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BUSINESS TRIAL LAWYERS

Ban the Billable Hour: Alternate Fee Arrangements in Business Disputes

By Jesse Gessin

Oliver Wendell Holmes, Jr. once quipped, "Lawyers spend a great deal of their time shoveling smoke." This is especially true in business litigation, where letter writing campaigns turn into epic battles of sound and fury, and discovery becomes divorced from what is necessary for the case. These inefficiencies are pervasive because clients have historically paid for them. It is high time to turn off the smoke machine of business litigation, the billable hour.

People pay to receive results. A mechanic's client expects his brakes to stop squeaking. A restaurant patron expects her steak to be medium-rare. A concert attendee expects to be entertained. With these services and products, the downside of unmet expectations is negligible. Customers can ask for their money back, exchange the item, or do nothing and temporarily experience disappointment.

But the cost of unmet expectations in litigation is difficult to swallow. So stop shouldering the entire risk. Stop agreeing to pay by the pure billable hour. That arrangement insulates lawyers – not the client – from a negative outcome and incentivizes needless litigation exercises.

When lawyers also shoulder some of the risks, clients no longer pay for shoveling smoke. Alternate fee arrangements ("AFA") are defined in this article as fee structures besides the pure billable hour. These AFAs force outside counsel to take on the risk of litigation and to "walk a mile" in their clients' shoes. Making your lawyers put skin in the game changes the dynamic for both the attorney and the client.

This article examines a few potential AFAs for business disputes.

Contingency and Reverse Contingency Fees
The most commonly known alternate fee structure is the contingency fee or partial contingency fee. This is when the attorney receives a fixed or scaled percentage of any monetary recovery. While contingency fees are common to the plaintiffs' bar, reverse contingency fees are gaining traction with the defense side. This is when the winning attorneys receive a fixed amount they "saved" the client. The key to a reverse contingency fee is correctly valuing the case. Experienced trial attorneys, with the assistance of a valuation expert, will have insight into damages likely to be awarded by a jury. A reverse contingency fee AFA only works if a matter is properly valued.

The benefit of contingency and reverse contingency fees are that the attorney has a stake in the outcome. The downside to contingency and reverse contingency agreements is that companies rarely see cases through to their conclusion, may switch counsel, or may settle for something other than money or for an amount far less than outside counsel thinks is wise. For these reasons, outside counsel may have trepidations about a "pure" contingency in business litigation.

Hybrid Fees
"Hybrid" means a combination of reduced hourly rate fees plus a percentage of the client's recovery or money saved. There are many benefits to a hybrid arrangement. The commonality of all contingency fees is that the attorney is sharing in the risk and therefore has a reason to win the case. The reduced hourly rate reduces the client's cash outflow while allowing attorneys to fund their day-to-day operations. The hybrid keeps the cost of litigation down, which gives the lawsuit staying power and in turn increases the potential recovery.

Flat Fees with a Success Bonus
A "fixed" or flat fee sets legal fees for each stage of the proceedings, such as summary judgment, settlement or trial. The downside to flat fees is the risk that litigation counsel may be forced by circumstances (an out-of-control opposing counsel, the need for more intense motion practice than was anticipated) to work many more hours than what was built into the fee. Outside counsel might then be disincentivized to work the case as hard as possible. But adding a success fee tied to outcomes, such as settlement or trial verdict in a certain amount, or a "clean sweep" defense verdict, will keep litigation counsel's interests aligned with those of the client.

An Example: PetNation v. Pickles' Pet Supply et al.
From the outset, companies must decide on an end goal for any litigation. Common goals include monetary damages, injunctive relief, a complete defense verdict, or mitigation of damages. After that, companies should think about what it will take to achieve that goal through discovery. This includes the breadth and scope of documents and witnesses needed to prove or defend the case, and the information, documents, and witnesses the opposing side will need and likely seek. Honesty is important here.

Imagine an antitrust case where the market is dominated by three pet food suppliers: Pickles' Pet Supply, Pepper's Puppy Chow and Vienna's Dog Food. All three pet food suppliers lower their prices on lamb-flavored dog food in tandem during a year. PetNation, the largest pet store in the nation, files a lawsuit to stop the anti-competitive behavior because the conduct is negatively affecting sales of its white label lamb flavored dog food. Here, although a consulting valuation expert places damages at $5 million, recouping monetary damages is not the primary goal.

The value is not large enough to justify hiring PetNation's normal outside counsel, Big Bigger & Biggest Law. So PetNation looks for a boutique law firm that will agree to an AFA. Sarah Smith is interested in taking the case. PetNation proposes a flat fee of $500,000 with a success bonus of $500,000 for any recovery of $5 million or over. There is no success bonus for a recovery of less than $5 million. Sarah is concerned that the case will be time intensive and that $500,000 is not enough. Sarah proposes a hybrid arrangement that reduces her hourly rate from $550 to $350 with a contingency fee of 20 percent. This AFA is attractive to PetNation, as they normally pay $750 per hour for counsel at Big Bigger and Biggest Law. PetNation also likes that Sarah will be motivated to be aggressive so she can recover her contingent fee.

