the United States take notice and reach out to Buchanan.

PRIMERUS
MEMBER

September 1992:
Primerus is officially created.

Global Conference, a name more fitting to the times, as the last conference drew around 200 lawyers from around the world.

At that original conference, they adopted the tagline, "Good people who happen to be good lawyers."

Primerus was born and on its way.

Six Pillars

Buchanan was concerned that the public know what makes a good lawyer and how to find one. The brochure he published in the early 1990s, "How to Judge an Attorney," became the basis for the Six Pillars – values that every member of Primerus to this day must adhere to in their daily practice of law:

- **Integrity**
- **Excellent work product**
- **Reasonable fees**
- **Continuing legal education**
- **Civility**
- **Community service**

According to longtime Primerus member Duncan Manley of Christian & Small in Birmingham, Alabama, the Six Pillars are critical to making Primerus work.

"I think the establishment and publication of the Six Pillars has contributed greatly to the legal industry because clients are comfortable calling on Primerus lawyers, even those they do not know, to handle their legal matters knowing they will honor and abide by the Six Pillars," Manley said. "I don't know of another legal organization that makes such a strong commitment to clients."

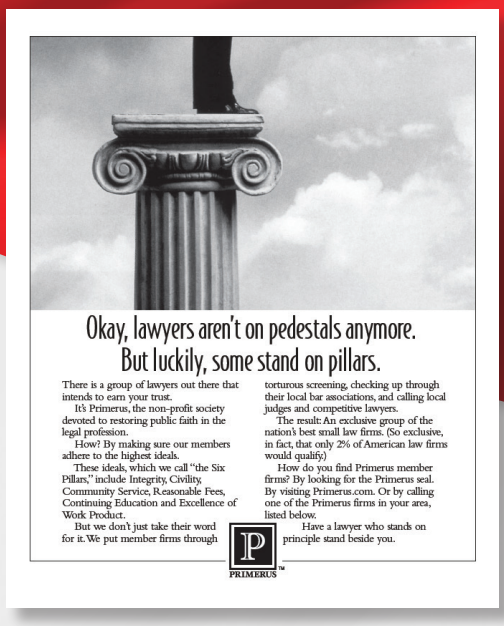
In fact, Manley's firm joined Primerus in 2003 because of these noble ideals. "I was concerned about the change in reputation our profession had experienced and I thought Primerus could help change that," he said.

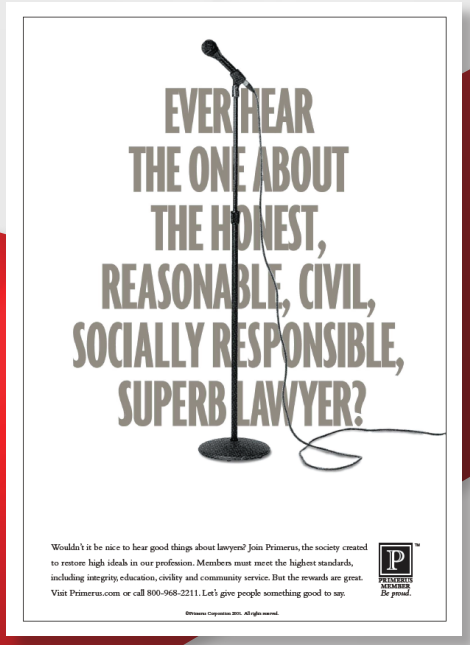
Small Firms, Big Service

Buchanan also wanted Primerus to be a society of strictly small to medium-sized firms, making it unique among various law firm networks and organizations. In fact, it remains unique today for that same reason – Primerus law firms have on average 14 lawyers.

By bringing together small to medium-sized law firms, Primerus allows clients to avoid the high overhead and bureaucracy of "big" law, while also enjoying the benefits of a global alliance, including assurance that all members have met the same stringent quality standards.

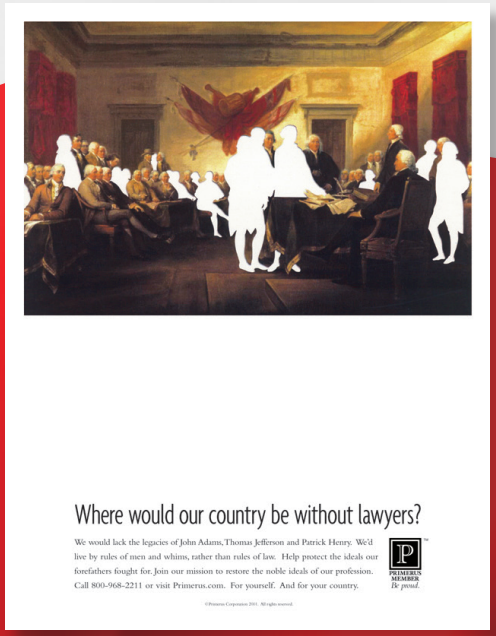
Donald Winder, partner at Magleby Cataxinos & Greenwood, P.C. in





November 3-5, 1994: Primerus holds its first Primerus National Conference in Scottsdale, Arizona, coinciding with the coldest Nov. 4 in Arizona history. The event would go on to be held every year, with its name later changing to the Primerus Global Conference.

2001: First firm outside of the United States joins Primerus. The firm, Houser Henry & Syron of Toronto, Canada, remains a member today.



2002: Primerus celebrates 10th anniversary. At the Primerus National Conference that year, Primerus organized into practice groups, which would later become the Primerus institutes.

Salt Lake City, Utah, remembers a key point in Primerus history, when at the 2002 Primerus Annual Conference in Carmel, California, a technology expert called Primerus a "virtual law firm."

"He said, 'You are a virtual law firm and you should organize as such,'" Winder said. "That was a seminal moment in Primerus history because it gave us the institutes and practice groups."

"The message was that we need to bind together these small and medium-sized select firms because the regional firms are coming into towns and gobbling us up, the national firms are gobbling up the regional firms, and the international firms are gobbling up the national firms," Winder said. "What are we going to do?"

The solution was to organize Primerus member law firms according to their primary area of focus and region. Over the years, Primerus would adapt its structure to follow its growth, ultimately resulting in the following:

- **Primerus Business Law Institute – Asia Pacific**
- **Primerus Business Law Institute – Europe, Middle East & Africa**
- **Primerus Business Law Institute – Latin America & Caribbean**
- **Primerus Business Law Institute – North America**
- **Primerus Defense Institute**
- **Primerus Personal Injury Institute**

Winder points to another key moment, when Manley suggested an idea to increase the number of defense firms in the Primerus Defense Institute. The idea was to host an annual event, now called the Primerus Defense Institute (PDI) Convocation, where Primerus members could invite their clients for a mixture of education and relationship-building activities.

The first PDI Convocation was held in 2005 with 50 members and 20 clients in attendance. The event has continued every year since then, with the 2016 Convocation in Napa Valley, California. The 2017 PDI Convocation will be held April 20-23 in Naples, Florida.

Clients including Matthew Tegmeyer, national director of claims for Vericlaim in Naperville, Illinois, love the event because it's low-pressure, educational and friendly, unlike so-called networking events hosted by some other organizations. He was pleasantly surprised when he came back from his first PDI with not one person offering him a business card. He now turns to Primerus first when he needs a lawyer.

According to Ferris, Primerus, with law firms in nearly 50 countries, becomes the alternative for clients to the large, expensive law firms of the world.

"Primerus can be one-stop shopping," he said. "You don't need one of the large firms that have, until recently, dominated the international

March 9-11, 2005: Primerus holds first annual Primerus Defense Institute Convocation in Key Largo, Florida. Fifty Primerus members and 20 national corporate clients attended.

2008: Primerus grows to include 80 firms, doubling in five years.

2008-2009: Primerus adds 46 firms in one year, coinciding with the global financial crisis – a time when corporate clients were seeking more value for their money in the delivery of legal services.

legal world. Primerus is a viable option for a company doing business nationwide or internationally. You don't have to go with the 3,000-lawyer firm, you can go with the 50-lawyer firm that is associated with 3,000 lawyers around the world."

He described a scenario he saw repeatedly when he was a full-time practicing litigator: walking into the courtroom, and on the other side, seeing five or six people – the lead lawyer who was a senior partner, the junior partner who had done most of the work on the case, an associate and a legal assistant. Meanwhile, on his side, it was just him, and possibly a legal assistant.

Most times, he would win, as he, the lead litigator, was familiar with every detail of the case.

"It's not good for the client or the client's case when you overstaff, you don't get the senior partner very often, and the client is subject to training the youngest lawyers at their expense."

Growth Over the Years

In the five-year period from 2003 to 2008, Primerus doubled in size to 80 law firms. Then, Primerus watched along with the rest of the world as the global financial crisis of 2008 took hold.

Many economists have referred to this as the worst financial crisis since the Great Depression of the 1930s. For Primerus, though, late 2008 and 2009 was a time of tremendous, unprecedented growth, with Primerus adding 46 new firms. While that might seem surprising given the state of the economy, it actually makes perfect sense, according to Buchanan. The Primerus brand, which he summarizes as high quality legal work for reasonable fees, was never more attractive to clients during those uncertain times.

Headlines read "Law firms feel strain of layoffs and cutbacks" *(The New York Times)* and "Big-firm partners go small to keep and attract frugal clients" *(The National Law Journal)*.

"Given the economic challenges of the time, it was never more important for clients to develop trusted relationships with law firms that offered significant value through high quality legal services at reasonable fees. Primerus offers partner-level services at the fees large firms charge for their associates. That resonated with a lot of corporate decision makers," Buchanan said. "It also resonated with a lot of small to medium-sized law firms who wanted to join with Primerus to help get the word out about their firm."

May 2010: Primerus hosts a conference in Paris, France, with about a dozen European law firms. Most of those firms would later join Primerus – the impetus for the society's tremendous international growth. Primerus now has member firms in nearly 50 countries.

Primerus
The World's Finest Law Firms

2012: Primerus updates its tagline to "The World's FInest Law Firms" to reflect the quality of the member firms.

Building upon this growth, going global was the next step for Primerus. In May 2010, Primerus held a conference in Paris, France, attended by about a dozen firms from European countries including Switzerland, Germany, The Netherlands, Greece and Hungary.

Nearly every firm there later joined, including Russell Advocaten of Amsterdam.

"We joined Primerus because we wanted to be able to offer our clients quality legal services worldwide," said the firm's managing partner, Reinier Russell. "As a member firm, we are able to share knowledge and to refer our clients to the best lawyers and offer them specialized services all over the world."

Law firms in more countries would follow, and Primerus now has member firms in nearly 50 countries.

Edward Sun, senior partner at Hengtai Law Offices in Shanghai, China, remembers one time when his firm was able to help a business partner, an Italian lawyer, work with five Primerus law firms for his clients.

Sun wanted to become involved in Primerus to do just that – get referrals from other members firms, as well as find lawyers in other jurisdictions for his clients when needed.

Primerus members refer their clients with confidence to those firms around the world, knowing that each firm has been vetted according to the highest standards. Before accepting a member firm, Primerus uses all the ratings services available, including Martindale Hubbell, Best Lawyers, Chambers and Legal 500. Primerus then conducts a more extensive investigation of the firm, including attorney backgrounds, references and malpractice history checks. An independent accreditation board has the last word on admission and retention of members, while another board oversees quality assurance to more specifically define the high standards embodied within the Six Pillars and to help firms live by those standards in everyday practice.

Ferris serves on the accreditation board as well as the Primerus board of directors, so he speaks with assurance to clients that all Primerus firms meet the quality standard.

"Primerus is a great place to house the majority of your legal business," Ferris said. "The Primerus lawyer near where you are headquartered has the ability to put you in touch with lawyers all over the world, and I know that they are good lawyers from good law firms."

October 1-4, 2015: For the first time, Primerus holds its Global Conference outside of the United States. Members and clients gathered in Amsterdam, Netherlands for the historic event.

2016: Primerus starts the Primerus Client Resource Institute, inviting clients to join Primerus.

2017: The International Society of Primerus Law Firms celebrates 25 years with 2,500 attorneys from 180 law firms in nearly 50 countries and 48 U.S. states.

The Next 25 Years

Primerus members and clients alike speak with excitement about the future of Primerus, which likely will include more international growth.

"I think Primerus is a great success story," said Joel Collins, founding partner of Collins & Lacy in Columbia, South Carolina. "I am proud to be part of it."

Collins was among the early members of Primerus, joining in 1996.

"Did I predict it? No. But am I pleased and proud to see what's happened? Absolutely," he said. "I think we have more potential for the future."

Primerus member Peter Bennett of The Bennett Law Firm in Portland, Maine, said, "My hope is to see Primerus continue to evolve into a global organization of lawyers who happen to be good people, and that we are able to creatively unite and compete with the large firms of the world, with a delivery model that is much more entrepreneurial while at the same time delivering exceptional legal services to our clients."

Robin Lewis, member of Mandelbaum Salsburg in New Jersey, calls Primerus' growth "amazing."

"To think that there is a Primerus member firm virtually anywhere on this planet is incredible and a credit to the Primerus organization," Lewis said. "Primerus has enabled the small or mid-sized firm to practice on a different level than it might otherwise be able to do because of the contacts and relationships it encourages."

She said Primerus has helped her firm serve its clients with needs that extend beyond its geographical borders, as well as in practice areas that it cannot serve itself.

"It's not simply a case where we have current clients with needs outside our area. As a marketing tool, being able to say to prospective or current clients that we can help them almost anywhere that they do business is a great help to us," Lewis said. "On a personal note, it's been a pleasure for me to get to know people from around the country and around the world through Primerus."

Why Clients Turn to Primerus – Time and Again

"Primerus is a great organization. I have been really pleased. It's the ultimate resource. Now if I need someone quick, I don't have to waste time going through all those steps."

– Mark DiGiovanni, vice president of litigation management for Global Indemnity Group in Bala Cynwyd, Pennsylvania

"We have adopted Primerus as a go-to source."

"With every one of the Primerus firms, not only did I get great service, but also highly successful resolution or litigation of the case. To me, it was a no-brainer at that point."

– Matthew Tegmeyer, national director of claims for Vericlaim in Naperville, Illinois

If you talk to clients of Primerus law firms, you will hear the same thing over and over: Primerus is their first stop when they need a lawyer.

As Primerus celebrates its 25th anniversary, the society includes 180 member law firms in 48 U.S. states, and nearly 50 countries, giving clients around the world access to Primerus' quality lawyers for reasonable fees.

One of those clients is Matthew Tegmeyer, national director of claims for Vericlaim in Naperville, Illinois. Vericlaim represents The Scott's Miracle-Gro Company, a Fortune 500 lawn care corporation, which 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 associates recommended Primerus member John Brydon of Demler, Armstrong & Rowland, LLP in San Francisco. Pleased with the results and the fees, they hired him for other cases, Tegmeyer said. Eventually, Brydon introduced Tegmeyer to other Primerus attorneys, and Tegmeyer began attending Primerus client events such as the Primerus Defense Institute (PDI) Convocation.

Now, Tegmeyer's a founding member of the Primerus Client Resource Institute as well as an executive committee member of the Primerus Client Advisory Board.

"We have adopted Primerus as a go-to source," he said. "We go to Primerus first."

He has worked with Primerus firms in Rochester, New York; New Orleans, Louisiana; Lexington, Kentucky and Des Moines, Iowa. In fact, at the 2016 Primerus Defense Institute Convocation he counted 22 firms he had worked with over the years. He expects their involvement with Primerus firms only to increase as his company grows rapidly internationally, increasing their need for quality lawyers in new jurisdictions around the world.

So, what keeps him coming back?

He likes that he can rely on Primerus to vet its members, so he knows they are top-quality – without exception.

"With every one of the Primerus firms, not only did I get great service, but also highly successful resolution or litigation of the case," Tegmeyer said. "To me, it was a no-brainer at that point."

He likes the low-key, no-pressure, friendly and educational atmosphere at Primerus client events. He was pleasantly surprised when he came back from his first PDI with not one person offering him a business card.

And he likes that along with great service, excellent results and reasonable fees, he gets lawyers who hold themselves to the highest standards of integrity and professionalism.

"When I get a case in an area where we don't have approved counsel, I always dial up the Primerus website, I have not been disappointed from the first."

– Jack Else, claims attorney with United Fire & Casualty Company in Cedar Rapids, Iowa

"It's been a great relationship," Tegmeyer said. "The bottom line is that if we, as well as our clients, weren't getting excellent results and quality representation from Primerus firms, we would not be having this conversation. Their rapid growth in 25 years is very impressive."

Another client who was won over by great results from a Primerus firm is Jack Else, claims attorney with United Fire & Casualty Company in Cedar Rapids, Iowa. He hired a Primerus firm for the first time after experiencing a major breach of trust with another non-Primerus law firm his company had retained. Else had already met Aaron Pool and Bob Brown of Primerus firm Donato, Minx, Brown and Pool in Houston, so when he knew he needed new litigators for this case, he called Brown for a recommendation of a Primerus firm. Since then, he has hired several Primerus law firms including Cardelli Lanfear P.C. of Royal Oak, Michigan, and Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson APLC of San Diego, California.

"Whatever success I have is the direct result of their excellent work," he said. "All I did was pay the bills and offer a few suggestions."

He also has worked with Duncan Manley of Primerus firm Christian & Small in Birmingham, Alabama.

"He did a magnificent job," Else said. So now he turns to Primerus on a regular basis.

"When I get a case in an area where we don't have approved counsel, I always dial up the Primerus website," Else said. "I have not been disappointed from the first."

You will hear the same story from the general counsel from a large nationwide retailer. She could not be identified because of company policy.

"Before we were acquainted with Primerus, when we had a claim in an area where we didn't already have legal representation, we were kind of taking a shot in the dark. We would pretty much go to the 'yellow pages' and put our trust in strangers. Now Primerus does all the work for us by vetting law firms. We know they adhere to the Six Pillars and that we can trust them. The legwork is already done for us, and we can just focus on the case. It's been a tremendous tool for us."

"To me, it's kind of like buying a used car. If you buy it from someone who says this was their grandma's car and they know everything about it, you trust that. But if you buy it from a used car salesman who you don't know at all, you don't have that same level of comfort. That's what Primerus brings to the table for us. They filter their attorneys through a process so we know they're quality attorneys. We are trusting in the attorney, but we are trusting in Primerus primarily."

– Colleen Taylor, claims administrator for Werner Ladder Company in Greenville, Pennsylvania

"There's a major confidence with Primerus that you're going to get excellent service at the best fee," she said.

She also values the educational programs at Primerus client events.

