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From the Chair’s Desk

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FROM THE Chair’s Desk

2013 has been the year of technology with the implementation of the most comprehensive legal resource app around – USLAW 24/7 – the launch of our new website at www.uslaw.org, and our increased outreach via social network channels. I can’t help but reflect on how all of these tie back to the core of our NETWORK: clients, relationships and resources.

As a network of law firms, we are singularly focused on client expectations and delivering resources and connections that will benefit clients in their businesses and industries. With USLAW’s newest digital tools, we’ve simply added more great ways for our network to connect, communicate, share, engage and collaborate.

USLAW is a vast network of the finest lawyers from around the country and the globe. We provide our clients with opportunities to meet and get to know our lawyers in informal educational and social settings, such as our client conferences and regional events. We often go far beyond the boardroom, so we are excited about the events that we have planned for the next 24 months that will deliver unique networking settings for attorneys and clients to interact.

Network lawyers and clients have access to current insights, perspectives and legal education through our vast resource library. Our roundtables bring together attorneys and clients in specific practice areas to share ideas on how cases might be handled. We remain committed to providing expansive, quality service to our clients.

An area of growth will continue to be USLAW practice areas. We now have sixteen substantive practice areas, which bring together attorneys from throughout the NETWORK who have successfully serviced clients in these areas. We will continue to actively seek participation from our diverse attorney network to ensure we deliver relevant data across the spectrum of industries.

We are constantly striving to provide additional value to our clients. We work closely with the Client Leadership Council to ensure we listen to our clients’ needs. By ensuring a high level of competency in member firms and maintaining state-of-the-art NETWORK resources, USLAW offers a wealth of high quality information and services to assist clients in every aspect of their businesses and industries.

In a world that emphasizes everything virtual, digital, electronic and mobile, we have adapted our tools and resources to ensure that we can deliver current information and services to our clients. One thing has not changed – at USLAW NETWORK relationships and networking are paramount. Let’s connect, communicate, share, engage and collaborate.

Sincerely,

Bradley A. Wright
Incoming Chair, USLAW NETWORK, Inc.
Consider a personal injury case in which an injured claimant requires medical treatment for which she is billed $189,978.63. Because the claimant has private medical insurance, the hospital accepts $39,691.73 in satisfaction of the bill. When the individual sues for reimbursement of the medical bills, how much can she recover for the cost of her injuries? Is it the $189,978.63 she was billed? Or is it the $39,691.73 the hospital accepted as full payment for the treatment?

A healthcare provider often accepts a lesser amount in satisfaction of the bill pursuant to a contractual agreement between the healthcare and insurance providers, Medicare, or Medicaid. The amount beyond what is accepted in full satisfaction of the bill is considered a “write-off.” In determining the amount of damages to be presented as evidence in trial to a jury, judges are often left to decide whether to admit as evidence the higher, billed amount, or the lesser amount actually paid as the cost of services rendered. This was the precise issue addressed in a 2011 case from the California Supreme Court, Howell v. Hamilton Meats & Provisions, Inc. After a thorough examination of the issue, the court ultimately found the injured individual could only be compensated up to the amount of services for which she had actually paid.

**THE COLLATERAL SOURCE RULE**

The Collateral Source Rule (“CSR”) precludes the admission of evidence that a source external to the injured plaintiff paid for some or all of the damages the plaintiff seeks to recover. The issue when applying this rule to medical services paid by insurance companies or governmental health plans, is whether the amount “written-off” by healthcare providers is considered a collateral payment to which the Collateral Source Rule applies.

**APPROACHES**

State courts are utilizing two major approaches and a variety of hybrids to address this issue.

1. **Accept evidence of Billed amounts only**
   
   Many states follow the CSR in its traditional form, permitting only evidence of the higher billed amount during a trial. The jury is not informed that the payment came from a collateral source, nor that the collateral source actually paid less than the billed amount. If she wins, the plaintiff may recover up to the higher billed amount of her medical treatment.

   States that follow the Collateral Source Rule in its most traditional form do so first and foremost based on the premise that the defendant tortfeasor should not benefit from the plaintiff’s method of payment or the fact that the Plaintiff has private insurance. Without the collateral source, plaintiff would have paid the full billed amount. The amount a defendant tortfeasor must pay as a result of his negligent conduct should not be different depending on whether the victim is insured. Unless the insured plaintiff is permitted to recover the full cost of the services, the defendant tortfeasor does not pay the full cost of his negligence.

   Whether the court allows in the billed amount and plaintiff benefits from the write-off, or allows in the paid amount only so the defendant benefits from the write-off, only one party gets to benefit. In either scenario someone receives the benefit of the write-off; state that deem write-offs as collateral source say that the windfall should go to the party that was wronged, not the tortfeasor.

   Opponents of this position argue that prohibiting evidence of the reduced amount would create a windfall to the plaintiff because she was never responsible for the full amount (by way of the collateral source). She should not be allowed to benefit from a non-existent debt.

   States that permit evidence of the billed amount, thus allowing for recovery up to the billed amount include: CO, GA, HI, KY, MS, MO, NV, NH, NM, NC, SD, VT, VI, WA, WV, WI, WY, and DC.

**THE COLLATERAL SOURCE RULE & WRITE-OFFS: WHAT IS THE TRUE VALUE OF MEDICAL SERVICES?**

Malinda S. Matlock  Pierce Couch Hendrickson Baysinger & Green
2. Accept evidence of paid amounts only

Many states have abrogated the traditional Collateral Source Rule and permit only evidence of the lower, actually paid amount during a trial while still prohibiting evidence that the payment came from a collateral source. The jury is neither informed that the healthcare provider billed a higher amount nor that a lower payment was accepted in satisfaction of a higher bill. The plaintiff may recover up to the amount actually paid for her medical treatment.

This position rests on two basic premises:

1) The write-off is not admissible as the plaintiff’s damages because it was paid by no one and can be recovered by no one. To be recoverable as “expenses,” monies must generally have been expended. The CSR cannot be applied to monies never paid, thus it cannot extend so as to allow the plaintiff to recover sums no one ever paid (neither plaintiff nor the collateral source). Plaintiff should only be able to recover that amount expended on medical services, it would violate the spirit of traditional tort law to award her beyond that which she was actually required to pay.

If damages are defined as the amount which will compensate for all the detriment proximately caused by the tortfeasor, to borrow from California Civil Code, the amount the healthcare provider accepts in satisfaction of the bill is that which has compensated for the detriment caused and thus is the proper amount of damages awarded. The amount the plaintiff actually pays for the medical treatment is the plaintiff’s “economic loss.” This is the amount the services cost plaintiff and not an arbitrary bill that the healthcare provider never actually expects to be paid. The “[v]alue of damages the plaintiff avoided” has never been the measure of tort recovery.2

2) Defendant tortfeasor should only be liable for the market-value of services rendered. The “market-value of services” isn’t the amount billed but the amount actually accepted by the healthcare provider because providers often overcharge and do not bill the actual amount in order to compensate for the uninsured. Hospitals have been known to charge $15 for an aspirin, not bill the actual amount in order to compensate providers often overcharge and do not bill the actual amount in order to compensate for the detriment caused and thus is the proper amount of damages awarded. The amount the plaintiff actually pays for the medical treatment is the plaintiff’s “economic loss.” This is the amount the services cost plaintiff and not an arbitrary bill that the healthcare provider never actually expects to be paid. The “[v]alue of damages the plaintiff avoided” has never been the measure of tort recovery.2

A HYBRID APPROACH

In light of all these considerations, many states have chosen to create a hybrid of the two approaches. As the healthcare system stands today, the only customers paying the full bill are uninsured, self-paying private citizens. “Before managed care, hospitals billed insured and uninsured patients similarly. In 1960, ‘there were no discounts; everyone paid the same rates’ – usually cost plus ten percent. But as some insurers demanded deep discounting, hospitals vigorously shifted costs to patients with less clout.”3 Many hospitals have a charge scale where the amount billed a patient is determined by the patient’s income, poverty level, or whether they are receiving governmental healthcare assistance. The price of a procedure may even vary from hospital to hospital for the same individual. Because hospitals charge different rates to different customers for even the same services, an argument can be made that the true value of services is neither the amount charged nor the amount accepted, but somewhere in between. For this reason and in light of all the reasons given above, a majority of states choose to combine the best aspects of each view and create a more balanced system. While states balance these competing interests in a variety of ways, there are three main hybrid approaches.

Because plausible arguments can be made that both amounts are the cost of services (or conversely, neither is), some states permit evidence of both the full billed amount and the reduced paid amount to permit the finder of fact to decide. Some states also permit evidence of premiums paid to secure the write-off benefit, or evidence that the Collateral Source has subrogation claim rights.

States that follow this approach include: AL, IN, IA, KS, OH, PA, RI, and TN.

A large number of states permit only evidence of the billed amount during trial, but reduce the award once the verdict is returned. Some courts do so automatically and others simply allow for a post-verdict motion for reduction where the judge decides. This approach balances the need for the Collateral Source Rule with the recognition that the amount of the full bill is likely higher than market value.

States that follow this approach include: (billed amount + post-verdict reduction) AK, CT, FL, ID, IL, ME, MD, MA, MI, MN, MT, NE, NJ, NY, ND, OR, and UT.

A number of other states have an entirely separate rule for dealing with plaintiffs whose collateral sources are public, such as Medicare or Medicaid. Because these programs are funded by the taxpayer, they are not wholly collateral to the defendant, which makes their payments not subject to the CSR. Additionally, plaintiffs pay little if anything to receive the benefits accrued from Medicare or Medicaid.

States that follow this approach include: (billed amount + post-verdict reduction) AZ, KS, DE, LA, MI, MT, NE, and RI.

CONCLUSION

Knowing what approach your jurisdiction has adopted can make a significant difference in evaluating exposure for trial or in accurately advising your client of settlement value. If a Plaintiff has the luxury of presenting a minimum of $189,000 in medical bills in a case where $39,000 was accepted by the provider as full payment, why would she ever take less than $189,000 in settlement? In venues where there is uncertainty or a lack of consistency applied among judges, an early inquiry or motion in limine should be attempted to gain clarity in advance of settlement negotiations and trial. It pays to be aware of what your jurisdiction does.

This article could not be written without the assistance and input of Bonnie Blumert, Law Clerk at Pierce Couch Hendrickson Baysinger & Green.
## 50-STATE SURVEY
### COLLATERAL SOURCE RULE & WRITE-OFFS

**BLUE STATES: PAID EVIDENCE ONLY**

**RED STATES: BILLED EVIDENCE ONLY**

**PURPLE STATES: HYBRID APPROACH**

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<th>MEDICARE/MEDICAID</th>
<th>AUTHORITY &amp; NOTES</th>
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<tr>
<td>ALABAMA</td>
<td>Billed</td>
<td>Billed</td>
<td>Ala. Code §§ 12-21-45, 6-5-22: essentially circumventing the need for a “billed v paid” distinction. Also admissible: Plaintiff’s obligation to repay Collateral Source.</td>
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<tr>
<td>FLORIDA</td>
<td>Billed + post-verdict reduction</td>
<td>Billed + post-verdict reduction</td>
<td>Under Fla. Stat. § 768.76(1)(2008): the write-off is a collateral source. REDUCTION: by the amount contributed by the CS less the cost of consideration for that benefit. Note: no reduction for Medicare/Medicaid/Workers’ Comp programs because the federal government has a right to subrogation claims.</td>
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<tr>
<td>ILLINOIS</td>
<td>MedMal: Billed + post-verdict reduction Other: Billed</td>
<td>MedMal: Billed + post-verdict reduction Other: Billed</td>
<td>Wilson v. Hoffman Group Inc., 546 N.E.2d 524, 530-31 (Ill. 1989). “reasonable value” of medical services is the amount billed the provider. MedMal cases: 735 Ill. Comp. Stat. § 5/2-1005 (2000). Reduction post-verdict – 50% of the benefits provided for lost wages by private or governmental disability programs, 100% of the benefits provided for medical/hospital/nursing or caretaking charges (BUT NOT for benefits where there is a right of subrogation, or where the reduction would exceed 50% of the award). Done by Application for reduction within 30 days of the judgment.</td>
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<tr>
<td>INDIANA</td>
<td>Billed</td>
<td>Billed &amp; paid</td>
<td>Shirley v. Russell, 663 N.E.2d 532 (Ind. 1998); Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009); Ind. Code § 34-44-1-1 (2008). The CSR does not bar evidence that a lesser amount was accepted by a medical provider, but evidence that payment came from a third-party is INADMISSIBLE. The CSR does NOT apply to write-offs because they are not payments. Inadmissible evidence for Personal Injury/Wrongful death actions: payments of life insurance or death benefits, insurance benefits for which plaintiff or his family paid for directly, and payments made by the state/US or its agencies.</td>
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<td>STATE</td>
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<td>IOWA</td>
<td>Billed</td>
<td>Billed</td>
<td>Plaintiff is entitled to reasonable value of services and can show this through billed and paid amounts, and expert witness testimony as to reasonableness. Pena v. Auto Owners Ins. Co., 686 N.W.2d 150 (Iowa 2004) Iowa Code § 668.14. Iowa Code § 147.136: MED MAL Cases – prohibits an award that includes any losses replaced or indemnified by insurance or govt/employment benefit programs.</td>
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<td>KANSAS</td>
<td>Billed</td>
<td>Billed</td>
<td>Follows common law CSR: Rot. 2d Torts § 920A(2). State statute ruled unconstitutional (§ 60-3802) Montez v. MiLibum Enterprises, Inc., 290 Kan, 572, 233 P3d 205 (2010). The source of the CS payment is inadmissible, but the billed &amp; paid amounts may be used to establish reasonableness of medical services because the Write-off is not a CS.</td>
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<td>LOUISIANA</td>
<td>Billed</td>
<td>Billed</td>
<td>Griffin v. Louisiana Sheriff's Auto Risk Ass'n, 802 So. 2d 691 (La.App. 1 Cir. 2001) writ denied, 801 So. 2d 376 (La.App. 1 Cir. 2001). Medicaid: because Medicaid is free for its recipients, they cannot recover the write-off, but Medicare recipients can recover it since they pay consideration for it. Beazem v. State, 879 So.2d 692 (La. 2004).</td>
</tr>
<tr>
<td>MARYLAND</td>
<td>MedMal: Billed + post-verdict reduction motion Other: Billed</td>
<td>MedMal: Billed + post-verdict reduction motion Other: Billed</td>
<td>Evidence of CS payments admissible to show malingering or an exaggeration of an injury, if alleged. Plaintiffs are entitled to the &quot;reasonable value&quot; of medic services, and the court has said which amount that is, but it has said that neither amount properly establishes the value. The plaintiff must offer some evidence that the amount charged was fair and reasonable. See, e.g., Simco Sales Service v. Schwiegnan, 205 A.2d 245, 249 (Md. 1964) plaintiff satisfied where hospital's director of admissions and accounts testified that the hospital charges were fair and reasonable and were the customary charges made by the hospital for such services. Md. Code Ann., Cts &amp; Jud. Proc. § 10-104(d)(1) (West 2008).</td>
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<td>MINNESOTA</td>
<td>Billed + post-verdict reduction</td>
<td>Billed</td>
<td>Swanson v. Bresnahan, 784 N.W.2d 264 Write-offs are collateral sources and must be deducted by trial court from a jury award. Minn. Stat. Ann. § 548.251 (West). CSR still applies, but amount paid by CS is reduced from verdict.</td>
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<td>MISSISSIPPI</td>
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<td>Medicare: Robinson Property Group, L.P. v. Mitchell, 7 So.3d 240 (Miss. 2009). Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1139 (Miss. 2002). (paid amount admissible for impeachment purpose only)</td>
</tr>
<tr>
<td>NEBRASKA</td>
<td>Billed + post-verdict reduction</td>
<td>Billed</td>
<td>Neb. Rev. Stat. 44-2819 (2008), bodily injury or wrongful death cases; evidence of medical reimbursement insurance is inadmissible. reduction by amount of nonrefundable medical reimbursement insurance minus premiums paid. Medicare/caid payments: excluded from the statute and covered by traditional CSR.</td>
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<tr>
<td>STATE</td>
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<td>SOUTH CAROLINA</td>
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<td>Covington v. George, 597 S.E.2d 142, 144 (C.C. 2004).</td>
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<td>SOUTH DAKOTA</td>
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<td>Cruz v. Goth, 2009 S.D. 19, 763 N.W.2d 810. Paper v. Harbert, 2007 S.D. 87, 738 N.W.2d 510, 530. Evidence of Write-offs is not permissable: Plaintiff is entitled to recover the reasonable value of medical services which is a question for the jury. Ruling that either amount is the reasonable value makes the other value inherently unreasonable. SDCC § 21-3-12; MedMal exception: evidence that special damages were paid for or are payable by insurance (not subject to sub- rogation or that was purchased privately) or state/fed gov’t programs (not subject to subrogation).</td>
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<td>WISCONSIN</td>
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<td>Leininger v. Ollart, Inc., 736 N.W.2d 1 (Wis. 2007).</td>
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Does your company use GPS to guide its vehicles? Does your company’s webpage have photographs or drop-down menus? Do your employees scan documents and then e-mail them? Congratulations. As other companies have found out, your company could be a target for a patent “troll” and face the prospect of paying millions to defend a patent infringement lawsuit. Manufacturers and high-tech companies are not the only ones facing patent infringement lawsuits. Patent owners are now going after customers and users, and just about anyone can be a target.

PATENTS ARE SUPPOSED TO ENCOURAGE INNOVATION

Patents are supposed to reward inventors for their creativity and encourage innovation. This principle is built into the Constitution, and the Patent Act was one of the earliest pieces of legislation passed by the first Congress. In its current incarnation, a patent owner has the exclusive right to limit others from using a new and novel invention for a period of twenty years.

Those violating this exclusive right can be found liable for patent infringement, which is a strict liability offense. It does not matter if you were unaware of the patent or thought that you did not infringe. Anyone who makes, uses, sells, offers to sell, or imports a product using a patented invention is potentially liable to pay at least a reasonable royalty for doing so.

PAE LITIGATION THREATENS INNOVATION

While in the past, most patent infringement lawsuits involved competitors suing each other, a new form of litigation has emerged in which entities that do not make or sell products target users of products that allegedly use their inventions. They acquire their patents in a variety of ways – such as by paying individual inventors, acquiring unused patents from companies, or through litigation settlements – but generally not by inventing anything themselves. These plaintiffs are often called non-practicing entities (NPEs) or patent assertion entities (PAEs), and sometimes more colorfully, patent “trolls.” Businesses targeted by PAEs have expressed frustration over these lawsuits because PAEs make little to no contribution to innovation and, instead, act as a form of parasitic private taxation in the marketplace. One study estimated that these PAE lawsuits cost companies $29 billion a year.

For example, one patent holder began sending licensing letters to companies, demanding that they pay between $900-$1,200 per employee for the privilege of being able to use their own networked document scanners with their e-mail. The patent holder wasn’t selling software or hardware to do this. Instead, it contended that the companies’ systems infringed its patents.

Another patent holder claimed that any website with JPG pictures on it (the kind from any digital camera) violated its patent rights and filed numerous lawsuits alleging infringement.

In another lawsuit, a patent holder sued more than 200 trucking companies for their use of a GPS-based vehicle tracking system. These companies faced the very real issues of being a defendant in a large patent infringement lawsuit over products that they purchased from other vendors.

PAEs commonly adopt a volume approach by suing many companies and seeking a relatively modest licensing fee ($25,000-$100,000) for a fully paid-up, per-
petual license. When a typical defense to a patent infringement lawsuit can easily cost more than $1,000,000 and take years, it is easy to see how attractive the certainty and convenience of a license at this price can be, especially to smaller companies that do not have the resources or desire to fight such a battle. PAEs count on this low-ball offer being irresistible, even if their patent is weak or proving infringement is unlikely.

ADDITIONAL PROBLEMS WITH PAE LAWSUITS

PAE lawsuits pose additional challenges for defendants. Unlike a typical lawsuit between competitors, which is often more symmetrical in its risks and burdens, a PAE lawsuit is often very asymmetric, with almost all of the risks and burdens falling on the defendants.

PAEs are often shell companies with few assets. As a result, they are generally immune from counterclaims, and there is little risk that their initiation of a lawsuit will put their business at risk. Their entire business is filing lawsuits and licensing patents.

In addition, PAEs face minimal discovery burdens because they often have little to no documents to review or witnesses to be deposed. In contrast, defendants often will have a significant number of documents to review and witnesses to be deposed, which impose substantial costs in terms of both time and money. Indeed, there is often very little a defendant can do to stop a PAE from imposing onerous discovery burdens, especially if a court is not attentive to the true dynamics of the situation.

The patent laws do provide that in exceptional cases a defendant can be awarded its attorneys’ fees in having to defend a meritless case. Unfortunately, the burden to prove this is sufficiently high that most defendants cannot rely on this relief. And, even if the court does shift fees, many PAEs are essentially judgment proof.

CURRENT STRATEGIES FOR DEFENDING AGAINST THESE LAWSUITS

Companies faced with PAE patent infringement lawsuits recognize that there are currently no good solutions to the problem. As a result, they typically follow four less-than-ideal approaches.

First, a defendant can settle quickly for a modest amount to avoid the substantial litigation costs, regardless of the merits of the case. The advantage of this approach is that it minimizes the risks and avoids the substantial distraction and costs of a lawsuit. Unfortunately, it also encourages PAEs to file additional lawsuits andFeed their war chests, thereby perpetuating the system. It can also result in the defendant being tar-geted in the future as one that is known to settle quickly.

Second, there are mechanisms that allow third parties to request that the USPTO reexamine the patent. This can be done either in an adversarial manner (with both the PAE and third party appearing before the USPTO) or on an ex parte basis (with only the PAE appearing before the USPTO). The new patent law enacted last year (the America Invents Act) provides more options and makes this approach easier. There are some significant advantages to this approach, including cost savings and requiring the PAE to litigate the validity of its patent first before a tribunal that likely has more technical expertise than a judge or jury. Of course, there are also disadvantages, including losing the ability to use prior inventions cited to the USPTO during the litigation and strengthening the patent in the eyes of the judge or jury if the PAE prevails in the USPTO.

Third, customers who purchased products or systems that allegedly infringe can try to get the manufacturer to step in. This is not a “get-out-of-jail-free-card,” though. Unless the PAE agrees to drop the cus-tomer, it will still be a party to the lawsuit and face all of the consequences and distractions that come with that.

Finally, a defendant can adopt a litigate-at-all-costs approach in order to defeat the claim and discourage PAEs from targeting it in the future. Most PAEs are looking for easy targets that will settle quickly. Engaging in long-term litigation that threatens the existence of the patent is the last thing a PAE wants, especially if it be-comes clear to a judge or jury that the PAE is really trying to extort the defendant with either a weak patent or one that really does not cover the accused products. However, this approach is expensive and runs the risk of the judge or jury concluding that the patent is valid and infringed, thereby cost-ing the company both the damages award and its legal fees.

LONG-TERM SOLUTIONS

Congress and the President are looking for ways to address the perceived inequities in many lawsuits brought by PAEs. Part of the problem is definitional – trying to determine exactly which lawsuits are problematic and which are tolerable.