Conclusion
Outside counsel with "skin in the game" are less likely to blow smoke. AFAs go a long way toward clearing the air, preserving your cash flow during litigation, and incentivizing outside counsel to maximize recovery for your case.

Jesse Gessin

Jesse Gessin, partner, is a highly accomplished trial attorney. He has tried over twenty-five jury trials to verdict as lead counsel. His areas of practice include complex commercial litigation, appellate litigation and white collar criminal defense. Recently, after a five-week trial, Jesse achieved a rare multi-million dollar legal malpractice and breach of fiduciary duty jury verdict for his client. Jesse also teaches trial advocacy at the University of California, Irvine School of Law, and has lectured on trial strategy and techniques throughout the United States. Contact him at 949.476.8700 or jgessin@kelleranderle.com.

UMBERG/ZIPSER LLP

Protecting Brands on the New Amazon Brand Registry

By Mei Tsang, Esq.

With 300 million users in the U.S., and 95 million of them (63 percent of the households) using Amazon Prime, it is no surprise that large retailers and private labels continue to flock to Amazon to sell their branded products. With about 100,000 new sellers joining every month, counterfeits continue to be a battle for Amazon and brand owners.

Over the years, Amazon has set up a Brand Registry which allows owners to register their marks. The original version was fairly easy to use. Brand owners would simply show an image of their product and an e-commerce site. Quickly this version was found to be problematic as many do not have legitimate rights to their trademarks. Amazon overhauled its program and launched the new Amazon Brand Registry aka Amazon Brand Registry 2.0.

One of the main differences between Amazon Brand Registry 2.0 and the original version is that the brand owner must have a valid federal trademark registration. The federal trademark registration also must be active on the *Principal Register*. Many descriptive marks have a U.S. Trademark Registration, but they may be on the Supplemental Register instead of the Principal Register, and thus not eligible.

The benefits outweigh the extra effort for brand owners under this program. First, it allows greater protection for brand owners to report brand violations and combat illegitimate claims of trademark ownerships. Furthermore, Amazon is also providing brand owners with a powerful search tool for infringing products. Amazon now has over 300 employees in the U.S. who only deal with infringement claims. Finally, the burden of proof on infringement has shifted now to the accused sellers instead of the brand owners.

Infringement litigation can be long and costly. Stopping infringers on Amazon is a quick way for brand owners to protect themselves in an increasingly competitive marketplace. The key factor for brand owners is to have a valid federal trademark. The U.S. Patent and Trademark Office continues to become stricter in allowing trademarks to get through the process. Many marks face common rejections of either a likelihood of confusion with other similar marks or being too descriptive. These rejections can be hard to overcome. Thus, brand owners would be wise to choose brands that have been cleared and consulted through a trademark attorney to ensure a higher chance of getting on the Principal Register.

Mei Tsang

Mei is an intellectual property partner at the law firm of Umberg/Zipser LLP. She helps clients build and enforce their IP portfolio - patents, trademarks and copyrights. Mei is fluent in both Cantonese and Mandarin.

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So You Want to Be a 100-Year Family?

There is no doubt about the importance of preserving your financial resources. You work hard to build up capital in the form of cash, real estate, marketable securities, retirement plans and business holdings. From a lawyer's point of view, planning for financial capital is relatively straightforward. There are about a dozen safe wealth transfer strategies and selecting the most appropriate is easy once your lawyer understands the assets.


Charles Daff

But high-net-worth families have a much greater opportunity. Instead of simply transferring wealth in a tax-efficient manner, they can shape their families into forces that will have meaningful impact for generations to come. To be one of these 100-year families, planning needs to encompass the four other forms of family capital.

The individual members of a family make up its human capital. Paying attention to human capital means taking care of their physical and emotional well-being at a minimum, but it should go further. It should encourage them to find meaningful work, develop a positive self-identity, and identify and advance toward the things that make them happy.

A family's intellectual capital comes from the knowledge its members attain not just in formal educational settings but through broader life experiences. Academic accomplishment, career advancement, artistic attainment, and understanding of their own and the family's finances are all indications that a family's intellectual capital is growing. The most important indicator of growth is when family members are able to teach and learn from each other. This may require serious work on family dynamics.

Family member's relationships with each other and with their communities form the family's social capital. By growing it, the family can start to make thoughtful decisions together and welcome input from others who share the family's mission – even if those individuals are not family by blood. Growth in social capital means family members develop an interest in supporting the larger communities of which they are a part and giving time, talent and energy to make those communities stronger.

Planning for your family's total capital requires an understanding of its foundational capital. Identifying your family's shared intentions or dreams is crucial. A plan for total capital will fail unless the family recognizes that the journey will present challenges that exceed the strength of any one family member. This realization should encourage a sense for gratitude for those who helped build the financial capital, for those who are journeying together now, and for those who will join the journey later.