"This is information I would not get anywhere else," she said. "If a lawsuit or an issue comes up, you learn from it. But because of the educational events through Primerus, I learn about things that have not happened to our company. This gives us a leg up to hopefully prevent issues in the future."

"Hiring a law firm to me is very precarious. It's hit or miss. What I like about the Primerus model is that the firms are already vetted. There is a screening process, and if something goes wrong with a firm, I need to contact someone who can hold the firm accountable. That to me is the value."

– Rodolfo Rivera, chief international counsel for Fidelity National Financial, Inc., in Jacksonville, Florida

Technology: Helping or Hindering the Mission?

I am a traditionally trained defense trial lawyer working in a modern, electronic practice environment. Most of my clients are insurers, trucking interests or licensed professionals. I view my "mission" in defense litigation, and every case, as follows: "To prevail in the case, or, to create enough risk for my adversary such that the risk becomes intolerable, so that the adversary will resolve the case in a way that is acceptable to my client." I focus on doing those things that achieve that mission, and I do not enjoy or promote anything that does not assist in that mission.

Technology has the capacity to greatly assist in that mission. It can also be a significant hindrance from completing the activities of highest priority and value, day to day.

But let's step back, for some perspective. Twenty years ago I was a young assistant district attorney. I seldom used a computer, and smartphones did not exist. Evidence gathering, case development and analysis, and trials were done with minimal use of computer technology. My boss and mentor, the district attorney, was heavily involved in capital murder litigation. He never used a computer. He meticulously prepared many high-profile cases for trial, with the various documents, briefs and other strategic information stored in sequential three-ring-binders. This became his roadmap for conducting an entire trial. In carrying out our case preparation, we had the benefit of large blocks of time for total focus without interruptions. We got good case outcomes, without email or litigation software.

Now, electronic (paperless) law practice and litigation management is fast becoming (or is) the standard, and it has altered the process of litigation dramatically. As president of my law firm, I embrace it. It has greatly increased the productivity of attorneys and clients. With my notebook computer, tablet or smartphone, I can research, edit legal documents, manage my professional billable time, communicate with courts and clients, file pleadings, communicate with opposing counsel, conduct searches for new evidence, read millions of pages of digitized evidentiary documents, check social media and news headlines, and co-manage a law firm – almost simultaneously. My adversaries also have this technology, so the field is level. The difference between who wins and loses is, in part, determined by who uses the assets better.

One of my law professors, a retired state Supreme Court Justice, advocated two core principles necessary to be a successful lawyer, and which still hold true:

- First, almost any attorney can handle a case well if (a) he or she has the *desire* to do so and (b) he or she *prepares* appropriately.
- Second, there is no good legal writing, there is only good *re-writing*.

Email and electronic-based litigation activity can easily impede an attorney from abiding by these key principles for success in a case.

I am willing to bet that during the time it takes you to read this article, you will receive one or more emails. Unless there is an exclamation point beside an email, or you have some reason (perhaps the identity of the sender) to expect an email is a high priority, you will likely be tempted to stop reading this now, click and read the email, and determine its content and importance, relative to everything else you need to do today. This is both normal and problematic. It is normal because we have created a system of standardized electronic communication in which, from the sender's perspective, an email should be read and responded to promptly. I endorse that, generally. It is also normal because we no longer rely upon a tiered system of external communications – postal correspondence, faxes, overnight couriers, etc., each with a different level of importance – to help us assess whether to review the new information sooner or later. Finally, it is normal

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because our brains produce dopamine when we click on an email to read it, akin to discovering a berry growing on the ground 100,000 years ago. However, the disruptive effect of the "fire hose" of incoming electronic mail messages upon litigation management and quality work flow cannot be understated. Every email must be assessed for what response is appropriate, which takes precious time, and it rapidly burns away the glucose stored in the executive functioning region of the brain.

The email "conversation" also defies the second principle: legal "re-writing" (letting a written position sit for later review with a fresh mind) cannot easily happen in real-time email discussions.

The modern electronic platform has caused attorneys and litigation managers to undertake, at considerable time and expense, activities that historically were performed by others. I am a bit surprised my firm's litigation software will not make coffee for me. A computer "dashboard" lets (and encourages) attorneys to manage documentation that historically their (non-timekeeping) support staff could manage instead. I suspect I am in the minority now, in that I do not print documents myself, or save many documents into our computer system. I am supported by capable staff for those tasks. I know young lawyers, however, who – groomed by their law school experience and modern litigation software options – will draft entire documents from scratch, unassisted by anyone. While certain hands-on drafting is desirable, cost-effective and produces the best product, it also can have an undesirable cumulative effect by diverting the attorney – for hundreds of hours a year – from his/her highest and best use: analyzing the evidence, the law and issues, planning the defense, and executing that plan. Practitioners and clients may stay "busy" all day in part from literally hundreds of email interactions but not as effectively advance "the mission."

In defending a case, there is no more valuable act of the attorney and/or the client than spending uninterrupted time to focus on, contemplate and analyze the preferred course of action. It may take several "sessions" of thought to reach the correct result. One cannot go through that deliberative process in his office if he is interrupted repeatedly by checking the email inbox. Ironically, for me, some of my best legal analysis happens away from the office, free from interruptions from my computer and telephone. (I once realized how to win a case while I was sitting in a barber shop reading *Field & Stream* magazine.)

Incorporating that valuable analysis and plan into a letter and report to a client (i.e., assuming the case and risk exposure warrants it) is also beneficial in that (a) I will not forget all that good information later and (b) it improves clarity of communication to my client. The optimal format includes an executive summary, a discussion of relevant facts, law, jurisdictional and venue considerations (often the most critical), a recommendation on short and longer term defense activity, a decision-tree style of analysis of potential outcomes from a litigated result and/or a resolution, and a budget. I think it is especially useful for the client to reflect awhile on my analysis and proposed plan, and in discussing it later, to probe for weaknesses or problems with my assumptions and recommendations. Such collaboration produces a refined assessment and plan that has the best chance of accomplishing the mission. Ironically, almost none of that valuable process requires much email or "clicking and dragging."

To my colleagues in the defense bar, and for clients involved in managing litigation, I'd encourage you to reflect a bit: has the electronic work environment and its incessant time demands usurped substantial time you need to spend on quality, uninterrupted analysis and case planning? Are you willing to shift your priorities and activities to "get off the gerbil wheel" and spend time on priorities and have better of control of the trajectory of and outcome of your cases? Under the system you currently follow, if you do *not* make some changes, is your practice model sustainable in the long run? Lastly, and I offer this tongue-in-cheek, would you want your physician to be checking his email while seeing you for your serious medical issue, and how is your professional obligation role and duty any less important?

I am a fan of and rely upon technology. I do not miss the days of pulling volumes of the *Federal Reporter* to manually make copies of decisions for use in court. Technology places the world at our fingertips and has enabled better communication with clients and others. When used correctly, it produces a better product and service, and outcome, at a lower cost. However, the technology and associated processes, like anything else, have to be managed to ensure we run it, and it does not run us, so that we can complete our mission.

How to Know You Need an Economic Development Lawyer

We all see news from time to time of a major economic development project that usually involves a CEO and a politician, holding a media conference to announce the creation of many new jobs, a major capital investment, and millions of dollars worth of economic incentives from government agencies. Do you ever wonder what went on behind the scenes to reach that happy occasion, its legal basis, and how you might be able to obtain those deals? This is what I do for a living as an economic development and commercial real estate lawyer for companies and public agencies in North and South Carolina.

Dave Brown

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My objective with this article is to make a field that can be amorphous more accessible for agencies and companies that deserve the benefits that these projects provide, and to make it more accessible for their lawyers as well. This is where law, politics and business meet to make deals. I believe wholeheartedly that it will happen more in the future as we compete for limited resources in an age of increasing automation, public scrutiny and expectation by shareholders, workers and voters. Regardless of one's political orientation, we see the new administration making job creation, job retention and capital investment in the U.S. a high priority.

Consider engaging an economic development lawyer whenever you are working on a project that involves significant capital investment and new jobs. The capital investment will result in a greater property tax base, and employment will broaden the economic base of a community in multiple ways. A project that involves a high proportion of "business property" such as robotics and other technical equipment for sophisticated manufacture is ideal because of the great initial investment, the rapid depreciation and the ongoing need to replace the equipment in industries such as pharmacology, data and high performance engine assembly. The significance of the fixtures, furnishings and equipment is frequently overlooked in the hoopla over the size of the plant and the hundreds of new jobs, but often it is this renewable value which makes the numbers work on public investment in the project. Lots of skilled and well-paid jobs tend to go with this kind of project too – the kind of success that elected officials love to sell.

The jobs are frequently what galvanize public support – and public investment. This is understandable and generally justified. No one can argue against greater employment opportunity and the almost innumerable benefits it brings to communities. The jobs are what usually bring the states to the table because they are likely to be the most direct beneficiary in the form of a greater income tax base. Incentives at the state level frequently key off of projected wages and personal income taxes, so the economic development lawyer's knowledge of how these programs are screened, scored and administered can be crucial to negotiating terms and in that lawyer helping a company or an agency determine the most effective location for a project.

The sleeper statistic for states is sales tax revenue. It is indirect and driven largely by job count and the quality of those jobs. Hundreds of new jobs means thousands of new consumers, and new revenue streams from taxes on everything from wine to energy consumption. Just like financial institutions, states have become more creative in mining for fee-based income as conventional employment and the withholding taxes that go with it have become less certain. The ability of a lawyer to evaluate those numbers and use them in objective advocacy for a project is highly valuable to the client, whether in the public or in the private sector.

The local level is where the greatest impact of a successful project is felt, although that impact is often indirect and intangible. This is why we frequently see local governments (and states) investing in projects seemingly beyond their projected economic return. Sales taxes from increased sales at the grocery stores may bring hundreds of thousands of dollars a year in additional tax revenue. Real property taxes and values may jump as employees and their families consume as-built housing stock and

demand greater inventory of new housing. The secondary and tertiary benefits are likely to be of even greater value. Some can be measured readily but many are difficult to qualify. A new facility is likely to lure suppliers and their employees to the area. Spouses bring their own businesses and skillsets to the host community, where they are absorbed by the market as start-ups or sustainable additions to existing employers. The correlation between a vibrantly diverse economy and lower rates of violent crime and chronic disease is so high that mutual causation is indisputable. It may be hard to quantify these benefits, but they sure are valuable. Communities, and states to a lesser extent, will frequently pay for them through economic incentives. The advocate's skill in reducing those benefits to economic value and identifying their intangible value for decision makers can make or break an incentives package and where the recruited company locates its project.

The importance of the real estate to the success of a project frequently transcends its economic value. Location has, of course, great symbolic value. Companies accept certain costs to be located where economic benefits can be derived, especially where the location itself communicates the mission, the ethos and future of the company. If a community already has the desired cachet, then it will probably have to pay less to land the project. Communities lacking it will have to pay more for the project and the cachet that they covet. This factor is akin to good will on a balance sheet. Much like good will, it can be easily overstated, resulting in a company overspending on its real estate or in a community overpaying for a project. This is, however, just the top line of how real estate and the application of local law regarding real estate and economic development can affect a project.

The availability of the real estate necessary for the project may be critical to where the project goes and how it is valued. Its readiness may help to satisfy demand for the most valuable resource of all, time (I admit that I took that from *Wall Street: Money Never Sleeps*, but that does not diminish its accuracy). A community that owns its best sites for economic development has a competitive advantage. In fact, this advantage has become so valued that site control, i.e. the right to deliver the site, early in a project may be necessary to qualify for consideration. A lawyer's ability to help the parties obtain site control and assess its security will probably become critical at some point in the process.

A lawyer's ability to apply the subset of real estate laws which apply to acquisition and disposition by public agencies for purposes of economic development can directly impact the bottom lines on the spreadsheet and on the schedule. For example, public agencies may have greater flexibility in how they buy, sell or otherwise convey real property when it is for economic development, but that flexibility frequently calls for greater disclosure to the public and an economic justification on the part of public decision-makers. For example, the local government may be able to contract with whomever it wishes for a discretionary price instead of having to convey the property for market value as determined by public bidding. However, the local government may be obligated to disclose the market value of the property and to find specifically that its conveyance will result in the creation of jobs paying more than the local average.

In these cases real estate is a field of opportunity fraught with potential pitfalls. An economic development lawyer's ability to envision and then to plot a course through that field, and that lawyer's ability to communicate the merits and the risks of that course, may determine the nature of the relationship between the company representing an opportunity and the communities which want to make that opportunity their own. A close friend recently asked me why someone would hire me to work on an economic development project with a real estate component. I told her that I can make these things happen without bringing out the opposition, or at least without enraging it. If it satisfied her, then it will probably satisfy most clients.

It does not always work out according to plan. This could mean fewer hires than projected, a lower capital investment than promised, the relocation of the company or the failure of the business. None of this is good, but an effective economic development lawyer can mitigate the damage proactively and, to a lesser extent, reactively. This may be done up front by means such as break-up fees, or later by the transfer of property, the renegotiation of economic development agreements or the dreaded refinancing of incentives. The best defensive course will probably depend on what the law allows, the terms of the initial agreements, and the negotiating positions that the parties hold, like most other contracts "in turnaround."

Structuring the deals so that recoupment of the public investment is not the only remedy is savvy and artful, because it is frequently something easy to provide for but hard to enforce. Finding an alternative means such as payments-in-kind of real property or devising the incentives so that they are paid out as public benefits are derived is generally a wiser course. These projects generally involve the passage of time, relatively high reward and some level of risk, so an effective lawyer will help to manage the downside for clients proactively with those factors in mind. Skillfully applied knowledge of the laws and contractual terms regarding these unfortunate events can result in effectively managing them as well as the expectations and relationships which hinge upon them. If you are good, then you will get to do it again.

The importance of economic incentives to a company's decision on where to land varies significantly based on the industry, the kind of workforce it requires, the portability of the project and the value of the incentives that a community, or a competing community, is willing to provide in exchange for the project. Incentives may serve as the "ante" one pays at the start of the selection process, or they may be what puts one location over the top after the field is narrowed. The high likelihood that incentives, the laws of economic development and the skill with which those laws are applied will come into play at one stage or another mean that companies and agencies should keep those factors and their economic development lawyers in mind throughout the process. Their importance will require at least one lawyer who can analyze the value of the project in relation to the law and communicate that particular value to decision makers including the general public, elected officials and C-level executives in the public and private sectors. P

Alternative Fee Arrangements: Beneficial for Law Firms and Clients

If it hasn't hit you yet, it's coming. More and more business clients enter into Alternative Fee Arrangements (AFAs) with their lawyers. Clients like the idea of the certainty and predictability an AFA provides, and they like the assurance that they can pick up the phone to ask you a question without increasing their costs with every tenth of a minute they are on the phone.

According to the BTI Consulting Group, outside counsel spending under AFAs was up to 35.6 percent in 2015, up from 21.7 percent just two years earlier. Almost 70 percent of companies polled were using AFAs for at least some portion of their legal work. Companies report on average that they are saving around 14 percent when using AFAs. In another survey conducted by LexisNexis, with 135 companies responding, the majority of respondents expressed a satisfaction with AFAs, many even suggesting that they hoped to increase their use of AFAs in the years to come.

Many lawyers' initial reaction to this news is negative. Lawyers assume AFAs will cut into their fees. But that does not have to be the case. In fact, if employed smartly, AFAs will not only make clients happier, but can help law firms increase overall business and profitability.

What Clients are Saying

An array of corporate counsel polled by LexisNexis responded that they believe pricing/fee structure to be the top issue facing the legal industry and their legal departments. Interestingly, as hourly fee rates continue to rise, a majority of corporate counsel polled actually said that their legal budgets had been cut in the past few years. These competing trends obviously make extracting the most value in the most efficient means possible, an important goal as businesses deal with their outside attorneys.

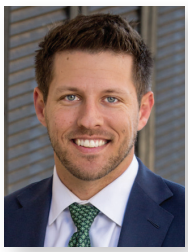
Businesses also enjoy the predictability that can be provided through various AFAs. It's no secret that the ability to accurately forecast costs is one of the most important criteria to whether a business venture will be profitable. In my own conversations with business owners and corporate counsel, the prevailing view is that traditional hourly fee-based litigation almost always ends up costing more than expected, as unforeseen issues invariably arise. And whether this a legitimate complaint or not, it is reality that clients often get frustrated with the idea that every time their lawyer picks up a pen or has a thought process that involves their case, it is costing them money.

In our experience, when we express enough of an understanding of a client's business to offer them AFA options that help make them more efficient, and their costs more predictive, they are incredibly appreciative. Many of the AFAs offered also shift some of the legal fee risk to the law firm, which again is appreciated by clients, as they perceive our interests becoming more aligned. This often leads to more business, not only from the client, but also from referrals the client makes.

Types of Common Alternative Fee Arrangements

1. Contingency Fee Where Client Pays Expenses

This is the most traditional AFA in which the law firm receives a fixed or scaled percentage of any recoveries in a lawsuit. The nice thing about this arrangement for the law firm is that the client pays all expenses. These arrangements are appreciated by smaller companies and start-ups who do not have a large legal budget. This type of arrangement obviously works best on a plaintiff claim, but it can be structured as part of a defense claim also, wherein the payment is made contingent on a percentage of savings off of a set agreed to amount.



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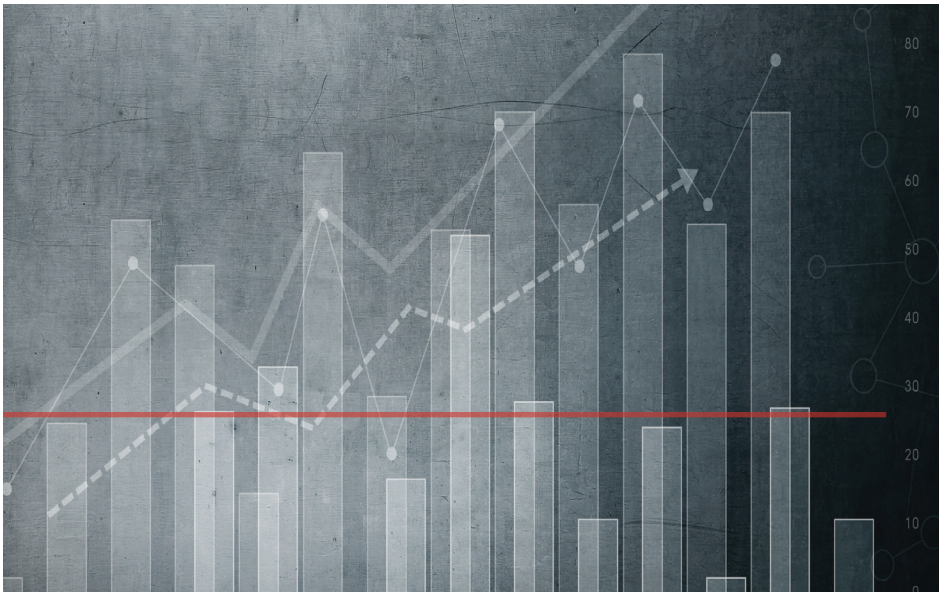

2. Partial Contingency Fee

This is an arrangement where the law firm bills at a reduced hourly rate, and also receives a percentage (smaller than normal) of the recovery. If a firm's normal contingency fee rate is 33 percent, they may take only 15 to 20 percent here, while also billing at about 50 percent of their normal hourly rate. This type of agreement can work well in many instances, as the law firm is guaranteed some money on the reduced hourly rate, but there is also some risk-sharing and aligning of financial interests provided to the client. This AFA is most common on a plaintiff claim but can also be structured as part of a defense file, with contingent money kicking in if agreed upon results are achieved.