Currently, Congress is considering at least six bills in this area. Among the many proposed solutions, one that is gaining more attention is legislation to make losing plaintiffs pay defendants’ costs and fees, mechanisms that allow customers to bow out and be replaced by manufacturers, limiting the amount and timing of discovery, and requiring cost-shift-ing for additional discovery. These proposals, while interesting, are unlikely to be the final solution, as there are a number of loopholes and ambiguities that would be easy for a PAE to avoid.

The Federal Circuit, which hears all appeals involving patents, is encouraging District Court judges to more freely consider awarding attorneys fees against PAEs when they lose. While encouraging, this approach still requires that a defendant aggres-sively litigate a case that it could lose and that the trial court judge appreciate the exact nature of the situation. Unfortunately, even in the best-case scenario, the defend-ant is only reimbursed for its legal costs. All of its indirect costs in the form of aggra-vation and diverted time and energy from its core business remain uncompensated.

None of these approaches really address the problems posed by PAEs, however. As long as cost imbalances remain that incentivize PAEs to file multiple lawsuits and defy-defense to settle quickly, this PAE problem will not go away soon. Further input and in-creased pressure from businesses will be nec-essary to make a dent in the PAE problem.
“UH-OH, THE OSHA INSPECTOR IS HERE!”
Those words strike fear into the hearts of otherwise unflappable business owners and managers. No one, it seems, relishes the thought of having an OSHA compliance officer (“inspector”) comb through their jobsite, manufacturing facility, warehouse or office in search of potential violations.

Significantly, the possibility of an OSHA inspector appearing at your worksite and ultimately issuing citations is very real. In 2012, the U.S. Department of Labor’s Occupational Safety and Health Administration estimated it would conduct 41,000 inspections. Additionally, 25 states run their own safety programs approved by OSHA, accounting for an additional 50,000 inspections annually. Between OSHA and these “state plan” programs, over 200,000 violations are cited every year.

But you don’t have to be fearful when OSHA knocks. You can successfully manage an OSHA inspection, provided you follow two sets of rules. The first set is a safety checklist of those provisions you should put in place long before an OSHA inspector arrives. The second set consists of “dos and don’ts” you should follow once an OSHA inspector actually appears on your site for an inspection.

SAFETY CHECKLIST
To facilitate a safe workplace and prepare for the day OSHA decides to inspect, you should take time to do the following:
• Develop a written safety and health program. Distributing the program, which should be tailored to the activities at your worksite, to each employee and updating it at least annually, will go a long way toward showing an OSHA inspector that you take safety seriously.
• Establish a disciplinary program for those employees who violate safety rules. This means documenting every disciplinary measure you take. Putting this program in place demonstrates your commitment to a safe workplace and may provide an important defense to OSHA citations.
• Designate an on-site safety officer who has the authority to discipline employees for safety rule infractions.
• Train your employees to wear the proper protective equipment, to safely operate tools and handle materials they work with, and to recognize and report safety hazards. This should be live training – not just a video – and should be reflected in detailed training records.
• Conduct regularly scheduled safety meetings at which you can address specific safety issues and at which employees can raise specific safety concerns. Then document those meetings.
• Make sure your OSHA 300 Logs, OSHA 300A Summaries, and OSHA 301 Incident Reports, which track employee injuries and illnesses, are accurate and kept up to date. These are the first records an OSHA inspector will ask to review.
• Designate an inspection representative (typically your safety officer) and back-up representatives. Waiting until OSHA arrives to make this decision is inadvisable. Your inspection representatives should be familiar with your safety and health program and OSHA’s inspection procedures.
• Conduct periodic self-audits to assess adherence to applicable safety and health regulations. Engage outside safety consultants and insurance company experts to conduct mock “inspections,” accompanied by your inspection representatives.

Preparation is key. Laying the essential safety groundwork before OSHA shows up on your worksite will calm your fears about an OSHA inspection and maximize your chances of that inspection going smoothly.

INSPECTION DOS AND DON’TS
As outlined below, you possess significant legal rights during the OSHA inspection process.

The Opening Conference
The inspection usually begins by the inspector ap-
pearing at your premises unannounced, without a search warrant, displaying his or her credentials. At this point your inspection representative should be contacted to deal with the OSHA inspector.

During the opening conference the inspector should explain the procedures for conducting the inspection.

Your inspection representative should:
- Ask the OSHA inspector during the opening conference to identify the reason for the inspection. If the inspection was triggered by an employee complaint, your representative should ask for a copy of the complaint (the employee’s name will be redacted).
- Ask the OSHA inspector to identify the scope (i.e., aimed at a specific area or the entire site) and the anticipated duration of the inspection. If the inspector is requesting a “wall-to-wall” inspection but the inspection was triggered by an employee complaint or a referral regarding a particular aspect of your operation, you should object and ask the inspector to limit the inspection to the matter raised in the complaint or referral.
- An authorized employee representative is also given the opportunity to attend the opening conference and accompany the OSHA inspector during the inspection. If your employees are union members, then their union may designate the employee representative.

The “Walk-Around”
The walk-around is the actual physical inspection, often referred to as the “walk-around.” During the walk-around the OSHA inspector, your inspection representative, and the employee representative (if there is one – often there is not) proceed through the workplace together to inspect for safety and health hazards.

Your inspection representative should:
- Escort the OSHA inspector at all times during the walk-around. The OSHA inspector should never be allowed to wander through the worksite alone.
- The law requires the inspection take place at “reasonable times and within reasonable limits.” Using good judgment, do not allow the inspection to unreasonably disrupt work or extend beyond normal working hours.
- Carefully consider the route on which you take the inspector to view his or her target area. Because any hazardous condition the inspector observes in “plain view” can be the subject of an OSHA citation, you want to minimize the inspector’s exposure to non-essential areas of your worksite.
- Take detailed notes of the entire inspection, including where the inspector goes, what he/she sees, and what he/she says. Write “Attorney-Client Privileged/Work Product” at the top of each page of your notes. If the inspector takes photos, videos, or measurements, so should you.
- Ask the inspector for duplicates of all physical samples and copies of all test results.
- Answer the OSHA inspector’s questions but avoid volunteering information.

Once the inspection starts, you should remain mindful that what your inspection representative says during the inspection can and will be used against you by OSHA. This means that your representative should not:
- Agree with the inspector that an observed condition is an OSHA violation. Agreeing that a violation exists will almost always result in a citation and fines. Nevertheless, immediately correct (if possible) violations noted by the inspector.
- Argue with the inspector. Attempts to defend against possible violations may undermine your defenses.
- Be hostile to or lie to the OSHA inspector.
- Punish any employee who speaks to or cooperates with OSHA.

Employee Interviews
How your employees (both supervisors and non-supervisors) respond during interviews with OSHA can significantly influence whether you are cited, as well as your ability to successfully defend any citations you receive.

The inspector has the right to privately question employees. You are not entitled to be present for interviews of non-supervisory employees. Nevertheless, you should conduct a voluntary debriefing of all non-supervisory employees interviewed by OSHA. You should also take the following steps to prepare your non-supervisory employees by:
- Informing them that they have the right to speak – or not speak – with the inspector.
- Advising them that they may request the presence of a representative during their interview – whether it be a supervisor, your safety officer, your OSHA attorney, their union representative, a personal attorney, or otherwise.
- Telling them what the inspector is likely to ask (e.g., questions about safety training or the facts involving an accident).
- Letting them know of their right to refuse to be video or audio tape-recorded during their interview.
- Informing them of their right to refuse to sign a written statement, and if they do sign such a statement, their right to receive a copy of it as a condition of giving the statement.

Interviews of supervisors present a different ball game. Because supervisors’ statements may legally bind you, you have much more latitude. Unlike with non-supervisors, your representatives have an absolute right to be present during your supervisors’ OSHA interviews, and you should always exercise that right. Moreover, in situations involving fatalities or serious injuries, you should have your OSHA attorney present during the interviews. Like non-supervisors, supervisors also have the right to refuse to be video or audio tape-recorded, and you should require that supervisors exercise that right.

The Closing Conference
The last step in the inspection process is the closing conference. During the closing conference the OSHA inspector will identify the alleged violations uncovered during the inspection. Your representative should closely question the inspector about each violation and the evidence the inspector believes supports that violation.

Following these rules and vigilantly protecting your legal rights is the surest way to effectively manage an OSHA inspection and minimize your financial exposure.
The underlying scenario is commonplace: a manufacturer wishes to bring a new product to market and will distribute the product through a network of vendors. The product is often displayed prominently at the retailer’s property, perhaps on an endcap or featured in some other special location. Occasionally, promotional signs, planograms, and custom-designed display stands are shipped to the store to market the product. For its part, the vendor complies by demonstrating, selling, installing, and servicing the item, and both manufacturer and vendor benefit from the sale. Unfortunately, accidents occasionally arise from the sale of the product; the question is whether the insurer for the manufacturer or the insurer for the vendor will bear the exposure for any liability.

One could argue that the manufacturer should be covered by the vendor’s policy, because the product has left the manufacturer’s hands and is now within the complete control of the vendor, who could modify, misuse, or misrepresent the item. On the other hand, the vendor took no part in designing, manufacturing, or packaging the goods, and should not be responsible for a defective product where the vendor merely handled and sold the product.

THE VENDOR’S ENDORSEMENT

So how does the insurance industry allocate responsibility? The Insurance Services Office, or ISO, produces an additional insured endorsement entitled “Additional Insured – Vendors,” numbered as form CG 20 15, which appears to immediately give away ISO’s answer to the threshold question of who bears the loss. This form adds as insureds to the manufacturer’s policy, named vendors or products (or “as required by written contract”), for damages arising out of the manufacturer’s products that are distributed or sold in the regular course of business. There are also certain exceptions to coverage.

The function of the endorsement is – to the extent possible – to place risk where it belongs. While the endorsement contemplates coverage for the vendor for faulty products, it also, generally speaking, covers the vendor’s activities that arise out of selling the manufacturer’s product.

The typical vendor’s endorsement lists activities it excludes from coverage, but then in some cases tempers those exclusions with exceptions that allow for coverage. Among the exclusions, the vendor’s endorsement excludes unauthorized warranties or significant changes to the product or repackaging done by the vendor. The endorsement also excludes demonstrations, installation, service, or repair of the item, unless these are done at the vendor’s premises in conjunction with the sale of the product.

Similarly, while the endorsement initially excludes damages arising out of the “sole neg-
The first examples involve product displays. In the first case, Nintendo manufactured and distributed Game Boy devices to a retailer. Nintendo retained a third party to manufacture a six-foot high interactive display unit to house a television monitor and display Game Boy units. While on display at the retail outlet, the 218-pound unit fell onto the five-year old plaintiff as he was attempting to play the game. In the ensuing coverage action, Nintendo’s carrier claimed that the vendor was negligent, and moreover, the product did not cause the injury; rather, the display stand did. In a straightforward application of the Additional Insured – Vendors endorsement, the Massachusetts court ruled that, by common understanding, marketing is part of selling the product, and thus the vendor was covered under the additional insured endorsement.

In the second case, a display cabinet containing decorative rugs tipped over and fell on a woman at a Home Depot. Home Depot sought coverage under the rug manufacturer’s policy, which included a vendor’s endorsement. Despite the carrier’s arguments that Home Depot was negligent by failing to bolt down the display unit, the Texas court found that the injury arose out of the distribution or sale of the manufacturer’s rugs.

Some jurisdictions could disagree with these courts. In fact, in most instances the product itself must cause the injury. So in another example, a court reviewed a question of whether an allegation that a “colorful and distracting” display at a school book sale, which caused a plaintiff to trip and fall on a defect in the floor, triggered the vendor’s endorsement. An Arizona appeals court reversed a lower court’s ruling declaring coverage, holding that the vendor’s endorsement is triggered only when the product itself causes the injury; it is not intended to cover negligently maintained premises.

In other instances, the loss may be directly related to the product, but the retailer is not the “vendor.” In one example, a tire manufacturer added vendors as insureds. One such vendor acted not as a retailer, but as a middle-man, and subsequently sold the tires to a retailer. One of the tires exploded when an employee of the retailer was mounting it, injuring him at the retailer’s premises. The retailer sought coverage under the vendor’s endorsement, but the court denied coverage because the installation was not consistent with the exception to the endorsement, having been performed on the retail installer’s premises, rather than the vendor’s premises.

**INDEPENDENT NEGLIGENCE**

The exceptions to the exclusionary language are significant because by virtue of the exceptions, the vendor’s endorsement provides coverage even if the vendor committed an independent negligent act. For example, in 1996, K-Mart agreed to purchase wrought iron patio furniture sets from the manufacturer. The manufacturer obtained the Additional Insured – Vendors endorsement, in favor of K-Mart. In order to display and promote the units, K-Mart employees assembled floor models. Beginning in 1997, K-Mart received 84 claims in which a customer sat in a display chair in the store, and the chair collapsed. K-Mart apparently admitted negligence, but sought coverage under the exception for the vendor’s demonstration. K-Mart issued a “Notice of Safety Recall,” and acknowledged that if the assembly directions were not followed precisely – including, apparently, by K-Mart’s own employees – the chairs could collapse.

The manufacturer’s carrier claimed that the endorsement “covers only product defects and not instances of ‘active negligence’ by the vendor” while the dealer acts as a mere conduit for the product; negligent assembly of the display furniture is not an enumerated exception. The Michigan court disagreed with the carrier, ruling that the insurer’s exclusionary language, construed strictly against the insurer, was not specific enough to negate coverage for K-Mart.

**Caveats**

In certain circumstances, the manufacturer is unable or unwilling to cover vendors. When a “third-party manufacturer” builds a product for someone else, based on that party’s design and specifications, the manufacturer may have no input regarding quality control, warning labels, or instructions. “Drop ship” arrangements, where the vendor sells the product but it ships directly from the manufacturer, may lack the formality of insurance. Likewise, products manufactured outside the United States, from drywall to toys to microchips, often come from a foreign manufacturer that is unable or unwilling to provide insurance for the vendor, leaving the domestic vendor a likely target.

It may go without saying, but for the vendor, it is critical to obtain written indemnity and insuring agreements in its favor, to request an Additional Insured – Vendors endorsement, with a certificate of insurance. Then, consistent with the endorsement, the vendor should not change, modify, misrepresent, or repackage the product, and all sales-related work should be done on the vendor’s premises.

**Conclusion**

The ISO “Additional Insured – Vendors” endorsement places risk where it belongs. If the vendor markets, sells, and services a product within the regular course of its business, at its premises, the endorsement should extend coverage to the vendor and any fault in the product or liability arising from the sale of the product lies with the manufacturer. If, on the other hand, the vendor goes outside these parameters, the vendor assumes responsibility for loss, and coverage is excluded by the endorsement.
The title of this article may be the most obtuse question of some time, but please allow us to explain. As part of The Federalist Papers James Madison penned the statements “…if men were angels, no government would be necessary. If angels were to govern men, no external or internal controls on government would be necessary.” As many readers know, this quote, and many other pearls of genuine wisdom, led to our United States Constitution. So what does this quote and angels have to do with employee injury benefit claims? Maybe everything.

As some background, this article follows up on a prior 2013 submission entitled “What in the Wild, Wild West is Texas Doing With Employee Injury Claims.” If you missed that article, it included a discussion of Texas’ “nonsubscription” system, wherein an employer may elect to withdraw from the state-sponsored workers’ compensation system and manage its own employee injury benefit program. Although Texas has allowed such election since 1913, it was not until the 1980s that nonsubscription became more widely used by Texas employers.1 Today it is estimated approximately 30 percent of employers in Texas are nonsubscribers, and they arguably save millions of dollars, by way of injury benefit claim-related cost savings.2 However, with such election comes the reality an employee may file a direct claim against the employer, in Texas state court, for negligence or recovery of benefits. If such occurs, the employer also waives several common law defenses. In other words, for a Texas nonsubscriber, the typical “exclusive remedy,” or an employee’s sole recovery for a workplace injury through the workers’ compensation system, is forfeited. The company has direct exposure for the loss. Nevertheless, in recent years, and primarily due to the astronomical employer cost savings, Texas’ system has caught the eye of legislators across the country.3 This all leads us to the ultimate question concluding this year’s previously submitted article, that is, should nonsubscription be part of the discussion in your State’s legislature or should your business be lobbying for this kind of alternative to traditional workers’ compensation? Apparently, the legislature for the state of Oklahoma was way ahead of us.

In early May 2013, Oklahoma Senate bill 1062 was signed into law.4 Like Texas, it allows an employer to opt out of traditional workers’ compensation. Affectionately known as the “Oklahoma Option,” proponents of the bill claim it to be a free-market savior to economic pressures driving up business costs associated with Oklahoma’s workers’ compensation system, a system that was actually over-hauled less than five years ago. Opponents to bill 1062 believe the allowances provided to employers drastically change the benefits and potential outcomes for employees, and cost savings will be primarily recouped to the detriment of injured employees, through unfair claim management practices. Irrespective of which side you may come down on bill 1062, the fact remains it is the law and may potentially be the beginning of a nationwide trend towards alternative systems to workers’ compensation. Some have called this a shift from “…adversarial...
The net-net of all these provisions on the new Oklahoma option are that Oklahoma employers appear to have carte blanche ability to design the benefit plan, determine compensable benefits and independently resolve disputes in a protected manner. In essence, employers can set the benefits, adjudicate the outcomes and enjoy exclusive remedy protection. This option, in theory, may be excellent news for businesses to obtain cost savings and maybe even help employers achieve more expedient and appropriate care.

This all brings us back to the title of this article, and begs the obtuse question, are employers angels? Is there a practical need for more external and internal controls on corporate employer driven programs, such as alternatives to workers’ compensation? Texas seems to think so, as tort exposure in state court likely precludes some bad-acting employers from taking unfair advantage of employees, through strict administration of injury claims and unscrupulous design of benefit plans. Texas’ system allows employers to determine benefits, but checks and balances such freedom with tort exposure. The Texas system has been working at a fast clip for approximately 20 years. Some employers float in and out of nonsubscription, but by and large, the system seems to work.

Oklahoma took a different approach, requiring employers to provide the “same forms of benefits,” but in doing so shielding the employer with exclusive remedy language. Will this work? Who knows? There are certainly some skeptics. Some folks evaluating the new law believe there may not be a genuine shield for employers. It is believed there may be exposure to an employer’s benefit plan administrator or even third party claims handler. Others point out that the text of the law does not provide exclusive remedy protection to vertically related parties, for instance, in a general contractor/subcontractor scenario. Many persons, who have analyzed the new law, believe the text itself provides numerous instances of unconstitutional issues, including violations of state and federal constitutional provisions and rights. And, as may be no surprise, some in the plaintiff’s bar believe it will be like “shooting fish in a barrel” attacking the law and employers who try to benefit from the election to opt out.

Whatever the outcome, those persons interested in being a part of this new system, as employers or facilitators, appear to universally believe there is a buck to be made. This fact alone may cause some to pause, when considering the source of certain advice, regarding the likely outcomes for employers who choose to take the option.

Maybe employers will get it right and the Oklahoma option will be the new model for alternatives to workers’ compensation. Maybe employers will get it totally wrong and be back on the steps of Congress in five years. Possibly employers will realize “that comp system was not so bad after all.” We do know employers are only human and certainly not angels. Might the Oklahoma option be a good start or will it be fraught with issues such as Supreme Court reversal, creative claims from the plaintiff’s bar, unintended employer consequences or employer exposure due to vague/absent language? Time will tell, but the best indicator may be that angels are not handling employee injury benefit claims. As James Madison also said, “…experience has taught mankind the necessity of auxiliary precautions.” Does the new Oklahoma Law have enough auxiliary precautions to protect employers, protect employees and allow our businesses to still make a profit?

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Three different approaches have developed in various states to persuade judges to dissolve a limited liability company when “it is not reasonably practicable to carry on the company’s activities in conformity with the certificate of organization and the operating agreement.” That’s the standard in the Revised Uniform Limited Liability Company Act or “RULLCA” and similar statutes for when a judge can order dissolution of an LLC.

Eight states (California, Florida, Idaho, Iowa, Nebraska, New Jersey, Utah and Wyoming) plus the District of Columbia have adopted RULLCA in whole or in part since 2006. RULLCA’s promoters intend that it will take into account the best features of prior LLC statutes. These jurisdictions adopted the statutory language that permits a judge to dissolve an LLC under this “not reasonably practicable” standard.

Neither the proposed statute nor the commissioners who adopted this standard explained how to measure “reasonable practicability” or conformity, and no definitive line of cases seems to have arisen. The federal bankruptcy court in Iowa may have been the first court in the nation to analyze the RULLCA standard, based on Iowa’s version. In that matter, creditors sought to dissolve the LLC. Though Iowa’s statute appears to require a member to apply for dissolution, the court apparently accepted the creditors’ petition. Instead, the court declined to dissolve the LLC in bankruptcy on the grounds that “not reasonably practicable” lacks a prevailing interpretation. In re Hejel, 2011 Bank. LEXIS 3750 (Bankr. N.D. Iowa 2011).

Imaginative practitioners and courts however have used three distinct approaches in applying this language. Those approaches may be described as “contractarian,” “economic” and “deadlock.”

Contractarians rely on the terms of the operating agreement. This approach rests on the “freedom of contract” values that Delaware courts have championed in dealing with relationships among LLC members. In Delaware, a non-RULLCA jurisdiction that allows LLC judicial dissolution, courts have held that its “not reasonably practicable” clause stands for a situation in which the company cannot do
what the operating agreement directs it to accomplish. Using this standard, a Delaware Chancery Court granted dissolution where the members were deadlocklocked and the LLC lost its sole client. The court reasoned that the LLC’s sole purpose of servicing that client no longer existed, and therefore it was not possible to continue the business. In re Silver Leaf LLC, 2005 Del. Ch. LEXIS 119 (citing P.C. Tower Cts. Inc. v. Tower Cts. Dev. Assoc. LP, 1989 Del. Ch. LEXIS 72).

Virginia’s Supreme Court using a similar standard reached a different result. In Dunbar Group LLC v. Tignor, 593 S.E.2d 216 (V.A. 2004), the court instructed Virginia judges to examine the circumstances in light of the company’s purpose before a judicial dissolution of an LLC. The Virginia Supreme Court applied this procedure as a strict standard to reflect deference to the parties’ contractual arrangement. The Dunbar court upheld the lower court decision to dismiss an LLC member for misconduct but reversed the decision to dissolve the LLC in question. The court found inadequate evidence to show the LLC could not function without the dispelled member.

The contractarian approach typically favors management, usually the party that wants to keep the entity going, because the burden falls onto the dissenter to show that at the outset the parties contemplated a narrow purpose or dissolution. Although this approach purports to hew closely to the purpose of the members’ contract, courts have viewed “not reasonably practicable” through the lens of the LLC’s specific economic purpose.

In South Dakota, for example, an LLC with a livestock ranch reached an impassable deadlock among the members. The LLC’s operating agreement lacked procedures for resolving the members’ deadlock. The trial court denied dissolution, and the state’s Supreme Court reversed the order, holding that the inability to resolve the members’ differences frustrated the LLC’s economic purpose to the point the LLC could no longer function as it had been functioning. Kirkey v. Grohmann, 754 N.W. 2d 825 (S.D. 2008).

Similarly, a New York court denied a request for a dissolution of a profitable and functioning LLC. Schindler v. Niche Media Holdings, LLC, 772 N.Y.S. 2d 781 (N.Y. Sup. Ct. 2003). Based on the “not reasonably practicable” provision of New York’s LLC statute, the NY court said judicial dissolution can be ordered only when the business sought to be dissolved is unable to function or it is failing financially.