Mark Powell

When a family decides to work across generations to grow all five forms of its capital, the resulting effort is called a family enterprise. This business term fits because the family will be working a several fronts that are closely connected but operate in different ways and toward separate objectives. This effort allows a family to plan to have impact 100 years into the future. Because the process will outlive all of us, creating flexibility and successfully inviting future generations into the work are crucial to the success of the enterprise.

When is the best time to start this work? The Chinese proverb about the best time to plant a tree gives us the answer. "The best time was 20 years ago. The second best time is now."

Mark Powell, Partner

With more than 20 years' experience as an estate planner, Mark Powell is uniquely qualified to help families create legacies. In this work, he implements plans that encourage family members to recognize their good fortune, make their own contributions to the family and their communities, and handle the responsibilities of wealth. These plans incorporate state of the art transfer tax strategies. Family philanthropy is often a cornerstone of his plans. He can be reached at (714) 800-1435 or powell.mark@dorsey.com.

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FAMILY OWNED BUSINESSES – WHAT TO DO WHEN AN AGING OWNER IS BEING SUBJECTED TO FINANCIAL ELDER ABUSE.

Beginning in 2011, the baby boom population began turning 65 years old. As the elder population grows, more business owners have begun to plan for their retirement. Some owners strive to work less hours and minimize their day-to-day management of the company. Concurrently, the owner frequently does not wish to relinquish or transfer his or her ownership interest or formal leadership role in the business until his or her passing. As the owner ages, this scenario may unfortunately be further impacted by an owner suffering from diminishing mental or physical capacity. This circumstance spurs increased risk for financial elder abuse within a business setting.

Notably, most financial abuse against elderly persons is perpetrated by one individual whom is usually a family member or other trusted person with access to financial information. Closely held or family-owned businesses often hire family members or close friends to work within the business. An elderly owner taking a less involved day-to-day role in the company will necessarily have less opportunity to detect financial harm, and may be less vigilant if the abusers are perceived to be trustworthy family members or friends. Once the abuse is known to the owner, he or she might be reluctant to take action against that family-member employee, and his or her ability to mentally or physically withstand against such financial harm will continue to diminish over time. In such a case, who has the ability to protect the owner, and by extension, the business, from this financial elder abuse?

WHO CAN LEGALLY PROTECT THE ELDER?

Generally, litigation must be prosecuted by the real party in interest – i.e., the person victimized by the abuse. In regards to elder abuse actions, the California legislature has expanded this scope under the Elder Abuse and Dependent Adult Civil Protection Act ("Act"). During the elder's lifetime, the Act authorizes the filing of financial elder abuse actions by the elder's 1) conservator; 2) trustee of his or her trust; 3) an attorney-in-fact; 4) a guardian ad litem; 5) another person legally authorized to seek the relief; or 6) the county adult protective services agency.

Despite the legislature authorizing elder abuse actions to be brought by third parties, actually bringing an elder abuse lawsuit while an abused elder is alive, but competent, can be very difficult if the elder does not want to bring the suit. This reluctance may stem from shame or embarrassment of being taken advantage of by someone close to them, an inability to bear their family member being held accountable for their actions, an unwillingness to report a relative or trusted confidant in efforts to protect them, or the fear of the ramifications from filing such a suit.

One of the most fundamental rights in our country is the right to make our own choices. The law supports an elder's free will to make bad choices within the confines of the law, including not taking action against his or her abuser, provided the elder is legally competent to do so. However, the concept of competence is an imprecise one, has several formulations, and its presentation in an elder often fluctuates over time. This makes it quite difficult to find the balance between protecting elders against abuse, whilst concurrently maintaining their personal autonomy to make their own life choices.

WHAT CAN YOU DO TO PROTECT AN ABUSED ELDER?

If you suspect that an elder is the subject of abuse, the first step is addressing the concerns with the elder, and investigating the extent of the financial abuse. This investigation may reveal that filing an action for elder abuse is necessary to protect against further abuse, and to sustain the future of the company and the elder.

This action can be filed by the elder or one of the third parties noted above. If the elder has capacity and objects to the action filed by a third party (as can occur when the alleged abuser is a family member), another option is to await the elder's passing before filing the litigation. However, there are significant risks involved in doing so.

The most obvious risk is that the abuse will continue to be perpetrated, resulting in further and continuing damage to the elder or the company. As to the elder, this damage is typically not just financial, and often includes pain and suffering that may warrant immediate response. As to the company, delay may be untenable if continued abuse would destroy the viability of the business.

Second, waiting poses a risk that the action is time-barred. The statute of limitations for a financial elder abuse action is four years after the plaintiff discovers, or should have discovered, the facts constituting the financial abuse. If the plaintiff is aware of the abuse, chooses to wait to file, and the elder passes away more than four years later, the action would be time-barred.