3. Fixed Fee

Clients often find this type of AFA very attractive and they can be tailored to a number of different situations and circumstances. A flat fee can be a one-time agreed upon payment up front, or made in increments. It can be a fixed number paid on a monthly basis, or a sort of hybrid hourly fee setting, it can be a ceiling on the amount of hours billed per month, providing some certainty to the client as to what the maximum exposure will be. This type of agreement is versatile and can provide efficiency and certainty to both law firm and client.

4. Holdback/Success Fee

This is another versatile type of AFA that can be tailored to fit a number of matters. In this AFA, a portion of the attorney's fee is paid up front, with another portion to be paid in the end, contingent upon certain agreed upon milestones or measures of success being reached. In this setting, the law firm is guaranteed some money without having to bill by the hour, which is nice, and has also aligned its interests with the client.

How AFAs are Positive for Clients *and* Firms

It seems that many lawyers assume AFAs will mean a net reduction in money to the firm without first putting the time in to evaluate the positives that could result. When a firm is not tied to just billing through as many hours as it possibly can, it is freed up to discover and entertain other opportunities.

The old model of "no stone unturned" on hourly files is a dying breed, except for at the largest of companies and on multimillion-dollar files. Clients, instead, are asking now for a more efficient, value-based approach. We see more reductions in time entries being asked for every day for tasks the client deems were unnecessary, or not technically a "legal" task, etc. More and more clients are also refusing to pay full price for associate work, making the partners spend more time on matters that are not their highest and best use for their law firms.

Under many of the AFAs discussed, many of these problems can be alleviated. Associates are freed up to work on the matters entrusted to them, while partners are able to spend more time adding value to the firm in other ways. Efficiencies can be achieved in multi-tasking on several matters at once that were not possible under hourly fee arrangements. Also, the certainty in the fee provided by many of AFAs helps firms more accurately forecast the money that they will have to invest in other matters, which again can lead to pursuing opportunities that firms would have been more hesitant about in the past.

Likewise, as discussed above, AFAs can inspire more confidence among clients that their lawyer understands their needs and goals. Clients become more likely to view their outside counsel as a partner, with aligned interests, working together to accomplish goals and achieve success. The expectations tend to become more defined both ways, and clients are provided more clarity and predictability, enabling them to plan and make decisions more accurately.

The bottom line is that if employed thoughtfully, smartly and appropriately, I believe AFAs to be win/win arrangements where the client appreciates that you've thought about and accommodated their situation and aligned your interests with theirs, while also providing your firm the opportunity to use resources more effectively, resulting in a net increase of business and productivity.P

Litigation Management: Strategies for Aligning Cost with Value

It is nearly a decade since the "Great Recession" of 2008. As in most industries, the aftermath of the Great Recession has had a significant impact on the business of law, both for the consumers of legal services – in-house law departments – and for the traditional suppliers – law firms. The goals for each have remained largely the same, but are now increasingly in conflict with each other.

Roger E. Barton

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The overarching goal for most in-house law departments is to efficiently achieve successful outcomes, while the goal for most law firms is to increase profitability. These goals can happily co-exist when the cost of legal services is not an issue. However, we all know those days are long gone. Post-Great-Recession law departments are now reporting to the CFO as well as the CEO and the board. Law department leaders are challenged with managing risk, handling budget pressure, creating predictability and doing more with less – and yet must still achieve successful outcomes. Law firms have their own challenges to manage risk, handle client pressure on fees, combat commoditization and maneuver competition from technology and non-law firm legal service providers – and yet increase profitability to retain top talent.

Has the new economic environment created a dynamic where it is impossible for law departments and law firms to meet their sometimes shared, but often conflicting challenges and goals? No, but changes in approach and structure are required from each.

Law firms have been slow to adapt. Those that have been able to break away from decades of traditional thinking have done well. The firms that have made a disciplined commitment to their place in the market are thriving. Firms that have narrowed their focus to exclusively high-tolerance/bet-the-company matters are able to command a premium for their services. Also doing well are firms that have restructured to eliminate ancillary and low profit margin practices and who have changed compensation structures to more business-like models. Alternatively, firms that are handling commodity work have had to find ways to cut costs, employ technology and be mindful to stay within their niche. Finally, the rise of high quality boutique firms is increasingly filling the need for sophisticated legal services at more reasonable rates. (See 10 Boutiques Giving BigLaw a Run For Its Money, Law360, July 8, 2015.)

What can law department leaders do to align cost with value in litigation? Like law firms, law departments have to function and think differently. There are three main strategies that law departments are using in this regard: disaggregation, alternative fee arrangements (AFAs) and aggressive case management.

Disaggregation

The newest trend among law departments is to disaggregate the supply chain of legal services. It is no longer the norm to only use a select group of outside law firms to satisfy all legal service needs. While the largest shift away from using outside counsel is to bring more work in-house, it is a pendulum that swings every five to 10 years and is not terribly innovative. The more interesting disaggregation strategy has been to divide the legal services pie into three parts: outside law firms; technology and technology service providers; and non-law firm or non-traditional law firm service providers, often boutique firms.

Horses for courses are important. Within a disaggregation strategy is the critical need for selection of the appropriate outside counsel, and clearly defining the scope of work to be performed by that lawyer or firm. The law departments that are leading the charge on disaggregation not only choose counsel that are best suited to handle a case, but

they often will involve more than one firm. This allows them to create a virtual firm or team of lawyers who will handle the specific aspects of a case that are best aligned with their strengths and abilities to achieve cost efficiency. For example, in a complex litigation, one firm may act as discovery counsel, while another handles substantive motion practice and yet a third is designated as trial counsel. Law departments also use their consortium of firms to provide value outside the context of a specific case. By using technology, law departments can further facilitate the virtual law firm model. Firms can be required to participate in a secure web portal where they share knowledge and make their work-product produced for the mutual client, or if not otherwise confidential, available to other firms in the consortium.

Alternative Fee Arrangements

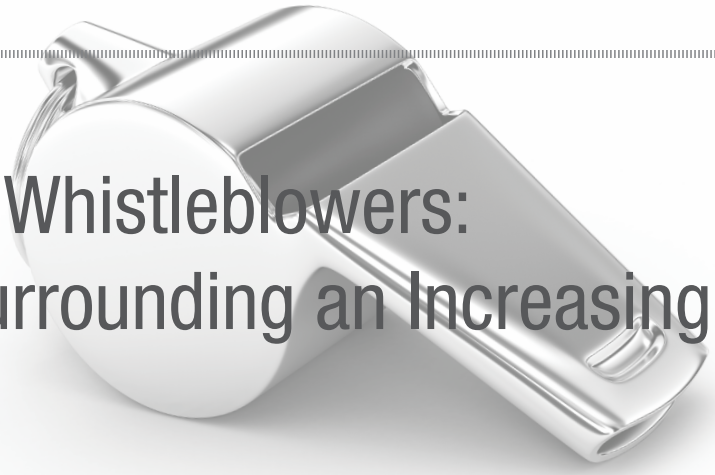
Alternative fee arrangements (AFAs) are another useful tool to align cost with value. The landscape of different AFAs is large and beyond the scope of this article. However, caution should be exercised in any AFA to ensure that the firm selected is the one most appropriate for the matter. An AFA with a firm that is not structured to realize a profit from the AFA could produce a poor outcome for everyone. Think of an AFA as an *appropriate* fee arrangement.

Aggressive Case Management

Apart from the above, how a case is managed is one of the most crucial areas where cost and value can be aligned. Nothing is more valuable than early case assessment. Get your outside counsel on the same page in terms of your business goals for a case. Clearly define what a successful outcome will be. Is it settle early and get out, or is it to take a strong case to the end as precedent to discourage other potential plaintiffs? Define the scope of the case, what are the key issues to defend or pursue, how can discovery be reduced, is mediation or other forms of alternative dispute resolution (ADR) appropriate and when?

Of course the best strategy to align cost with value in litigation is to invest in activities that can reduce or even eliminate the incidents of litigation. A proactive risk avoidance program can provide high value returns. Employee training, a robust compliance program, review of form contracts to eliminate repetitive cases or require mediation, are all effective methods to reduce a law department's expenditures.

"The times they are a-changin'." Thinking more expansively, striving to innovate and moving away from the traditional legal services supply chain will help to align cost with value in the new economic reality. P



In-House Counsel as Whistleblowers: The Thorny Issues Surrounding an Increasingly Common Event

In the past two decades, the size of in-house legal departments has increased dramatically. Consequently, it should be no surprise that in the same period of time the prevalence of whistleblower claims by in-house counsel has increased as well. This article addresses the most common grounds for whistleblower claims by in-house attorneys, as well as two thorny issues that arise when an attorney turns whistleblower.

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Common Federal Whistleblower Claims

Retaliation Under the Sarbanes-Oxley Act (SOX)

Section 806 of SOX prohibits a publicly traded company, or any contractor or agent of such company, from retaliating against an employee who blows-the-whistle on what she reasonably believes to be a violation of statutes regarding mail fraud, wire fraud, bank fraud or securities fraud; any rule or regulation of the Securities and Exchange Commission (SEC); or any provision of Federal law relating to fraud against shareholders. *See* 15 U.S.C. §1514A(a)(1). Section 307 of SOX instructed the SEC to issue rules regarding the "standards of professional conduct for attorneys" and specifically mandated that such rules "requir[e] an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof" to the company's general counsel or CEO, or if those persons fail to respond appropriately, to the audit committee of the board of directors. *See* 15 U.S.C. §7245. The SEC carried out this mandate by issuing the "Standards of Professional Conduct for Attorneys,"17 C.F.R. Part 205, which require attorneys to report material violations "up the ladder" until the attorney receives an "appropriate response." *See* 17 C.F.R. §205.3(b).

Generally, "attorneys who undertake actions required by SOX Section 307 are to be protected from employer retaliation under the whistleblower provisions of SOX Section 806." *Jordan v. Sprint-Nextel Corp.*, ARB No. 06-105, ALJ No. 2006-SOX-041, slip op. at 16 (ARB Sept. 30, 2009). Courts have routinely found that in-house counsel may be protected under Section 806 if they engage in other types of protected activity. *See*, e.g., *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 996 (9th Cir. 2009) ("Nothing in this section indicates that in-house attorneys are not also protected from retaliation …").

Retaliation and Bounties Under the Dodd-Frank Act

The Dodd-Frank Act prohibits employers from retaliating against whistleblowers who, *inter alia*, "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*)…." *See* 15 U.S.C. 78u-6(h)(1)(A)(iii). This language incorporates Section 307 of SOX and Part 205 of the rules implementing this provision, and thus, any in-house attorney who made a disclosure of a "material violation" under Part 205 would be protected from retaliation under Dodd-Frank as well as SOX.

In addition to Dodd-Frank's anti-retaliation provision, the Act also created a bounty program under which a whistleblower providing "original information" relating to a violation of securities laws which leads to the recovery of monetary sanctions of more than $1 million is entitled to a bounty of between 10 and 30 percent of the recovery. *See* 15 U.S.C. 78u-6.

Attorneys may not be able to recover a whistleblower bounty under Dodd-Frank because the SEC's rules preclude an award if the information disclosed was (a) obtained through a communication subject to the attorney-client privilege, (b) obtained in connection with legal representation, or (c) made by an employee in or based on information derived from an entity's legal, compliance or auditing departments.

See 17 C.F.R. § 240.21F-4(b)(4)(i)-(iii). However, exceptions to these exclusions allow a bounty if the disclosure was made in order to remedy or stop a material violation that could injure the company or its investors, or in some circumstances if the company's officers and board have failed to act on the information for over 120 days. *See* 17 C.F.R. § 240.21F-4(b)(4)(v).

Retaliation and *Qui Tam* Awards Under the False Claims Act

The False Claim Act (FCA) imposes liability on any person who receives federal funds as the result of a fraudulent or false claim for payment, or who avoids paying the federal government funds through a fraudulent or false representation. *See* 31 U.S.C. § 3729(a). The Act contains a *Qui Tam* provision that allows private persons, known as "Relators," to prosecute violations on behalf of the federal government. See 31 U.S.C. § 3730(b). The Act provides that such Relators will receive an award equal to 15 to 30 percent of the damages and fines recovered in any *Qui Tam* action. *See id.* at (d).

The FCA also contains an anti-retaliation provision that bars any person from retaliating against a whistleblower who engages in acts in preparation to file a *Qui Tam* claim, files a *Qui Tam* claim, or attempts to stop one or more violations of the FCA's liability provisions. *See* 31 U.S.C. § 3730(h).

Generally, an in-house attorney may be a Relator in a *Qui Tam* action against their employer only if the ethical rules applicable to that attorney would permit the disclosure of the client's confidential information in such circumstances. *See U.S. ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1508 (E.D. Va. 1994); *U.S. v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013).

However, a whistleblower is protected from retaliation under the FCA even if they could not otherwise bring a *Qui Tam* claim, so long as they engaged in efforts to stop a violation of the FCA. Consequently, even if an in-house attorney were barred from becoming a Relator in a *Qui Tam* action, her efforts to stop the violations of the FCA are likely protected activity under the Act.

Unique Issues Regarding In-House Attorney Whistleblowers

Use of Protected and Privileged Information

One of the most unique issues in any attorney whistleblower case is the extent to which, or whether, the whistleblower will be able to use the client's confidential information to prove her claims. The American Bar Association (ABA) has weighed in on this issue in an ethics opinion discussing Rule 1.6(b)(2) of the Model Rules of Professional Conduct[1], which concluded that

> [t]he Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in-house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client and may reveal information to the extent necessary to establish her claim against her employer.

ABA Formal Ethics Opinion 01-424 at 5 (Sep. 22, 2001).

Model Rule 1.6(b)(2) and similar state rules have led a "modern trend" towards a more liberal view of allowing retaliatory discharge claims by in-house attorneys, even when such claims require the attorney to use client confidences to prove the claim. *See, e.g., Willy v. ARB*, 423 F.3d 483 (5th Cir. 2005).

However, courts in several states that have not adopted the Model Rules often hold that there are no (or very limited) circumstances in which an in-house attorney may use her employer's confidences to prove a whistleblower claim. *See, e.g., General Dynamics Corp. v. Superior Ct. of San Bernardino*, 876 P.2d 487 (Cal. 1994).

Retention of Documents

Another thorny issue in attorney whistleblower cases is whether the whistleblower can use the documents she collected from her prior employer to prove her claims.

Generally, courts engage in a balancing test to determine whether a whistleblower's acquisition, retention and dissemination of documents were protected activity. *See Jefferies v. Harris County Cnty Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980). Several courts have applied the multi-factor test laid out in *Niswander v. Cincinnati Insurance Co.*, which requires consideration of

(1) how the documents were obtained,
(2) to whom the documents were produced,
(3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct,
(4) why the documents were produced, including whether the production was in direct response to a discovery request,
(5) the scope of the employer's privacy policy, and
(6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.

Niswander v. Cincinnati Insurance Co., 529 F.3d 714, 726 (6th Cir. 2008).

However, under both the False Claims Act and the Dodd-Frank Act, the mere act of collecting and retaining documents can itself be protected activity. Under the FCA, retention of documents has been held to be protected activity under the Act's anti-retaliation provision, 31 U.S.C. § 3730(h). *See U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 740 (D.C. Cir. 1998). Similarly, Dodd-Frank and its regulations appear to provide protection for individuals who collect incriminating documents and provide those documents to the SEC to support a whistleblower claim. *See* 17 C.F.R. § 240.21f-4(b)(1).

Conclusion

In-house attorneys are uniquely able to identify and expose perceived wrongful conduct by their employers. The questions then become whether the whistleblowing attorney has protection from retaliation and whether she can even use her knowledge to blow the whistle. Given the prevalence of whistleblower statutes and the increasing size of in-house legal departments, we will likely continue to see these difficult and unique issues arise. P

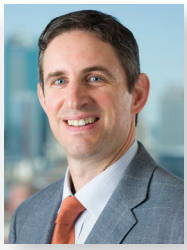
1 Since the release of its Ethics Opinion, the ABA re-numbered Model Rule 1.6(b)(2), as originally set forth in 1983, and it is now Model Rule 1.6(b)(5). *See* Model Rules of Prof'l Conduct R. 1.6(b)(5) (2003).

For Federal Student Loan Debt, What You Owe Is Less Important Than What You Know

"The most important loan to pay is your student loan. It's more important than your mortgage, car and credit card payments. You cannot discharge student loan debt in the majority of cases."
— *Suze Orman, personal finance expert*

"I invested all my money in debt."
— *Hamish Linklater, actor and writer*

Neil S. Sader



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It's no secret that for several decades the cost of a college degree has increased at a much higher rate than the consumer price index. In fact, since 1985, overall consumer prices have increased at a rate of 115 percent, while the price of pursuing a college degree has risen by almost 500 percent in the same period. *("College Costs Out of Control," Steve Odland, March 24, 2012, former chairman and CEO of Office Depot, Inc., and Autozone, Inc., and adjunct professor at Lynn University)*

In response to the runaway costs of earning a college degree, students and families are resorting to student loans as a primary means to pay for undergraduate and graduate degrees. The result is that each graduating class finds it owes more in student loan debt than prior classes. For example, in 2014, the average student graduated with a student debt load of approximately $33,000, while students from the class of 2015 incurred an average of $35,000 in student debt. *("Class of 2015 has the most student debt in U.S. history," Jillian Berman, Market Watch, May 9, 2015)*

The good news is when it comes to repaying student loan debt, the amount you owe is less important than what you know. Given the variety of income-based repayment and loan forgiveness options available for federal student loans, both parents and students would be wise to research available options or get in touch with an attorney specializing in student loan debt.