An economics-oriented baseline to determine whether to dissolve an LLC may be appropriate, especially if the operating agreement lacks relevant terms. In a particular case “not reasonably practicable” may mean “not profitable” in the entity’s current form. Maybe, the “in conformity” language refers to an implied, underlying assumption that the entity will turn a profit.

“Reasonably practicable” decisions are not uniform. Though Delaware courts have often adopted a contractarian view, at least one Delaware court looked to the economic impacts on the parties for determining a dissolution order. At least one Delaware Chancery court looked to economic facts and analogy to dissolution provisions of the Delaware General Corporation Law. These corporation law provisions required that, for a judicial dissolution, two equal shareholders must engage in a joint venture, and those shareholders must be unable to agree whether to discontinue the business or to dispose of the business’s assets. In Haley v. Talcott, 864 A.2d 86 (Del. Ch. 2004), the members fit those parameters, but, in addition, the company agreement provided a buyout for a departing member. However, a contractual-based departure would not free the departing member from his personal guarantee of the LLC’s mortgage debt. Therefore, Vice Chancellor Strine ordered dissolution and sale of the company’s property as a remedy because that outcome seemed more equitable than strict enforcement of the members’ contract.

Sometimes, courts grant dissolution as a remedy where powerful tensions exist within an LLC, even though the entity’s economic performance does not manifest the impact. That might be deemed the “deadlock” approach.

A New Jersey court applied the substantially identical standard in the partnership context under the Uniform Partnership Act (UPA). One New Jersey intermediate appellate court deemed judicial dissolution appropriate when, regardless of independent management and financial success, partner discord renders it impracticable to carry on the business, but the discord must be more than “mere trifling causes or temporary grievances.” That court approved the company’s dissolution due to extreme disagreement among the family member partners. DeBellon Assocs. v. Van Slooten, 2012 N.J. Super Unpub. LEXIS 1520 (N.J. App. Div. 2012). DeBellon may be said to stand for the proposition that dissolution can be appropriate due to a deadlock or substantial grievances among the parties even if some level of functionality or profitability remains. Looking solely at the members’ grievances may be too subjective at times. Member mistrust and animosity that seem intolerable for one person may seem normal in other settings. Looking solely at their grievances may discourage compromise and civility. However, this approach may represent the approach that most discourages minority oppression and treats all equityholders most respectfully, taking a case-by-case approach that allows judges an opportunity to evaluate individual circumstances.

While RULLCA’s promoters hope to create more uniform state laws, jurisdictions may still manifest different interpretations of similar language. RULLCA remains mostly untested, but decided cases suggest contractarian, economic and deadlock-oriented approaches may all succeed as winning arguments under the same statutory language.

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When a bankruptcy petition is filed, all of the debtor’s legal and equitable interests become part of the bankruptcy estate. The statutory definition of “property of the estate” is broad and includes all causes of action that belong to the debtor on the petition date, even if the debtor is unaware of such claims. For example, a debtor’s pre-petition claims against third parties could include personal injury, breach of contract, and professional malpractice claims.

A growing body of law presents opportunities to defend or settle such claims using arguments and tactics that would not have been available if the debtor brought the claim outside of bankruptcy. When defending a claim brought by a bankruptcy trustee, a plaintiff who files a voluntary petition or is the subject of an involuntary petition while the lawsuit is pending, or a plaintiff who was a debtor in a recent bankruptcy case, your defense checklist should include these strategies.

TRUSTEE’S STANDING TO PROSECUTE AND SETTLE CLAIMS

A bankruptcy trustee inherits the debtor’s pre-petition claims against third parties and is the only party with standing to bring such claims. A trustee is appointed automatically in chapter 7, 12 and 13 cases, and may be appointed in chapter 11 cases upon a showing of fraud or gross mismanagement. Thus, for a period of time after a bankruptcy filing, the debtor is divested of the right to decide whether to pursue, settle or dismiss a claim. The defendant or prospective defendant will deal instead with the bankruptcy trustee, who typically is an experienced, practicing bankruptcy attorney who doesn’t share the debtor’s emotional attachment to pursuit of particular claims.

If the trustee believes she can produce a net benefit for creditors of the debtor’s estate by pursuing such claims, she may do so by hiring legal counsel. Trustees often request, and the bankruptcy court often approves, retention of the trustee’s law firm to prosecute an action on behalf of the estate. The estate is unlikely to have ample resources to finance litigation, so the ability of trustee’s counsel to get paid often depends on the outcome of the action. Limited resources may stack the deck in favor of avoiding protracted litigation.

Frequently, the trustee’s fiduciary duty to maximize the value of the estate for the benefit of creditors is satisfied through a prompt settlement.

Therefore, defense counsel and insurance companies with exposure on third party claims can obtain highly favorable outcomes by offering the trustee value in exchange for release and dismissal of the debtor’s claims. If the trustee did not believe the claim was worth pursuing, then any recovery the trustee obtains through settlement will be seen as a win for the estate, whereas rejecting a reasonable offer could be seen as a breach of fiduciary duty. Even if the trustee believes the claim is valuable, the trustee may be willing to settle sooner and on more favorable terms than the debtor would have.

The trustee must file a motion seeking the bankruptcy court’s approval of a settlement. The debtor and other creditors have an opportunity to review and ob-
ject to the settlement terms. However, approval of bankruptcy settlements is in the discretion of the court and is commonly granted unless the terms are well below the range of reasonableness. Once the settlement is approved, the debtor is precluded from asserting released claims at a later date.

CLAIMS AFTER BANKRUPTCY

It’s a wise practice to check the plaintiff’s name in the national PACER bankruptcy database before answering a complaint. A debtor who lists a claim against a third party on her bankruptcy schedules only regains standing to pursue the claim if the trustee abandons the action by failing to pursue or resolve it during the bankruptcy case. For the debtor who knowingly or unknowingly omits a pre-petition cause of action on her schedules, however, standing may be lost forever. Such an omission deprives the trustee of an opportunity to administer the asset. Therefore, the claim remains property of the estate and will not be deemed abandoned upon the close of the bankruptcy case. Parties defending such claims may argue with success that the debtor’s post-bankruptcy prosecution of the action is judicially estopped as a result of the omission, or that the bankruptcy case should be reopened to allow the trustee to administer the claim.

TRUSTEE’S SALE OF CLAIMS AGAINST THIRD PARTIES

One increasingly seen option for trustees is the sale of third party claims on the open market. Underlying state or federal law may prohibit the sale or assignment of certain claims, but the Bankruptcy Code contains no independent restriction. At such sales, nothing prevents the debtor from buying the claim from the estate or the defendant from being the successful bidder at the auction. A defendant’s acquisition of adverse claims can be an effective and comparatively inexpensive way to eliminate risk.

Recent case law illustrates the preclusive effect that a bankruptcy sale has on the debtor-plaintiff’s rights following bankruptcy. In Duncan v. Stokes (In re: Stokes), 2013 WL 492477 (Bankr. D. Mont. February 8, 2013), the debtor retained an attorney to file a chapter 11 bankruptcy petition. After the petition was filed, the attorney withdrew from representation. The debtor’s case was converted to chapter 7, and two years later the debtor filed a malpractice action in state court against his former bankruptcy attorney. The chapter 7 trustee intervened and obtained a stay of the state court action pending a determination by the bankruptcy court of whether the malpractice claim was property of the bankruptcy estate. Because the malpractice claim accrued pre-petition, the bankruptcy court found that the claim was property of the estate and could be auctioned by the trustee.

The debtor’s former bankruptcy attorney was the high bidder and purchased the claim against him. Thereafter, the attorney filed an adversary proceeding in bankruptcy court seeking a declaratory judgment that the debtor was estopped from prosecuting the state law claim. The bankruptcy court ruled that the claim had been fully administered through the auction. This precluded any further prosecution of the claim in state court.

DEFENDANT’S PAYMENT OR PURCHASE OF CLAIMS AGAINST THE DEBtor

Contrary to popular belief, the Bankruptcy Code does not require a debtor to be insolvent to file a bankruptcy petition. However, if there are no creditors who would benefit from the trustee’s efforts, then the trustee’s claims may fail. When defending against bankruptcy-specific causes of action, such as a trustee’s attempt to avoid a preferential pre-petition transfer or a fraudulent transfer, the Code states that any recovery is “for the benefit of the estate.” Bankruptcy courts have held that if there are no creditors, then there is no estate to benefit from the trustee’s claims and they should be dismissed.

Therefore, defendants in avoidance actions should closely review the debtor’s bankruptcy schedules, docket and claims register. Occasionally, defendants find that the aggregate amount of claims against the debtor is far less than the defendant’s litigation exposure or anticipated costs of defense. In such cases, the best strategy to defeat the trustee’s avoidance action may be to pay the debtor’s creditors directly and move to dismiss the case. Alternatively, the creditors’ claims might be purchased for full value or at a discount and waived as to the debtor’s estate, but reserved as to potential collection efforts against other non-bankrupt co-borrowers and guarantors.

THE “IN pari delicto” DEFENSE

Lastly, in defending against claims brought by a bankruptcy trustee, sometimes the most obvious defense is the one that gets overlooked. A trustee succeeds to the debtor’s prepetition rights, and for some purposes in a bankruptcy case is treated as a hypothetical creditor and bona fide purchaser without knowledge of facts that could impede recovery for the benefit of the estate. Nevertheless, in at least some jurisdictions bankruptcy trustees are subject to the affirmative defense of in pari delicto (“in equal fault”), which precludes a plaintiff who participated in the same wrongdoing as the defendant from recovering damages resulting from that wrongdoing.

The in pari delicto defense was used successfully in a recent Fourth Circuit Court of Appeals case to bar claims brought by the assignee of a bankruptcy trustee against defendants who allegedly participated in a Ponzi scheme. In re Derivium Capital LLC, 716 F.3d 355, 367 (4th Cir. 2013). Recognizing that appellate courts in the Seventh and Ninth Circuits declined to apply the defense in bankruptcy cases that involved claims asserted by receivers, the Fourth Circuit distinguished bankruptcy trustees from receivers because the Bankruptcy Code grants trustees rights that are no greater than the rights the debtor had.

CONCLUSION

Given the array of options available to dispose of claims brought by a bankruptcy trustee, a plaintiff’s/debtor’s bankruptcy filing may be a welcome development, especially if the trustee recognizes the allegations are weak, too expensive to pursue, or motivated by personal grudges or greed. Proactive defendants can seize the chance to find an effective and comparatively inexpensive resolution in bankruptcy court.

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Are you ready for an investigation by the Department of Labor? The most vital thing any employer can do to prepare for an audit is to ensure continuous compliance with the Fair Labor Standards Act and other wage and hour laws. Preventative measures including a comprehensive wage and hour program, self-audits, meticulous recordkeeping, and employee training go a long way in ensuring that the DOL investigation process is as painless as possible. By regularly following a few steps, an employer can ensure compliance with the FLSA and make a DOL audit less disruptive.

The Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”) enforces the provisions of the Fair Labor Standards Act (“FLSA”). The FLSA establishes minimum wage, overtime pay, recordkeeping, and other standards affecting employees in the private sector and in federal, state, and local governments. The WHD may also ensure compliance with: 1) the Family and Medical Leave Act; 2) the Migrant and Seasonal Agricultural Worker Protection Act; 3) field sanitation standards under OSHA; 4) the Employee Polygraph Protection Act; 5) Davis-Bacon and McNamara-O’Hara Service Contract Acts; 6) and garnishment provisions under the Consumer Credit Protection Act. However, the DOL has increasingly focused on its auditing and enforcement powers under the FLSA. As such, it is critical for your corporate clients to prepare for, and receive the proper guidance, with respect to such investigations.

The DOL has the authority to conduct workplace inspections and bring enforcement actions against employers who violate the provisions of the FLSA and other related wage and payment statutes. A DOL inspector may give advanced notice of an on-site inspection, but the inspector can also make an unexpected appearance. In that case, if the employer does not feel prepared, the employer may consider refusing to allow the DOL investigator on site without a search warrant. However, it is recommended to request a 72-hour period to comply with any investigative demand. Because a investigator has the power to subpoena witnesses and documentary evidence related to the investigation, it is best to be prepared for an unannounced visit and assist in coordinating the details of the inspection. An employer should ensure that interviews and inspections take place at reasonable times and do
not unreasonably interfere with the company’s business. The employer should actively participate in the investigation by attending all meetings and conferences, escorting the inspector through the facility, and taking detailed notes.

The WHD investigator may want to inspect payroll and tax records, review written policies and procedures, interview employees, and even conduct surveillance and collect evidence. The investigator is simply reviewing the company’s records and procedures and observing employees to look for wage and hour violations. The WHD has been persistent in its auditing of independent contractors to determine whether they are properly classified.

The best way for an employer to prepare for a potential DOL audit is to establish a wage and hour program within the company to ensure continuous compliance with the FLSA and other state and federal wage and hour laws. Preventative measures, self-audits, and relentless recordkeeping are truly the best preparation for a DOL investigation. The most important preventative measure to ensure FLSA compliance is properly classifying exempt and nonexempt employees. This classification can impact minimum wage, overtime pay, and other payment scenarios. For example, nonexempt employees must be paid for all hours worked, including pre and post-shift work and when work is done during meal breaks. By way of further example, in general the salary of an exempt employee cannot be deducted due to the quality or quantity of work. Because the rules regarding wages and hours hinge on the employee’s status, it is vital for an employer to properly classify its employees.

The exempt/nonexempt status is a matter of law and cannot be modified by an employment agreement. Section 13(a)(1) of the FLSA exempts employees employed as bona fide executive, administrative, professional, or outside sales employees, as well as certain computer employees. These classifications are determined by the employee’s actual job duties, not job title. In addition, to qualify as exempt, an employee must be paid on a salary basis at not less than $455 per week. Particular attention should be paid to the executive, administrative, and professional exemptions. An employer should examine all written job descriptions to ensure that they accurately reflect the actual work done by that position, such that it justifies any applicable exemption.

Several recent cases highlight the importance of proper classification of exempt/nonexempt employees. For example, as recently as April 2013, sixteen subsidiaries of a rental car company agreed to pay millions of dollars to resolve more than 3,000 claims alleging that it failed to pay its assistant rental managers overtime wages. The settlement is the culmination of many years of litigation challenging the company’s classification of its regional assistant rental managers as exempt from overtime regulations under the FLSA. It is estimated that the settlement provided each of the more than 3,000 current and former managers about $4 for every week they worked for one of the subsidiaries.

Employers should also be careful in assuming that its “independent contractors” are exempt. The United States Supreme Court has outlined a six-factor test to determine whether independent contractors may be treated as exempt: (1) the extent to which the worker’s services are an integral part of the employer’s business, (2) the permanency of the relationship, (3) the amount of the worker’s investment in facilities and equipment, (4) the nature and degree of control by the principal, (5) the worker’s opportunities for profit and loss, and (6) the level of skill required in performing the job. An employer’s ultimate resolution of this test can have large monetary consequences if challenged.

In another April 2013 settlement, a company reached a resolution with a certified class of delivery drivers who claimed the courier misclassified them as independent contractors in violation of Pennsylvania’s Wage Payment and Collection law. The drivers claimed they were deprived of benefits to which they would have been entitled as employees under the law, including compensation for all hours actually worked, overtime pay, protection from unauthorized deductions, and workers’ compensation benefits. The parties settled for a reported $700,000.

Once employees are properly classified and a comprehensive wage and hour program is established, the employer should look into common violations of the FLSA. Some examples include: 1) granting time off in lieu of overtime pay; 2) failing to compute overtime on a weekly basis; 3) making improper deductions for part-day absences from exempt employees’ salaries; docking pay for small infractions of company policy; 4) automatically deducting pay for meal breaks when a non-exempt employee fails to clock in or out and 5) preventing employees from taking breaks in work areas. It is recommended that the employer conduct an independent audit annually to ensure satellite offices are complying with company policy and the FLSA, and not creating policies in a haphazard and spontaneous manner.

An employer should ensure its nonexempt employees are not working off the clock. An employer may protect itself by including provisions in its handbook that ban working off the clock unless preapproved. Supervisors should be trained to monitor nonexempt employees from engaging in unapproved work after the employee’s official work hours.

Personnel files should be uniform and contain the information required under the FLSA, 29 C.F.R. Part 516. The following information must be retained for at least three years: full name, address, gender, occupation, time and day on which the work week begins, rate of pay, the basis on which wages are paid and any exclusions, hours worked each day and total per week, total daily or weekly straight time earnings, weekly overtime pay, deductions/additions to compensation each pay period, and the date of payment and pay period covered.

Violations of the FLSA can be significant. Employers should train supervisors and administrators on the FLSA. Preventative measures will decrease anxiety and minimize exposure when an audit is announced.

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Contract provisions requiring parties to arbitrate their disputes are ubiquitous, and almost always, these clauses are ancillary to the contract’s purpose. For that reason, it may be tempting to let a boilerplate arbitration clause remain in a contract and not waste time or resources negotiating its inclusion or exclusion. We caution otherwise.

Contrary to popular belief, arbitration may cost more and take longer to resolve a dispute than litigation. This is not to say that arbitration is never useful. Nor is it to say that contract drafters must accept unrestricted litigation as the only avenue available to resolve contract disputes. A contract creates a specific relationship for a specific reason. Contracting parties should consider the unique risks of the disputes that might arise from the contract. The parties then can replace the boilerplate arbitration clause with an alternative that avoids the costly components of litigation while retaining its benefits.

THE CASE AGAINST ARBITRATION

Evidence suggests that arbitration costs meet or exceed litigation costs. A comparative study of nine single-plaintiff cases resolved through arbitration to ten single-plaintiff cases resolved in court showed that, on average, the total cost of counsel and fees for arbitration was $102,538.02 while the total cost for litigation was $70,490.82. The extra cost did not reduce the time to resolve the dispute. The nine cases in arbitration took an average of 21 months to resolve while the ten cases in litigation took an average of 19 months to resolve.¹

This is not surprising. Arbitration includes costs not found in litigation, including filing fees that may rise with the amount in controversy, hourly rates for the arbitrator(s), and costs for the hearing room. Moreover, arbitration frequently uses discovery in the same manner as litigation, so arbitration no longer enjoys the cost savings compared to litigation.

Arbitration provides some benefits unavailable in litigation. First is confidentiality; except in extenuating circumstances, documents filed with the court are matters of public record. Arbitration can be entirely confidential. Second is experience of the decision-maker; litigants cannot select their judge. Parties to arbitration may require that the arbitrator have certain experience in the field in which the cause of action arose. Third, arbitration provisions are useful in avoiding unfavorable jurisdictions. Finally, arbitration can be effective at avoiding class action litigation.

These benefits may be offset, however, by myriad detriments and risks. Foremost is that arbitrators have authority only over the parties to the contract. If your dispute involves a third party to the contract who has not agreed to arbitration, the arbitrator cannot require that party to participate in arbitration. In such cases, you may have to proceed against one party in arbitration and another party in court and risk inconsistent results. Or, if your dispute turns on the testimony or documents of third-parties who are not bound to the arbitration agreement, the arbitrator may have limited ability to subpoena the witnesses or their documents.

Furthermore, arbitrations do not adhere to the rules of civil procedures used in courts. Some boast this as a benefit to arbitration – avoiding strict procedural rulings so arbitrators can get to the meat of the conflict. We disagree. Procedural rules, which permit motions to dismiss or motions for summary judgment, help combat frivolous
claims and require an actual controversy of facts for a case to go to trial.

Finally, arbitration is subject to very limited review. A court may overturn an arbitrator’s ruling only under certain circumstances. Arbitrators undoubtedly perform their role with best intentions and provide a result they think is correct, but without supervisory authority, the result is often less predictable than with litigation. Federal and state laws require that a court uphold an arbitrator’s ruling even if there is clear error. The U.S. Supreme Court recently stated,

All we say is that convincing a court of an arbitrator’s error – even his grave error – is not enough. So long as the arbitrator was “arguably construing” the contract – which this one was – a court may not correct his mistakes. The potential for those mistakes is the price of agreeing to arbitration.²

The parties therefore should exercise great caution before agreeing to divest themselves of their right to appellate review.

ALTERNATIVES TO ARBITRATION

That arbitration is costly and risky does not make litigation more palatable. In some instances, litigation presents the risk that the cost of resolving the contract dispute will eliminate the benefit the party received from entering the contract. Fortunately, you do not have to choose between arbitration and unfettered litigation.

Much of the cost involved in litigation is associated with the breadth of discovery permitted under the rules of civil procedure. In many cases, parties are forced to spend thousands on legal fees and expenses in responding to discovery requests and producing voluminous documents. At the same time, litigation is effective at resolving conflicts because the parties are compelled by a higher authority – the court – to share information and have their problem solved for them. The fear of the result makes mediation, often conducted after substantial discovery, effective.

Thus, parties desiring to achieve a cost-effective middle ground between arbitration and unfettered litigation should consider including provisions in the contract that retain the fruitful components of discovery and litigation. Here are a few ideas that may be helpful to accomplish this result:

• Adopt a procedure for initiating claims outside of court or arbitration. Perhaps require that the aggrieved party send a demand letter setting forth with reasonable specificity the basis for the claim, and require the opposing party respond with reasonable specificity within a certain number of days. If you require that the letters be made under oath or the penalty of perjury as appropriate, the parties’ rationale can be testimony should alternative dispute resolutions fail.³

• Include a provision addressing the statute of limitations for any claims. Lengthening or reducing the time a party can initiate a court proceeding after sending a demand letter could facilitate negotiations.

• Mandate meaningful mediation. Mediation is an opportunity for the disputing parties to consider the net present value of the conflict. Consider requiring pre-mediation disclosures akin to those the parties must provide required in the Federal Rules of Civil Procedure; the contract can require broad or narrow disclosures. Also consider requiring the exchange of pre-mediation submissions. The information exchange will facilitate settlement at mediation.

• Authorize alternate uses of the mediator. In some instances, mediation cannot resolve the conflict, but a mediator can narrow the conflict to a few issues of fact or one issue of law. Permit use of a mediator to set forth proposed stipulations of fact to reduce the scope of the trial if there is no other way to resolve the dispute.

Some contractual disputes can only be resolved through a trial: genuine factual disputes, genuine legal disputes, and disputes in which the parties’ principles are at stake. In such cases, there is no alternative to a jury for a factual dispute or a judge for a legal dispute, and no shortcut for a trial of the parties’ principles. Consider incorporating the following provisions in the event litigation is necessary following an unsuccessful mediation:

• Limit the parties’ filing discovery with the court until necessary. Depending on the local court rules, discovery may be conducted between parties but not filed with the court until offered as evidence. That way, sensitive information can remain confidential until the case proceeds to trial. Also consider requiring the parties to jointly propose a protective order to keep sensitive information filed with the court confidential to the extent permitted.

• Require that the parties establish a proposed scheduling order or set forth a scheduling order the parties will propose to the court. The court may not adopt the proposal, and you cannot control how quickly a court determines an issue. However, you can facilitate the court’s determination by requiring the parties to proceed according to stringent deadlines pre-trial deadlines.

Finally, include enforcement provisions. Requirements will only be as successful as the contract’s enforcement provisions. Consider shifting attorneys’ fees in the event litigation is necessary to enforce these provisions.