Third, the suit might be barred if the plaintiff unreasonably delays bringing the action, and it prejudices the defendant. Any delay in filing may potentially be deemed unreasonable given the delayed filing will not prevent or protect the elder from abuse, but will merely seek to obtain a remedy, usually monetary damages or a disinheritance of the abuser from the elder's estate, as reparations for the past abuse. The delay could be deemed prejudicial since the victim would be deceased and unable to serve as a witness in support of the abuser's defense. Together, these factors could bar the suit.

While the California legislature attempted to increase the ability of third parties to take up the cause of protecting abused elderly persons, the issue is not easily solved with the stroke of a pen. That is why it is important to have in place a good business succession plan, and also to nominate trusted advisors within your estate planning documents, so they can protect your rights and interests should you become the target of financial elder abuse.

Timothy J McElfish, Esq. is a Partner and chairs the Firm's Trust and Estate Litigation Practices Group. His practice group dedicates themselves to protecting and defending trust and estate. Additionally, Mr. McElfish also handles all aspects of Estate Planning, Business Succession Planning, and Fiduciary Representation.

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Finance the Expansion of Your Business in the U.S. Through E-2, L-1/EB-1C, & EB-5 Visa Pathways

The U.S. economy is going strong now with businesses on the rise, unemployment at a record low, and more open job positions than there are applicants. We can see many businesses implementing expansion plans on a regular basis these days, with such growing businesses searching for good sources of capital. The purpose of this article is to introduce the idea that it can be worthwhile and even cheaper to use non-U.S. sources of capital in order to expand your business in the U.S.

One good way of accessing foreign sources of capital is tying the foreign capital investment to immigration pathways. The U.S. offers a few different avenues of immigration that combine a foreign individual's dreams of coming and starting/expanding a business here on U.S. soil. Let's go over a few key points of the E-2, L-1, EB-1C, and EB-5 visas:

E-2 Treaty Investor Visa
An individual may be issued an E-2 Treaty Investor visa if:

▶ The individual or the individual's business is from an E-2 Treaty nation and at least half of the business must be owned by nationals of the treaty nation.

▶ The individual or the individual's business has made or is in the process of making a substantial investment (generally in excess of $100,000) in a business in the U.S.

▶ The individual is either the principal investor who will direct and develop the business in the U.S., or the individual is an executive manager or employee with special skills essential to the company.

▶ The investment is not the individual's sole source of income.

E-2 Treaty Nations are countries that have treaties of trade and commerce with the U.S. There are a lot of E-2 treaty nations. Unfortunately, countries such as China and India are not E-2 treaty nations and therefore do not qualify for E-2 Treaty Investor visas. (That being said, individuals from China or India could potentially obtain citizenship from other E-2 treaty nations that have Citizenship by Investment ("CBI") programs and then the Chinese or Indian national could subsequently qualify for an E-2 visa.)

L-1 Intracompany Executive/Manager Transferee Visa (Nonimmigrant Visa)
An L-1 Intracompany Executive/Manager Transferee visa is for those foreign nationals who have plans to be employed in the U.S. by a parent, subsidiary, affiliate, or branch of a foreign business where the foreign national had already been working overseas for at least one year (within the three preceding years). The foreign national must have been employed in an executive, managerial, or specialized knowledge capacity for the overseas employer and subsequently be employed in an executive, managerial, or specialized capacity in the U.S. company.

The L-1 visa allows a qualifying foreign national to enter the U.S. relatively quickly to start working. It is important to note that the L-1 transferee does not need to do the same work as he or she was performing overseas; this means that the foreign transferee who managed a factory in China could potentially come and manage a new franchise business in the U.S. given that the U.S. franchise will become an affiliate or subsidiary company of the Chinese factory. This visa is only a *temporary* work visa.

EB-1C Intracompany Transferee Visa (Immigrant Visa)
The EB-1C (a.k.a. EB-1-3) visa is the *permanent* version of the L-1 visa which leads to U.S. permanent resident status with a green card. The requirements for this visa are very similar to the L-1 executive/manager visa requirements, except that there is no "specialized knowledge" qualification category. The foreign national must be coming to the U.S. on the basis of a permanent job offer to work in a management or executive capacity. It is important to note that while this visa leads to a foreign national obtaining a green card, the applicant must wait for an EB-1C visa number to be available.

In some circumstances where a company is just starting its operations in the U.S., a foreign manager or executive can apply for an L-1 visa first and then submit an EB-1C visa application after a year or so.

EB-5 Immigrant Investor Visa
The EB-5 visa has become very popular in recent years as a pathway for foreigners to invest in the U.S., create full-time jobs for U.S. workers, and bring their families to the U.S. There are no managerial, executive, or specialized knowledge requirements for this visa because the EB-5 requirements focus on the foreign national investing either $500,000 or $1 million (depending on the investment's location and minimum investment amounts subject to change soon) and that investment must be proven to have created at least 10 full-time U.S. jobs per EB-5 investor.

There is currently a huge backlog for EB-5 visa applicants from China, Vietnam, and India. This has led EB-5 applicants from these countries to explore other corporate immigration pathways such as the L-1/EB-1C visa pathways that require foreign nationals to come and manage a sizeable business in the U.S.