A great starting point for repayment options and loan forgiveness programs is the National Student Loan Data System, which is the central database for student aid run by the U.S. Department of Education. To reach the site, go to nslds.ed.gov, where you will be prompted to enter a username and password. This will allow you to access information concerning your federal student loans. You will be able to determine the types of loans you have, e.g. Perkins Loans, William D. Ford Direct Loans, Stafford, or Federal Family Education Loans (FFEL) to name a few. The website will also identify the lender and servicer for your loan(s), the account balance(s), and whether you have consolidated some or all of your loans. The loan servicer information is important because that is who you will want to contact to discuss consolidation and income-based repayment plans. Please note, if you log onto the website and do not see loan information, it means you likely have private or state-issued student loans. In that case, you will need to contact your private lender or state entity to discuss potential repayment or forgiveness options.

Whether your federal student loans qualify for an income-based repayment plan depends on the status of your loan. If your loan is in default and/or you have an active wage garnishment, you will not be able to consolidate your loans or enter into a repayment plan. To fix this problem, you need to rehabilitate your loan, which can be done by contacting

the collection agency that is suing you or garnishing your income. You will be given a set amount to pay each month during the rehabilitation period which, once completed, will result in your loan being removed from default status. This will enable you to pursue consolidation and an income-based repayment plan.

To apply for an income-based repayment plan, you will need to provide proof of income in the form of paystubs and tax returns. At our firm, we ask clients to bring in six months of paystubs and their two most recent federal and state tax returns. Application forms for the various repayment plans can be obtained from the U.S. Department of Education's website, or you can contact the agency via phone to discuss available options with a representative. If you opt to hire an attorney specializing in student loan issues, you will need to complete a third-party authorization form so your attorney can discuss your loans and repayment options with Department of Education employees.

Once approved for an income-based repayment plan, you will need to make the required number of payments (either for 20 or 25 years depending on the type of loan involved) and, at the end of your repayment plan, you will be able to have your remaining student loan debt forgiven, regardless of the amount owed.

Currently, you do have to report forgiven student loans on your taxes, though it is possible in the future that Congress will pass legislation that removes any tax liability for forgiven student loan debt. Since most people in income-based repayment plans will not be in a position to complete their plans until well into the future, it is likely they will never have to cope with the current tax consequences of loan forgiveness. Consequently, borrowers should focus on the benefits of lowering their monthly payments to an affordable amount through income based repayment plans rather than focus on potential tax consequences once their debt is forgiven.

For borrowers with federal loans with government jobs, an attractive option is the Public Service Loan Forgiveness program. Before pursing this program, you should ensure your employer qualifies as a public service or governmental entity (such as teachers, nonprofit employees, government workers), that you work at least 30 hours per week, and that you are a W2 employee as opposed to an independent contractor. The program forgives any remaining student loan debt once a debtor makes 120 monthly payments during the time he or she worked in the public sector. The great thing about this program is that there are no tax consequences for forgiven debt. Once you've made your 120th payment, you will need to send in proof of payment information, and employment verification for each employer during the time you worked in the public sector.

Borrowers with federal student loans also can seek debt relief through administrative discharges. Administrative discharges may be granted upon proof that a former student has died, or has been declared to have a total and permanent disability by a doctor with a medical license issued in the United States. If a discharge is sought for a temporary permanent disability, the government will review tax returns for three years after the discharge is granted to ensure the borrower has not experienced a significant increase in income. Other administrative discharge options are school-related and can stem from a school closing before a student earned his or her degree, or where a school falsely certifies a student's qualifications for admission. Students also can pursue administrative discharges for unpaid refunds, i.e. the student never received the loan proceeds and the school failed to refund said proceeds to the federal government, or where someone forged a student's name onto loan documents.

While the above remedies are by no means exhaustive, they provide a good starting point for borrowers who want to lower their monthly payments, avoid default and ultimately discharge their student loan debt. Regardless of loan type, the worst thing a borrower can do is go in default or sign up for repeated forbearances. These have the short-term benefit of putting payments off to a later date, but have the long-term disadvantage of interest accruing during the forbearance period, which only increases the outstanding loan balance. Knowledge truly is power and can help informed borrowers to significantly reduce their student debt burden. P

Using a Withdrawn Expert's Opinions as an Authorized Admission

Experts are human beings and are subject to making mistakes, just as anyone is capable of doing. Generally, an expert is hired to establish an essential issue in a case. However, what the expert is hired to do and what the derivative outcome is may not be the same. In fact, a party's expert may take a turn for the worse. This is obviously advantageous only when it is the opposing party's expert.

To illuminate this point, let's say a plaintiff files a negligence action against the defendant. The plaintiff, then, may hire an expert to prove an essential fact or element in her case, such as whether the accident was foreseeable based upon the conduct of the defendant. The plaintiff will designate the expert, and the defendant will depose the expert. The plaintiff may also produce an expert report stating the expert's opinions. At this point, everything is going smoothly. However, let's say during the expert's deposition, the expert says something no one expected, such as, "This accident was unforeseeable." Logically, the plaintiff will seek to withdraw the expert due to the tremendous damage this has done to her case. In turn, the defendant will seek to use the deposition testimony to his advantage. After all, if the statement is admitted, the case is most likely over because the expert is essentially saying the defendant did nothing wrong or cannot be held liable for an accident that they could not prevent.

At this point, the plaintiff is frantic and will likely seek to withdraw the designated expert. However, many cases say that it is too late and that the damage is already done. Specifically, these cases state that the statements an expert makes in a deposition may qualify as an authorized admission of the plaintiff and fall within an express exception to the hearsay rule under USCS Fed Rules Evid R 801.[1] In fact, the admissibility of the opposing party's expert's out-of-court statements has been recognized by several courts.[2] The Federal Rule 801(d)(2)(C) provides that statements are not hearsay where an opposing party's statement is offered against them and were "made by a person whom the party authorized to make a statement on the subject…".[3] This is complementary with Rule 32(a)(1) of the Federal Rules of Civil Procedure, which provides that "any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(1).[4]

The answer is obvious as to why the expert's opinion should be imputed back to the party that hired the expert – the expert was authorized by the party to make statements regarding the issues in the cause of action.The leading case on this issue is *H.S. Collins v. Wayne Corp.*[5] *Collins* makes clear that what an expert says in his deposition can be used at trial, even though the expert does not testify, because the expert's testimony is considered an authorized admission of the opposing party. Once a party designates the expert and he has been deposed, use of such statements made in their deposition at trial are admissible as evidence.[6] An expert designated by a plaintiff is thereby authorized to render opinions and make statements on behalf of the plaintiff. Even if the party did not specifically authorize the statement, the party does expressly authorize the expert to make "admissions."[7]

If you or your client are faced with a trial involving expert witnesses, you

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do have a strong weapon on your side: A minority of courts have held that an expert is not an agent of the party and, therefore, the expert is not authorized to make admissions.[8] If there is no authorization to make an admission, the hearsay exception discussed above cannot come into play.

1 *H.S. Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980).

2 *See Long v. Fairbank Farms, Inc.*, 2011 U.S. Dist. LEXIS 73887, 2011 WL 2516378 (D. Me. May 31, 2011); *Kreppel v. Guttman Breast Diagnostic Inst.*, 1999 U.S. Dist. LEXIS 19602, 1999 WL 1243891 (S.D.N.Y. Dec. 21, 1999); *see also North Star Mut. Ins. Co. v. CNH Am. LLC*, 2014 U.S. Dist. LEXIS 28560, *9-10 (D.S.D. Mar. 6, 2014); *Dean v. Watson*, 1996 U.S. Dist. LEXIS 2243, *9, 1996 WL 88861 (N.D. Ill. Feb. 16, 1996); *Kreppel v. Guttman Breast Diagnostic Inst., Inc.*, 1999 U.S. Dist. LEXIS 19602, 1999 WL 1243891 (S.D.N.Y. Dec. 17, 1999).

3 Federal Rule 801(d)(2)(C) provides in pertinent part as follows:

> **Rule 801. Definitions that Apply to This Article; Exclusions from Hearsay**
>
> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> USCS Fed Rules Evid R 801.

4 *Dean*, 1996 U.S. Dist. LEXIS at*9, 1996 WL 88861.

5 621 F.2d 777, 782 (5th Cir. 1980).

6 *Id.*

7 *Long*, 2011 U.S. Dist. LEXIS at *36-37; Collins, 621 F.2d at 780-82 *superseded by rule on other grounds as noted in Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002) (district court erred in ruling defendant's expert's deposition testimony inadmissible pursuant to Federal Rule of Evidence 801(d)(2)(C) when, in giving his deposition, the expert performed the function the defendant had employed him to perform);

Bianco v. Hultsteg AB, No. 05 C 0538, 2009 U.S. Dist. LEXIS 9284, 2009 WL 347002, at *12 (N.D. Ill. Feb. 5, 2009) ("We agree that [the plaintiff's expert's] sworn testimony constitutes admissions by a party opponent within the meaning of Federal Rule of Evidence 801(d)(2), which [one of the defendants] may offer into evidence against plaintiff without running afoul of the Rule prohibiting admission of hearsay evidence.");

Dean, 1996 U.S. Dist. LEXIS 2243, 1996 WL 88861, at *3-*4 (defendant's expert's testimony was admissible pursuant to Rule 801(d)(2)(C) when he was authorized by the defendant to make statements regarding the issues in the cause of action).

8 *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 1995 U.S. App. LEXIS 19940, 42 Fed. R. Evid. Serv. (Callaghan) 883, 155 A.L.R. Fed. 701 (3d Cir. Pa. 1995).

Preliminary Considerations for Litigation Involving a Trust

With the proliferation of trusts in estate planning and real estate over the past two decades, individuals are frequently asked to serve as a trustee of a trust without fully understanding that role. Having a basic understanding of a trustee's relationship to a trust is important, particularly in the event of litigation. Individuals serving as trustees as well as attorneys called upon to litigate matters affecting a trust should be informed of the basics.

Litigation may include a trust in a number of circumstances. For example, a beneficiary of a trust may seek the court's intervention where a trustee fails to administer the trust in accordance with the trust documents. Individuals may attempt to transfer assets to a trust in order to shield them from creditors, in violation of a state's fraudulent conveyance act. A trustee may need to sue to protect assets belonging to the trust. The list of instances where litigation involving a trust may arise is endless. Certain fundamentals regarding trust litigation, however, remain the same.

A trust is merely a right in property held in a fiduciary relationship by one party, called the "trustee," for the benefit of another party, called the "beneficiary." The trustee holds title to property or "corpus" in the trust, while the beneficiary collects the benefits. With the exception of business trusts, which are generally more akin to corporate entities in their purpose and characteristic of having freely transferable interests, a trust should be considered a *relationship* to property rather than a separate entity. A trust's status as a relationship to property rather than an entity presents preliminary issues for a litigator under both federal and state rules of civil procedure.

Under Federal Rule of Civil Procedure 17(b), the capacity of a trust to sue or be sued is determined by the laws of the state where the court is located. Fed.R.Civ.P. 17(b). The overwhelming weight of authority holds that a trust, under state law, does not have the capacity to sue or be sued in its own name. *See Coverdell v. Mid-South Farm Equipment Ass'n*, 335 F.2d 9, 12-13 (6th Cir.1964); *Limouze v. M.M. & P. Maritime Advancement, Training, Education and Safety Program*, 397 F.Supp. 784, 789-90 (D.Md.1975); *White v. Lundeberg Maryland Seamanship School, Inc.*, 57 F.R.D. 128, 130 (D.Md.1972); *Yonce v. Miners Mem'l Hosp. Ass'n*, 161 F.Supp. 178, 188 (W.D.Va.1958); *Colorado Springs Cablevision, Inc. v. Lively*, 579 F.Supp. 252, 254 (D.Colo.1984); *Powers v. Ashton*, 45 Cal.App.3d 783, 119 Cal. Rptr. 729, 732 (1975); *Morrison v. Lennett*, 415 Mass. 857, 616 N.E.2d 92, 94 (1993); *Western Life Trust v. State*, 536 N.W.2d 709, 712 (1995); *see also Bogert, Trusts & Trustees* § 712 (rev.2d ed.1982); *IV Scott, Trusts* § 280 (1989).

The trustee, as the legal title holder of the trust's property or corpus, is generally the real party in interest with the power to prosecute or defend actions in the name of the trust under Fed.R.Civ.P. 17(a). *See Coverdell*, 335 F.2d at 13; *Colorado Springs Cablevision*, 579 F.Supp. at 254; *Limouze*, 397 F.Supp. at 789-90; *White*, 57 F.R.D. at 130; *Powers*, 119 Cal.Rptr. at 732; *IV Scott, Trusts* at § 280. Attorneys seeking to affect a trust through litigation should name the individual trustees as parties in their capacity as "trustee on behalf of" the name of the subject trust.

Ensuring personal jurisdiction exists over a trustee presents its own considerations. Article 2-202 of the Uniform Trust Code, adopted by 31 states and the District of Columbia,[1] includes provisions concerning the appropriate jurisdiction. Subsections (a) and (b) of Article 2-202 state that the place of administration of the trust is the place with personal jurisdiction over the trustee and beneficiaries of that

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trust. Subsection (c) clarifies that "[t]his section does not preclude other methods of obtaining jurisdiction over a trustee, a beneficiary, or any other person receiving property from the trust," Uniform Trust Code Article 2-202(c), meaning a state's applicable long-arm statute may afford personal jurisdiction over a trustee where minimum contacts exist with that state.

Fed.R.Civ.P. 4(k)(1)(A) provides that a federal district court may assert personal jurisdiction over a defendant who would be subject to jurisdiction in state court in the state where the district court is located. *See Lydia Schweer Family Trust ex rel. Fuqua v. Dingler*, 2010 WL 55599 (M.D. Fla. 2010) (Personal jurisdiction over out-of-state life insurance company held proper in lawsuit by trustee on behalf of trust originally settled in Georgia where life insurance's ongoing communications with trustee, which provided the basis of the tort action, occurred while trustee was living in Florida.) *See also Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980) (As the trustee is the real party to the controversy, it is the trustee's citizenship, not the citizenship of the beneficiaries, that will determine whether diversity jurisdiction exists.)

While litigation involving a trust may involve complex issues, an attorney taking time to consider the fundamentals of civil procedure in that context serves his or her clients' best interests.

1 Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

Vendors of Products in California Beware

Proposition 65 is a ballot initiative approved by California voters in 1986 which potentially impacts every manufacturer, importer, distributor and retailer with an expectation that their products will make their way into California. These companies need not be located in California. Its official title is the "Safe Drinking Water and Toxic Enforcement Act of 1986," commonly called "Prop 65." It is codified in Health & Safety Code §§25249.5, et seq. and requires that the state publish a list of chemicals known to cause cancer,

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birth defects or other reproductive harm. It imposes two sets of regulatory criteria on businesses using these listed chemicals. The chemical list, which is updated at least once per year, currently includes over 800 chemicals. The Prop 65 program is administered by the Office of Environmental Health Hazard Assessment (OEHHA), which is a part of the California Environmental Protection Agency (Cal/EPA).

Prop 65 has two components. First, it prohibits California businesses from knowingly discharging significant amounts of the listed chemicals into sources of drinking water. Second, it requires that businesses notify all potentially exposed users in California about significant amounts of the listed chemicals in their products. Each component of Prop 65 has its own time frame for compliance following the listing of a chemical. The second component is the primary focus hereafter.

What Are the Chemicals?

The listed chemicals are both naturally occurring and synthetic, and not just individual chemicals, but also compounds as well as ingredients in products such as drugs, pesticides, solvents, common household products, dyes and foods. Listed chemicals may also be used in manufacturing and construction. Examples include alcoholic beverages, coal emissions, arsenic, nickel, toluene, estrogens, leather dust, lead, benzene, phthalates, chromium, aspirin, wood dust, tobacco, aloe vera and tetracycline. Chemicals occasionally are delisted by OEHHA as scientific opinions change.

What Are the Warning Requirements?

Prop 65 does not require that businesses reformulate to remove listed chemicals, which can have continued use if the businesses warn about these potential chemical exposures. These warnings

must be "clear and reasonable," while the method of warning depends upon the nature of the item containing the chemical. Examples include, labeling a consumer product, posting signs at the workplace, distributing notices at a rental housing complex or publishing notices in a newspaper. Businesses are not required to report what warnings they have issued and why. There is concern that the citizens of California are habituated and de-sensitized to Prop 65 warnings, essentially not paying attention at all to the warnings, some of which they see printed in newspapers, in their utility bills and at grocery stores.

Prop 65 Penalties

Penalties for violating Prop 65's consumer notification provisions can run as high as $2,500 per violation per day. In assessing the amount of a civil penalty, courts must consider seven factors focusing on the violations and the level of culpability of the offender. There are some exemptions to Prop 65, e.g., businesses with less than 10 employees need not comply with either the discharge requirements or the notification requirements. Also, there are defenses concerning "safe harbors" and issues of bioavailability. OEHHA has adopted safe harbor exposure levels for some chemicals, but not for the vast majority. If a business proves that its product exposes average users to a chemical at a level below that established by OEHHA, then the exposure from the product is within the safe harbor level and the business is exempt from the requirements of Prop 65. The burden is on the business to establish that an exposure falls within the safe harbor level. For those chemicals for which OEHHA has not adopted safe harbor levels, the business essentially must establish safe harbor numbers. Of course, the business should expect to face the argument that there are no safe harbor levels for the chemicals. The presentation of this type of scientific evidence can be very expensive.

Prop 65 Enforcement

Lawsuits to enforce Prop 65 can be filed by three types of entities – the California Attorney General's Office; district attorneys and city attorneys for cities with populations exceeding 750,000 people (Los Angeles, San Diego, San Francisco and San Jose are the only four California cities currently satisfying this criteria); and private citizens. The first two entities are known as "public enforcers," while the private citizens are referred to as "private enforcers." Any individual or entity claiming to be acting in the public interest may seek to enforce Prop 65 by filing a lawsuit against a business alleged to be in violation of this law. By far the vast majority of lawsuits are filed by the last category. It is believed that many of the private enforcers are not driven by altruism, but by financial gain, resulting in the private enforcers frequently being called "Bounty Hunters."

Private Enforcers

Private enforcers must provide a business with "60-day notice" before filing suit. The suit can be filed in any superior court. The 60-day notice is designed to allow the business time to investigate the alleged violation and take corrective actions. Government prosecutors are not required to provide 60-day notices. Private enforcers must provide copies of 60-day notices to all of the previously mentioned government enforcers and can only file suit if the government enforcers decide not to do so. Seventy-five percent of all civil penalty settlements are paid to the state, while the other 25% are kept by the private enforcers, who also are allowed to collect their billed fees. The California Attorney General must be notified of each proposed settlement so that it has time to object. All settlements are posted on the Attorney General's website, so settlements cannot be private/confidential.