CONCLUSION

Parties should carefully consider their particular needs before agreeing to arbitration provisions. There are certainly instances in which arbitration better serves the needs of the contracting parties compared to litigation. For parties desiring to achieve a middle ground, we hope the above suggestions allow you to craft an alternative to arbitration that will prevent the cost of any dispute from eviscerating the value of the contractual relationship. Remember that the best time to make rules to resolve your dispute fairly is before the dispute occurs.

³ If you choose to go this route, remember that Federal Rule of Evidence 408 prohibits offers of compromise and negotiations from being used as evidence of liability and tailor the provision accordingly.
Does your company export goods manufactured, produced, grown, or extracted in the United States? If so, consider establishing an Interest Charge Domestic International Sales Corporation (“IC-DISC”). The IC-DISC is a valuable and relatively simple tool, which can result in real tax savings for qualifying exporters and even certain architectural and engineering firms. By no means is the IC-DISC a “new” concept. It has been around since 1971 in one form or another. However, it continues to provide permanent tax savings to U.S. exporters in an otherwise uncertain time. The IC-DISC remains the only tax incentive plan specifically designed to subsidize U.S. exporters, and now is the time to take advantage of its unique benefits.

WHAT IS AN IC-DISC?

An IC-DISC is a C-corporation that exists separate and apart from its parent or affiliated exporting company (such parent or affiliated company, the “Exporter”). The IC-DISC need not have the same stockholders as the Exporter, it need not have employees or provide services, and it may be organized under the laws of any state or the District of Columbia. However, the IC-DISC must meet certain standards and qualifications and also receive approval from the Internal Revenue Service (the “IRS”) to be classified as an IC-DISC under Section 992(a)(1) of the Internal Revenue Code of 1986. Although it is a C-Corporation, an IC-DISC will not be subject to federal income tax at the corporate level. When combined with the Exporter’s ability to deduct commissions paid to the IC-DISC, this special treatment is the key to the IC-DISC’s power as a tax-planning tool.

WHO IS QUALIFIED?

To qualify as an IC-DISC, a corporation must:
• File an election and be approved by the IRS to receive IC-DISC treatment.
• Be incorporated under the laws of any state or the District of Columbia.
• Have only one class of stock.
• Maintain a minimum capitalization of $2,500 of authorized and issued stock.
• Maintain a separate bank account, books and records apart from the Exporter.
• Meet the IRS’s annual qualified export receipts test (at least 95% of the IC-DISC’s annual receipts must be qualified export receipts).
• Meet the IRS’s qualified export assets test (at least 95% of the assets held by the IC-DISC at year-end must consist of qualified export assets).

Proper organization of the IC-DISC is crucial, or else the intended tax benefits will not be realized (regardless of whether all of the above requirements are met). For example, if the existing Exporter is a pass-through entity (such as an S-corporation,
partnership, or limited liability company), then the IC-DISC can be organized as a wholly-owned subsidiary of the Exporter. However, if the existing Exporter is a C-Corporation, then the individual stockholders of the Exporter (and not the Exporter itself) should organize and own the IC-DISC. Otherwise, the IC-DISC’s income will be distributed out to the C-corporation and taxed at ordinary income rates and no tax benefit will be realized.

**HOW DOES IT WORK?**

Once the IC-DISC has been properly organized, the Exporter and IC-DISC will take the following steps down the path to joint tax savings:

**Step One:** The IC-DISC and the Exporter enter into a written Exporter Commission Agreement, where the Exporter engages the IC-DISC to act as its agent for the sale of the Exporter’s goods (or architectural or engineering services) outside the United States.

**Step Two:** The Exporter sells its goods, and pays tax-deductible commissions to the IC-DISC equal to the greater of 4% of the Exporter’s qualified export receipts, or 50% of the Exporter’s taxable income. Again, the IC-DISC need not provide any actual services to the Exporter.

**Step Three:** The Exporter deducts the commissions paid to the IC-DISC in full, and the IC-DISC distributes its income to its stockholder(s) at the qualified dividend rate (versus the higher tax rates on ordinary income).

**WHAT ARE THE TAX SAVINGS?**

The IC-DISC is not a new or “risky” vehicle for tax savings. In fact, the concept has existed in one iteration or another since 1971. Despite multiple challenges by Congress over the years and occasional pressure by foreign governments, the IC-DISC continues to exist and flourish.

The latest threat to the IC-DISC arose at the conclusion of 2012, amid speculation that Congress intended to repeal preferred rates on qualified dividends. As we all know, Congress ultimately chose to keep a preferred rate, albeit raising the top dividend tax rate from 15% to 20% as part of the deal struck under the American Taxpayer Relief Act of 2012 (the “Act”). In addition, the Act instituted a 3.8% Unearned Income Medicare Contribution Tax, resulting in an effective dividend tax rate of 23.8% for top earners and 18.8% for the lower bracket. Regardless, even this top rate of 23.8% is lower than the top ordinary income tax rate of 39.6% (raised from 35.6%). Thus, although the rate on dividends was increased, U.S. exporters still stand to achieve potential income tax savings of no less than 15.8% by virtue of IC-DISC implementation.

Given the relatively low cost required to form an IC-DISC, qualifying U.S. exporters should not be deterred from forming an IC-DISC despite the Act’s increase on dividend rates. The tax-savings in the first year alone will far outweigh the minimal professional fees required.

...the concept has existed in one iteration or another since 1971. Despite multiple challenges by Congress over the years and occasional pressure by foreign governments, the IC-DISC continues to exist and flourish.

**WHAT OTHER BENEFITS CAN IC-DISC’S PROVIDE?**

The benefits of the IC-DISC stretch beyond the tax savings on federal income. One draw of the IC-DISC is that it is not required to maintain an office, hire employees or perform services. However, having the IC-DISC perform certain services, such as promotion of the Exporter’s activities, can result in additional tax savings. As with the IC-DISC commissions, any qualifying income earned from such services provided by the IC-DISC can be distributed to stockholder(s) at the reduced qualified dividend tax rate.

Another draw of the IC-DISC is that there is no requirement that the stockholder(s) of the IC-DISC be the same as the stockholders of the Exporter. As a result, employees, company founders, prior owners, and others can be rewarded with stock and/or dividends of the IC-DISC. In such cases, dividends from the IC-DISC can act as annuity bonuses or commissions paid on export sales. Assuming employees qualify for a tax rate of only 15%, this structure can be used as a valuable tool to convert employee bonuses from ordinary income to lower-taxed dividend income.

Finally, IC-DISC stock can also defer up to $10 million of net income of export sales per year on qualifying export revenue, so long as the IC-DISC reinvests a certain portion of the income in the Exporter.

**WILL THE TAX BENEFITS LAST?**

In his 2010 State of the Union Address, President Obama pledged to double U.S. exports by 2015. Whether we achieve this ambitious goal remains questionable. However this promise will most certainly be broken if the tax incentives provided by the IC-DISC are further whittled away by Congress. Given this pledge and the overall economic uncertainty still facing the United States, it seems highly unlikely that either the current administration or Congress would choose to disarm the IC-DISC in the foreseeable future.

**WHEN TO ACT?**

Because the tax benefits of the IC-DISC are not retroactive, an Exporter can only begin to receive such benefits after the IC-DISC is established. Therefore, the sooner an Exporter makes the decision to form an IC-DISC, the better.

This article is not exhaustive of the requirements or applications of IC-DISC rules. Any business considering the formation of an IC-DISC must consult with their tax and legal representatives to determine their eligibility and whether an IC-DISC will offer potential tax savings or other benefits in their particular situation.
As more American businesses expand overseas, and as worldwide marketing of products and services becomes commonplace, the pressure on salespeople and business executives to maintain and to expand sales continues to increase. That said, many businesses and their employees have sought to grow their international businesses by courting government officials overseas. Suchcourting may include giving a small token of esteem to an official, purchasing a meal, or it may involve providing substantial gifts of cash or automobiles. These business practices can easily run afoul of the Foreign Corrupt Practices Act (hereinafter “FCPA” or “the Act”). Accordingly, they are now the subject of great scrutiny by both the United States Department of Justice (DOJ) and the United States Securities and Exchange Commission (SEC). Fortunately, the DOJ and the SEC have recently issued detailed guidance interpreting the FCPA provisions. All business leaders and their corporate counsel should pay close attention to this guidance in order to avoid violations of the FCPA.

The DOJ/SEC guidance for FCPA enforcement was issued in November of 2012. Since that time, it has been the topic of much commentary, including continued speculation concerning what is or is not prohibited under the Act. By design, the FCPA contains a two-pronged attack to prevent the anti-competitive impact that bribery may have in the competitive marketplace. The first prong is the anti-bribery provisions, which prohibit domestic entities (including corporations, partnerships, limited liability companies, and the principals of such entities) from making “corrupt” payments to foreign officials in order to retain or to obtain business. The second prong is the “books and records” provisions, which require corporations to maintain detailed and accurate books and records and to implement internal controls to uncover and prevent improper financial transactions.

THE FCPA ANTI-BRIBERY PROVISIONS

The FCPA applies not only to domestic corporations and their employees that do business overseas, but also to foreign entities and individuals who commit any act in furtherance of a corrupt payment while in the United States. On its face, the Act applies to “corrupt” payments to individual government officials, i.e., payments that are intended to influence a foreign official to use his or her position “in order to assist...in obtaining or retaining business” for any person. This “business purpose test” is to be broadly interpreted and it clearly reaches bribes given to public officials for the purpose of obtaining or retaining government contracts. It also covers payments to obtain “favorable tax treatment,” or to eliminate duties that would give the bribing company an advantage not given to competitors. The DOJ/SEC guidance states that bribery to obtain any of the following actions would meet the “business purpose test” and would thus violate the FCPA:

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid information in order to gain an advantage in the bidding process
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination

In order to violate the FCPA anti-bribery provisions, the payment or offer of
payment to a government official also must be made “corruptly.” The word “corruptly” essentially means improperly or wrongfully. Thus, the FCPA makes clear that the payment or offer of payment to the public official must be intended to induce the recipient “to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to perform an official function.”

The FCPA does not distinguish between small or large payments. However, by requiring “corrupt intent,” the FCPA effectively insulates companies that may engage in the “ordinary and legitimate” giving of small gifts to local officials. Such gifts will be deemed a permissible token of respect or esteem. Similarly, it is not a violation of the FCPA to give an official “cups of coffee, taxi fare, or company promotional items of nominal value.” In such cases, there generally is no evidence that providing small tokens of esteem or small gifts are intended to corrupt public officials. Nevertheless, even in those instances where the gifts may be small, the government reserves its right to pursue criminal charges where there is a pattern showing a consistent or long-term effort to corruptly influence foreign officials in order to obtain or retain business. Moreover, the larger the gift, the more likely the government will see it as a corrupt effort to influence a public official.

Aside from examining the value of gifts given to a public official, the government will scrutinize the manner in which the gift is given. Cash gifts are inherently suspect unless they are given to reimburse an official for some travel or other expense that the official incurred in furtherance of the company’s legitimate business. Moreover, cash gifts are often delivered to the public official in a manner that bespeaks corrupt intent. For example, when the cash payment is disguised on the corporate books as a legitimate expense, or the cash is secretly paid in a surreptitious manner such as by delivery in plain envelopes, in suitcases filled with cash, or through offshore accounts, corrupt intent will be assumed by the government.

In sum, the FCPA does not outlaw all gift-giving to foreign officials. Instead, it prohibits the corrupt payment of bribes, including those that are designated as “gifts.”

**THE FCPA “BOOKS AND RECORDS” REQUIREMENTS**

While the FCPA’s bribery prohibitions receive the attention of most lawyers and business leaders, it is the FCPA’s requirements concerning both internal bookkeeping and accounting controls that are more likely to trigger a violation of the FCPA. Indeed, while the anti-bribery provisions reach “foreign” bribery, the “books and records” provisions apply to accounting practices that have no “foreign” component whatsoever. The SEC interprets these provisions not simply as protection against accounting fraud to hide bribes, but broadly to ensure that all financial statements are honest. As a result, the books and records provisions have given rise to far more enforcement actions than have the better known anti-bribery provisions.

The “books and records” provisions apply both to domestic and foreign operations of businesses that are required to file reports with the SEC. They also may apply to certain subsidiaries and joint ventures. These requirements can create major problems for corporate executives because accounting practices in many countries are far different from the practices in the U.S. Nevertheless, corporate executives who are subject to the FCPA must ensure that all operations, both foreign and domestic, comply with the Act.

In general, the “books and records” provisions mandate that corporations subject to the Act (a) maintain accounting records that, in “reasonable detail,” fairly and accurately show all corporate transactions involving the purchase or disposition of corporate assets, and (b) implement and maintain a system of internal accounting controls that reasonably ensure management’s control over the corporation’s assets. According to the DOJ/SEC guidance, “the accounting provisions assure that all public companies account for all of their assets accurately and in reasonable detail.”

The term “reasonable detail” was deemed a necessary element of the Act to make it clear that complete exactitude in accounting records, especially for diverse and multi-national corporations, is neither expected nor required. Instead, the Act merely requires that the accounting detail be sufficient to “satisfy prudent officials in the conduct of their own affairs.” The Act also is clear, however, that it is never permissible to mischaracterize any financial transaction in the company’s books and records. As a result, the Act reaches transactions both big and small. There is no requirement that falsely reported transactions involve an amount material to the corporation.

Aside from requiring books and records to be properly maintained, the FCPA mandates the implementation of sufficient “accounting controls” to reduce the likelihood that bribes prohibited by the Act could be concealed from auditors and regulators. The controls must be “sufficient to provide reasonable assurances” that transactions are executed and recorded in conformance with corporate policies, that they comply with appropriate accounting standards, and that they are examined periodically to uncover or prevent improper transactions. The FCPA does not specify how corporations must maintain their books and records, nor does the Act set forth the internal controls that must be implemented to comply with the Act. Instead, the FCPA imposes a reasonableness test under which books and records must be maintained in “reasonable detail” and internal controls must be devised to provide “reasonable assurance” that transactions are properly reflected in the corporation’s accounting records. Among the “internal controls” deemed essential is an effective compliance program. Such a program will take into account many factors, including the nature of the business, the degree of regulation by governmental entities, the amount of government interactions and the amount of business that the corporation conducts in nations with a high risk of government corruption. A corporation whose business involves a substantial risk of corruption, for example, would be expected to create and install a far more complex internal control system than would a company with little exposure to corruption.

**CONCLUSION**

Corporate executives, especially corporate counsel, should never consider the FCPA in a vacuum. It now operates in a regulatory environment both more complex and comprehensive than when it was first enacted in 1977. With the subsequent enactment of similar statutes, corporate executives must not simply assume that their accounting records are being properly maintained, they must actively take steps to “reasonably” assure themselves that the records are accurate and complete and that the internal control system is such that it will uncover significant departures from corporate accounting requirements. Such vigilance will help avoid FCPA violations and will ensure that corporations implement and maintain sound business practices.
With 600 million people, an ever expanding middle class, and a growing economy already worth trillions, it is no wonder businesses in the United States are making expansion into Latin American markets a top priority. Such expansion, however, is not without risk. Chief among the risks is the cost of wading through complex foreign regulatory schemes governing commercial relationships or, even worse, operating in a region with ill-defined and malleable commercial laws. Businesses entering into the Latin American market would therefore be wise to first gain an understanding of the key regulatory constraints they will be facing. The following article seeks to assist businesses in attaining this understanding with regard to one of the most important instruments in a business’ expansion tool-kit – the distribution agreement. Specifically, the article provides a survey of the key regulations affecting distribution agreements in the following eight countries: Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Nicaragua, and Panama.

ARGENTINA

Argentina has no particular regulatory scheme governing distribution agreements but rather relies on a still developing body of case law affecting the terms of these agreements. Under the case law, exclusivity provisions are valid and enforceable but will be voided if a court determines they are “abusive.” With regard to termination, if the agreement’s term is indefinite, a business may terminate it at any time with reasonable prior notice. If a business terminates the agreement abruptly and without adequate notice, however, it will face liability for consequential damages. Finally, businesses should take note that choice of law provisions in distribution agreements with local Argentinian distributors are likely to be ignored and Argentinian law applied regardless.

BRAZIL

Brazil began regulating distribution agreements in 2003 and the law governs and affects several aspects of the foreign company, local distributor relationship. As to exclusivity, businesses should be aware that it is allowed. If the distributor is granted exclusivity, however, and the foreign company allows third-parties to carry out transactions anyway, the local distributor is entitled to remuneration. With regard to termination, a business may terminate the distribution agreement on 90-day notice to the local distributor. Finally, with regard to indemnification, if the agreement is terminated without cause the local distributor is entitled to compensation equal to the amount owed to it pursuant to the agreement – including for pending transactions – at the time of termination.

CHILE

Chile does not treat distribution agreements as a distinct form of contract. Rather, distribution agreements in Chile are treated like any other type of contract and subject to the same general principles applicable to all agreements in Chile. This lack of specific regulatory oversight does not mean, however, that businesses have nothing to be aware of when it comes to entering into distribution agreements with Chilean distributors. Specifically, with regard to the termination of distribution agreements, businesses should be aware that where parties have agreed to a fixed duration, the agreement may only be terminated for cause. Where the agreement is indefinite, by contrast, Chilean law allows either party to unilaterally terminate the agreement upon written notice to the other side and after the expiration of a reasonable period.

COLOMBIA

Colombia’s laws are relatively unique in the region in that they tend to favor the foreign company. Businesses entering into dis-
MEXICO

While commonly used among merchants, distribution agreements are nevertheless not regulated under Mexican law. Rather, distribution agreements in Mexico are given the same lenient treatment of their terms as is provided to other commercial agreements. Specifically, Mexican commercial law allows merchants to freely enter into contracts with any terms or conditions, provided that the agreement does not violate public policy and has no illegal purpose, the agreement is not subject to a formality, and the agreement does not violate applicable regulatory requirements. In light of this lenient policy, typical contract provisions for distribution agreements in Mexico include exclusivity clauses, price and other guidelines for selling the products, territory restrictions, delivery procedures, and non-compete and confidentiality provisions.

COSTA RICA

Distribution agreements in Costa Rica are governed by the Sales Representative Act and businesses seeking to engage local distributors in this country would do well to familiarize themselves with its restrictive requirements. The act is characterized by its general protective nature toward local distributors, the restrictions it places on circumstances in which a foreign company may terminate the distribution relationship, and its compulsory application of Costa Rican law. With regard to terminating distribution agreements, foreign companies are quite limited in their options. A distribution agreement with a local distributor may only be terminated for offenses against the foreign company, for negligence, for a violation of a trade secret or duty of loyalty, or under the terms of the agreement itself. Further, if the agreement is silent as to duration, 10 months advance notice is required to terminate.

Moreover, other than the limited circumstances enumerated above, if a foreign company terminates a distribution agreement early it will face stiff indemnification costs. These stiff costs include not only all damages associated with the termination but also the cost to repurchase any inventory left over with an extra 10% paid to the local distributor as a financial cost.

With regard to exclusivity, it is allowed in Costa Rica but businesses should be aware that if they agree to grant the distributor exclusivity, the appointment of another agent, representative, or distributor gives cause to the original local distributor to terminate the agreement early.

Finally, businesses are cautioned that Costa Rican law will govern the terms of the distribution agreement despite any other terms to the contrary.

PANAMA

In 1989, the Panamanian Supreme Court declared the laws governing distribution agreements at that time to be unconstitutional and no similar act has been enacted since. In light of this, distribution agreements in Panama are generally subject to the terms and conditions agreed to by the parties. This lack of regulatory oversight makes Panama an attractive location for foreign businesses because it means that no mandatory indemnification or termination right exists for local distributors.

Exclusivity clauses, by contrast, are still prohibited under Panama’s laws relating to restraint of trade as a vertical practice. It should be noted, however, that under current Guidelines for the Analysis of Vertical Practices, an exclusivity clause in a distribution agreement may be valid as a temporary business development strategy. Any business seeking to engage a local distribution in Panama should thus explore this option more fully.

CONCLUSION

The opportunities and vibrant economic growth of Latin America make it an ideal target for business expansion. Businesses would do well, however, to gain an understanding of the regulatory and legal environments they are stepping into before entering the market. This is particularly true with regard to distribution agreements where a business may face substantial or little regulation depending on the country in which they are engaging a local distributor.


3 Brazilian Civil Code Articles 717, 720 (2013).

4 A period of 90 days is not, however, always sufficient notice. Businesses must consider the nature and extent of the local distributor’s investment in determining the proper amount of notice in their case.

5 Chasen and Puchner, supra note 2.

6 Sales Agreement, Costa Rican Law No. 6299.


8 Tax Agreement Law, Law No. 822; Competition Promotion Law, Article 2 of Law No. 601.

INTRODUCTION

Product liability law in Canada does not differ substantially from that of the United States. Manufacturers, distributors and sellers of goods are all subject to exposure. The basis of liability is essentially the same and arises from manufacturing defects, design defects and failures to warn (“marketing” defects).

Despite the similarities, there are nonetheless some significant differences in the Canadian regime, both procedural and substantive, that are worth noting. Some of these include:

- Product defects do not give rise to strict liability in Canada, whether under statute or common law; rather, the cause of action is limited to the tort of negligence and, in the case of the actual purchaser, breach of contract;
- Federal legislation, the Canada Consumer Product Safety Act (“CCPSA”) imposes onerous duties on manufacturers, importers and sellers of consumer products to report product defects and incidents which have or may cause serious injury;
- Jury trials in Canadian product liability cases are relatively rare and the vast majority of cases are decided by judge alone;
- Punitive damages awards in product liability cases are generally not available; and
- “General damages” for non-pecuniary loss (pain, suffering, loss of amenities) in personal injury cases are “capped” (presently at approximately $340,000, even in catastrophic injury cases).

It is sometimes forgotten that the 1933 English House of Lords decision in Donoghue v. Stevenson, which is considered to be the modern basis for the tort of negligence in the common law world, was actually a product liability drama arising from the discovery (and ingestion) of a snail in a bottle of ginger beer. The court declared “a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they leave him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care and the preparation of putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.” This principle, now 80 years old, remains the foundation for common-law product liability in Canada.

In Canada, the standard of care in product liability cases has been stated by one court as “the duty to take reasonable care in the circumstances, and nothing more.” A breach of any statutory standard governing the manufacturer of the product does not in and of itself result in liability, but any such breach will very often be accepted as evidence of negligence in most cases.

Product liability in Canada, as in the USA, also arises from breach of a common-law “duty to warn.” In Canada, manufacturers, distributors and retailers of products owe consumers a duty to warn them of the dangers that they know or ought to know are associated with the products they manufacture, distribute or sell. The duty applies to defects that are known at the time of manufacture as well as those defects that may arise later: the duty to warn is a continuous one.

The required explicitness and adequacy of the warning varies with a degree of danger likely to be encountered in the ordinary use of the product. Generally speaking, there is no duty to warn consumers of known and obvious dangers arising from use or misuse of the product although, of course, a risk obvious to an adult may not be obvious to a child and warnings should be tailored accordingly.

In product liability cases in Canada, expert evidence will usually be required in most cases to address issues respecting adequacy of design, industry standards, causa-
tion, and the efficacy of any warnings provided. As in the U.S., a prudent designer of warnings would be wise to assume minimal levels of intelligence on the part of the average consumer.