It is at this point that some foreign nationals start to look at investing in and running their own franchise business in the U.S. Some brand-name franchises are now cooperating with foreign investors who are looking to tie their family's immigration dreams with a dream of running a business in the U.S. The L-1/EB-1C visa pathways can become a viable tool that allows U.S. businesses to expand by working with foreign nationals who become managers of the expanding or new U.S. business.

The attorneys at our law firm, David Hirson & Partners, LLP, specialize in successfully strategizing and filing these corporate immigration visas and many other visa types. Come find out if your U.S. business expansion plans can work alongside the E-2, L-1/EB-1C, or EB-5 visa pathways.

David Hirson

David Hirson, Esq. has more than 35 years of experience in corporate immigration law, specializing in business and investment immigration. David is the founding and manager partner of David Hirson & Partners, LLP ("DHP"), and he is internationally-recognized for his decades of success in investment immigration. DHP's attorneys have over 70 years of combined experience in advising individuals, start-ups, large corporations, hospitals, and universities in navigating complex areas of employment immigration. The firm's business and employment-based immigration practice provides a full range of services, including EB-1-1(A), EB-1-2(B), EB-1-3(C), National Interest Waivers (NIW), EB-2, EB-3, EB-5, H-1B, E-1/2, L-1(A)/2(B), H1B, and other immigrant and non-immigrant visas. DHP is one of a select few firms that also specialize in immigration for franchise businesses who have foreign partners/managers. David's firm also works closely with individuals and HR departments to understand their needs and customize an immigration plan that surpasses their expectations.

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My Lawyer Screwed Up!!! Can I Sue for Legal Malpractice?

Like other professions, lawyers sometimes make mistakes and those mistakes may have substantial consequences. So, when does an attorney's mistake justify a legal malpractice lawsuit? Ultimately, a viable legal malpractice claim will turn on the facts of the case, but here are five questions to ask if considering a legal malpractice lawsuit.

1. Was it my attorney who erred? With complex corporate structures, identifying the lawyer's clients is not always easy. If the attorney represents the corporation, does she also represent the shareholders or subsidiaries? Does the attorney represent the partnership, the partners, or both? If the attorney represents one spouse, does she represent the other spouse? If you cannot establish the attorney represented you (and owed you a duty of care), then your malpractice claim will not get far.

2. Was the attorney negligent? Clients often review their attorney's actions after the damage is done. But to determine negligence, you must put yourself in the attorney's shoes when the "mistake" happened. A decision reasonable at the time may look foolhardy with the benefit of hindsight. Nor does the law does require every attorney be Clarence Darrow or Perry Mason. Attorneys must only act consistently with the community standard of care.

3. Did the attorney cause damage? This is often where the rubber meets the road in legal malpractice cases. Even if an attorney makes an inexcusable error, that error must cause damages. The classic example of negligence is the attorney that failed to file a lawsuit before the statute of limitations expired. To prevail in a legal malpractice claim, you must prove to a legal certainty you would have won the case if the attorney timely filed the complaint. You must also prove how much you would have won and how much you would have recovered.

4. How much money did you lose? Legal malpractice cases are expensive because you are litigating two cases: the malpractice case and the underlying matter, (*i.e.,* a case-within-the-case). Before filing a legal malpractice action, be sure the economics of the case justify the effort. In addition to legal fees, you will almost always need an expert to establish the attorney's conduct fell below the standard of care. Most cases also require a damages expert. Those experts can cost a lot of money.

5. When did the damage occur? The statute of limitations for legal malpractice claims may be as short as one year from when the attorney's representation ended. This is a trap for the unwary. If you suspect malpractice, seek legal advice immediately.

We are trial attorneys. If you have a business litigation or attorney malpractice matter, call us at (949) 631-3300.

Michael S. LeBoff

Mr. LeBoff has been a business trial lawyer in Orange County for almost 20 years, handling and winning trials, arbitrations, and high-stakes disputes. Mr. LeBoff represents clients of all sizes in a wide variety of business cases, including shareholder, partnership, and joint venture disputes, trade secrets, fraud, breach of contract, business torts, real estate, and legal malpractice actions. Mr. LeBoff will serve as Chair of the Orange County Bar Association's Business Litigation Section in 2019.

jackson lewis

Injury & Illness Prevention Programs – the Low-Hanging Fruit for OSHA Citations

By Ellen M. Tipping and Scott Ruygrok

The importance of a well-considered Injury & Illness Prevention Program (IIPP) is something that many businesses do not appreciate until they are visited by state or federal Occupational Safety & Health Administration (OSHA) Investigators after a safety incident or complaint. An IIPP can seem like one more box to tick off on the list of policies a company should have in place. But disregarding its significance would be a mistake.