Recent Statutory Amendments

On August 30, 2016, California adopted amendments to the Prop 65 warning requirements which include new criteria for what constitutes a clear and reasonable warning. Businesses warning about exposure to a Prop 65 listed chemical may use either the current or new version of warning until the new requirements take effect on August 30, 2018. The changes include the following:

- text of warnings must be the same size as other consumer information presented on packaging and may not be smaller than 6-point type;
- the warnings must specifically identify at least one toxic chemical;
- the warnings must include a warning symbol that is an equilateral triangle with an exclamation point. The triangle must have a bold outline. If the printing of the label that includes the warning is in color, the triangle must also be yellow. This symbol is followed by the word WARNING in capital letters and bold print the same size as the triangle symbol.

Conclusion

The author is not aware of any other state or county that has a statute like California's Prop 65. The fact that a product bears a Prop 65 warning does not on its face render the product unsafe. Prop 65 is more about a "right to know" than a pure product safety law. However, many businesses are concerned that consumers may interpret the warnings to mean that products are unsafe. This concern often results in businesses deciding to reformulate products instead of warning. Other businesses make the decision to stop selling products in California. Prop 65 has been a very expensive statute for businesses throughout the United States and the world. Expenses incurred include providing and installing warning information, testing products, research and development of alternative chemicals to use in the place of listed chemical and defending litigation. An attorney with experience with Prop 65 can help businesses minimize these expenses by avoiding litigation, and if litigation is not avoided, by resolving cases quickly.

Know Your Burden: Statutes, Violations and *per se* Negligence

Life in this country is largely held together with a patchwork network of regulations, administrative codes and statutes governing everything from how far apart power outlets must be in a residential home, to how fast you can drive in a school zone, to how often a sidewalk must be cleared of snow and ice. In litigation involving allegations of negligence, whether an applicable code or regulation has been violated may have enormous consequences for the outcome of the case, because in certain situations the violation of the statute, regulation or industry standard will be considered negligence *per se*. In effect, the statute or regulation replaces the common law "reasonable man" standard of care, and a plaintiff need only establish a violation of the statute or regulation to win the day. While there are some general rules that are basically the same across most jurisdictions, the impact of proof of a code or rule violation depends on your jurisdiction.

In New York, and in many other jurisdictions, statutes enacted by state legislatures are treated differently than local ordinances or regulations promulgated by government agencies or industry groups. The violation of a state statute will be considered *per se* negligence if the statute was enacted to protect a class of persons, the injury is the type contemplated by the statute, and the defendant violated the statute and by doing so proximately caused the injury. (*See e.g. Elliott v City of N.Y.*, 95 NY2d 730, 733 [2001].) In contrast, "violation of a municipal ordinance" or other administrative regulation "constitutes only evidence of negligence," and proof of a violation is not enough to establish negligence *per se*. (*Id.*)

What this means as a practical matter, is that in New York (and those states following the New York rule) proof of a violation of an administrative standard or rule – for example, an Occupational Safety and Health Administration (OSHA) standard, or a standard governing best practices in a certain field or industry – will *never* be enough to establish, *per se*, the negligence of the party in violation of the standard. While American National Standards Institute (ANSI) and similar requirements are "properly admitted" and can be "considered by the jury as some evidence of negligence," the standards are "not conclusive on the subject of negligence" and must be "considered with all the other facts and circumstances of the case in determining" whether the violating party is negligent. (S*awyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328 [1986].)

In contrast, Florida and a number of southern and western states do not treat state statutes any differently from local rules and regulations, and in those states the violation of a building code or other local administrative regulation may be considered as *per se* evidence of negligence. (*See e.g. Brown v S. Broward Hosp. Dist.*, 402 So. 2d 58, 60 [Fla Dist. Ct. App. 1981].) The cases applying this stricter standard typically deal with vehicle and traffic violations, or violations of a building code that result in injurious accidents, but there is nothing in the reasoning of those decisions to limit the scope of the doctrine to traffic laws and building codes. (*See e.g. Giambra v Kelsey*, 338 Mont. 19, 36-37; *Federated Mut. Ins. Co. v. Hardin*, 67 N.C. App. 487, 489 [1984].)

Regardless of the jurisdiction, defense counsel should be alert to the opportunity to use *compliance* with a statute, rule or

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regulation as a shield to liability. Just as the violation of a statute, rule or regulation may be enough, in certain circumstances, to establish negligence as a matter of law, so too may proof of compliance with a statute or regulation be sufficient to establish that a defendant acted reasonably and without negligence. (*See e.g. Norris v Excel Industries, Inc.*, 139 F Supp 3d 742 [WD Virginia 2015] [proof of compliance with ANSI standard sufficient basis to grant defendant summary judgment]; *Heer v Costco Wholesale Corp.*, 589 Fed Appx 854 [10th Circ. 2014].) Even in those situations and jurisdictions where compliance with an industry standard or administrative regulation is not dispositive, evidence of a defendant's compliance with such standards is admissible and relevant to show that a defendant acted reasonably under the circumstances.

In sum, proof of a violation of, or compliance with, a state statute, industry standard or administrative regulation will almost always be admissible as some proof on the question or negligence, and in many jurisdictions such proof may be dispositive and establish negligence *per se*. Therefore, it is incumbent on defense counsel in negligence cases to be aware of all potentially relevant statutes, standards and regulations, and be ready to meet the proof that a client violated a standard, or better yet be prepared to present evidence of compliance with a statute or regulation as a shield against liability.

Disclosure of Cyber Attacks to the Public and Regulators: Changing Standards?

The first-of-its-kind New York State (NYS) Cybersecurity Regulation requires covered companies to notify the NYS Department of Financial Services (NYSDFS) for "any act or attempt, successful or unsuccessful, to gain unauthorized access to, disrupt or misuse" a computer system. The NYS regulation appears to go beyond the disclosure requirements of current regulations and laws, including through public filings (10-Ks and 8-Ks), state data breach laws, the Gramm-Leach-Bliley Act (GLBA) and the Health Insurance Portability and Accountability Act (HIPAA). This article will explore several current disclosure laws, how they differ from each other, in what circumstance each applies, and what corporate counsel must do to keep their companies safe in the face of existing legal ambiguity.

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Disclosure Requirements of Several Current Regulations and Laws

State Data Breach Laws

Most states and some territories have enacted laws requiring notification of security breaches involving personally identifiable information (PII). The primary purpose of these laws is to prevent identity theft. Most of these laws apply to any organization that collects PII from individuals in the state (even if not stored in that state). Some, but not all, of the laws create exemptions for organizations that are already covered by HIPAA or the GLBA.

PII is typically defined as an individual's name plus one or more of the following: (i) social security number (SSN), (ii) driver's license number or state issued ID card number, (iii) account number, credit card number or debit card number combined with any code or password needed to access an account. Some state definitions of PII are broader than the general definition (e.g., California includes email addresses, and Illinois includes fingerprints and other biometric data, etc.).

For the most part, breach is defined as the unlawful and unauthorized *acquisition* of PII that compromises the security, confidentiality or integrity of PII. In some states, notification is triggered by access, and not acquisition (e.g., Connecticut and New Jersey). If a breach occurs, organizations must notify the residents that are affected by the breach, in some cases law enforcement (e.g., New York and California, etc.), and in other cases they must make a public disclosure via publication. As for timing, organizations must generally notify as soon as practicable, although several states have specific time requirements, ranging from five calendar days to 90 days (many are 45 days).

A formal incident response plan is typically not required by state laws, but note that several states have specific requirements on storing information and security plans (e.g., Massachusetts requires organizations to draft and update a written information security plan).

HIPAA

Like state data breach laws, HIPAA focuses on the risk of harm to consumers and identity theft. HIPAA requires covered entities[1] and their vendors (business associates) to provide notification following a breach of

unsecured protected health information (PHI).[2] PHI is information collected from an individual, and is created or received by a covered entity and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual; and that identifies, or can identify, that individual.

A breach may result when there is an impermissible PHI use or disclosure that compromises security or privacy. Following a breach, covered entities must provide notification to affected individuals, the Department of Health and Human Services (HHS), and, in certain circumstances, to the media. This notification must be made to affected individuals within 60 days, and to HHS, within a specific time frame that is dependent on the size of the breach.

10-K and 8-K Disclosure[3]

In 2011, the SEC instructed organizations to report cyber incidents that could have a "material adverse effect on the business" and "when necessary in order to make other disclosures . . . not misleading," but did not define how organizations should analyze. Note that this obligation has little to do with protecting against identity theft, but rather disclosing "timely, comprehensive and accurate information about risks and events that a reasonable investor would consider important to an investment decision."[4] While the SEC has yet to bring an enforcement action against a public company for violating this guidance (but has brought enforcement actions relating to cybersecurity against broker-dealers), the recently disclosed Yahoo data breach may present its first test opportunity.[5] It appears that the SEC has requested documents to determine whether the company could have, and should have, reported a hacking attack cyber incident sooner that it did.

This regulatory focus on cyber disclosures is present in Federal Trade Commission (FTC) enforcement efforts as well. While not specifically focused on data breach notification (mainly because there is no federal data breach law), the FTC has been active against companies whose disclosures or omissions mislead consumers and violate Section 5 of the FTC Act. For example, in the recent Ashley Madison settlement, the company was required to pay $1.6 million after deceiving consumers by making assurances that personal information was private and securely protected, while, in reality, using "lax" security protections, including not having an adequate information security policy or incident response plan.

NYSDFS Cyber Regulation (December 2016 Revision[6])

The NYSDFS regulation does not focus on the risk of identity theft (although one of its stated goals is to protect NYS residents) or investor decisions, but on proper disclosure to the NYS regulator. The regulation applies to any banks, insurance companies or other financial services institutions regulated by NYSDFS that have 10 or more employees, or $5 million or more in revenue, or $10 million or more in assets. Like with HIPAA, vendors to covered organizations will be impacted through required contractual provisions.

Organizations must protect all nonpublic information, which is defined as all electronic information that is not publicly available and is: (i) business information whose tampering, unauthorized disclosure, access or use, would cause a "material adverse impact"; (ii) any personal identifier in combination with a SSN, drivers' license number or non-driver identification card number, account number, credit card or debit card number, any security code, access code, or password that would permit access to an individual's financial account, or biometric records; or (iii) any information, except age or gender, in any medium created by or derived from a health care provider or an individual and that relates to the past, present or future physical, mental or behavioral health or condition of any individual or a member of the individual's family, the provision of health care to any individual, or payment for the provision of health care to any individual. Note that an incident response plan is explicitly required.

Each organization must notify the NYSDFS when "any act or attempt, successful or unsuccessful, to gain unauthorized access to, disrupt or misuse an information system or information stored on an information system" has

occurred and: (i) notice is required under another law or regulation; and (ii) has a reasonable likelihood of materially harming any material part of the normal operations of the organization, as promptly as possible but in no event later than 72 hours from a determination. There is no specific requirement to notify affected individuals, but the NYS data breach law still applies, as well as federal laws such as the GLBA.

What Corporate Counsel Must Do to Keep Their Companies Safe

We have touched on several laws, but because of space constraints, we do not address in detail every law that gives rise to disclosure obligations (e.g., various international laws, the FTC Health Breach Notification Rule, GLBA, specific SEC rules, such as Regulation S-P, to name several), which may apply depending on the types of information involved. Nonetheless, we can see that the NYSDFS regulation is different, in terms of applicable incidents, protected information and notification time frame. These differences follow a trend in state breach laws. States are generally expanding their PII definitions while shrinking the notification time periods. Corporate counsel must understand all laws, regulations and obligations (including contractual) that may apply to their organization.

Trying to ignore these obligations, before or after a breach, is not a viable option. Regulators have begun fining organizations for failing to notify in a timely manner.

Corporate counsel must also help their organizations draft their incident response plans with these varying laws in mind to ensure such plans are legally compliant. We often see incident response plans written by information technology professionals, which, while sometimes technologically robust, lack consideration of the liability risks.

Finally, note that for each of these and other laws, the information generator (controller) is ultimately liable for any breach or unauthorized access/acquisition, even if information is processed by a third party vendor. This risk can be mitigated through the proper contracts and insurance.

1 Covered entities are defined as health plans, health care clearinghouses and health care providers who electronically transmit health information.

2 Similar breach notification provisions are implemented and enforced by the Federal Trade Commission (FTC) for vendors of personal health records under the HITECH Act.

3 Form 10-K is an annual report that gives a summary of an organization's financial performance. Form 8-K is the form on which organizations report the occurrence of significant current corporate events.

4 See sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

5 In September 2006, Yahoo revealed than a state-sponsored attacker harvested personal data belonging to "at least" 500 million users. Just three months later, it admitted that some employees were aware of it as early as 2014, but waited years before making a disclosure. This issue is threatening to derail the acquisition of Yahoo by Verizon, which is reportedly seeking a $1 billion discount (or almost 20%) of the deal price.

6 After first introducing the proposed cybersecurity regulation in September 2016, the NYSDFS updated it on December 28, 2016, after "carefully consider[ing] comments submitted." This updated draft will be subject to an additional final 30-day comment period, which means that the regulation may change again before this article is published. For now, the effective date is March 1, 2017.


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Expanding into Canada? Brief Overview of Shareholder Decision Making and the Right of Dissent

In most jurisdictions in Canada, shareholders resolutions are passed by a majority or two-thirds of the voting shareholders of the corporation.

For corporations incorporated in the province of Ontario, the voting threshold required to pass a resolution is outlined in the Ontario Business Corporations Act (OBCA) and changes depending on the subject matter.

Many privately held corporations tend to forgo the holding of a formal shareholders meeting to approve business decisions and instead pass written resolutions. This is an acceptable alternative, provided the written resolution is unanimously agreed upon and signed by all shareholders.

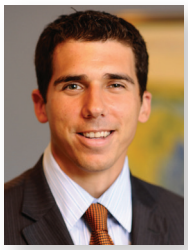
However, where there are sharpening differences of personality or approach among shareholders, a unanimous resolution may not be possible and a formal shareholders meeting will need to be held.

Conducting a proper shareholders meeting, particularly a contentious shareholders meeting, is a very technical exercise. It is important that all aspects of the meeting are properly performed, otherwise, in certain cases, the business at the meeting may be held to be invalid.

It is also very important to be aware of a shareholders right of dissent. A right of dissent is available to a shareholder if certain items of business are proposed to be passed by resolution. If a shareholder exercises his or her right of dissent, that shareholder may demand that the corporation purchase his or her shares for fair value.

What is the Right of Dissent?

Generally, the right of dissent allows a shareholder of a corporation to demand to be paid the "fair value" of his/her shares in the event that certain shareholders resolutions are passed by a special majority. The right of dissent is intended to protect the interests of minority shareholders.



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The dissent process under the OBCA is only available in prescribed circumstances. For example, Section 185 of the OBCA permits shareholders to exercise their dissent rights in the following situations:

- the sale, lease or exchange of all or substantially all the corporation's property;
- certain amalgamations with other corporations; and
- certain amendments to the articles of incorporation that add or change restrictions on the issuance, transfer or ownership of shares.

This is only a summary and not an exhaustive list. It is important to note that the resolutions for which dissent rights are available require at least two-thirds shareholder approval to be passed, but not every resolution that requires two-thirds shareholder approval triggers the availability of dissent rights.

Inadvertently Exposed to Dissent Rights

Shareholders

Corporations entering the Canadian marketplace may have minority shareholders. Accordingly, it is important to be aware of each shareholder's rights under the OBCA or you may find your company in the unenviable position of dealing with a dissenting shareholder at an inopportune time.

Further, failing to recognize that a shareholder has a right to dissent at the applicable shareholders meeting can have serious consequences that may ultimately delay or invalidate the proposed business.

Note, a unanimous shareholders agreement (USA) can limit shareholders' rights under the OBCA, including in some cases, the right to dissent.

"Substantially All the Corporation's Property"

Determining what constitutes "substantially all of a corporation's property" requires both a quantitative and qualitative approach.

As stated in *Amaranth LLC v Counsel Corp*, "the quantitative approach compares the proportion or relative value of the transferred property to the total property of the transferor. The qualitative analysis assesses whether the transferred property was integral to the transferor's core business activity, so that its disposition strikes at the heart of its existence."

Ultimately, the qualitative analysis will govern. There have been cases where over 90 percent of a corporation's assets were sold, but the sale was held not to be substantially all of a corporation's property. Determining the nature of the corporation's business is critical in the application of the test.

Consequences of Dissenting

A shareholder who dissents and makes a demand for payment loses all rights as a shareholder other than the right to be paid fair value of his or her shares.

From the date such demand for payment is made (and not withdrawn in accordance with the OBCA) the shareholder is not entitled to participate in the future profits of the corporation. If the corporation has a capital dividend account, the shareholder should consider whether he or she will lose the benefit of the capital divided account if he or she dissents.

There is no mention in the OBCA that a dissenting shareholder is entitled to any favorable tax treatment and there is indication in case law that taxation on the redeemed shares will not factor in to the determination of "fair value."

Conversely, the dissenting shareholder is able to affix in time, the value of his or her shares. If the corporation subsequently declines in value after the resolution is passed, that will not affect the fair value of the dissenting shareholder's shares.

Using Dissent as a Tactic

In some situations, corporations have purposely proceeded with amalgamating two corporations, the end result of which leaves the minority shareholders with redeemable preference shares. This can be a method to "squeeze out" unwanted shareholders.

Similarly, a corporation can choose to proceed with amending the articles of incorporation to provide for the redemption of certain shares, where no such previous right of redemption existed.

In each case, the minority shareholders will be in a tough legal position. A minority shareholder can choose to exercise his or her right of dissent, attempt to negotiate a private settlement and/or pursue other remedies under the OBCA, such as making a claim that he or she is being oppressed by the proposed action.

The options available to shareholders in a situation where their shares in the corporation are going to be "involuntarily" redeemed are complex and are beyond the scope of this article. However, the common factor in these situations is that deciding to pass a resolution that makes dissent rights available forces action. It is important to be ready for and aware of the consequences that could flow from making such a decision.

Conclusion

Shareholders meetings are a fundamental part of corporate governance that is often overlooked in privately held companies. These meetings and any accompanying rights of dissent should be considered carefully with the help of legal counsel with expertise in corporate governance matters.