DEFENSES

Common defenses in Canadian product liability cases include:

- causation,...in Canada the common law test for causation in tort is the “but for” test: would the injury not have occurred but for the negligent conduct of the defendant? No causation, no liability;
- contributory fault by the plaintiff: failing to read or heed warnings, misusing the product, failing to pay appropriate attention, and the like will all reduce (and in some cases eliminate) the liability of the manufacturer, supplier or retailer;
- subsequent modification of the product by third parties without the knowledge or approval of the manufacturer can immunize the latter in some cases;
- the “learned intermediary” exception to the general requirement to directly warn consumers of product risk may in limited circumstances relieve a manufacturer of liability.

THE CIVIL JUSTICE SYSTEM IN CANADA

Like the U.S., Canada’s system of government comprises a constitutional federation. In addition to the federal government, there are ten provinces and three territories each of which has its own court system and legislation affecting judicial process. Such provincial statutes will govern limitation periods, contribution between tortfeasors, joint and several liability, implied warranties of fitness in sale of goods transactions, the availability of and procedure for class actions, and the like all of which can and will impact product liability cases.

Canadian judges are appointed by government and are not elected. Their mandatory retirement age is 75. Trial by jury is generally available for civil cases in Canada, including product liability cases, but unlike the U.S., such trials are rare and most product liability cases will be tried before a single judge.

Limitation periods can vary from province to province but generally speaking, most personal injury lawsuits in Canada are subject to a limitation period of two years starting on the date of the injury. Such limitation periods are usually “postponed” in cases involving plaintiffs under the age of majority or subject to disability and in situations involving delayed “discoverability” of the cause of action.

“Forum shopping” by plaintiffs is a fact of life in Canada as it is elsewhere. Plaintiffs will bring their product liability cases in those jurisdictions where they can expect to receive the most favorable treatment whether with respect to applicable legal principles or the availability of “generous” damage awards. Many products will involve international elements and those, for example, manufactured in South East Asia, imported into the USA, sold or advertised on the internet, and consumed in Canada (or elsewhere) raise the prospect of product liability plaintiffs bringing or at least considering claims in more than one jurisdiction. In Canada, most courts will accept jurisdiction to hear a products liability case based on the relevant provincial statutes and the common law regarding “conflicts of law.” Generally the court will take jurisdiction over a foreign defendant based on a “real and substantial connection” test. The court also has the discretion to decline jurisdiction on the basis of “judicial comity” militating in favor of the case being heard elsewhere.

Product defect cases are particularly well suited to class action litigation, all the more so where an individual claim against a large institutional defendant is impractical given the high cost of litigation and Canadian judicial conservatism in both non-pecuniary and punitive damages awards. Class actions in Canada are governed by provincial legislation but, although variations exist (particularly respecting opt-in/out regimes and costs awards) the process and criteria for class action certification is fairly standard. A large number of product liability class actions have been certified in Canada over the years although most settle following certification and very rarely proceed to any trial.

CANADA CONSUMER PRODUCT SAFETY ACT

In June 2011, the federal government passed the Canada Consumer Product Safety Act ("CCPSA"), which imposes broad and onerous duties on persons who manufacture, import or sell consumer products in or to Canada. While the legislation does not expressly impose statutory liability for defective products or inadequate warnings, significant penalties can be imposed for non-compliance.

The CCPSA mandates record-keeping protocol that requires manufacturers, importers, and sellers of consumer products to maintain records, including names and addresses of all parties in the supply chain, at a place of business in Canada for a period of seven years.

In addition to record-keeping requiremen-

CONCLUSION

Although there are significant differences in the ways that product liability claims are treated in Canada and the United States, the similarities between the two jurisdictions far outweigh their differences. The implementation of Canada’s CCPSA was done explicitly to make more uniform the consumer product regimes of both countries. While there remains a significant difference on the matter of strict liability, in many instances there is little practical difference in terms of outcome. It is probably fair to say, however, that Canada remains a somewhat more judicially conservative jurisdiction in terms of damage awards but perhaps that too will change in due course.

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What’s the situation with your Germany-based staff’s pensions, your product’s trademark rights in the Netherlands, or your transport contracts in China? Anyone who does business abroad will soon find that legislation there is very different from U.S. legislation. Every country has its own national rules. But how do you stay informed? If you have any legal questions about international affairs, go to the unique site for entrepreneurs: www.legalknowledgeportal.com.

The Legal Knowledge Portal is an online source of knowledge that is specifically intended for business leaders and entrepreneurs who do business internationally. Thanks to close collaboration between USLAW and its European counterpart TELFA (see text box), the knowledge portal has grown into a unique global knowledge portal that helps business leaders navigate international law.

NEW MATERIAL EVERY DAY

More than 30 European law firms have committed to the site since its launch in January 2012, and they regularly post topical legal articles. Subjects covered range from
Maltese maritime law to price cuts in Turkey’s pharmaceutical industry. In turn, increasing numbers of USLAW firms are also active on the site, answering questions of European entrepreneurs about U.S. legislation. Other countries have meanwhile also joined this initiative, with legal professionals from reputable firms in Argentina, Brazil, Russia, India, and China publishing articles on the knowledge portal. These new additions have brought unprecedented growth in the daily publication of new material with no signs of slowing down. Reliability of both content and authors is guaranteed, as all participating firms are affiliated with the TELFA or USLAW NETWORK.

MEETING A NEED
The international knowledge portal is an initiative by the Netherlands-based firm and TELFA member Dirkzwager advocaten & notarissen, which also takes care of administration of the website. Domestically, Dirkzwager has been successfully sharing legal knowledge through its own knowledge websites and social media for some time now. In 2011, their efforts earned the firm the Dutch award for the ‘Best and Most Innovating Knowledge Sharer’ among Dutch law firms.

Marcel Hielkema, Dirkzwager’s Managing Director: “We noticed that visitors to partnerinkennis.nl, our Dutch-language knowledge portal, needed legal information relating to other countries where they do business. This prompted us to ask our partners across Europe and the U.S. to also post these kinds of articles.”

NEW CONTENT
Initially, other law firms were slightly uncomfortable with sharing their knowledge online. But there is a real upside to taking part in this initiative: it generates publicity. Dirkzwager helps participating firms with site-related marketing and advertising, raising the site’s profile in the various countries. This leads to a major influx of visitors to the site, more or less forcing participating firms to continuously post new articles. This guarantees regular publication of new content. Visitors from 158 countries have meanwhile already found their way to the website. Although site administrators do not edit the contents of the articles, because after all the authors are specialists, articles are search engine-optimized and appropriately tagged and enriched with visual material.

UNDERSTANDING CROSS-BORDER LEGAL DIFFERENCES
Articles posted on the Legal Knowledge Portal deal with legal activities and legislative amendments that affect international trade, providing important cross-border information that never used to be this easily accessible online, but which attorneys, business leaders and entrepreneurs need to know.

Hielkema reiterates that legislation differs greatly across the various nations of Europe. “The basic premise of employment law in Europe, for example, is very different from U.S. employment law. The separate U.S. states still have to comply with national laws. In Europe, each country has its own national legislation except for in the area of antitrust law. Dutch employment termination law, for example, differs greatly from Italian legislation governing employment termination. Lack of insight into these differences will make doing business across borders very difficult.”

COLLABORATION, DIRECT ACCESS KNOWLEDGE SHARING
The basic idea behind the legal knowledge portal is to facilitate knowledge sharing. Because a well-informed business leader, entrepreneur or organization will be in a better position and be able to put more targeted questions to legal professionals.

Hielkema: “In many cases, lawyers are only consulted when companies stumble on problems. If an entrepreneur were to be able to better assess the situation using appropriate legal knowledge, these problems could be avoided. Entrepreneurs are already increasingly taking to Google before calling a legal professional. And their inhouse legal counsel simply cannot stay on top of all international legislative issues. On the Legal Knowledge Portal, visitors can find up-to-date legal information about European and other countries, written in plain English. Where else will you find up-to-date information about China in English?”

Visitors to the site can search by country or subject. A particularly unique feature of the site is that users can subsequently contact the author of an article by e-mail or phone. Hielkema: “This gives entrepreneurs direct access to a huge network of dependable law firms across Europe and further afield through the site. Because users should be mindful of the fact that the website is not a substitute for a specialist legal advisor.”

The Legal Knowledge Portal will soon also be available as an app for iPhone and iPad. If you are an entrepreneur and you do business internationally, make sure you don’t miss out on all that practical information. Bookmark www.legalknowledgeportal.com today.
I. PORT SECTOR: GENERAL OVERVIEW

There is no doubt about the importance of a well-organized Port sector for the economic development of a country. The more organized the Port sector, the lower will be the transaction costs in import operations, and especially in export operations.

Until the early ’90s, the Brazilian Port sector was ruled by disparate and sparse legislation, and was subject to a centralized management system, which hindered the organization of the sector. In 1993, Law No. 8.630, known as the Port Law, was issued. Among other purposes, such Law sought the decentralization of the Port management, the optimization of terminals and a more efficient system of port-related fee rates.

Law No. 8.630/1993, however, was not enough to create a favorable environment for investments, and the sector was involved in intense judicial disputes. Hence, the need for a new regulatory framework.

Law No. 8.630/1993, however, was not enough to create a favorable environment for investments, and the sector was involved in intense judicial disputes. Hence, the need for a new regulatory framework.

II. MAIN ASPECTS OF THE NEW LEGISLATION

1. A public regime of concession of the organized port and lease of port facilities

The legal regimes related to concessions and the lease of public properties apply, respectively, to the operation of the organized port and to the exploitation of the related port facilities.

The law defines an organized port as the “public good built and equipped to meet the needs of navigating, handling of passengers or handling and storing goods, and whose traffic and port operations are under the jurisdiction of the Port Authority.” Organized port area is defined as “the area delimited by the Executive Power which includes the port facilities and infrastructure of protection and access to the organized port.” And port facility is defined as an “installation inside or outside of the organized port area and used in handling of passengers, handling or storage of goods, going through or coming by waterway transport.”

The boundaries of an organized port area are not defined by the new legislation. Rather, this will be provided by an act of the President (under a proposal of the Ports Secretariat of the Presidency), considering the adequacy of the land and sea accesses,
the gains of efficiency and competitiveness arising from the scale of operations and the existing port facilities. The fact that the Law did not delimit the definition of the organized port area, leaving this decision to the Executive Power, is not an aspect that should be seen as positive, as it leaves such an important determination to the discretion of the Executive Branch.

The concession and lease takes place through a bidding procedure. Previously, the value offered for the concession was the criterion adopted to select the winning bidder. Now, the greatest handling capacity, the lowest rates and/or the shortest time for cargo handling, among other rules established by the tender invitation, may be adopted as criteria of judgment.

As for the term of the concession and lease agreements, President Dilma Rousseff vetoed the text approved by the Congress, according to which this term would be up to 25 years from the date of signature, extendable only once, until it reaches the maximum of 50 years, and provided that the concessionaire or lessee has made the necessary investments for the expansion and modernization of port facilities. The justification pointed out by the President was that the Congress had removed from the text of MP 595 the prerogative of the Executive Power to evaluate the convenience and opportunity of each extension, jeopardizing its ability to plan and manage the Port sector.

Decree No. 8.033/2013, which was issued by the President in order to regulate Law No. 12.815/2013, set forth that the concession and lease agreements will have a term of up to 25 years, renewable only once for a period not exceeding the original one, at the discretion of the granting power. This provision will probably be challenged in court, since what was done here was to insert in the legal system, via the Executive Branch, a discipline that had already been rejected by the Legislative Branch.

2. An authorization regime

The authorization regime applies to the operation of the port facilities located out of the organized port area comprised the following types: (i) terminal for private use (TUP), (ii) cargo overflow station (ETC), (iii) public port installation of small capacity, and (iv) port installation for tourism.

One of the main changes introduced by the new legislation affects TUPs. Law No. 12.815/2013 eliminated the requirement that TUPs could only handle their own cargo. Now, the licensee can choose whether to work only with its own cargo or handle both their own cargo and that of its third-parties.

The granting of the authorization is preceded by public notice or call for expressions of interest so as to identify the existence of parties interested in obtaining the authorization for construction and operation of the port facility. In case there is more than one interested party and it is impossible to implement all the projects presented, a bidding process will be carried out, which will consider as criteria of judgment, alone or combined, the greatest handling capacity, the lowest rates and/or the shortest time for cargo handling, among other rules that can be established by the tender invitation.

The authorization is formalized through a contract of adhesion, which is valid for up to 25 years, renewable for successive periods, as long as the port activity is maintained and the licensee effects the necessary investments for the expansion and modernization of the port facilities, in accordance with applicable regulation.

3. Main governmental entities

Among others, the following entities will play an important role in the new regulatory framework:

a) Ports Secretariat of the Presidency – SEP: among other responsibilities, SEP is responsible for centralizing the planning and for preparing the general licensing plan for the Port sector.

b) National Agency for Waterway Transportation – ANTAQ: among other responsibilities, ANTAQ is responsible for conducting the bidding procedures and for supervising performance of contracts.

c) Lease agreements signed prior to 1993 – The text sent by the Congress to the President set forth that the lease agreements signed before 1993 must be extended for one more period, not inferior to the original term of the agreement. Such provision was vetoed by the President under the argument that the compulsory renewal violates the separation of powers principle, to the extent that it would take away the Executive’s prerogative to evaluate the appropriateness of the extensions, besides violating the principle that requires treating all players fairly by ignoring the conditions and the validity of their contracts.

d) Terms of authorization and adhesion agreements – These will have to be adapted to the provisions of Law No. 12.815/2013.

III. FINAL REMARKS

Brazil hopes the new legislation will make the port sector cheaper and more efficient. Bids of the first port terminals under the new legislation are expected to be carried out later this year. There is a concern, however, that Brazil has only substituted one complicated system for another.
Since the economic crisis of 2001-2002, the Argentine government has imposed a number of restrictions on foreign exchange transactions that have reshaped the way of doing business in Argentina. This has led to a decline in foreign investments and consequently, of dollars. The government, in dire need of the American currency, has recently launched a tax amnesty plan to attract undeclared dollars back into the country. However, this amnesty plan has shown that previous measures have not been very successful when coming to grips with the real problem.

BACKGROUND

After the U.S. dollar-peso parity was abandoned in 2002, the Argentine government adopted a set of emergency rules to bring back the foreign exchange control system, and created the Single Free Exchange Market ("MULC").

These rules establish that inflows and outflows in foreign currency must be channeled through the MULC; proceeds of exports must be repatriated within pre-established terms; and foreign currency brought into Argentina will be immediately exchanged for AR$ pesos at the official exchange rate. Those who fail to comply with these regulations are subject to foreign exchange criminal actions.

Despite these new controls, the Argentine government has been unable – so far – to plug the leak in the Argentine Central Bank’s foreign currency reserves. The country’s increasing energy imports, the narrowing trade balance following the international 2008 crisis, and the fact that the dollar has historically been a savings currency for Argentines, led to a growing concern over the dwindling dollar reserves and increased the government clampdown on foreign exchange transactions.

In October 2011, the Argentine Central
Bank (“BCRA”) and the Federal Tax Authority (“AFIP”) created a registry and surveillance system to record every foreign exchange transaction by Argentine residents. This turned into a severe limitation to acquire foreign currency, even for the purpose of effecting payments, making transfers, or travelling abroad. Few months later, the BCRA suspended the right to purchase foreign currency for portfolio investments.

In some cases, restrictions on inflows and outflows of foreign currency have even resulted from *de facto* rules, verbal instructions to banks and companies based on no written regulations.

This set of regulations and *de facto* rules on the foreign exchange control system has had a dramatic impact on the country’s economy: the supply chain of several products was severely affected – in 2012 the car industry suffered the restrictions to import car parts, transfers of payments abroad decreased and foreign investments declined drastically.

**CURRENT SITUATION**

The current Argentine foreign exchange control system may be summarized as follows:

1) **Outflow of foreign currency**
   
   (a) As from February 2012, importers must file with the tax authorities an “Early Import Sworn Statement” (“DJA1”) prior to issuing a purchase order – or similar document – to the foreign supplier.

   After filing the DJA1, the corresponding governmental agency must decide whether to permit or not the transaction. If approved, the importer must prove the entrance of the purchased goods within a certain time frame as of the date in which access to the MULC was allowed.

   The import of services, including license of patents and trademarks must follow a similar pattern. Only payments for professional or technical assistance services not exceeding US$100,000, or payments of installments not exceeding US$10,000, are exempted from a prior authorization, though only if: (i) the payee is not an affiliate of the local – paying – resident; and if (ii) the payee or target bank account are not located in a low-tax jurisdiction.

   In any case, the importer must file with its bank (through which it is making the transfer) sufficient evidence that the services have been effectively rendered to be given access to the MULC.

   (b) Concerning the transfer of dividends to foreign beneficiaries, payment must be done through the MULC by complying with special regulations, which require that the local payer’s bank confirms that the funds to be transferred abroad actually correspond to dividends. Other than these, there are no legal requirements in place that restrict the transfer of dividends to foreign shareholders.

   However, the BCRA has implemented certain *de facto* limits that have blocked the actual transfer of dividends to foreign shareholders.

   As a consequence of these restrictions, the securities market is being regularly used as an alternative channel to remit funds abroad. The process basically consists in purchasing securities in the Argentine securities exchange market and then selling them in a foreign market. These transactions entail a substantially higher exchange rate.

   (c) In March 2013, the AFIP established a tax surcharge of 20% on (i) any payment for goods or services made abroad by a local resident using credit or debit cards issued in Argentina; (ii) any payment in foreign currency made through websites; (iii) any payment effected in a foreign country for services rendered abroad hired through a local travel agency; and (iv) any payment of passenger transportation services to travel abroad.

   The tax status of the local resident determines whether this 20% surcharge will be treated as payment on account on income tax or on personal assets’ tax.

2) **Inflow of foreign currency**

   Despite the fact that export of goods and services is not prohibited in Argentina, the government has restricted the export of certain products for a limited time in order to cover the local demand and to stop the sharp price increases affecting the domestic market.

   (2) Inflow of foreign currency

   IMPACT ON FOREIGN COMPANIES

   **DOING BUSINESS IN ARGENTINA**

   This new economic situation has mainly affected the activity of those companies making cross-border transactions.

   Many importers and distribution companies have been temporarily or permanently banned from importing goods for commercialization, until they offset their imports and exports.

   Thus, many importers have had to adapt their activities in order to export goods, even when such operations were not related to their business core (widely-known automobile companies began exporting grains and other commodities so as to continue importing cars).

   These companies have alleged the existence of unjustified delays and even *de facto* restrictions to import products due to objections made by the Secretary of Commerce, once the DJA1 had been submitted for approval.

   Local manufacturers have also found obstacles to import fixed assets and raw materials, and their production chain was affected. Some were forced to shut down operations in Argentina.

   Finally, companies that successfully comply with these regulations have been affected by the informal restrictions on the payment of dividends to foreign beneficiaries.

   A decree recently enacted by the Argentine government endorsing the terms of an agreement with a major U.S. oil producer eliminates many of these restrictions.

   **CONCLUSION**

   The series of foreign exchange measures issued since 2011 to ease the demand of dollars and to shield the Argentine reserve from the constant dollar leak, seem not only to have failed to come up to the Argentine government’s expectations but also to have strengthened the illegal foreign exchange market, where the dollar-peso foreign exchange rate has been 50% higher than the official rate.

   All these legal and *de facto* changes have led to a depletion of dollars: the government has recently established a tax amnesty plan to attract undeclared U.S. dollar savings held outside the Argentine financial system, provided they are invested in real estate and in energy projects.

   The three-month period during which undeclared funds can be cleared comes to a close in September 30, 2013. The aim was reaching US$4 billion. However, by the time this article is being written, this amnesty plan has attracted little interest, if not scarce.

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**IMPACT ON FOREIGN COMPANIES**

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Spain is for sale nowadays. Not all, but almost. Some months ago, some Spanish commercial banks and savings banks had been rescued ("restructured") and nationalized due to an injection of around 40,000 million Euro of BCE/EU money through the FROB ("Fondo de Reestructuración Ordenada Bancaria"), www.frob.es/, a public legal entity created to restructure the Spanish financial sector.

The rescue included the creation of the SAREB ("Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria"), www.sareb.es/, a real estate assets management company, popularly known as "banco malo" ("bad bank").

It's entrusted to administrate and to sell the toxic assets of the nationalized banks and other financial entities which received public assistance. SAREB is 55% owned by private entities (14 Spanish banks, two foreign banks, an electric company and insurance companies) and 45% by the FROB.

SAREB received 197,474 assets (with a total transfer value of 50,781 million Euros) from nationalized entities and from other entities with public aids.

SAREB plans to sell most of these assets over the next 15 years, obtaining profit. Some member banks announced loans to investors to buy them.

It has also been announced by several public administrations and entities that up to 15,000 unused real estate properties of different kinds will be sold in the next few years.

According to this picture of undervalued real estate (with an expected revalorization in 5 to 10 years) it would be wise to search for opportunities to invest.

Real estate investments are usually made by three ways:

- **SOCIMI**: create or buy share of one.
- **Share deals**: purchase the corporate vehicle which owns the real estate active.
- **Asset deals**: direct purchase of real estate as a natural person or with a company.

Another two minority ways could also be:

- **Reverse mortgages** ("Hipoteca inversa"): Law 41/2007, December 7th.
- **Reservative census** ("Censo reservativo"): art. 1607 Civil Code et al.

Let’s take a look at the first three more popular ways, because the two minority ways are more specialized or unusual:

The first way is through a SOCIMI ("Sociedad Cotizada de Inversión en el Mercado Inmobiliario," a.k.a. “Spanish REIT”).

Corporate Tax ("I.S.") rate is 0%. Exceptionally, society profits would be taxed at 19% if dividends obtained by partners with equal or more than 5% of the shares...
don’t pay in the partners’ country at least at a 10% rate.

The requisites to create one: share capital of at least 5 million Euros. 80% of the assets should be used to get urban real estate for the company. There is no limit of financing from third parties. Real estate could be given as capital. At least one real estate is necessary.

The distribution of at least 80% of ordinary profits (from lease contracts) and 50% of the capital gains obtained is compulsory, and it has to reinvest the other 50% in 3-year time. Dividends and capital gains of the partners (if the shares are sold) will be taxed at 21%, 25% or 27% for a Tax Resident natural person according to Income Tax Law (“IRPF”), and at 25% or 30% for a Tax Resident legal person in Corporate Tax.

A Non Tax Resident natural or legal person would pay according to the Non Residents Income Tax Law (“IRNR”), with a retention of 21%, without detriment to the application of a Double Taxation Treaty (retention varies from a 5% to 15%) or the EU Directive that allows to distribute dividends without retention from subsidiary to matrix companies inside the EU.

SOCIMI can also request to negotiate its shares in a regulated market (Stock Exchange) or in the Spanish multilateral system of negotiation (“Mercado Alternativo Bursátil”-“MAB”) or of any other EU State.

The second way is to buy an existing company which has one or more real estate assets in its balance. The purchase of shares or participations would be subject to VAT (21%) or Transfer Tax (for next transfers, or between non professionals).

It’s paid to the Regional Tax Agency by the purchaser, 30 days after the execution.

General tax rate: 6% as mentioned before. Each Region can pass a specific rate. Some main samples are as follows:

- Madrid, 7%
- Andalusia, 8%, 9% or 10% on a scale of prices
- Catalonia and Valencia Autonomous Community, 8%

After the selling, the vendor will pay this one:

- Municipal Tax on increase in urban land value (“Impuesto sobre el Incremento del Valor de los Terrenos de Naturaleza Urbana”-“IIVTNU”), a.k.a “Impuesto de Plusvalía Municipal”

It’s a municipal tax, a rate calculated over the increase of value of the land, paid 30 days after the execution.