IIPPs have become the low-hanging fruit for OSHA investigators. California requires that an employer "shall establish, implement and maintain an effective" IIPP, and sets forth seven detailed elements for inclusion in the IIPP. An IIPP which is weak on any element can result in a citation, even when there is no connection to an incident under investigation, because OSHA issues citations in a law enforcement capacity. Investigators are charged with citing any violation they may discover.

All elements must be addressed in the IIPP. It is not enough for OSHA that a company may have an excellent training program and good communications programs, if they are not identified as part of the IIPP programs, responsibilities and general procedures in a single document easily reviewed by employees.

In the event a workplace safety incident occurs, an investigator and perhaps a judge will scrutinize the program document. Every month the Occupational Safety and Health Appeals Board publishes its decisions, and every month almost every decision includes an IIPP citation. If the judge can connect a weak element to the safety event, there will be exhaustive discussion. But citations for a weak element can also stand alone, and such citations create a historical record that will be considered in any future safety incidents.

The State offers an eTool to assist businesses in preparing an IIPP with the necessary elements. This is a very good place for a business to start from scratch or to use when vetting an existing IIPP. However, regular review and updating of an IIPP with the assistance of experienced counsel is also a good idea, to help ensure the program will meet OSHA's scrutiny.

Ellen M. Tipping

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Throw Grandma From the Train

by Stephen Jay Kaufman, CFLS, founding partner at Kaufman Steinberg LLP

Today's economy often requires two incomes to support a family. A major societal trend, the "gig economy" also has a profound effect on families. Parents must maintain uncertain or flexible work schedules, and they often need extended child care to do so. When parents separate, they lose the economy of scale, and that may make childcare unaffordable.

Whether separated or not, parents needing childcare often turn to their own parents, their children's grandparents for (usually free) childcare. Grandparents deliver child care with love, attention, and oftentimes spend more time with their grandchildren than their parents do. Many grandparents are involved with their grandchildren from birth, and their loving bonds are formed over many years.

However, when parents split, extended families are often pitched into two camps, and feelings for the "other side" harden as custody disputes rage on. Into this great divide fall the loving bonds of grandparents to their treasured grandchildren. If one parent throws the other's momma under the bus, (or from the train a la Danny DeVito), the other parent is usually there to defend the grandparent relationship.

What if one parent is in prison? What if one parent is absent due to drugs or mental illness, or even dead? In each of these cases, Grandma and Grandpa try to deal with the surviving, and perhaps hostile, present parent. The present parent may wish to move on to another relationship, replace the absent parent, or to expunge the child's memory of the absent parent. Whether or not this is ever a good idea, the law jealously protects parents' right to decide what is in their children's best interests. Grandparents must show that preserving their relationships with their grandkids ***is*** in the grandkids' best interests.

When necessary, grandparents can petition the court for contact ("visitation") with their grandkids. To be granted visitation, a grandparent must show by clear and convincing evidence that preserving the relationship with their grandchild(ren) is in the grandchild(ren)'s best interests. With photos, videos and other evidence - of home life, school, holidays, travel, gifts and other material support that may go back for years - grandparents can show the court how their grandchildren benefit from these relationships.

When patient negotiation with an objecting parent for time with the grandkids fails, if no amount of talking will resolve the problem, talk to a family law attorney about filing a petition for grandparent visitation.

Stephen Jay Kaufman

Stephen Jay Kaufman is a recognized as a Certified Family Law Specialist by the State Bar of California. Steve lives and works in Irvine, California and has been repeatedly recognized as a Super Lawyer. Steve serves several Orange County non-profits, and enjoys sports and performing and recording original, world music. Call Steve at 949.757.900, or write him at steve@kaufmansteinberg.com.

McDermott Will & Emery

Look Out! New Claim Construction Standard in Post-Grant Proceedings Before the PTAB

On October 11, 2018, the United States Patent and Trademark Office (USPTO) published a final rule in the Federal Register that changes the claim construction standard applied in *inter partes* review (IPR), post-grant review (PGR) and covered business method patents (CBM) proceedings before the Patent Trial and Appeal Board (PTAB) to align with the claim construction standard applied in patent litigations before the federal courts and the U.S. International Trade Commission (ITC).

The final rule will not be retroactively applied and will apply only to IPR, PGR, and CBM petitions filed on or after the effective date of the final rule, which is November 13, 2018. The final rule adds that when construing a claim term in an IPR, PGR or CBM proceeding, the PTAB will consider any prior claim construction determination that has been made in civil or International Trade Commission (ITC) actions, if timely made of record in that IPR, PGR or CBM proceeding.

Prior to this rulemaking, the PTAB applied the "broadest reasonable interpretation" (BRI) standard which differs from the narrower claim construction standard articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) ("*Phillips* standard") that is used by federal courts and the ITC. Generally, the *Phillips* standard gives claims their "ordinary and customary meaning" which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id.* at 1312-1313.

Importantly, there will now be uniformity in the use of the *Phillips* standard across the three primary patent litigation forums – the federal courts, ITC and PTAB. In this recent publication, the USPTO stated after receiving comments from the public and carefully reviewing the comments that "[m]inimizing differences between claim construction standards in the various fora will lead to greater uniformity and predictability of the patent grant, improving the integrity of the patent system. In addition, using the same standard in the various fora will help increase judicial efficiency overall."