Major Changes to Canada's Trademark Registration System: What You Need to Know and Why You Should Act Now

In 2014, several bills were passed into law in Canada to modernize Canada's trademark registration system and to align it with international best practices. Canada will now adhere to various international treaties, specifically the Madrid Protocol, the Nice Agreement and the Singapore Treaty, which together constitute the main system for registering trademarks in many jurisdictions worldwide. The Canadian Trade-marks Act (the Act) has already been amended to reflect the new registration system. However, these amendments will likely only come into effect in 2018 or later, once the Canadian Intellectual Property Office (CIPO) has updated the Trademarks Regulations, its policies and procedures, and web-based applications. Until then, the current registration system will remain in force, allowing trademark owners to continue taking advantage of certain benefits of the current regime.

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Major Changes

• Classification of Goods and Services

The current regime only requires that goods and services be described in ordinary commercial terms and does not require that goods and services be divided into classes. Under the new regime, applicants will be required to identify goods and services by class according to the classification system established by the Nice Agreement (the Nice Classification). This change could complicate and delay the application drafting and filing process, particularly for applicants who have not already filed applications for their trademarks in other countries that comply with the Nice Classification.

• More Fees

In Canada, under the current regime, there is only one government filing fee per application regardless of how many classes of goods and services are included. However, in most other countries, government filing fees are applied to each class of goods and services covered by the application. Along with the implementation of the Nice Classification, it is likely that CIPO will also implement a per-class filing fee structure.

• No Filing Grounds

Under the new regime, applicants will no longer have to identify the filing grounds of the application and therefore will no longer have to specify whether there is actual or intended use of the trademark, or provide a date of first use. This will not change the first-to-use entitlement regime that has always been in effect in Canada, and applications may still be opposed on the basis of prior use or previously filed applications or registrations. However, it will no longer be possible to determine from the trademark register whether the owner of an existing registration or previously filed application is a prior user. In the absence of such use information, trademark availability searches will become more complex, and more extensive marketplace investigations will be required to determine relative dates of first use and the chances of success of an opposition. Oppositions may have to be filed blindly without this information and prior use will instead be determined through the exchange of evidence during opposition proceedings.

• Use Not Required for Registration

Under the current regime, a trademark must be in use (in Canada or elsewhere) in order to obtain registration. Applications can be filed on a proposed use basis, but a declaration of use is required in order for such applications to proceed to registration. Under the new regime, registration can be issued based solely on a stated intention to use the trademark in Canada. Declarations of use will no longer be required and registration fees will no longer be payable. Proof of use will only be required if a registration is challenged for non-use after three years from the date of registration. Since actual use will no

longer be required for registration, choosing a trademark will become more difficult as the Register will become cluttered with intended use trademarks. It will also likely lead to an increase in "trademark trolls" or "trademark squatters" in Canada who will file applications to register trademarks ahead of the legitimate trademark owners merely to try to gain an advantage, financial or otherwise. Unfortunately, this will put trademark owners in a position of having to oppose, seek to expunge or otherwise try to reclaim their trademarks, which can be both lengthy and costly.

- **Divisional Applications Permitted**

The new Act will permit applications to be divided so that non-contentious portions of the application can proceed to registration while the remainder of the application undergoes continued examination. As a result, applicants might strategically choose to file for goods and services that are much broader than before since there is no longer a risk that the application will be held back on account of potentially problematic goods and services.

- **Shorter Registration and Renewal Terms**

The initial term of a trademark registration and subsequent renewal terms in Canada will be shortened from 15 years to 10 years. However, registrations issued and renewals granted (if due) prior to the coming into force of the new Act will still have the benefit of a 15-year term.

- **Expanded Definition of Trademark**

Under the new Act, the definition of what constitutes a trademark (which will no longer be hyphenated) has been expanded to include not only words and designs, but also personal names, letters, numbers, colors, figurative elements, three-dimensional shapes, holograms, moving images, modes of packaging goods, sounds, scents, tastes, textures and the positioning of signs. However, trademarks with primarily utilitarian features (those that serve a use or function) will not be registerable. While it is still unclear how these new forms of trademarks will be handled, there will likely be a rush to be the first to file them, even before the new Act comes into effect.

- **Evidence of Distinctiveness May Be Required**

Currently, CIPO examiners cannot object to a trademark for lack of distinctiveness. Distinctiveness is the characteristic or quality that distinguishes an owner's brand or trademark from those of competitors. A trademark that is not inherently distinctive may acquire distinctiveness through use. Currently, evidence of distinctiveness may only be required in limited circumstances, such as for trademarks that are clearly descriptive, or that have a name or surname significance. Under the new Act, CIPO examiners will be able to object to a trademark if their preliminary view is that the trademark is not inherently distinctive, and therefore, applicants may be required to submit evidence of distinctiveness of the trademark in order to overcome the objection.

- **International Applications Permitted**

The adoption of the Madrid Protocol will offer trademark owners another avenue through which to obtain trademark protection in Canada. Since Canada will become a contracting state, foreign applicants will be able to add Canada to their international applications filed with the World Intellectual Property Organization (WIPO) and Canadian applicants will be able to file international applications with WIPO to obtain international protection for their trademarks.

Implications and Call to Action

For Canadian and foreign business owners who wish to protect their brands in Canada, it is more important than ever to review your brand portfolios in order to identify any trademarks that are not yet registered or any goods and services that are not covered by existing applications or registrations in Canada, and to consider filing applications for registration as soon as possible before the amendments to the Act come into force. Here is why:

- **Save on Costs**

Although the new fee structure is not yet determined, filing now while government filing fees remain modest could avoid an anticipated increase in filing fees for multiple classes of goods and services.

- **Simplify Drafting**

Filing now would circumvent having to list goods and services according to the Nice Classification for the time being, making the drafting and filing process quicker and easier. Moreover, since divisional applications will soon be allowed, you can take advantage of that by filing as broadly as possible.

- **Be the First to File**

Under the new regime, being the first to file will be of paramount importance since use of a trademark will no longer be a prerequisite for registration.

- **Avoid "Trademark Trolls"**

In light of the increased risk of "trademark trolls" under the new regime, applications for registration should be filed as soon as there is even a reasonable likelihood of using trademarks in Canada. As well, priority of foreign trademark applications should be claimed when possible, particularly if the trademarks are being used across the border in the United States or on the Internet, which is likely to result in spillover advertising.

- **Get Longer Protection**

If you are able to obtain registration before the new Act comes into force, you will still benefit from a 15-year registration term. And if you already have a registered trademark with a renewal deadline that falls on a date before the new Act comes into force, you can renew now to take advantage of a longer renewal term.

- **File Non-Traditional Marks**

Since evidence of distinctiveness is not currently required, filing now for any non-traditional marks or marks that are not inherently distinctive (e.g., letters, numbers, graphic images, tag lines) could avoid lengthy and costly objections based on distinctiveness under the new regime. Also, filing now for any new forms of trademarks will put you at the front of the line.

Some of these amendments to the Act may also apply to pending applications as well as existing registrations. The full impact of the transitional provisions is not yet known. However, the further along you are in the registration process when the new Act comes into force, the better. Take action now to implement a proactive strategy that best protects your brands in Canada.

Shareholder Agreements: Intersection of International Arbitration Agreements and Local Company Law

When drafting or enforcing a shareholder agreement, a cross border investor will need to be mindful of the local company law and local commercial arbitration provisions.

As in the recent Australian example of *WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd* [2016] FCA 1164 (Masters Case), local company laws can confer remedies on shareholders that may intersect with their shareholders agreement and its referrals to commercial arbitration.

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In this article, we look at key shareholder protection rights under Australian company law, and review the Masters Case which involved a subsidiary of Lowe's home improvement store of the United States and Woolworths of Australia. The court in the Masters Case ultimately stayed an application for dissolving under local company law, to allow a commercial arbitration to deal with the substantive dispute.

In doing so, the court looked to international precedents.

Australian Company Law Remedies for Shareholders

The two main Australian statutory remedies available to shareholders of a company in dispute are the oppression remedy and the dissolution of the company on "just and equitable" grounds.

The oppression remedy can be sought if the conduct of the company's affairs, its acts, omissions or any of its resolutions, is contrary to the interests of the shareholders as a whole or is oppressive, unfairly prejudicial or unfairly discriminatory against a shareholder. If such a finding is made, Australian courts are empowered to make any order it considers appropriate in relation to that company.

The oppression remedy has been interpreted by Australian courts in a broad manner. The type of conduct which can give rise to an oppression claim is varied and fact dependent but is primarily concerned with unfairness in the treatment of shareholders.

Successful oppression claims include situations in which excessive remuneration is paid to executive shareholders, shares are issued with the dominant purpose of reducing a shareholder's proportional shareholding, access to books and records are denied, and company assets are sold on uncommercial terms.

Examples of orders that Australian courts have made pursuant to the oppression remedy include amending the company's constitution, setting aside company resolutions, requiring the payment of compensation by oppressive directors, and requiring a shareholder acquire another shareholder's shares.

A separate cause of action exists if a shareholder wishes to dissolve the company on "just and equitable" grounds. The phrase "just and equitable" is broadly interpreted and many of the factors that indicate a shareholder is being treated oppressively are relevant in determining whether it is "just and equitable" for a company to be dissolved.

It should be noted that in relation to both remedies, the courts will not readily dissolve a solvent company. The court may be persuaded to do so in more extreme circumstances, for example, if there is continued animosity between shareholders or if it is likely that oppressive behavior will continue in the future.

The Masters Case

Hydrox Holdings Pty Ltd (Hydrox) was a joint venture company set up to carry on the Masters hardware business. Australian publically listed company

Woolworths Ltd (Woolworths) owned two-thirds of the shares in Hydrox, while U.S. company WDR Delaware Corporation (WDR), a subsidiary of Lowe's Companies, Inc. (Lowe's), owned one third.

Disputes arose in relation to the Masters business. WDR and Lowe's commenced proceedings alleging oppressive conduct by Hydrox and sought orders that Hydrox be dissolved pursuant to the oppression remedy or alternatively on "just and equitable" grounds.

Woolworths sought that the proceedings be stayed on the basis that the terms of the joint venture agreement between the parties required disputes to be determined by arbitration.

Section 7(2) of the Australian *International Arbitration Act 1974* requires proceedings to be stayed and referred to arbitration if they are commenced by a party to an arbitration agreement and the matter is capable of being settled by arbitration.

The central issue in the proceedings was whether the matters raised by WDR and Lowe's in their proceedings could be resolved by arbitration.

WDR and Lowe's argued that there was only one matter to be determined by the proceedings, and that was whether Hydrox should be dissolved. WDR and Lowe's argued that this determination could only be made by a court and not by private arbitration.

The court rejected this argument and agreed with Woolworths in finding that the proceedings involved several matters to be referred to arbitration (such as whether there was a failure to provide information and whether the joint venture agreement had been breached as alleged by WDR and Lowe's).

The court stated that whether these matters were arbitrable involved "a consideration of the inherent power of a national legal system to determine what issues are capable of being resolved through arbitration. The issue goes beyond the will or the agreement of the parties. The parties cannot agree to submit to arbitration disputes that are not arbitrable."

The court noted that matters incapable of being resolved by arbitration shared a "sufficient element of legitimate public interest in the subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate."

WDR and Lowe's argued that a claim for a dissolution order is not arbitrable on the basis that it affects the legal status of a person, it affects a number of third parties, the creation and dissolution of a company legal entity is a matter of governmental authority, and there is a public interest in ensuring that the procedural steps by which a company is liquidated are governed by court and determined publicly rather than by private arbitration.

Woolworths argued that the question the arbitrator would answer was not whether to dissolve Hydrox. The arbitrator would resolve the matters that the court would have regard to in determining whether to dissolve Hydrox, such as whether there had actually been a failure to provide information or whether a breach of the joint venture agreement had occurred as alleged by WDR and Lowe's.

The court had regard to Australian and international case law on the arbitrability of matters, and was of the view that the matters raised by WDR and Lowe's could be arbitrated. The matters were in substance contractual disputes and other obligations between private parties. The fact that a dissolution order was sought by WDR and Lowe's did not change the nature of the dispute between the parties that needed to be resolved. While the court saw no issue in having these matters determined by arbitration, it held that the ultimate decision of whether to dissolve Hydrox was only capable of being made by the court and was not arbitrable.

Conclusion

Local laws can add to or subtract from agreements that are reached between local and foreign parties. It is essential that local expertise be obtained in dealing with any cross-border transactions. The Masters Case is an example in which local Australian shareholder remedies did not overrule the joint venture agreement reached between an Australian company and a U.S. company. P

Metadata in Civil Litigation: An Australian Perspective

The Telecommunications Interception and Access Act 1979 (Cth) (TIAA), as amended in 2015, requires that Australian telecommunication companies retain specific data for a period of at least two years. The purpose of the TIAA is to permit access to retained data by Australian law enforcement and security agencies to assist in national security and serious criminal investigations. According to the Australian government's 2014/15 annual report on the TIAA, enforcement agencies made 365,728 authorizations for access to historical telecommunications data in that financial year, of which the overwhelming majority was related to enforcement of criminal law.[1]

While it is not uncommon for a party in civil proceedings to request a subpoena to compel a service provider (SP) to produce documents relating to telephone or internet communications, amendments to the TIAA due to come into effect in April 2017 will restrict access of data by subpoena where that data was retained by a SP to solely comply with the TIAA, provided no exclusion applies.

The Federal Attorney-General's Department has recently invited submissions to widen the application of the TIAA to allow access to retained data in civil litigation.[2] The Australian government's reasons for this expansion are not immediately apparent as, apart from copyright rights holders, there appears to be limited support for the proposal when weighed against the compromise to personal privacy.

Currently under consideration by the Government is the Parliamentary Committee on Intelligence and Security's recommendation that the TIAA include the ability for regulations to be made which exclude the new restriction for certain classes of matters. The Committee mentioned examples such as family law proceedings, including violence or international child abduction cases, but did not propose an exhaustive list of classes.

What Data is Retained under the TIAA?

Retained data under the TIAA includes information such as:

(a) a person's name, address, contact information and device details;

(b) the source and destination of a communication including a phone number, email address or IP address;

(c) the duration and time of a communication or a session of data transfer; and

(d) the geographical location where the communication took place.

Access to Retained Data for Civil Litigation

Despite not including the content of a communication, such as the data transfer or web history, the retained data is by no means minimal and its significance to civil litigation ought not be underestimated. Such data may, and often can, substantially assist a litigant to prove elements of their case, and would have wide application in matters where, for example, defamation or breach of copyright is alleged.

Dallas Buyers Club LLC Litigation

One example which highlights the significance of retained data is the case of *Dallas Buyers Club*.[3] In this case, Dallas Buyers Club LLC made an application to obtain preliminary discovery of the identifying information of 4,726 IP address[4] holders who allegedly downloaded and shared the 2013 movie Dallas Buyers Club via

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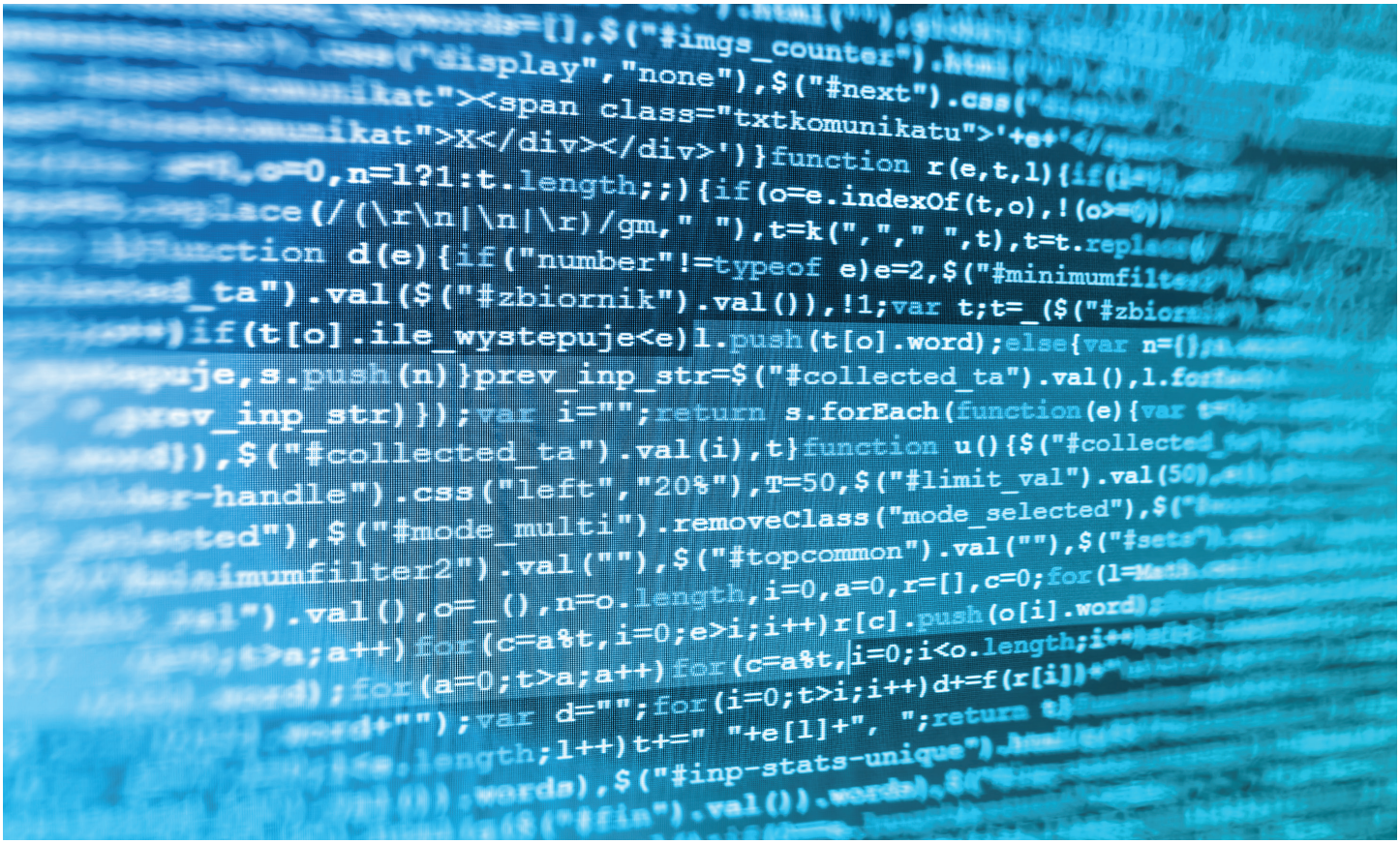

BitTorrent (a peer-to-peer file sharing network), without consent and therefore in breach of Australian copyright laws.