The annual taxation over the real estate property will be the “Real Estate Local Tax on urban real estate property” a.k.a. “Property tax” (“Impuesto sobre Bienes Inmuebles de naturaleza urbana”-“IBI”), an amount of a 1.1% or 2% of the cadastral value of the property (depending if the cadastral value is actualized or not). The calculation is made over cadastral value and the quota is moderated along ten years.

Another tax could be the “Tax on Income from leased houses,” over the net income once deducted expenses made. There are also tax benefits: 60% or 100% of net income exempt in certain cases. For Tax Residents the rate is up to 52% (56% in Catalonia) on a gradual scale in Income Tax, and 25% (SME) or 30% (general) in Corporate Tax. For Non Tax Residents the rate is 24.75%.

How many taxes will cost the purchase and maintenance of the properties?

The taxes at the time of purchase are either one of these two:

- Value Added Tax (VAT) for first sale of new buildings (“Impuesto sobre el Valor Añadido”-“IVA”)
- Transfer Tax (“Impuesto de Transmisiones Patrimoniales”-“ITP”), applicable to properties not subject to VAT (second and next transfers, or between non professionals).

The Zones of Military Interest in Cross-Border Areas in Spain are defined and regulated by laws and a decree. It affects 1,560 towns, mainly located in the coasts, the islands and in the borders with France, Portugal, Gibraltar and Morocco.

If you’re interested in purchasing a whole Spanish private island or a plot in one of the bigger ones, you must apply for a permit by the Ministry of Defense. It’s forbidden for any foreigners to purchase islands or land in islands with less than 82.8 km2. There is a limit of the total amount of land owned by foreigners in any island established by law (15% of the whole island).

Finally, a Bill regulates a residence permit for two years (extended) for qualified investors in Spanish real estate (500,000 Euros, free of charges).
This article is intended to assist U.S. citizens, and their advisors, when considering whether to purchase property in the UK, either as an investment or home, or to use when visiting or working in the UK.

THE LONDON PROPERTY MARKET

The London property market is thriving and continues to go from strength to strength. Indeed, properties in the UK have seen an increase in value in the most recent published figures. Activity in the UK market is forecast to carry on growing.

London is a world-class city and has a great reputation as a global financial centre. It is an attractive and popular choice for those who wish to invest in property and particularly for those based abroad and wanting a base in Europe. Property prices continue to rise, particularly in London, despite the economic difficulties. A purchase in London is seen as a safe investment that will bring a healthy return. Despite an increase in the prices being paid, the yield remains very good and appealing.

The majority of property purchases in Central London are by overseas purchasers. Developments such as One Hyde Park and The Knightsbridge have helped ensure that the interest in London is kept alive.

Foreign investors are particularly interested in areas such as Knightsbridge, Mayfair, Belgravia and St John’s Wood. The rest of London also benefits from this interest as property values continue to rise throughout the area.

FORMS OF OWNERSHIP

This article assumes that the U.S. citizen will purchase the UK property in his own name, or jointly with his spouse or civil partner (the term “spouse” hereafter refers to either).

If spouses decide to purchase jointly, they should hold as “tenants in common,” a form of co-ownership that allows them to pass their respective shares on death by Will and provides the greatest scope for UK tax planning. However, if one spouse is a non-U.S. citizen, purchasing in their sole name may avoid U.S. tax on the rental income. Coordinated U.S. advice should be taken as there may be gift tax points to consider.

TAX ISSUES

Income Tax

U.S. citizens purchasing a property as an investment will be liable to UK income tax on the rental income. For tax year 2013/14, the rates are 20% on the first £32,010 (after any applicable reliefs and personal allowances), 40% on the remainder up to £150,000 and 45% on the surplus. Under the Non-Resident Landlord Scheme, income tax at 20% is effectively withheld from the rent by the UK letting agent (if any) or by the tenant unless the landlord actively opts out.

U.S. citizens purchasing a property for personal use should take advice on whether their proposed use of the property will make them UK resident for tax purposes. Under the UK statutory residence test, days of physical presence in the UK count towards UK residence, as can an individual’s “connections” to the UK, of which UK accommodation can be one. If the residence test applies, the worldwide income of the
U.S. citizen could be subject to UK tax. The 2003 UK/U.S. treaty should provide relief for any element of double taxation but a UK/U.S. accountant should be involved.

**Capital Gains Tax**

UK capital gains tax (“CGT”) may apply when a U.S. citizen sells a UK property if a gain is made over the acquisition cost of the property. The rate of CGT is currently 28%. However, CGT only applies if the individual is a UK resident in the tax year of sale or, has been a UK resident and sells when a non-resident, and returns to the UK within five tax years. Up to 100% relief can be claimed if the UK property is the individual’s only or main residence.

**Stamp Duty Land Tax (SDLT)**

SDLT is a mandatory tax to which a buyer is liable when buying a property in the UK (regardless of residence status). The rate of SDLT varies according to the purchase price with the maximum rate of 7% applying to properties worth over £2m.

**Inheritance Tax**

UK inheritance tax (“IHT”) will apply if a U.S. citizen dies whilst holding a UK property or if he makes a gift of it during his lifetime. The rate on death is 40% on chargeable transfers in excess of £325,000 (a threshold known as the “nil-rate band”). Transfers between spouses are generally exempt but a restriction applies if the recipient spouse is non-UK domiciled, in which case the exemption is limited to £325,000.

The UK IHT regime is usually the main drawback for U.S. citizens purchasing UK property but mitigation planning is discussed below.

**ESTATE PLANNING**

**Wills**

It is important that a U.S. citizen makes a Will to deal with the succession to a UK property on death. The property will otherwise pass in accordance with the UK Intestacy Rules according to a fixed order of priority.

Having a Will also allows the U.S. citizen to include provisions to ensure the property passes efficiently from an IHT planning and U.S. estate tax perspective.

The UK Will may need to include a “credit shelter trust,” benefitting the spouse and any children, into which an amount equivalent to the estate tax applicable exclusion credit (a maximum of $5,250,000 for 2013) should pass. Whether this is to be included will depend on the terms of any U.S. (or other) Will and the value of the U.S. citizen’s estate, and legal advice on UK and U.S. Wills should be coordinated (not least to ensure that one does not revoke the other). Either way, an equivalent provision to make use of the IHT nil-rate band should be included or carved out of the credit shelter trust as necessary. Any remainder of the UK estate should pass to the surviving spouse in a form that qualifies for the estate tax marital deduction and IHT spouse exemption (subject to the restriction for non-UK domiciles referred to above). This structure ensures that IHT and estate tax are deferred until the survivor’s death. If the surviving spouse is not a U.S. citizen, the marital deduction will only apply if a qualified domestic trust (a “QDOT”) is used for the survivor’s interest, and the UK Will must be drafted so as to comply with the requirements for a valid QDOT.

**Further IHT planning**

Using a mortgage can be an efficient way to minimise an IHT liability as any borrowing on the property should be deductible from the property’s value for IHT purposes. Co-ownership will avoid IHT if the value of each person’s share falls under the nil-rate band but each co-owner must use or occupy the property in proportion to their share of the property. Otherwise, life insurance could be considered and a policy purchased to cover the estimated IHT liability on death.

**CONVEYANCING PROCESS**

The conveyancing procedure in England can be broken down into two elements, namely exchange of contracts and completion. The main steps are:

1. After a price is agreed, the seller and buyer will instruct separate lawyers.
2. The seller’s lawyers will draft the contract and compile documents relating to the property. Title to land in England and Wales is guaranteed by the state, and registered at the Land Registry.
3. The buyer should instruct a surveyor to investigate the physical aspects of the property. The cost is around £1,500 plus VAT (a sales tax levied at 20%).
4. The buyer’s lawyer will undertake due diligence including carrying out a number of standard searches, namely:
   - Local Authority Search. This is submitted to the Local Authority and deals with information relating to authorized alterations and works carried out at the property.
   - Drainage Search. This will confirm details of the water and drainage facilities.
   - Environmental Search. This identifies any possible environmental issues, including problems with past land use or contamination.
   - Planning Search. This advises of neighborhood statistics and of any new developments or applications relating to the surrounding area.
   - Chancel Repair Liability Search. Although uncommon, there remain properties affected by chancel repair liabilities. The liabilities often date back to medieval times, when the parish church was granted powers to charge rectorial properties for the upkeep of its chancel.

The buyer’s lawyer will deal with any issues and raise enquiries with the seller’s lawyer, if necessary.

5. When all enquiries have been dealt with, and the search results are received, the buyer’s lawyer will advise the buyer to proceed to exchange of contracts. Until exchange, it is open to either party to withdraw from the transaction, or renegotiate the price.

6. On exchange, the contract signed by the buyer is exchanged for the contract signed by the seller, and normally a 10 per cent deposit is paid. The sale is now legally binding and a completion date is fixed.

7. Between exchange and completion, there are various formalities to deal with, including signing documents and calculating funds required to complete.

8. On completion, the balance of the purchase price is paid, along with any other sums due, and the keys are handed over. Following completion, SDLT is paid and the buyer registered as the new owner.
THE PRIOR KNOWLEDGE EXCLUSION IN CLAIMS-MADE POLICIES: OBJECTIVE OR SUBJECTIVE STANDARD?

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Virtually every professional (lawyers, doctors, architects, etc.) who is insured under a “claims-made” policy is familiar with the following scenario: After performing a professional service for its client, the client contacts the insured and expresses unhappiness or dissatisfaction over the services provided by the insured. The client does not file a formal claim or lawsuit against the professional, and perhaps does not even threaten to file a claim or lawsuit in the future, but merely expresses grave dissatisfaction with the services rendered. Weeks, months, or even years later, the professional becomes insured under a claims-made policy, covering it for claims that are first made against it during the policy period. Subsequent thereto, the “unhappy client” files a formal claim or lawsuit against the professional.

Even though, technically speaking, that claim was “first made” against the insured during the policy period, thereby satisfying the requirements of the claims-made policy, what is the impact of the prior series of communications in which the client expressed dissatisfaction with the services provided? Do those conversations, while perhaps falling short of constituting a formal “claim” as defined by the policy, nevertheless operate to preclude coverage for the formal claim made during the policy period?

Most claims-made policies contain language barring coverage for claims first made against the insured during the policy period where the insured had a “reasonable belief,” prior to the policy period, that a claim might be made against it in the future. For example:

“This policy does not apply to any claim arising out of a wrongful act occurring prior to the policy period if, prior to the effective date of the [policy]: … b. you had a reasonable basis to … foresee that a claim would be made against you; …”

Would this type of exclusionary language bar the sort of pre-policy expressions of dissatisfaction described above? Courts use a mixed subjective-objective test in answering that question, ultimately asking what a “reasonable” insured possessed of the knowledge of those facts would believe, as opposed to what that particular insured actually believed.

It is important to put this issue into its proper perspective in the context of claims-made policies. Under a “claims made” pol-
icy, coverage is triggered by the making of the claim against the insured, and the reporting of that claim to the insurer, during the policy period. By utilizing claims-made policies, insurers are able to confine the risks that are covered to only those claims that are made and reported during a specified time, thus enabling the insurers to more accurately predict risks and price coverage. The risk that is insured is the risk of claims reported during the current policy period, and the coverage is priced based on current market conditions.

As such, the notice requirements attendant to claims-made policies are of paramount importance. As a New Jersey court commented, “an extension of the notice period in a ‘claims made’ policy constitutes an unbargained-for expansion of coverage, gratis, resulting in the insurance company’s exposure to a risk substantially broader than that expressly insured against in the policy.” (Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304 (1985)). This interest in containing risks to those made against the insured during the policy period is equally true with respect to the insured’s knowledge of a potential claim prior to the policy period where that potentiality blossoms into an actual claim during the policy period. For that reason, many claims-made policies contain language that bars coverage for such claims, under similar language noted above.

Thus, where an insured, prior to the policy, had reason to believe that something it did would result in a claim being filed against it, many claims-made policies operate to preclude coverage for that claim when it is actually made against the insured, even during the policy period. The difficult question to ask, and the issue explored in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?” Certainly, most insureds, in this article, is exactly what constitutes “reasonable belief?”

In other words, under the subjective component of the test, the court will first ask whether or not the insured was actually aware of the facts or circumstances. A court will not presume that the insured must have known of the facts, or assume that because of the surrounding circumstances, the insured is deemed to have been aware. There must be actual, subjective awareness. In the hypothetical situation noted at the beginning of this Article, an actual communication between the insured and its client in which the insured expressed dissatisfaction with the services rendered would likely satisfy this subjective element. On the other hand, an insured that has no actual knowledge that it performed its services deficiently might be justified in believing that a claim’s complaints are just “mere mutterings” (General Ins. Co. v. Rhodeis, 196 F.R.D. 620 (D.N.Mex. 2000)).

Once it is established that the insured was subjectively aware of the facts giving rise to a potential claim, the test then becomes an objective one, asking whether a reasonable attorney possessed of those facts would reasonably expect those facts to result in a claim or suit (see, e.g., Colliers Lanard & Axelband v. Lloyds of London, 458 F.3d 231 (3d Cir. N.J. 2006); Selko v. Home Ins. Co., 139 F.3d 146 (3d Cir. Pa. 1998); Am. Special Risk Mgmt. Corp. v. Cahow, 286 Kan. 1134 (Kan. 2008); Maynard v. Westport Ins. Corp., 208 F. Supp. 2d 568, 576 (D. Md. 2002); Nat’l Union Ins. Co. v. Holmes & Graven, 23 F. Supp. 2d 1057, 1066 n.7 (D. Minn. 1998); Home Indem. Co. Manchester, N.H. v. Toombs, 910 F. Supp. 1569, 1574 (N.D. Ga. 1995); Smith v. Neumann, 289 Ill. App. 3d 1056, 682 N.E.2d 1245, 225 Ill. Dec. 168 (1997); Wittner, Poger, Etc. v. Bar Plan Mut., 969 S.W.2d 749, 754 (Mo. 1998) (entry of default against client together with client’s letter of complaint “was sufficient to establish a ‘basis to believe that the insured committed such act or omission’” regardless of the subjective belief of the lawyers involved).

Under this test, courts will essentially ignore the insured’s plea that although it was aware of the client’s dissatisfaction and unhappiness, it never “in its wildest dreams” believed that the client would actually file a claim or suit. The insured’s own belief that the claim lacks merit also makes no difference. Once there is a reasonable belief that there could be a claim, the insured cannot unilaterally conclude that a claim will not be brought simply because the insured believes it lacks merit or that the client will not pursue a claim. This approach is consistent with the purpose behind claims-made policies - a subjective standard by itself can “defeat the ability of an insurance company to assess risk prior to issuing insurance” because the insured would be permitted to determine “unilaterally whether the risk is material and accordingly, whether it should be reported.” (Mt. Airy Ins. Co. v. Thomas, 954 F. Supp. 1073, 1079 (W.D. Pa. 1997).

This quote from the Colliers case perhaps sums it up best:

“It is reasonable for the insurer to refuse coverage for claims based on preexisting but undisclosed misconduct by an insured attorney. Nor is it unreasonable to tie such an exclusion to an even-handed ‘reasonable attorney’ assessment, rather than to speculation concerning the individual attorney’s subjective understanding. The latter approach, by rewarding the attorney who is ignorant of the law, or by encouraging disingenuous, after-the-fact justifications, could result in totally capricious and unpredictable outcomes. Under the mixed standard...coverage does not turn on psychoanalysis, yet the attorney is not made accountable for matters he did not know about, nor for known matters that would not cause a reasonable attorney to forego a claim.”

Naturally, this is a factually-specific issue rendering it difficult to apply a “cookie cutter” answer. What is clear, however, is that courts do not permit the insured to perform its own risk analysis in lieu of the insurer.
Directional drilling and hydraulic fracturing, or fracking; the unconventional oil and gas extraction from deep and expansive shale formations, have brought with them the opportunity to positively and significantly impact local, state, and even the federal economy. Also impacted by this modern-day oil and gas rush are the lives of the oil and gas workers, as well as the surrounding public.

From the Barnett Shale fields in Texas, to the Marcellus Shale natural-gas fields in New York, Ohio, Pennsylvania, and West Virginia comes the thriving industry of oil and gas exploration. Expansive natural-gas and oil deposits were known to exist throughout the United States for decades. In 1970, a horizontal well in the Marcellus Shale field may have taken three months to drill – now they may take 30 days. In 2002, the Marcellus Shale field was estimated to hold more than 1.9 trillion cubic feet (tcf) of natural gas. A recent study now estimates that this field may hold 500 tcf, with 50 tcf being recoverable with current technology. If this research is correct, this may be one of the largest, most valuable producing fields in the United States.

The recent increase in nationwide exploration and production of oil and gas is followed by the spike of midstream activities involving the construction of new pipelines, refining and fractionating facilities, as well as petrochemical facilities.

Now Chesapeake Energy Corporation, ExxonMobil, Range Resources®, Halliburton, Baker Hughes, and many other like-minded corporations are becoming common to the Appalachian area. But it is not just “big oil,” many smaller, local businesses are getting in on the action. Various coalitions and government acts strive for the involvement of small, local, and diverse companies into oil and gas exploration. With these opportunities to prosper in such an industry also come a number of challenges that are presented to both the small and large companies alike. Although the industry of oil and gas exploration is becoming more experienced, each geographical area may pose new and unique challenges. These challenges may vary from the terrain, to the temperature, to the availability of local workforce and infrastructure.

A number of industrial standards and references exist that are applicable to the oil and gas extraction industry. The National Institute for Occupational Safety and Health (NIOSH) has begun an Oil and Gas Extraction Safety Program, due to the fatality rate within the industry. The Occupational Safety and Health Administration (OSHA) maintains jurisdiction over the safety and health of workers, including workers involved in upstream oil and gas operations. As such, employers must protect workers, and workers must comply with OSHA’s general industry standard (29 CFR 1910, Occupational Safety and Health Standards), OSHA’s construction standard (29 CFR 1926, Safety and Health Regulations for Construction), and The General Duty Clause of the OSH Act of 1970.

According to census data, during 2011, in excess of 450,000 employees were part of the oil and gas extraction and support industry. These, often specialized, work crews utilize unique techniques, processes, and equipment to successfully drill and service a well. From 2003 to 2010, 823 oil and gas extraction workers were killed on the job. This fatality rate is seven times greater than that of all other United States industries. Reports indicate the fatality rate to be highly variable; however, this rate correlates with the number of active drilling rigs and work-over rigs. The number of inexperienced workers, lack of training and supervision, longer work hours, rough terrain and the utilization of equipment not in-
tended for the purpose are suspected of impacting the number of workers injured in the industry.

Workplace safety and health hazards, and dangerous conditions that may contribute to these worker injury rates include, but are not limited to:

- Vehicle accidents
- Struck-by, caught-in, caught-between hazards
- Explosions and fires
- Falls
- Confined spaces
- Chemical exposures

The industry faces potential for vehicle accidents from the beginning, with four out of every 10 fatalities being related to a highway vehicular accident. Whether the hazards begin with traffic control due to seismic testing, or the transport of heavy equipment to begin site preparation for the drilling pad and associated pipelines, all of the resulting accidents are often newsworthy. Beyond exploration and site preparation, the oil and gas industry utilizes numerous over-the-road trucks to supply materials and equipment, often to remote areas. Rail and river barges are also utilized as transportation means of materials and equipment, each presenting their own unique hazards and challenges. The infrastructure of these rural areas are often not designed or constructed to support the width or weight of the traffic being introduced as a result of the boom.

Struck-by, caught-in, and caught-between hazards exist in most industrial settings; however, these hazards are quite recurrent in the oil and gas extraction industry. Three of every five fatalities for this industry result from struck-by, caught-in, and caught-between hazards. Often, the remoteness of the pad, the treacherous topography, and the transportation of large equipment present such hazards from the onset of site preparation, but are most common during the drilling activities, such as rigging-up, tripping out or in, and casing operations. Cautious, properly trained workers, following proper safety practices and procedures, significantly reduce such hazards.

Obviously the potential for fire and explosions exist throughout the industry. The presence of various gases, chemicals, and fuels, combined with numerous ignition sources, such as electrical and hot work/welding, yields an increased potential for fire and/or explosion. Fires and explosions in the proximity of a well site may prove to be catastrophic. Fires and explosions may be prevented in the beginning at the design and engineering stage, and as the well progresses, safe work practices and procedures may reduce the risk further.

The oil and gas extraction industry poses an increased potential for workers to fall from elevations. This is due to the nature of the work as well as the elevation of many of the working surfaces that the workers occupy. These falls often result in severe, or even fatal, injury. From rigging-up, maintenance and servicing, to well completion, fall hazards and associated liabilities may be reduced by maintaining a safe workplace and the application of safe work practices and procedures.

Unique confined spaces are also present in the oil and gas industry. From mud pits, to pipe trenches, and various storage tanks, the hazards associated with confined spaces are prevalent. As the confined spaces may be unique and numerous to the industry, so should the safe workplace procedures and practices be; such that properly trained employees may interact with such hazards safely.

Methane, hydrogen sulfide gas, benzene, toluene, xylene, and crystalline silica: these are just a few of the numerous chemical hazards that may be present during oil and gas extraction. Such chemical hazards may pose risks, such as illness or fatality of employees due to health issues, to the increased potential for fire and/or explosion. Environmental issues also become a concern near well and disposal sites. Contamination of groundwater and surface water, or the exposure of the public to pollutants, are all risk factors that need to be dealt with through proper planning and procedures.

The United States Environmental Protection Agency (EPA) identifies compounds related to air pollutants in the Clean Air Act in 42 U.S.C. 7412. The EPA National Primary Drinking Regulations provide primary and secondary maximum contamination levels (MCL) for drinking water, but it should be noted that the EPA does not have authority to regulate private drinking water wells. State and local health departments, along with states’ Department of Natural Resources may dictate levels of contamination of waters not otherwise regulated by the EPA.

There are also a number of organizations striving to optimize the economic impact of the recent oil and gas exploration, as well as the safety and health associated with the extraction workers and those of the public surrounding such activities. These include the National Service, Transmission, Exploration & Production Safety (STEPS) Network; the American Petroleum Institute (API); and the International Association of Drilling Contractors (IADC) to name a few.

Even more vexing to the industry than dealing with the hazards, both present and future, is dealing with the presence of numerous contractors. Skilled contractors, trades, and workers, often working side-by-side under various contracts and agreements, or lack thereof, presents the potential for one or more entities to potentially have responsibility for incidences shared or experienced by other contractors or their employees. Analyzing such occurrences and assigning responsibility requires experience, knowledge, and the application of appropriate industrial standards and regulations.

The certain hazards of the oil and gas extraction industry are well documented. These hazards, if uncontrolled, can certainly cause injury, illness, and even death. Beyond controlling these certain hazards also comes the need to anticipate, understand, and control those latent exposures to the hazards, which may cause illness, injury, or contamination for years to come.

Charles A. Guinther, Jr., CSP, CMR, of S-E-A, Ltd., obtained his Associate degree in Allied Health from Harrisburg Community College, as well as his Bachelor of Science degrees in Forensic Science and Chemistry from Eastern Kentucky University. He is an Environmental Safety and Health Consultant, with more than 30 years of investigative experience in the industrial hygiene, environmental, and occupational health and safety field. Mr. Guinther has provided expert testimony in more than 100 trials and depositions for cases involving environmental contamination (including water and well), chemical exposure, chemical storage, chemical flammability, spontaneous heating, mold investigation, indoor air quality, and laboratory analysis verification and results.