The application of the final rule will generally favor patent owners who no longer need to be concerned that their issued claims will be once again scrutinized under the broader BRI standard. Using a uniform *Phillips* standard will also remove unfair advantages a patent challenger may pursue because an accused patent infringer may seek a broad construction for purposes of finding claims unpatentable in an IPR, PGR or CBM proceeding before the PTAB and a narrow construction for purposes of arguing non-infringement in a federal court action. *Ex parte* re-examination proceedings before the PTAB may increase in popularity because the BRI standard remains intact for re-examination requests.

Mandy H. Kim

Mandy H. Kim focuses her practice on intellectual property litigation. Mandy has significant experience managing complex litigations across a wide range of technologies, including in the life sciences, biotechnology, medical devices, computer hardware and software, and consumer electronics industries. She can be reached at (949) 757-6061 or mhkim@mwe.com

Maschoff Brennan

The Battle Between Big Pharma and Generics Heats Up in 2018

The Hatch-Waxman Act (1984) made it easier for generic drugs to enter the market by relieving a manufacturer from having to conduct clinical tests to prove the safety and efficacy of the generic. Instead, the manufacturer need only submit an Abbreviated New Drug Application (ANDA) proving the bioequivalence of the generic to the original branded drug by showing the rate of absorption and bioavailability of the generic is the same as the branded drug. The Act also exempts generic manufacturers from patent infringement claims for conducting testing and other conduct necessary to prepare the ANDA filing. These rules have resulted in nearly all branded drugs facing generic copycats.

Brent Johnson

The Act also created rules of engagement for branded pharma to enforce patents. Under the Act, a patent holder publicly lists all drug-related patents and respective expiration dates. When a generic submits an ANDA, it certifies the absence of patent infringement, or that any applicable branded patent is invalid. The branded company then has 45 days to initiate an infringement action, the filing of which stays FDA approval of the generic ANDA product for 30 months.

The American Invents Act of 2014 created a second, faster track for challenging branded drug patents other than in federal court. The inter partes review (IPR) allows a challenge to be made before the Patent Trial and Appeal Board within nine months after the branded patent issues, with a ruling 12 to 18 months thereafter. A generic company prevailing in an IPR could then rely on the other companies' efficacy studies to enter the market bypassing the ANDA procedures. In contrast, under the Hatch-Waxman Act, the federal proceeding may take between 25 and 32 months to get to trial, and can only be initiated after a generic files an ANDA application with the FDA.

Michael Katz

In June 2018, Senator Hatch proposed an amendment called the "Hatch-Waxman Integrity Act of 2018" "to prevent companies from using IPR to put added litigation pressure on innovators above and beyond what Hatch-Waxman already provides." The proposed amendment would force a generic company to choose between an IPR challenge and the ANDA/biosimilar approval process. A party opting for the former would be required to develop its own safety and efficacy studies.

Congress must decide whether to afford protection to branded pharma not available to other technology industries. The Hatch-Waxman Integrity Act would do just that. All this is unfolding against the backdrop of the diminishing investment of U.S. companies in patents more generally. Prognostications about outcome and effect are difficult. The authors predicts another article in 2019.

Michael Katz and Brent Johnson are shareholders in Maschoff Brennan's Irvine office. Katz focuses on litigating complex business disputes, including intellectual property. Johnson manages and procures IP portfolios in life sciences and other chemistry and material-based technologies.

Protection For Landlords When Retailers File for Chapter 11 Bankruptcy

Retailers with “bricks and mortar” stores have seen competition primarily from online retailers; several have had to file Chapter 11 bankruptcies. Those retailers include: Radio Shack; Sports Authority; Circuit City; Toy R Us; Linens and Things; and Brookstone. Even though this article discusses retailers, most of these protections discussed below exist for landlords who have other types of commercial leases.

Landlords have been well represented when Congress passed legislation. Today’s Bankruptcy Code gives landlords protections not experienced by other classes of creditors. Protections and safeguards include:

Post Filing Payment of Rent

A debtor must make all post filing rent payments. If rent is due on the first of the month and the debtor files on the 12th, is the whole month considered pre-bankruptcy or does the landlord get paid for the 18 days left in the month? The prevailing view is the landlord gets paid for the 18 days and every day thereafter until the debtor vacates or assumes the lease under section 365 of the code.