A single judge of the Federal Court of Australia found that section 280 of the TIAA authorized an SP to disclose the identifying information by order of the court. However, the court was reluctant to permit the unconditional release of the identifying information and stayed the proceedings until Dallas Buyers Club LLC could satisfy the court that the contents of letters addressed to the IP address holders was appropriate.

In a later hearing, Dallas Buyers Club LLC subsequently failed to satisfy the court that the demands in their draft letter of demand were appropriate[5]. The court ordered that the stay would not be lifted until Dallas Buyers Club LLC provided an undertaking that the identifying information would not be used to demand payment of the cost of a licence fee and punitive damages, as set out in the draft letter, and provided a bond of $600,000.

Although that litigation appears to have been abandoned by Dallas Buyers Club LLC (given that it was prevented from engaging in speculative invoicing), it shows that Australian courts appreciate the ramifications of allowing unrestricted access to vast quantities of otherwise sensitive data.

Individual's Access to Retained Data

Gaining access to retained data from SPs can be notoriously difficult. Early this year, the Full Federal Court in the case of *Privacy Commissioner v Telstra* dismissed an appeal against a decision that a journalist was not entitled to obtain access to all metadata retained by an SP from his mobile phone usage. The court considered that the SP had no obligations to provide such information as it did not fall within the meaning of the term "personal information" for the purpose of the Privacy Act 1988 (Cth) at the time.

While this case has a narrow application to the newly amended TIAA, it highlights the difficulty individuals face when seeking to obtain an understanding of and access to, data retained by SPs for the purpose of litigation.

Further Consultation Needed

It is widely considered that access to retained data in future civil litigation may allow aggressive litigators of copyright infringement to commence "fishing expeditions." Other consequences include otherwise confidential communications, such as lawyer/client and journalist/source, being compromised.

Given the significance of the proposal to water down the prohibition of access to retained data in civil litigation, a longer period of consultation could be beneficial, as the impact of widening application of the TIAA as proposed will likely only become apparent when the regime is formally reviewed in 2019. P

1 ag.gov.au/NationalSecurity/TelecommunicationsSurveillance/Documents/Telecommunications-Interception-and-Access-Act-1979-Annual-Report-14-15.PDF

2 ag.gov.au/Consultations/Documents/Access-to-telecommunications-data/Consultation-paper-access-to-retained-data-in-civil-proceedings.pdf

3 *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317

4 An Internet Protocol address is a series of numbers assigned to identify electronic devices which form part of a network.

5 *Dallas Buyers Club LLC v iiNet Limited* (No 4) [2015] FCA 838

Companies Act 2016: A New Dawn for Business in Malaysia

The new Companies Bill of Malaysia ("the Bill") was passed by the House of Senate on April 29, 2016, and became an official Act of Parliament on September 15, 2016. The Companies Commission of Malaysia announced that the new Companies Act 2016 would take effect on January 31, 2017, in stages. The new Companies Act 2016 marks the beginning of a total new regulatory regime in Malaysia.

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Here, we will highlight the major changes in the new Companies Act 2016, with regard to the incorporation of a company and the maintenance of it.

One Person Company for Private Company

Under the previous Companies Act 1965, Section 14(1) provided that a company should be incorporated by at least two people. Thus, there must be at least two directors in one company.

However, the new Companies Act 2016, Section 9, provides that one of the essential requirements to form a company is one or more directors. Further, Section 196 (1) states that a private company should have at least one director.

Therefore, these two sections have clearly been drafted in such a way to make it easy for local or foreign investors to form a private company in Malaysia.

The Director

The previous Companies Act 1965 by virtue of Section 122 (1) had required that all of the directors must have a principal place of residence, or at the very least a place of residence, within Malaysia.

Conversely, under the new act, by virtue of Section 196(4)(a), only a minimum number of directors is required to have a principal place of residence in Malaysia. Therefore, under the new act, it is not a requirement for all directors to have a principal place of residence in Malaysia.

Further, the new Companies Act 2016 covers the issue of a "shadow director." This can be seen in Section 2

whereby the term "director" is defined as the person who is occupying the position and the person whose directions or instructions the majority of directors are accustomed to follow.

The key change and the only difference in the definition of director under Section 2 of the new act is the insertion of the word "majority." By such insertion, in order to prove that a person is a "shadow director," one needs to look at the circumstances of the case to ascertain whether or not the majority of the directors are accustomed to act in accordance with that person's instruction. If the answer is affirmative, that person is a "shadow director" and will be subjected to similar liabilities as the directors of the company. This is notwithstanding the fact that the company has never officially appointed him as director.

Implementation of Constitution

Under the previous Companies Act 1965, the companies in Malaysia were "identified" and "controlled" by their Memorandum of Association and Article of Association.

However, under this new regime, the need for a Memorandum of Association and Article of Association has been abolished.

This is now replaced by the implementation of a constitution. Section 31 of the new Companies Act 2016 provides that a company, other than a company limited by guarantee, may or may not have a constitution.

Thus, a private company in Malaysia has an option whether to have a constitution or not. Having said that, however, once the company decides to have a constitution, the company, each of the directors and each of the members shall be bound by the said constitution as provided by Section 33(1) of the new act.

On the other hand, in the event the company does not have a constitution, Section 33(3) of the new act provides that the company, each of the directors and each of the members of the company shall have the rights, power, duties and obligations as set out in the new act.

Section 35(1) further provides that the contents of the constitution may either be the objects of the company, the right and powers of the company and any other matter the company wishes to include in the constitution.

It is important to note that, if the company sets out the objects in its constitution, by virtue of Section 35(2)(a) of the new act, the company will be restricted from carrying on any business or activity that is not within the objects stipulated in the constitution.

Company Seal is Optional

Companies registered in Malaysia can now choose whether to have their common seals by virtue of Section 61 of the new act. Besides, Section 66(1) of the new act states that a company may execute any document either by affixing its common seal or by way of signature.

Section 66(2)(a) of the new act further provides that the signature must be at least by two authorized officers, one of whom shall be a director.

By virtue of Section 66(5) of the new act, the term "authorized officers" means a director of the company, a secretary of the company or any other person approved by the board of directors.

In the case of a sole director, Section 66(2)(b) of the new act provides that the director needs to execute the documents in the presence of a witness who could attest the signature.

Conclusion

Although it was announced that the new Companies Act 2016 will come into force in stages, it is just a matter of time before it is fully enforced and effective. Any existing company and the local and foreign investors who might want to incorporate a local company must be prepared for the dawn of the new company regulation regime in Malaysia.

1 Prof. Brian Broughman, *Corporations Class*, Maurer School of Law, Indiana University Fall 2015.

2 Dennis J. Block, Nancy E. Barton and Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, FIFTH. ED. VOLUME II, 1380 (1998) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991), and *Hawes v. City of Oakland*, 104 U.S. 450, 453 (1881)).

3 ACT 222 OF 1995. ARTICLE 25. SOCIAL LIABILITY ACTION.

4 Also known in comparative legal systems as direct action.

5 BILL PROJECT NO. 70 OF 2015. ARTICLE 32. INDIVIDUAL LIABILITY ACTION. In those cases in which it is aimed to correct the damages directly suffered by an shareholders, partner or a third party by reason of the manager's actions, the affected persons may demand their personal liability pursuant to article 16 of this law, through an individual action, provided that said damages do not correspond to those that can be requested through the derived action.

6 Also referred to as social or corporate action.

7 BILL PROJECT NO. 70 OF 2015. ARTICLE 26. COLLECTIVE ACTION. In case of correcting the harm suffered by the company as a consequence of the managers' actions, the company may demand, through a collective action, their responsibility pursuant to the provisions of article 16 of this law. In order to initiate the collective action of responsibility, the authorization of the general assembly of shareholders or partners shall be obtained.

8 BILL PROJECT NO. 70 OF 2015. ARTICLE 27. DERIVATIVE ACTION. Provided that the collective action of responsibility has not been initiated, any associate may petition for the derived action in order to correct the damages suffered by the company as a consequence of the managers' actions. In these cases, the action will be filed by the plaintiff in the name of the company.

9 BILL PROJECT NO. 70 OF 2015. ARTICLE 28. LEGITIMACY FOR FILING THE DERIVATIVE ACTION. The plaintiff must have had the capacity as associate when the facts or omissions that give rise to the liability occurred or must have acquired said capacity subsequently, by operation of the law, (…).

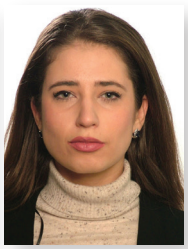
10 An example of these exemptions are: divorces, bequests, inheritances, devise, legacy, among others.

11 BILL PROJECT NO. 70 OF 2015. ARTICLE 27. DERIVATIVE ACTION. (…) The associates may file the same action in case of avoiding the occurrence of an imminent damage to the company.

12 BILL PROJECT NO. 70 OF 2015. ARTICLE 30. LITIGATION COSTS IN DERIVATIVE ACTIONS.

New Data Protection Rules in the EU

Tomislav Pedišić



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Current data protection rules in the European Union (EU) are based on the Data Protection Directive 95/46/EC. In the 21 years since the current data protection rules were adopted, a lot has changed. According to the information released by the European Commission, 250 million people use the Internet daily in Europe. Furthermore, new ways of communicating, such as online social networks, have significantly changed the way people use and share personal information. In addition, the development of cloud computing means that data is stored in remote computer servers instead of in personal computers. The flow of data has become increasingly globalized, in that personal information is collected, transferred and exchanged in large quantities, across the globe in milliseconds.

Such change in the development of electronic communication and use of personal data has contributed to the widespread perception in the EU that the current data protection rules do not provide an adequate level of protection. Studies from the European Commission show that half of European Internet users are worried about being a victim of a fraud through misuse of their personal information, while around seven out of ten people are concerned about their information being used for a purpose different from the one it was collected for. Moreover, current data protection rules mean that businesses in the EU have to deal with 28 different data protection laws, which is a costly administrative burden, making it difficult for companies to access new markets.

All of this has caused a lot of discussion about the necessity to reform the current data protection rules. Such discussions in the end resulted in adoption of the Regulation (EU) 2016/679 – the so-called General Data Protection Regulation (GDPR). The GDPR went into effect on May 24, 2016, and all EU member states are required to implement the same into their national legislation by May 6, 2018. At this time, the GDPR will completely replace the currently applicable data protection rules based on the Data Protection Directive 95/46/EC. The proclaimed goals of the GDPR are to achieve a balance between the free movement of personal data and protection of the same, as well as to strengthen the internal market by establishing one single law applicable across the EU. It also aims to simplify the regulatory environment, principally through establishment of a "one-stop-shop" system (i.e. each business organization will have to answer to just one single data protection authority) and suppress different formalities that are perceived as burdensome and unnecessary, such as general notification requirements.

Within its goals, the GDPR aims to strengthen the citizen's fundamental rights in the digital age by introducing more transparency of how personal

data is handled. It also requires data controllers to provide easy-to-understand information and inform data subjects about breaches; sets stricter rules for providing consent for processing personal information; provides easier access for data subjects to his/her personal information; sets more elaborate rules on the right of the data subject to obtain from the data controller the erasure of personal data concerning him/her (i.e. "right to be forgotten"); as well as introduces new concepts such as "data portability" (i.e. right to transfer personal data from one service provider to another).

As stated earlier, the GDPR imposes stricter rules regarding the consent to process personal data. Accordingly, the consent must be given by a clear affirmative action, in a written or oral form or by electronic means, including, for example, ticking a box on a website. Any kind of statement or action from which it is clear that the data subject has accepted the processing of its data is also considered as approval. The request for consent should be presented in the manner that is clearly distinguishable, in plain language and in easily accessible form. Presumption is not allowed by inactivity, nor by silence. Data subjects have the right to withdraw their consent at any time, without limitation.

One of the novelties introduced by the GDPR concerning the consent to process data is the so called "parental consent." It means that for children below a certain age, parents must give parental consent in order for the child's data to be processed. It includes the most common children's activities on the Internet, such as opening social accounts with Facebook, Instagram or Snapchat. Nevertheless, parental consent is not required in the context of preventive or counseling services offered directly to a child. The age limit established by the GDPR for parental consent is 16; however, it allows each of the member states to lower the age to as young as 13. This arrangement was one of the most debated issues concerning the GDPR, because it is expected to result in lack of consistency among the member states, while consistency was one of the principal goals of the GDPR.

The GDPR introduces more elaborate rules concerning the so-called "right to be forgotten," which provides a data subject with the right to demand erasure when their personal data is no longer necessary, when the data subject withdraws consent or when the personal data has not been processed lawfully. In such situations data controllers are required to erase mentioned data promptly after data subject's request. On the other hand, if processing of data is necessary for public interest, scientific research, defense of legal claims and similar, the right to erasure will not be exercised. The burden of evidence for keeping the data is on data controllers.

One of the intended goals of the GDPR is for data subjects to be more aware of illegal actions over their personal data, such as breaches and hacker attacks. The GDPR imposes an obligation for data controllers to notify individuals when there is a high risk of harm to their fundamental freedom and rights. In any case, data controllers will be obliged to notify a competent supervisory authority of data breaches, describing the nature of the personal data breach, the consequences of the personal data breach and the measures taken or proposed to be taken by the controller itself.

Besides regulating the actions to be taken by data controllers in the case of data breaches, the GDPR also provides for specific guidelines that data controllers and processors must follow to prevent personal data from being misused both by data controllers themselves and by third parties. Such measures apply even in the initial stage of data processing. In fact, data controllers have the obligation to conduct a data protection impact assessment, aimed at considering the likelihood and severity of the risk, particularly with large scale processing. Regarding the data processing itself, data controllers and processors are required to maintain a record of processing activities under their responsibility. Nevertheless, the GDPR abolished various notification requirements, e.g., the obligation of data controllers to notify the competent supervisory authority before carrying out certain personal data processing operations.

One of the new concepts introduced by the GDPR is the so called "data portability," or the right of a data subject to transfer personal data from one service provider to another. In this regard, the GDPR establishes the right of the data subject to receive his personal data in a structured, commonly used and machine-readable format, and to transmit this data to another controller, without hindrance from the controller to which the personal data has been provided.

The GDPR introduced clearer rules regarding the territorial scope of its application. Accordingly, its rules are always applicable in matters containing the EU element. This element exists in cases when a company which processes data is registered in the EU or outside of the EU, but operates and offers goods and services to consumers residing in the EU.

In conclusion, the GDPR introduces significant changes to the data protection rules in the EU that will affect individuals and companies alike.

New Rules for Europe's Medical Technology Companies in their Interaction with Healthcare Professionals

In December 2015, MedTech Europe,[1] the principal association in Europe representing the medical devices industry, adopted a new Code of Ethical Business Practice (the "Revised MedTech Code"), with the objective of regulating all aspects of the interaction between the medical device industry and healthcare professionals, in order to reinforce ethical standards.

MedTech Europe calculates that it represents over 25,000 European medical technology companies. MedTech Europe's guidelines and rules are followed by members and non-members alike.

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The Revised MedTech Code is meant to set minimum standards across the MedTech Europe geographic area, but not to supersede any national laws or regulations or any professional association or company codes of ethics that provide for more strict requirements.[2]

Principal Changes Brought About by the Revised MedTech Code

As of January 1, 2017, more stringent rules apply to the relationship between medical technology companies and healthcare professionals. These rules include:

- the phasing out of direct sponsorship of healthcare professionals throughout 2017;
- more strict requirements for the giving of educational grants: they must be publicly disclosed, can only be provided to a legal entity (which will then select the individuals receiving them), and must be the result of a grant request followed by an independent and objective process within the company giving the grant;
- more stringent ethical standards to all aspects of medical conferences: strictly scientific/medical program, appropriate location and venue, no entertainment, reasonable hospitality, and no spouses or guests; and
- a conference vetting system that will review the compliance of third-party educational conferences with the Revised MedTech Code, and will decide whether it is appropriate for members to financially support these events through educational grants, promotional activity or satellite symposia.

Starting on January 1, 2018, medical technology companies will no longer be able to directly invite healthcare professionals and pay for their expenses for attending third-party organized medical conferences as attendees or listeners.

A third-party organized medical conference must be interpreted broadly to include any educational, scientific or medical conference organized by national, regional or specialty associations, societies, hospitals, professional conference organizers, patient organizations or accredited medical education providers.

Support to healthcare professionals directly from medical technology companies will continue to be permitted only if healthcare professionals are

(1) hired to speak at satellite symposiums under consultancy agreements, or

(2) invited to attend third-party organized procedure training.

Medical technology companies will only be able to sponsor healthcare professionals attending medical conferences as mere attendees or listeners through a more strict system of educational grants paid to hospitals, scientific societies and other healthcare organizations, who will then choose which healthcare professionals can benefit from such grants and attend conferences.

The Banning of Direct Sponsorship of Healthcare Professionals by Medical Device Companies

The banning of direct sponsorship of healthcare professionals is consistent with the code published by the Advanced Medical Technology Association (AdvaMed), MedTech Europe's U.S. counterpart. In the U.S., healthcare professionals attending medical conferences as attendees or listeners have not been directly sponsored by medical companies for over 20 years.

In continental Europe and the United Kingdom, direct sponsorship of healthcare professionals is currently generally permitted, subject to the limitations set forth in each of the applicable legislations, and subject also to the rules and recommendations issued by local representative associations.[3] It is common practice in medical conferences held throughout Europe that medical technology companies sponsor healthcare professionals by directly paying conference fees, travel, food and entertainment.

There has been much debate on whether the banning of this practice could negatively impact not only the way in which medical companies do business in Europe, but also continuing medical education and patient care.

Some of the principal arguments made against the ban include that continuing medical education, and particularly, attendance to larger congresses, will be made far more difficult with the new grant system.

In November 2015, shortly before the publication of the Revised MedTech Code, several European leading interventional cardiologists urged for a postponement of the ban to 2019 on the basis that it would negatively impact the future of medical continued education, possibly reducing conference attendance by 30 to 50 percent.[4]

MedTech Europe representatives have counter-argued that high-quality educational conferences that offer strong scientific programs and are held in appropriate locations will continue to attract healthcare professionals and obtain support from the industry via educational grants.

In similar terms, many healthcare professionals, medical associations and advocacy groups have welcomed the ban of direct sponsorship.