Jason E. Henthorn, CIE, of S-E-A, Ltd., earned his Bachelor of Science degree in Industrial Hygiene from Ohio University. He is responsible for managing projects involving environmental and occupational factors or stresses which may cause sickness, impaired health and well-being, or significant discomfort among workers or among the citizens of the community. Mr. Henthorn has managed multi-employer worksites within company facilities and has provided expert deposition and trial testimony regarding analysis of workplace accidents and injuries, including exposures to chemical agents and physical hazards.
The U.S. Chamber of Commerce estimates that occupational fraud costs U.S. businesses more than $50 billion annually and that one-third of business failures are directly related to employee theft. The Chamber also estimates that 75% of all employees have stolen from their employers at least once and half of these employees have stolen repeatedly.

Statistics from a study conducted by the Association of Certified Fraud Examiners show that no company is immune to occupational fraud and that the cost of fraud is significant. Companies that do not have good internal controls in place are losses waiting to happen, while companies that already have controls in place need to assess them periodically to assure they continue to minimize the risk of fraud.

Occupational Fraud generally falls into the following three categories:

- **Asset misappropriation schemes** are the most common form of fraud, accounting for 87% of fraud cases; however they also have the lowest loss amounts.

- **Corruption schemes** occur when an employee misuses his or her influence in a business transaction in a way that violates his or her duty to the employer.

- **Financial statement fraud schemes** take place when an employee intentionally causes a misstatement or omission of material information in the organization’s financial reports.

The following cases are actual examples of occupational fraud. The companies range in size from twenty to more than 500 employees. In each case, their management never thought they would be a victim of fraud, and therefore, never saw a need to review or assess internal controls. They all thought fraud was something that happened to “other companies.”

**DURATION OF FRAUD: 18 MONTHS COST TO COMPANY: $300,000**

A manager at a tire company distributed paychecks to his employees on a weekly basis. The manager received the paychecks each week from the payroll service company and then passed them out to employees. After another employee noticed that the manager locked his door for a few minutes every time the payroll checks were received, she became suspicious and reported this to her manager. The company ultimately discovered that several former employees were still receiving paychecks, some of whom had left the company years ago. To facilitate the fraud, the perpetrator used his access to edit payroll records and passwords to falsify hours and thus, paychecks, for previous employees. He then took the paychecks to check cashing companies to redeem them.

**Key fraud contributors:**
- A lack of proper internal controls
- Not observing proper separation of duties
- Not regularly monitoring payroll records for ghost employees
- Not requiring that employees regularly change system passwords
- Allowing the manager who passed out checks to accept them from the payroll service company
- No fraud hotline for employees to report suspicious behavior

**DURATION OF FRAUD: 4 YEARS COST TO COMPANY: $215,000**

A 10-year accounting clerk working for a supplier to the automotive industry was in charge of preparing checks for vendor payments. A 10-year accounting clerk working for a supplier to the automotive industry was in charge of preparing checks for vendor payments. After several years on the job and added responsibilities, which included the ability to make entries in the company’s general ledger, she began to issue checks to herself and forge the authorized signatures. To conceal the fraud, she recorded the fraudulent checks as Use Tax in the ledger and noted the payee as “Confidential Vendor.”

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Key fraud contributors:
- No procedures in place to review cancelled checks and verify that the vendor listed in the accounting system matched the vendor on the check.
- No review to ensure proper support for all disbursements.
- No sequential review of checks to assure that all checks were accounted for was conducted by a manager prior to the checks being issued.

DURATION OF FRAUD: 1 YEAR
COST TO COMPANY: $115,000

A newly promoted controller at a printing company was in charge of overseeing all accounting functions and reported directly to the CEO. As part of his responsibilities, the controller was made a signatory for company issued checks. To commit the fraud, the controller established a bank account for a fictitious company and then began issuing company checks to the fictitious vendor. Although one of the company’s controls was to require two signatories on all checks, the second signatory was a subordinate of the controller, and the subordinate employee was directed to sign the checks even though they lacked proper documentation. Additionally, rather than setting up a separate vendor account for the fictitious vendor, the controller made the payments under various existing vendor accounts. The fraud was ultimately discovered when one of the customers received a statement showing several payments made by the printing company to the fictitious company under this customer account.

Key fraud contributors:
- Too much responsibility given to the controller.
- The second signatory was a subordinate of the controller.
- Lack of formal communication channels to report potential fraud.
- No secondary review by another employee to assure all payments were properly documented.

As you can see, fraud is not limited to a specific industry, company or employee. It is far reaching and impacts all types of organizations, regardless of whether they are large or small, public or private, for profit or not-for-profit. Furthermore, due to limited resources, statistics show that smaller companies may be at a higher risk for fraud. Below are some steps that any organization can implement to help them keep their resources safe.

1 The Association of Certified Fraud Examiners’ “2012 Report to the Nations on Occupational Fraud and Abuse”

CREATE A SEPARATION OF DUTIES
While a smaller firm may have a more difficult time with these procedures, owner involvement in the process is a good alternative. A larger firm should be able to easily implement internal control procedures. A good place to begin is organizing the firm’s accounting acumen has been utilized by businesses ranging from sole proprietorships to Fortune 500 entities. He has served as both a fact and expert witness in several litigation cases.

STOP EXPENSE ACCOUNT ABUSE
To ensure employees don’t take advantage of their expense accounts, operate with a corporate American Express card; all corporate charges are billed to a master account that is paid directly by the firm. Each month, all expenses should be reconciled. If an expense is not reported on an expense account, the employee should be questioned and the expense accounted for.

On a quarterly basis, review the expenses by scanning the entries and look for any out-of-the-ordinary charges or vendors and investigate. These extra steps should be taken so that certain employees will think twice before acting.

CONSIDER USING OUTSIDE RESOURCES
A firm can engage an outside professional accountant to interview the employees who handle the above tasks, review the internal controls you have in place and recommend changes to the controls based on your individual business, staff levels, operations and degree of owner involvement. They will be able to provide an outsider’s view and comments on your procedures in place, as well as judge the employee’s responses to questions regarding their duties. Also, a firm can have a partner or owner do a high-level review of the monthly financial statements, checking for anything out of the ordinary.

Remember: a few simple procedures and some extra time can go a long way in ensuring a firm does not become a victim of fraud.

Brian Mohlenhoff is a CPA and Partner in MDD’s Parsippany, N.J., office. He also holds the Certified in Financial Forensics designation. His forensic accounting acumen has been utilized by businesses ranging from sole proprietorships to Fortune 500 entities. He has served as both a fact and expert witness in several litigation cases.

George Uhl is a CPA and Partner in MDD’s Dallas, Texas, office. He also holds the Certified Fraud Examiner and Certified in Financial Forensics designations. He has provided his expertise on a number of litigation cases and has served as both a fact and expert witness. He has testified in support of his findings and also on opposing expert findings.
The legal market is moving faster than ever towards a “New Normal,” driving drastic changes in the way relationships are managed between in-house counsel and their most trusted law firms. Relationships and expertise still serve as the primary factors for why law firms are selected, however General Counsel are finding themselves under increasing scrutiny and pressure to be more systematic and balanced in how they evaluate and select outside counsel. Likewise, law firms are facing greater pressure to demonstrate increased client satisfaction and alignment, which includes not only helping their clients win big cases, but doing so in a predictable and cost-effective manner. In other words, being the best attorney is no longer enough to get firms hired – or keep them hired.

These trends are fundamentally changing how the legal ecosystem has traditionally functioned. Why? First, they are driving firms to compete for work in areas where they historically enjoyed comfort. This not only impacts firms, but also the GC, who is now compelled to explore new possibilities outside the long-standing relationships they already know.

Second, these trends have created an urgent need to develop more proactive, transparent and mutually beneficial relationship management practices – an area both law departments and law firms have typically shied away from for years. This was apparent to me recently when I presented at a recent ILDE (Institute for Law Department Excellence) summit. I asked a group of twenty-four Law Department Operations Directors and General Counsel whether they “trusted” their outside counsel. Twenty three out of twenty four claimed they did not, for various reasons. In itself, this was very surprising. I then asked the same group whether they had figured out how to communicate that discomfort to their law firms in an open and meaningful way, and less than half raised their hands. In other words, attorneys and their clients can openly argue and debate for days about a legal issue, but they become as shy as school children when it comes to having candid conversations about their business relationship and mutual trust.

What does this mean for your law department and/or law firm? Unless we improve how both sides communicate and maintain their relationships, then General Counsel will find it more difficult than ever to justify high-priced counsel in certain areas of legal work – even where well justified – and law firms will find it more difficult than ever to deliver high-value legal services at current price points – even where well justified.

In an effort to nurture healthier, more symbiotic relationships between law departments and law firms, here are five practical strategies that both should consider:

1. Ensure there’s an explicit understanding of what the client values – and, clients: be prepared to articulate what you value. Too often, we hear stories of AFAs (and hence relationships) gone sour because the AFA wasn’t designed or delivered to support what the client truly valued. Why? Because nobody asked. That can be avoided if firms create a simple framework or playbook, configured by matter type, that enables managing attorneys and client relationship managers to ask the right questions and get the right information at the onset of a matter. Communicate that framework with your clients so that there is a consistent understanding of how value is assessed and defined for each matter. Separately, make sure that you have a standard set of “tools” that can help satisfy each of the value criteria demanded from your client.

For example, if a client conveys to your firm that predictability of costs and frequent budget to actuals tracking is a significant driver for success on a matter, then what strategies can your firm deploy from its toolbox to satisfy this? In this case, a fixed fee arrangement coupled with the deployment of legal project management may be the right fit to satisfy their needs and achieve success.

2. Status updates will keep you on the same wavelength. If outside counsel were to ask their in-house counsel counterparts to name their top three pet peeves of dealing with outside law firms, many would include “being surprised” as one of their top three. And one of the biggest root causes of that peeve is the absence of frequent and consistent status updates.

Status updates don’t have to be heavy lifting exercises that take long to develop. On the contrary, they should be quick and succinct, helping clients to easily understand key matter achievements, risks, opportunities and decision items. Clients who are proactively kept abreast of the matter variables and risks are far more receptive to difficult conversations about outcomes than those who are left in the dark. Avoiding surprises keeps both sides happier.
When negotiating matter-based fee arrangements, since it is almost impossible to compare “apples to apples” pricing with matters, both sides should agree on what data should be used – and how – to derive pricing.

5. Be transparent in how success is measured. Scorecards and analytics are a great way for law departments to measure and manage the performance of their outside counsel, but also for law firms to ensure successful delivery throughout the lifecycle of the matter. Developing a balanced scorecard – one that contains both qualitative and quantitative success measures and is accessible by both sides – will help keep all parties focused on the same set of expectations. The measures included within a scorecard can change matter by matter and should be practical enough that both sides can adequately measure success. One example of a balanced scorecard, which contains both qualitative and quantitative matter and performance evaluation criteria is shown in the chart above.

<table>
<thead>
<tr>
<th>Qualitative Scorecard</th>
<th>Definition of Success</th>
<th>Quantitative Scorecard</th>
<th>Definition of Success</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject Matter Expertise</td>
<td>Specializes in areas of need and delivers resources aligned to expertise requirements</td>
<td>Staffing Models</td>
<td>Delivers aggregate staffing with the following characteristics:</td>
</tr>
<tr>
<td>Business Alignment</td>
<td>Possesses knowledge of our business and understands and delivers towards our business goals</td>
<td>▪ Maximum of 30% partner leverage</td>
<td></td>
</tr>
<tr>
<td>Responsiveness/ Accessibility</td>
<td>Is responsive to email/phone calls and strives to make themselves available when needed</td>
<td>▪ At least 15% of time dedicated to paralegals</td>
<td></td>
</tr>
<tr>
<td>Project Management</td>
<td>Leverages project management principals to plan, manage and deliver matter tasks</td>
<td>▪ Less than 5% “other” timekeeper spend</td>
<td></td>
</tr>
<tr>
<td>Budgeting Accuracy</td>
<td>Delivers at or within (5%) the anticipated budget proposed in a consistent fashion</td>
<td>Centralizes resource delivery model to, at most, 15TK/FTES (depending on the matter type)</td>
<td></td>
</tr>
<tr>
<td>Creativity</td>
<td>Thinks outside the box to try and resolve business and legal related challenges</td>
<td>Staffing Efficiency</td>
<td>Right-sources and unbundles following activities to PIs or LPOs:</td>
</tr>
<tr>
<td>Proactive Execution</td>
<td>Anticipates my needs and proactively takes charge and leadership of situations</td>
<td>▪ Use of Alternative Fees where appropriate</td>
<td></td>
</tr>
<tr>
<td>Aggressiveness to Resolve</td>
<td>Resolves issues and disputes in a timely and aggressive manner</td>
<td>▪ Rates are in-line (within 5%) of portfolio and/or market rates</td>
<td></td>
</tr>
<tr>
<td>Communication</td>
<td>Provides clear, concise and easily understandable advice and guidance</td>
<td>▪ Paralegals billed at ≤ $100/hr</td>
<td></td>
</tr>
<tr>
<td>Partnership/ Trustworthiness</td>
<td>Demonstrates strong partnership mentality and acts in ways that gains trust of our staff</td>
<td>Fees/Costs</td>
<td>▪ Sky Billing Precision Score ≥4</td>
</tr>
<tr>
<td>Quality and Presentation</td>
<td>Delivers crisp, quality-focused and compelling work products and presentations</td>
<td>▪ Invoice lag time &lt;45 days</td>
<td></td>
</tr>
<tr>
<td>Results/Outcomes</td>
<td>Delivers outcomes on matters that meet and/or exceed our expectations</td>
<td>Compliance</td>
<td>▪ Compliant to billing guidelines</td>
</tr>
</tbody>
</table>

© Elevate Services, Inc.
There are many discussions underway by employers and their advisors about cutting their workforce mix to minimize costs under the Affordable Care Act (“ACA”). One of the most controversial provisions of the ACA is Section 1513, informally known as the “Play or Pay” mandate. This provision applies to “large” employers, defined as employers of 50 or more full-time employees. Under the ACA, “full-time” employees are those employees that work 30 or more hours per week or 130 hours per month.

The “Play or Pay” mandate requires that employers of 50 or more full-time employees offer affordable, employer-sponsored health coverage to their full-time employees and their children, or else pay penalties to the IRS. The Obama Administration’s July 2, 2013 announcement that the implementation of the “Play or Pay” mandate will be delayed until January, 2015, has given employers additional time to develop strategies to minimize costs under the ACA.

One approach that employers are considering is to minimize the number of employees working 30 or more hours a week so as not to fall under the ACA’s definition of a “large employer” – and thus avoid the “Play or Pay” mandate. Employers, however, should proceed with caution in taking this approach because it may create unexpected legal exposure under ERISA.

ERISA governs almost all types of employer-sponsored health plans, and more than 177 million Americans are currently enrolled in employer-sponsored health plans having ERISA protections. One such protection is Section 510: Interference with Protected Rights. This Section protects participants and beneficiaries of employment benefit plans from losing their protected rights created by employment relationships.

Specifically, Section 510 states: “It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan … or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan…” In short, employers may not use adverse employment action to interfere “with the attainment of any right to which such participant may become entitled under the Plan.”

With the implementation of the ACA, the battle lines for future claims under ERISA Section 510 are already being etched out. Employees are likely to challenge workforce realignments, including, but not limited to, a change in status to part-time employment or any other act that results in employees working less hours, claiming the employer’s decisions were either in retaliation for employees exercising rights under the plan or intended to interfere with employees’ attainment of rights under the plan. Employers, on the other hand, are likely to respond that such decisions were based on legitimate business needs, including managing costs, and were neither retaliatory nor for the purpose of interfering with the employees’ attainment of rights under any applicable benefit plan. While it is unclear who has the prevailing argument, it is virtually certain that ERISA Section 510 claims will be on the rise with the implementation of the ACA and employers’ resulting decisions to reduce employee hours to minimize cost under the ACA. The bottom line is that employers may face legal exposure using the cut-in-hours approach to escape being under the “Play or Pay” mandate.

Employers should also be aware that the ACA has a whistleblower provision, that states that no employer shall discharge or discriminate against “any employee with respect to his or her compensation, terms, conditions, or other privileges of employment” because the employee has received a credit or subsidy provided by the ACA. In other words, an employer may not reduce an employee’s hours or pay because the employee received a subsidy to purchase insurance through a public health insurance exchange. Thus, an employee who has received a subsidy under the ACA, and whose work hours were subsequently reduced by their employer, can assert that the reduction constitutes “adverse action” by the employer because of the past subsidy received, whereas the employer can assert that the purpose of the reduction is prospective – to avoid future costs under the ACA. It is, of course, impossible to know how courts will resolve such a dispute, but it is important to know that, unlike ERISA 510 complaints, the ACA whistleblower process places the burden of proof on the employer.

In sum, employers seeking to avoid the ACA’s “Play or Pay” mandate through cutting employee hours may risk being sued under the ACA’s whistleblower provision and ERISA Section 510. Given the risks involved, employers should consult with legal counsel before taking any action intended to avoid the ACA’s coverage.

Bob Hinton is a partner in the Hartford, CT, office of Hinckley, Allen & Snyder LLP. His practice is focused on commercial litigation, including ERISA litigation. Bob is admitted in both Connecticut and New York, and he may be reached at rhinton@hinckleyallen.com.
Plaintiff alleged that the defendant’s service technician, who had been in the crawl space to inspect a fuel storage tank, turned off the lights and closed the closet door, but left the trap door open. Shortly after the technician left, the plaintiff claims she went into the closet to retrieve a steam cleaner to clean snow the technician tracked in. The technician testified that as he was emerging from the hatchway, he offered to turn off the lights and close the trap door, however plaintiff said she would take care of this. He testified that when he left the house, the lights were on and the trap door and closet door were open.

A human-factors engineer testified that the accident could not have happened as the plaintiff claimed. Due to the size of the hatchway opening, the plaintiff’s momentum would have caused her to come into contact with the far edge of the opening. Plaintiff insisted that she fell straight down the hatchway opening, the plaintiff’s momentum would have caused her to come into contact with the far edge of the opening. Plaintiff insisted that she fell straight down. The jury ultimately did not accept the plaintiff’s testimony and found that the defendant did not create an unsafe condition in the plaintiff’s home.

Ahmuty, Demers & McManus (Albertson, NY)

Henri A. Demers of Ahmuty, Demers & McManus obtained a defense verdict for his clients, Larissa Oil Inc., in a recent trial in Suffolk County. The plaintiff sustained bilateral calcaneus fractures when she stepped into an open hatchway inside a closet in her own home and fell to the concrete floor about five feet below.

Plaintiff alleged that the defendant’s service technician, who had been in the crawl space to inspect a fuel storage tank, turned off the lights and closed the closet door, but left the trap door open. Shortly after the technician left, the plaintiff claims she went into the closet to retrieve a steam cleaner to clean snow the technician tracked in. The technician testified that as he was emerging from the hatchway, he offered to turn off the lights and close the trap door, however plaintiff said she would take care of this. He testified that when he left the house, the lights were on and the trap door and closet door were open.

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Ebeltoft . Sickler . Lawyers PLLC (Dickinson, ND)

After an excavator operated by Frontier Services, Inc. (Frontier) collided with an underground high-pressure natural gas line, an explosion, fire and significant property damage resulted. Ebeltoft . Sickler . Lawyers represented Frontier, an underground pipeline installation company active in the North Dakota Bakken oil play. Williston Basin Interstate Pipeline Company (WBI), the owner-operator of the line that exploded, sued Frontier for recovery of property damage and lost saleable gas. Paul Ebeltoft and Courtney Olson of Ebeltoft . Sickler . Lawyers convinced a jury to allocate the largest portion of fault for the event to Plaintiff WBI, enabling Frontier’s insurers to obtain judgment to recover a majority of their payments for Frontier’s excavation equipment lost in the blaze.

Ebeltoft and Olson successfully attacked the credibility of the WBI line locator who claimed that, though he was unable to locate Frontier’s path of excavation, he none-the-less was able to plant flags warning of WBI’s intersecting underground facilities. The flags, together with Frontier’s admitted knowledge of buried facilities in the general area, were sufficient to alert Frontier to danger, WBI claimed. Frontier established that its installation practices assured that Frontier’s employees would not have missed WBI’s flags, had WBI placed them as claimed. A challenge that Frontier needed to overcome was the impact of statements made by its distraught company president on the day of the explosion when, to help the WBI line locator keep his job, he shouldered part of the blame, even though he didn’t feel Frontier actually had been at fault. The jury returned its favorable verdict after one and one-half hours of deliberation.

Jones, Skelton & Hochuli (Phoenix, AZ)

Donald Myles and Josh Snell, with Jones, Skelton & Hochuli in Arizona, received summary judgment in Maricopa County for Farmers in a breach of contract, bad faith claim arising from an underlying $5,000,000 stipulated judgment claim involving a third party injured by a Yamaha Rhino owned by a Farmers’ insured. In the underlying matter the third party sued Farmers’ insured for negligent entrustment and failure to warn of the Rhino’s alleged dangerous propensities. Farmers’ insured tendered the claim to Farmers under both his homeowners and umbrella policies. Farmers denied the claim based upon the applicable policies exclusions and the insured entered into a stipulated judgment for $5,000,000 and covenant not to execute.

In the subsequent breach of contract, bad faith claim Farmers filed a motion for summary judgment that the claims arose from a motor vehicle/recreational vehicle and the maintenance, use or entrustment of the Rhino was excluded under both the homeowners and umbrella policies. Plaintiff cross moved for summary judgment that the claims arose from a motor vehicle/recreational vehicle and the maintenance, use or entrustment of the Rhino was excluded under both the homeowners and umbrella policies. The court granted Farmers’ motion and denied Plaintiff’s cross-motion because the claims asserted fell within the applicable exclusions.
Lashly & Baer, P.C. (St. Louis, MO)
Kevin L. Fritz and Patrick E. Foppe of Lashly & Baer, P.C. recently secured a judgment on the pleadings in favor of their client who was sued for allegedly stacking furniture at a warehouse that fell and caused plaintiff’s injury. Judge Messina of the Circuit Court of Kansas City, Missouri, dismissed plaintiff’s petition for failing to state a claim upon which relief could be granted. The case was styled: Hudson v. Wheeler, et al., Cause No. 1216-CV22106 (Circuit Court of Kansas City, Mo).

Martin Tate Morrow and Marston, P.C. (Memphis, TN)
On Friday, June 28, 2013, at 11:30 p.m., after five (5) days of trial, a jury in the Circuit Court of Shelby County (Memphis), Tennessee, rendered a defense verdict (take nothing judgment) in favor of a national bus company, see Biowarcy and Lew Wardlaw of the Martin Tate Firm in Memphis tried the case to verdict. The case went to the jury on both compensatory and punitive damages. The causes of action alleged against the bus company and the security guard were False Arrest; False Imprisonment; Assault and Battery; False Light and Section 1983 Violations of Constitutional Rights. The relevant facts involve a 68 year old woman, who weighed less than 100 pounds who was handcuffed by a 280 pound private security guard in the terminal. The woman was asking for her luggage which did not arrive with her on her bus. She was in Memphis to attend a relative’s funeral and for a family reunion. There were allegations that employees of the bus company assisted the security guard when he arrested the lady for disturbing the peace and disorderly conduct. The bus company employee allegedly assisted in handcuffing the woman and detaining her until Memphis Police Officers arrived. The Defendant security guard was found guilty of assault and battery and minimal compensatory damages only were awarded. No damages were awarded against the bus company.