Assumption, Sale or Rejection of the Lease

Generally, debtors have three choices; i) reject the lease but pay rent for post filing use; ii) assume the lease and honor all provisions of the lease; or iii) sell the lease. If the Debtor wishes to reorganize and keep the lease in place they must “assume” the lease pursuant to 365 of the Bankruptcy Code. To assume a lease, a debtor must cure all arrearages and defaults and must provide proof of adequate assurance of future performance. Under the code, the debtor must “assume” or “reject” leases where they are a tenant within 120 days of the filing of the bankruptcy petition. The court may allow an extension of this period but for no more than 90 days, absent consent of the landlord. If the debtor has equity in the lease and wishes to sell it, the Code provides that they may do so if the assignee cures all of the arrearages and provides adequate assurance of future performance. This includes the provision that any percentage of rent due under the lease will not substantially decline, that they will not breach any lease provisions, and that the assumption and assignment will not disrupt any contractual tenant mix. A few of the special protections for landlords are discussed above. There are dozens of other protections and issues and variations that arise. These technical issues include: can a debtor run a going out of business sale when the lease prohibits it (usually but under tight controls); and does a lender who has a lien on all assets get paid before the landlord gets paid for unpaid post-petition rent if the reorganization fails (depends on whether the landlord negotiated that term with the lender when the debtor sought bankruptcy court approval of the post-petition financing agreements).

Congress gave specific rights to landlords but did not specifically address all issues that can arise. It is important that you start planning for bankruptcy when drafting the lease and that you retain experienced counsel if the debtor files bankruptcy or if you suspect they will file bankruptcy.

Richard Marshack

Richard Marshack is a founding partner of Marshack Hays LLP and has been a bankruptcy attorney for over 36 years. He is a frequent lecturer on bankruptcy and commercial law issues. The four partners of Marshack Hays combined have over 70 years practicing in bankruptcy, insolvency, and reorganization issues. He can be reached at rmarshack@marshackhays.com or (949) 333-7777

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SMITH DICKSON
AN ACCOUNTANCY CORPORATION

Beneficiary Wars

By Gina Lara, MBA, CFP®, Tax & Forensic Accounting Manager, Smith Dickson CPAs

Gina Lara

Some families are just antagonistic; but, when individuals are suddenly bequeathed multi-million-dollar estates, even the most reasonable and harmonious families can become embroiled in "beneficiary wars."

The Second Spouse: In a recent battle, a gentleman had purchased rental properties and built up a sizeable estate during his first marriage. Years after his first wife passed away, he married again, keeping separate bank accounts for all assets accumulated during his first marriage. His adult children managed the rental properties, and everything was going smoothly … until he died. Allegedly, the decedent did not update his estate planning documents during the 20 years of his second marriage to "provide for" his new wife. Although she received millions comprised of brokerage accounts and retirement plan benefits, she took the kids to court demanding as surviving spouse that she was also lawfully entitled to the rental properties. Smith Dickson, working on behalf of counsel representing the children, examined bank and brokerage accounts dating as far back as the 1960s. Our forensic analysis provided evidence supporting the decedent's intention to keep assets from each of his marriages separate and distinct. This evidence was instrumental in the children retaining the properties.

The Unwitting Participant: In another case, the trustee acted in a good faith manner, kept years of receipts and documentation, and did everything she could to be fair in distributing assets. Unfortunately, since the trustee was unfamiliar with the intricacies of fiduciary accounting as required by the California Probate Code, she still found herself as an unwitting participant in a beneficiary war. When this happened, Smith Dickson was called to quickly complete more than 7 years-worth of fiduciary accountings in less than 60 days to ensure the trustee was in compliance with State requirements.

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Borrower Beware of the Loan Forbearance Agreement

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CORPORATE RESTRUCTURING AND BANKRUPTCY

When a borrower defaults under the terms of a loan agreement, a lender may, among other options, sue to foreclose on its collateral and collect from the borrower, agree to amend the loan agreement, or enter into a forbearance agreement.

With limited exceptions, a forbearance agreement offers a tremendous benefit to a lender at very little risk or cost. Forbearance agreements are an extremely effective tool to encourage borrower cooperation, while providing the lender an opportunity to strengthen its position in several ways.

For example, a lender-drafted forbearance agreement will contain a number of key provisions, such as the borrower's admission: (a) of the specific indebtedness owed; (b) that it has no defense to full payment of the indebtedness; (c) of all monetary and non-monetary defaults that the borrower committed; and (d) that there is no material issue of fact as to the fact of such defaults. In many ways this aspect of the forbearance agreement is tantamount to a borrower's confession of judgment.

Furthermore, the lender may obtain additional collateral from the borrower or guarantor, confirm liens, ratify all obligations, correct documentation defects, and obtain broad-based and valuable release of claims. Lenders may also request that a borrower waive certain important rights, such as protection of the automatic stay against the lender's collection efforts if the borrower ultimately files for bankruptcy. While stay waivers have historically been disfavored, an increasing number of bankruptcy courts are enforcing them.

From the borrower's perspective, a forbearance agreement allows time to create options and avoid immediately defending collection actions. In many cases, the situation has become so desperate, the borrower will be inclined to accept a fatal path, and execute any document to relieve the pressure from the lender.

As with the initial loan documents, it is important that the borrower understand the immediate and long-term impact of its new commitment on the borrower's business and capability to remain in compliance. The use of an attorney experienced in bankruptcy and financial restructuring is critical to this process.

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