In December 2015, Larry Husten, editor of *CardioBrief*, a source for information about cardiovascular medicine, argued that "[…] this possible decline [in attendance] might be a sign that industry funding for the routine activities of medical education might be unseemly and even unhealthy. If the industry stranglehold on European doctors is the only thing propping up medical meetings then it might be a good idea to reconsider the entire underlying relationship of industry and medicine, not just the direct sponsorship of physicians to attend medical meetings."[5]

Healthcare professionals in Europe who are in favor of the ban have pointed out that the new grant system offers greater transparency and will benefit younger, less experienced professionals at lower levels of hospital hierarchies who do not make purchase decisions, and are not being invited to conferences.

Could This be the End of Third-Party Medical Congresses in Europe?

In March 2012, John P. Ioannidis, a professor of medicine at Stanford University, in a resonant article published in the American Journal of Medicine, predicted the extinction of many of the world's current third-party organized medical conferences. "In theory, these meetings aim to disseminate and advance research, train, educate and set evidence policy. Although these are worthy goals, there is virtually no evidence supporting the utility of most conferences. Conversely, some accumulative evidence suggests that medical congresses may serve a specific system of questionable value that may be harmful to medicine and healthcare."[6]

In Spain, in recent years, an increasing number of medical congresses have entirely forfeited the financing of the medical industry. Most of them are smaller in scope (with fewer attendees and a shorter duration), are often local or regional, offer little social content, encourage high levels of participation and networking of attendees, use the latest technology as an important tool for teaching how medical devices work, and offer more economic fees. They are typically financed with the fees paid directly by attendees. In some cases, public health institutions may contribute funds or cede a location in which to hold the event.

Without a doubt, important changes will take place throughout the next years in Europe's medical technology industry. In his article, Ioannidis wrote: "Are medical congresses dinosaurs doomed to become extinct? The future will tell."

1 Medtech Europe, founded in October of 2012, is an alliance of 2 European medical associations, EDMA (representing the European in vitro diagnostic industry), and EUCOMED (representing the European medical devices industry).

2 medtecheurope.org

3 In Spain, direct sponsorship of healthcare professionals is currently permitted subject to the requirements and limitations set forth in the FENIN Ethics Code, first published in 2005, revised in 2009, and again on December 2016, to incorporate the changes brought about by the Revised MedTech Code. FENIN, founded in 1977, represents over 500 companies dedicated to the manufacture and distribution of medical technology, equal to 80% of Spanish medical technology companies.

4 Patrick Serruys, William Wijns, Stephen Windecker, A Vote Taking Place on 2 December 2015 (EUCOMED) that will Definitely Influence our Profession and Continuing Medical Education. Eurointervention, November 20, 2015.

5 Larry Hustin, Prominent European Cardiologists Decry Curbs on Industry Support for Docs Attending Medical Meetings. cardiobrief.org/2015/12/03/prominent-european-cardiologists-decry-curbs-on-industry-support-for-docs-attending-medical-meetings/

6 John P. A. Ioannidis, Are Medical Conferences Useful? And for Whom? JAMA 307 (12) 1257-8 DOI: 10.1001/jama.2012.360

Introducing American Fiduciary Duties of Officers and Directors in Colombian Corporate Law

In the American legal system, the *direct action* could be defined as the "claim brought by the shareholder in his or her own name, which cause of action belongs to the shareholder in his or her individual capacity, and that arises from an injury directly to the shareholder."[1]

On the contrary, in the U.S. legal system the *derivative action* general definition is "the lawsuit brought by one or more minority shareholders in order to 'enforce a corporate cause of action against officers, directors, and third parties…."'[2] Thus, the real plaintiff in this kind of action is the corporation, which acts and brings the lawsuit through the shareholders, and the real defendant is the board of directors for breaching of their fiduciary duties.

Existing Fiduciary Litigation Claims in Colombia

Currently, the corporate law regime in Colombia allows two types of claims for fiduciary litigation against officers and directors who have harmed the corporation with their acts or omissions. These are: (i) individual action; and (ii) social action.

The *individual action* is established in article 200 of the Act 222 of 1995 and consists of the capacity granted to the corporation, its shareholders and third parties, to make the directors liable for the damages caused by their negligence or willful misconduct.

This action contains a presumption of negligence against the directors who have the burden to prove their innocence if any breach or abuse of their fiduciary duties, to the company's bylaws or the law, is committed.

With respect to the *social action*, the provision established to regulate it,[3] although ambiguous and unclear, states that the action belongs exclusively to the corporation and must be approved by the voting of the majority (50 percent plus one vote) of the shareholders (whether interested or disinterested). This lack of clarity means that in cases of conflicts of interest involving directors who were also shareholders with a controlling or dominant position, the latest could block and veto the minority initiative, since they are not required to abstain voting the action's approval, thus making the *social action* useless in practice for minority shareholders in closely-held corporations.

Bill Project No. 70 of 2015 Fiduciary Litigation Claims

The Bill Project introduces three types of actions to pursue the liability of the officers and directors. The claims proposed by the Colombian government are: (i) individual action (ii) social action; and, (iii) derivative action.

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The *individual action*[4] is entitled to any shareholder or third party of the company, acting in their individual capacity, considering that the director's actions have affected them directly, therefore causing damages during the performance of their duties to personal interests of the formers.[5] Unlike the current applicable individual action, the interests of the corporation are excluded by means of this new version of the direct action. Also, any attempt of trying to seek damages must be pursued through the derivative action.

The *social action*[6] is granted exclusively to the shareholders, not third parties, who want to bear the directors liable, according to article 16 of the Bill Project, for their actions if they were detrimental or caused harm to the company.[7] Considering that the social action belongs to the shareholders, its authorization needs to be approved by the majority of the shareholders of the corporation in the form of a general assembly decision. Whenever no special majority is established in the company's bylaws, the default rule for this kind of corporate decisions is 50 percent plus one vote.

Besides the attempt to fix the numerous practical problems of the current social and individual actions, the innovative proposal of the Bill Project is the importation to the different existing alternatives from the U.S. legal system, of the well-known *derivative action*.[8] This is incorporated as a residual option (the social action could not have been initiated) to protect those minority shareholders that cannot obtain the majority approval required to activate the social action, but still considering that the directors have damaged the corporation, thus, filing the lawsuit on its behalf.

The derivative action could only be filed by a person who was a shareholder of the corporation at the time the acts or omissions where executed by the alleged liable director,[9] or by a person who acquired that capacity according to the exceptions authorized by law.[10] Likewise, the derivative action has a special feature not contemplated in the other two actions, which is that the claim can be used by an individual shareholder, on behalf of the corporation, to prevent the detrimental conduct of the director with the purpose of avoiding the "occurrence of an imminent damage to the company."[11]

Notwithstanding, in order to restrain the minority shareholders' misconduct, reckless or wrong use of this new legal instrument, they will be held liable for the director's legal fees, litigations costs and any other damages caused to the them or the corporation if their derivative suit is frivolous, they use it to holdup the company or for any other detrimental purposes.[12]

Finally, the Colombian government withdrew the Bill Project No. 70 of 2015 so that it could be amended and adjusted. However, we are expecting that the new text maintains intact the scope of the actions we have discussed. P

1 Prof. Brian Broughman, *Corporations Class*, Maurer School of Law, Indiana University Fall 2015.

2 Dennis J. Block, Nancy E. Barton and Stephen A. Radin, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, FIFTH. ED. VOLUME II, 1380 (1998) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991), and *Hawes v. City of Oakland*, 104 U.S. 450, 453 (1881)).

3 ACT 222 OF 1995. ARTICLE 25. SOCIAL LIABILITY ACTION.

4 Also known in comparative legal systems as *direct action*.

5 BILL PROJECT NO. 70 OF 2015. ARTICLE 32. INDIVIDUAL LIABILITY ACTION. In those cases in which it is aimed to correct the damages directly suffered by an shareholders, partner or a third party by reason of the manager's actions, the affected persons may demand their personal liability pursuant to article 16 of this law, through an individual action, provided that said damages do not correspond to those that can be requested through the derived action.

6 Also referred to as *social or corporate action*.

7 BILL PROJECT NO. 70 OF 2015. ARTICLE 26. COLLECTIVE ACTION. In case of correcting the harm suffered by the company as a consequence of the managers' actions, the company may demand, through a collective action, their responsibility pursuant to the provisions of article 16 of this law. In order to initiate the collective action of responsibility, the authorization of the general assembly of shareholders or partners shall be obtained.

8 BILL PROJECT NO. 70 OF 2015. ARTICLE 27. DERIVATIVE ACTION. Provided that the collective action of responsibility has not been initiated, any associate may petition for the derived action in order to correct the damages suffered by the company as a consequence of the managers' actions. In these cases, the action will be filed by the plaintiff in the name of the company.

9 BILL PROJECT NO. 70 OF 2015. ARTICLE 28. LEGITIMACY FOR FILING THE DERIVATIVE ACTION. The plaintiff must have had the capacity as associate when the facts or omissions that give rise to the liability occurred or must have acquired said capacity subsequently, by operation of the law, (…).

10 An example of these exemptions are: divorces, bequests, inheritances, devise, legacy, among others.

11 BILL PROJECT NO. 70 OF 2015. ARTICLE 27. DERIVATIVE ACTION. (…) The associates may file the same action in case of avoiding the occurrence of an imminent damage to the company.

12 BILL PROJECT NO. 70 OF 2015. ARTICLE 30. LITIGATION COSTS IN DERIVATIVE ACTIONS.

Foreign Investor Requirements to Disclose Beneficial Owners to Brazil

In light of a recent Normative Instruction enacted by the Brazilian Federal Revenue Service *(Instrução Normativa RFB 1.634)* ("IN 1634"[1]), starting in July 2017, foreign investors (i.e. any individual or entity residing or headquartered abroad) investing in Brazil must disclose their final beneficial owner(s) to Brazilian authorities.

Under Brazilian regulations, any entity headquartered abroad and that owns certain assets in Brazil must be registered with the Brazilian Federal Revenue Service. Upon registration, each entity receives a specific CNPJ (Cadastro Nacional da Pesso a Juridica) number.

This rule has been in force for years and it applies to any foreign entity that owns:

(i) real estate, vehicles, aircrafts located or registered, as applicable, in Brazil;

(ii) bank accounts in Brazil;

(iii) investments in the Brazilian financial or capital markets; and

(iv) equity in Brazilian companies/entities (i.e. companies/entities incorporated in Brazil, including subsidiaries of foreign entities).

A CNPJ is also mandatory to:

(i) foreign entities with any of the following activities:

a. cross-border leasing involving Brazil;

b. affreightment of vessels, equipment lease and commercial lease (*arrendamento simples*); or

c. import of goods without remittance of payment therefore, destined to be incorporated as capital in Brazilian companies;

(ii) foreign banking entities that trade foreign currency (any currency other than Brazilian Reais) with banks in Brazil, receiving and delivering Reais in the settlement of foreign exchange transactions.

In addition to the mandatory registration, such entities will now have to disclose their respective final beneficial owner(s). This obligation will

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be effective in July 2017 for new foreign entities (i.e. entities applying for a CNPJ number in Brazil). Entities already enrolled in CNPJ in July 2017 must disclose this information by the end of 2018.

According to the new regulation, a final beneficial owner is the individual who ultimately, directly or indirectly, owns, controls or has significant influence in the entity, or the individual on behalf of whom the transaction is made.

The one having significant influence is the individual who directly or indirectly holds more than 25 percent of the entity's capital, or who directly or indirectly makes the majority of the corporate decisions and holds the power to appoint the majority of its administrators (directors or officers), even without controlling it.

Some exceptions apply, as the following entities are not required to disclose information on final beneficial owner(s):

(i) publicly traded companies incorporated in jurisdictions that require the public disclosure of all shareholders deemed relevant (and as long as the respective jurisdiction is not considered a tax haven under Brazilian laws);

(ii) non-profit entities that do not provide fiduciary administration services and as long as they are regulated by a competent local authority and are not incorporated in a tax haven, as defined by Brazilian laws;

(iii) multilateral organizations, central banks, government entities or entities related to sovereign funds;

(iv) social security entities, pension funds and similar entities, as long as regulated by a competent local authority; and

(v) Brazilian investment funds regulated by the Brazilian Exchange Commission (CVM), as long as their quotaholders' Tax ID numbers are disclosed to the Federal Revenue.

The exceptions above are reasonable, as such entities already disclose similar information in their respective jurisdiction, are regulated by competent authority and/or may not even have final beneficial owner(s) as defined by IN 1634.

Notwithstanding the exemption, each of those entities must disclose to the Brazilian Federal information on the individuals authorized to represent the entity, its controlling individuals/entities, its administrators and managers, if any, as well as the individuals or entities in favor of/on behalf of whom the entity has been created.

Please note that any quotaholder of a foreign investment fund who falls into the category of final beneficial owner must have his/her information disclosed to the Federal Revenue.

Also, an individual acting solely as administrator (manager, officer, etc.) of a foreign entity applying for a CNPJ number is not deemed as its final beneficial owner, even if he/she has authority to decide on most corporate matters and/or to appoint the majority of the administrators, However, his/her information must be disclosed to the Federal Revenue (as an administrator, not a beneficial owner).

IN 1634 sets forth the procedures for new CNPJ applications as well as the timeframe and procedures to update existing CNPJ registrations.

The new rule is in line with the growing global trend regarding transparency and the fight against harmful tax practices, money laundering, terrorist financing and other crimes.

Regarding money laundering and terrorist financing, for instance, the Brazilian Securities Commission is also strengthening the rules applicable to the entities under its jurisdiction, in order to follow international trends and recommendations.

As to harmful tax practices, the disclosure of the beneficial owner of foreign investors may help to prevent Brazilian investors from taking undue advantage of certain tax benefits granted exclusively to foreign investors.

In light of the above, foreign entities holding (or intending to hold) assets and/or investments in Brazil, as well as those practicing (or intending to practice) certain activities related to Brazil, must be prepared to disclose information on individuals deemed as beneficial owners under IN 1634.

In addition to IN 1634, the Brazilian Federal Revenue Service also enacted IN 1680 and IN 1681 in order to facilitate the exchange of information with other jurisdictions.

IN 1680 establishes the parameters of the Common Reporting Standard (CRS), as defined by the Organization for Economic Cooperation and Development (OECD), to allow Brazilian authorities to exchange with foreign jurisdictions information obtained from financial and similar institutions.

Under IN 1681, if an entity based in Brazil for tax purposes is the ultimate controlling entity of a multinational group it must present to Brazilian tax authorities the *Declaração País-a-País* (Jurisdiction-to-Jurisdiction Report), with detailed information on the activities of the group in each jurisdiction. P

1 IN 1634 expressly mentions "funds," but a conservative interpretation would include any kind of investment vehicle or scheme.

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Primerus Law Firm Directory – North America

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Ontario, Canada PBLI

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Primerus Business Law Institute (PBLI)

Lewis Johs Avallone Aviles Dresses Down to Do Good

Clients visiting the law firm of Lewis Johs Avallone Aviles, LLP (LJAA) on the last Friday of every month may be surprised by what they see. At the firm's offices in both Islandia, New York, and New York City, employees leave suits and skirts at home and replace them with jeans and casual attire – all for a good cause.

In return for dressing down, the LJAA team is asked to make a donation to that month's recipient charity. They call this their monthly "Denim Day."

"Giving back is so important and I am proud to be part of a team that goes the extra mile for those who can use a helping hand," said Managing Partner Robert J. Avallone.

Although this initiative started to help the community, it has created a strong culture of corporate social responsibility within the firm.

"Not only do our Denim Days help non-profit organizations in the communities the firm serves, but they help build team camaraderie. We make it fun," said Donna DeVita, director of marketing and communications at the firm.

DeVita asks management, the lawyers and support staff to wear certain colors and silly hats, as well as hold balloons and other props for photos which she then posts on social media. She links the photos to the social media pages of the recipient charities.

"The unique photos shared on social media help to raise awareness and bring

"Giving back is so important and I am proud to be part of a team that goes the extra mile for those who can use a helping hand," said Managing Partner Robert J. Avallone.

attention to these worthy causes each month," she said. "The firm members and the charities love it."

Over the holidays, not only did the LJAA team wear their denim, but they wore ugly sweaters and Santa hats and posed for a photo. This year they donated the toys and funds to the John Theissen Children's Foundation, an organization that provides toys to sick and needy children, helps families with medical expenses and fulfills patients' wish lists throughout the year.

Another Denim Day was bathed in pink to support the American Cancer Society Making Strides Against Breast Cancer. Other organizations Lewis Johs Avallone Aviles has helped include: The Fresh Air Fund, Operation Backpack, Hole in the Wall Gang Camp, Boys Hope Girls Hope, local Police Athletic Leagues and the Leukemia & Lymphoma Society. P

2017 Calendar of Events

Scan to learn more about Primerus.

January 26 – Primerus Europe, Middle East & Africa/ Association of Corporate Counsel Legal Seminar
Paris, France

January 27 – Primerus Western U.S. Regional Meeting
San Francisco, California

February 8-10 – Primerus Young Lawyers Section Boot Camp
Las Vegas, Nevada

February 16-17 – Primerus Defense Institute Transportation Seminar
San Antonio, Texas

March 1-2 – Primerus Asia Pacific Client Seminar
Hong Kong

March 1-4 – Primerus Plaintiff Personal Injury Institute Winter Conference
Tucson, Arizona

March 29-31 – Claims & Litigation Management Alliance Annual Conference
Nashville, Tennessee
Primerus will be participating and is a sponsor of this organization.

April 20-23 – Primerus Defense Institute Convocation
Naples, Florida

May 7-9 – Association of Corporate Counsel Europe Annual Meeting
Cascais, Portugal
Primerus will be a sponsor.

May 11-12 – Primerus Business Law Institute Member Meeting
Denver, Colorado

June 1-2 – Primerus Europe, Middle East & Africa Member Meeting
Valletta, Malta

June 7-8 – Primerus Latin America & Caribbean Client Seminar
Bogota, Colombia

June 9 – Primerus Southeast/South Central U.S. Regional Meeting
Boca Raton, FL/South Florida

June 9 – Primerus Northeast U.S. Regional Meeting
New York, New York

June 16 – Primerus Midwest U.S. Regional Meeting
Toronto, Canada

September 6-9 – Claims & Litigation Management Alliance Claims College
Baltimore, Maryland
Primerus will be a sponsor.

October 4-7 – Primerus Global Conference
Vancouver, Canada

October 15-18 – ACC Annual Meeting
Washington, DC
Primerus is a corporate sponsor.

November 9-10 – Primerus Defense Institute Insurance Coverage and Bad Faith Seminar
New York, New York

November 16 – Primerus Europe, Middle East & Africa/Association of Corporate Counsel Legal Seminar
Brussels, Belgium

There are other events for 2017 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at primerus.com/events.

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

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