Murchison & Cumming, LLP (Los Angeles, CA)
The Fourth District Court of Appeal affirmed in full the Orange County Superior Court’s granting of Essentia Insurance Company’s Motion for Summary Judgment. Carolyn A. Mathews handled the Motion for Summary Judgment and the opposition to the appeal, and Maria A. Sarni handled the oral argument.

Essentia Insurance Company (OneBeacon) issued a classic boat insurance policy on Ashoff’s 1958 classic Chris Craft Continental 18-foot wood boat, the “Amore that insured Ashoff against “accidental direct physical loss or damage except as specifically excluded.” The policy excluded from coverage loss or damage caused by or resulting from neglect, wear and tear, defect, deterioration, weathering and inherent vice.

On November 17, 2010, Ashoff reported to Essentia’s agent, Hagerty Class Marine Insurance Agency, that the Amore sank where it was berthed. Ashoff said he had last used the boat on November 14, 2010, there were no recent repairs or issues with the boat and he did not hit any submerged object. A marine inspector hired by Hagerty concluded that the vessel sank due to wear, tear and fatigue of the hull planking and seal joints in the transom area, and Hagerty denied coverage on that basis.

Ashoff filed suit against Essentia for breach of contract and bad faith. Ashoff alleged that he did not impact anything and nothing impacted him. Ashoff’s February 14, 2012 opposition to Essentia’s Motion for Summary Judgment was accompanied by his declaration in which he stated that a large ship went by the Amore causing a large wake that hit the Amore hard. Ashoff engaged a marine surveyor, who opined that the Amore did not sink due to wear, tear and fatigue of the hull.

The Court of Appeal found that Ashoff’s whole story changed when he opposed Essentia’s Motion for Summary Judgment and the trial court was free to disregard it.

Simmons Perrine Moyer Bergman PLC (Cedar Rapids, IA)
Simmons Perrine Moyer Bergman client, CRST Van Expedited, Inc., was awarded $4.7M in fees against the U.S. Equal Employment Opportunity Commission (EEOC). This result is one of the largest fees awarded against the EEOC and represents unprecedented relief for CRST. In 2007, the EEOC brought a class-type lawsuit attacking CRST’s “pattern or practice” of alleged sexual harassment. The original lawsuit had 270 women seeking damages, but following the Third Circuit’s prediction and inherent vice doctrine, the Court ruled prior to trial that those provisions, and not Restatement (Third) of Torts: Product Liability, the Court ruled prior to trial that those provisions, and not Restatement (Second) §402A, applied to plaintiff’s strict liability claims. The court found no negligence and also that the ladder was not defective.

In Patel v. Primary Construction, LLC, et al., Plaintiffs alleged that improvements made to property being developed by Traub Lieberman Strauss & Shrewsbury LLP (TLS&S) clients resulted in storm water drainage onto Plaintiffs’ property causing damage.

Strong & Hanni (Salt Lake City, UT)
Strong & Hanni associate Spencer Brown obtained summary judgment on behalf of a concrete and excavating subcontractor in a multimillion dollar construction defect lawsuit concerning a townhome development in Utah County. The Fourth Judicial District Court granted the motion for summary judgment, and dismissed all claims against the subcontractor. The court found that all claims were barred by Utah’s Builders’ Statute of Repose or by the economic loss doctrine. In reaching its ruling, the court determined that the “discovery rule,” which extends the statute of limitations in which to bring a lawsuit in certain situations, does not apply to the Builders’ Statute of Repose. This issue is hotly contested in several construction defect lawsuits throughout the state.

Sweeney & Sheehan (Philadelphia, PA)
After six days of trial, Sweeney & Sheehan partner and USLAW Board member Michael Kunsch obtained a defense verdict in favor of Louisville Ladder and W.W. Grainger in a product liability case in the U.S. District Court for the Middle District of Pennsylvania. The jury deliberated for less than one hour in reaching its unanimous verdict, with Chief Judge Yvette Kane presiding.

Plaintiff alleged that he suffered orthopedic injuries and a traumatic brain injury as the result of falling from a 6’ aluminum stepladder at work. Engineers retained on his behalf opined that the ladder was defectively designed and collapsed while plaintiff was standing on the fourth step of the ladder. They offered alternate designs of the bottom step and the gussets. The defendants established that the ladder was safe for its intended uses, complied with applicable design standards and OSHA regulations, and could not have failed in the manner alleged by plaintiff. Further, the defendants established that damage to the ladder seen post-accident was caused by, and not the cause of, the accident. Plaintiff proceeded to trial under strict liability and negligence.

Following the Third Circuit’s prediction that the Pennsylvania Supreme Court will adopt the provisions of §§312 and 2 of the Restatement (Third) of Torts: Product Liability, the Court ruled prior to trial that those provisions, and not Restatement (Second) §402A, applied to plaintiff’s strict liability claims. The jury found no negligence and also that the ladder was not defective.

Traub Lieberman Strauss & Shrewsbury LLP (Hawthorne, NY)
In Patel v. Primary Construction, LLC, et al., Plaintiffs alleged that improvements made to property being developed by Traub Lieberman Strauss & Shrewsbury LLP (TLS&S) clients resulted in storm water drainage onto Plaintiffs’ property causing damage.
Plaintiffs commenced this action by Order to Show Cause seeking a preliminary injunction and compensatory damages. The Order to Show Cause sought an Order: (1) enjoining TLS&S’ clients from causing alleged waste and damaging storm water runoff upon Plaintiffs’ property; (2) requiring TLS&S’ clients to implement alternative drainage systems on their property; and (3) monetary damages.

Mr. Castellitto and Mr. Kuebler moved for dismissal arguing that Plaintiffs failed to establish danger of irreparable injury in the absence of an injunction and that the injunctive redesign of the drainage system would be inequitable. Mr. Castellitto and Mr. Kuebler further argued that Plaintiffs’ claim for monetary damages was inconsistent with Plaintiffs’ demand for a preliminary injunction. Following oral argument, Plaintiffs’ withdrew their Order to Show Cause.

In turn, Plaintiffs’ filed a summons and complaint against TLS&S’ clients again seeking injunctive relief, along with monetary damages premised upon causes of action sounding in trespass and nuisance. Mr. Castellitto and Mr. Kuebler sought dismissal via a pre-answer motion asserting that the complaint failed to state a cause of action. Mr. Castellitto and Mr. Kuebler argued that their clients were not causing actionable water runoff onto Plaintiffs’ property, submitting evidence that their clients’ drainage system had been properly designed and inspected by two independent engineers and was permissibly discharging water onto Plaintiffs’ property pursuant to a drainage easement. Mr. Castellitto and Mr. Kuebler further argued that the unsigned and uncorroborated expert affidavit submitted by Plaintiffs’ lacked any evidentiary value. The Court found that the parties had charted a summary judgment course, and granted TLS&S summary judgment. Mr. Castellitto successfully opposed Plaintiffs’ motion to reargue.

**Successful Recent USLAW Law Firm Verdicts**

**Wicker Smith O’Hara McCoy & Ford P.A. (Coral Gables, FL)**

Wicker Smith O’Hara McCoy & Ford P.A. client, Dantzler, is a Miami supplier of lumber and building materials with established distribution channels and a wide customer base in the United States, the Caribbean, Central and South America. Dantzler historically funded its operations through the use of an Asset Based Revolving Line of Credit and was solicited by PNC’s Business Credit division, and ultimately agreed to enter into a new credit facility with PNC. Dantzler later sued PNC alleging Fraud in the Inducement, Negligent Misrepresentation, or in the alternative Mutual Mistake, in connection with a problematic loan closing that cost Dantzler several hundred thousand dollars to close. Dantzler further alleged it experienced lost profits given the lack of sufficient capital to operate its business under the PNC credit facility. Dantzler paid off the loan and closed with a new lender, at additional expense, five and a half (5 1/2) months after the closing. Dantzler filed suit which was vigorously defended by PNC in Federal Court. After 1 7 years of litigation, the Court denied PNC’s Motion for Summary Judgment on all counts. Shortly thereafter PNC agreed to a settlement of $1.25 million payable to Dantzler, Inc.

**Successful Recent USLAW Law Firm Transactions**

**Clark Wilson LLP (Vancouver, B.C., Canada)**

Clark Wilson client Pure Industrial Real Estate Trust (PIRET) (TSX: AAR.UN) completed the purchase on June 17, 2103, of four industrial properties in Calgary, Alberta, comprised of two single-tenant and two multi-tenant properties having a total of over 720,000 square feet of leasable premises, for a total purchase price of $72 million. James Speakman and Shauna Towriss worked on the deal with assistance from paralegal Wendy Ng. PIRET’s year-to-date 2013 acquisitions total 75 properties having a total of 5.8 million square feet of leasable premises and a total purchase price of $577.3 million. Clark Wilson is lead securities, real estate and corporate counsel to PIRET. PIRET is the largest internally managed publicly traded REIT in Canada that offers investors exclusive exposure to Canada’s industrial asset class.
Carr Allison (Birmingham, AL)
Carr Allison shareholder Jeremy P. Taylor has been elected to a preeminent position within the American Bar Association. Taylor will serve as Chair of the Commercial Trucking Litigation Committee of the ABA’s Tort Trial and Insurance Practice Section (TIPS). He will serve during the 2013-2014 fiscal year. Taylor practices in the firm’s Mobile, AL, office.

Clyde & Co (Florham Park, NJ)
Jeff O’Hara, a USLAW NETWORK Board member and a partner with Clyde & Co, is an unprecedented four-time recipient of the Bullseye Barrister for work performed in defense of Target Corporation litigation. He was awarded this distinction for his outstanding work on the Rebecca Walczak v. Target trial.

Gallagher, Callahan & Gartrell, PC (Concord, NH)
R. Matthew Cairns, litigation attorney with Gallagher, Callahan and Gartrell, has been appointed as one of four vice chairs of the Federation of Defense and Corporate Counsel’s Products Liability Section.

Jones, Skelton & Hochuli, P.L.C. (Phoenix, AZ)
Don Myles, Jr., partner in at Jones, Skelton & Hochuli in Phoenix, has been elected to Federation of Defense & Corporate Counsel Board of Directors as Senior Director.

Martin, Tate, Morrow & Marston, P.C. (Memphis, TN)
Martin Tate based in Memphis announces the opening of an office in the Middle Tennessee/Nashville area where Lee Piovarcy will be the resident partner. He will continue to maintain an office in Memphis.

Traub Lieberman Straus & Shrewsberry LLP (Hawthorne, NY)
Traub Lieberman Straus & Shrewsberry LLP (TLS&S) opened its first international liaison office in London on May 1, 2013, located at Gallery 4, 12 Leadenhall Street, London EC3V 1LP in the Lloyds of London building. Telephone: +44 (0) 020 7816 5900. The firm’s managing partners along with other partners from the firm’s five U.S. offices, will use the London liaison office to better serve their European clients with regard to U.S. insurance business. Opening an office in the Lloyd’s building strengthens the firm’s commitment to the London and international insurance markets.
2001. The Start of Something Better...

Mega-firms...big, impersonal bastions of legal tradition, encumbered by bureaucracy and often slow to react. The need for an alternative was obvious. A vision of a network of smaller, regionally based, independent firms with the capability to respond quickly, efficiently and economically to client needs from Atlantic City to Pacific Grove was born. In its infancy, it was little more than a possibility, discussed around a small table and dreamed about by a handful of visionaries. But the idea proved too good to leave on the drawing board. Instead, with the support of some of the country’s brightest legal minds, USLAW NETWORK became a reality.

Fast-forward to today. The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client’s legal success. Now as a network with over 6,000 attorneys from 110 defense-based law firms, spanning the United States, Canada, Latin America, Europe, Asia and Africa, USLAW NETWORK remains a responsive, agile legal alternative to the Mega-firms.

Homefield Advantage.

USLAW NETWORK offers what it calls The Homefield Advantage which comes from knowing and understanding the venue in a way that allows a competitive advantage – a truism in both sports and business. Jurisdictional awareness is a key ingredient to successfully operating throughout the United States and abroad. Knowing the local rules, the judge, and the “gossip” provides our firms’ clients this advantage. The strength and power of an international presence combined with the understanding of a respected local firm makes for a winning line-up.

A Legal Network Not for its Member Lawyers. Instead a Legal Network for Purchasers of Legal Services.

USLAW NETWORK firms go way beyond providing quality legal services to their clients. Unlike other legal networks, USLAW is organized around client expectations, not around the member law firms. Clients receive ongoing educational opportunities, online resources including webinars, jurisdictional updates, and resource libraries. We also provide monthly podcasts through USLAW Radio, a semi-annual USLAW Magazine, webinars, compendiums of law, as well as annual membership directories and practice group directories. To ensure our goals are the same as the clients our member firms serve, our 40-member Client Leadership Council is directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.

Just as legal issues seldom follow state borders, they often extend beyond US boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of nearly 30 independent law firms representing more than 700 lawyers through Europe. Subsequently, in 2010 we entered a similar affiliation with the ALN (formerly the Africa Legal Network) to further our service and reach. Additional, USLAW member firms are located throughout Canada, Latin America, and Asia.

How is USLAW NETWORK Membership Determined.

Firms are admitted to the Network by invitation only and only after they are fully vetted through a rigorous review process. Many firms have been reviewed over the years, but only a small percentage were eventually invited to join. The search for quality member firms is a continuous and ongoing effort. Firms admitted must possess broad commercial legal capabilities and have substantial litigation and trial experience. In addition, USLAW NETWORK members must subscribe to a high level of service standards and are continuously evaluated to ensure these standards of quality and expertise are met.

USLAW in Review.

- All vetted firms with demonstrated, robust practices and specialties
- Efficient use of legal budgets, providing maximum return on legal services investments
- Seamless, cross-jurisdictional service
- Responsive and flexible
- Multitude of educational opportunities and online resources
- Team approach to legal services

The USLAW Success Story.

The reality of our success is simple: we succeed because our firms’ clients succeed. Our member firms provide high-quality legal results through the efficient use of legal budgets. We provide cross-jurisdictional services eliminating the time and expense of securing adequate representation in different regions. We provide trusted and experienced specialists quickly.

When a difficult legal matter emerges – whether it’s in a single jurisdiction, nationwide or internationally – USLAW is there. Success.

For more information, please contact Roger M. Yaffe, USLAW CEO, at (800) 231-9110 or roger@uslaw.org
USLAW NETWORK: YOUR HOMEFIELD ADVANTAGE
USLAW NETWORK offers our members’ clients countless products free of charge to assist with day-to-day operations and management of legal issues. Many of these products are the direct result of concepts and initiatives developed by our Client Community for the Client Community.

The following listings detail each product which runs the gamut from USLAW Solutions to USLAW Resources and finally to USLAW People. We encourage you to review these and take advantage of those that are applicable to you.

USLAW is continually seeking ways to ensure that your legal outcomes are seamless and, most importantly, successful and we hope that these resources can assist in this regard. Please don’t hesitate to send us input on your experience with any of the items listed in the Sourcebook as well as ideas for the future that would benefit you and your fellow colleagues.

TEAM USLAW
Corporations and insurers alike need consistent, quality legal services over a broad spectrum of legal and geographical areas. The cost, time, and expertise required in securing legal representation and negotiating fee schedules throughout the region, country and around the world can be overwhelming, requiring constant effort, oversight, frustration and missed opportunity. Team USLAW is the solution to meet these challenges. Team USLAW, a wholly-owned subsidiary of USLAW NETWORK, Inc., manages a client’s legal needs, providing one point of contact to clients ensuring they receive consistent and quality legal firm choices and services no matter where in the world your needs may arise. Team USLAW eliminates the need to negotiate different fee schedules for each and every legal need. And clients always have the option to reject any candidate firm presented. In summary, Team USLAW is a comprehensive service designed to eliminate much of the hassle and uncertainty of moving from in-house to outside counsel.

EDUCATION
It’s no secret – USLAW can host a great party; however, we are much prouder of the industry-leading educational components of our events and conferences. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve provide countless seminars, workshops and conference sessions not only at USLAW branded events but also at many legal conferences throughout the year. CLE accreditation is provided for most USLAW educational offerings.

A TEAM OF EXPERTS
USLAW NETWORK undoubtedly has the most knowledgeable attorneys in the world, but did you know that we also have the most valuable corporate partners in the legal profession? Don’t miss out on an opportunity to better your legal game plan by taking advantage of our corporate partners’ expertise. Areas of expertise include forensic engineering, structured settlements, court reporting, jury consultation, e-discovery, medical record analysis, forensic accounting, investigation and legal animation services.

USLAW SOLUTIONS

USLAW ON CALL
What is the value in having individual access to 4 - 8 highly experienced USLAW member attorneys from around the country and around the world (if necessary) roundtable specific issues you may be facing including actual cases or hypotheticals? USLAW is pleased to provide this free consultation which will give you a sense of comfort that you are managing a specific issue/case in an appropriate manner and make you aware of unforeseen roadblocks and variables that may pop up. It never hurts to phone a friend!

USLAW CLAIMS CHALLENGE
The Challenge is a one-day, experiential claims program that USLAW brings to you and your company. Directed to claims personnel, a detailed, hypothetical, multi-jurisdictional scenario is played out with USLAW member attorneys and corporate partner experts working side-by-side with your staff in smaller teams to manage all of the issues and curveballs that are sure to come. Do we go to trial, mediate, or settle? This is just one of the many questions at hand as USLAW stages this highly interactive program customizable for your specific company and legal staff.

LAWSUIT MONITORING
Let USLAW help you be the first to know when your company is facing litigation. With USLAW’s Lawsuit Monitoring program, we can search for your company on a daily basis and alert you of any activity we find.
USLAW NETWORK CLIENT SERVICES AND PRODUCTS

USLAW RESOURCES

COMPELLDNIUMS OF LAW
USLAW regularly produces new and updates existing Compendiums providing a multi-state resource that permits users to easily access state common and statutory law. Compendiums are easily sourced on a state by state basis and are developed by the members firms of USLAW. Just some of the current Compendiums include: Transportation, Construction Law, Offers of Judgment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

STATE JUDICIAL PROFILES BY COUNTY
Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully operating legal challenges throughout the United States. Knowing the local rules, the judge, and the “gossip” provides a unique competitive advantage. In order to best serve clients, USLAW NETWORK offers a judicial profile that identifies counties as Conservative, Moderate or Liberal and thus provides you an important Homefield Advantage.

JURISDICTIONAL UPDATES
Highlighting timely information specific to state by state jurisdictions, USLAW’s Jurisdictional Update is released via e-mail bi-weekly and is an excellent resource to keep abreast of new case law, important verdicts and other pending legislation.

USLAW CONNECT
USLAW’s password-protected area for Clients, USLAW Connect boasts libraries of papers and articles prepared by USLAW members, USLAW Magazine and webinar archives, discussions amongst colleagues, past Conference presentations and much, much more. Get your log-in today!

USLAW MOBILE APPS
We pack light. Take USLAW with you wherever you go with a variety of USLAW mobile applications. View past conference information by downloading any of our Client Conference apps, search our member directory online using Mobile Membership, or go to our mobile site by visiting www.uslaw.org on your mobile device.

USLAW MAGAZINE
USLAW Magazine is an in-depth publication produced twice annually and designed to address legal and business issues facing commercial and corporate clients. Released in Spring and Fall, recent topics have covered managing litigation in a tighter economy, changes in M&A strategies, sidestepping legal challenges during a workforce reduction, best practices in e-discovery policies, and weighing the pros and cons of litigation versus mediation and much more.

USLAW EDUNET
A wealth of knowledge offered on demand. USLAW EduNet is a regular series of interactive webinars produced by several USLAW practice groups. The one-hour programs are available live to you right on your desktop and are also archived on USLAW’s YouTube Channel for viewing at a later date. Topics range from Medicare to Employment & Labor Law to Product Liability Law and beyond.

USLAW RADIO
Timely and relevant, USLAW Radio is a monthly podcast produced for in-house counsel, risk managers, claims personnel and senior executives in companies large and small. Topics include emerging federal statutes, cases pending before the Supreme Court, issues employers should be aware of, file and case management, cost containment, retention of women and minorities in the legal profession and more.

USLAW PEOPLE

USLAW MEMBER AND ATTORNEY DIRECTORIES
Clients can access USLAW member firms and the attorneys in those firms through a variety of USLAW directories, including our annual USLAW Membership Directory as well as directories by specific practice area. Find a firm in a specific jurisdiction or search for an attorney in a specific area of practice, at any moment. Available through hard copy, electronic files and the web.

RAPID RESPONSE
USLAW Rapid Response Directories and Quick Access Online Searches secure USLAW attorneys quickly when timeliness is critical for you and your company. Offered in several practice areas, this resource provides clients’ cell and home telephone numbers along with assurance that USLAW will be available 24/7 with the right person and the right expertise.

PRACTICE GROUPS
USLAW prides itself on variety. Its 6,000+ attorneys study all areas of legal practice and participate in USLAW’s 16 active groups and communities including Banking/Finance, Business & Advisory Services, Business Litigation, Construction Law, E-Discovery, Employment & Labor Law, Healthcare Law, Insurance Coverage, International Business & Trade, IP and Technology, Product Liability, Professional Liability, Retail, Transportation, White Collar Defense, and Workers’ Compensation. Don’t see a specific practice area listed? No worries as USLAW firms cover the gamut of the legal profession and we are sure to find a firm that has significant experience in the area of need.

CLIENT LEADERSHIP COUNCIL
Take advantage of the knowledge of your peers. USLAW NETWORK’s Client Leadership Council is a hand-selected, diverse group of prestigious USLAW firm clients that provides expertise and advice to ensure the organization and its law firms meet the expectations of the client community. In addition to the valuable insights they provide, CLC members also serve as USLAW Ambassadors, utilizing their stature within their various industries to promote the many benefits of USLAW NETWORK. For a current list of CLC members, go to www.uslaw.org/clc.
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Please refer to our website for further information and contact an individual Ringer Associate in your area. While online, check out our top-rated legal podcast Series called RINGER RADIO, with over 1,000,000 total listeners!
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Elevate provides corporate law departments and law firms with practical ways to improve legal efficiency, quality, and outcomes through consulting, managed services and technology.

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Headquartered in the United States, Elevate serves clients worldwide.

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Doug Marshall, the founder of Marshall Investigative Group, has been investigating claims for over 25 years. Our nationwide firm specializes in insurance fraud investigations, providing coverage throughout the United States. Our private investigators provide the knowledge and skills necessary to extract the information you need to successfully evaluate your claim. We use investigators from diverse backgrounds like criminal justice, information technology and business, who share their knowledge with others in the firm. Our goal is to exceed your expectations by providing prompt, thorough and accurate information whether that is to establish proper reserves or to document claimant activities. We have a wide variety of services for Cargo, Disability, Liability and Workman’s Compensation claims such as activity/background checks, employment, health history, internet research, public records, skip tracing, statements, subrogation and surveillance. We conduct our investigative business with the highest degree of integrity, confidentiality and productivity.

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Please contact Doug Marshall to discuss your case at (855) 350-6474 or email him at dmarshall@mi-pi.com.
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