LAW SPECIALTIES

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Managing Your Law Firm

Best practices for weathering the economy and positioning for recovery

by David Jochim, Senior Vice President, Legal Specialty Group, Union Bank, N.A.

The legal profession has hardly been immune to the current economic crisis. Indeed, law firms have their own distinctive business risks. But, we've also seen firms succeed and grow through proactive management. From our conversations with law firm clients in recent months, we've compiled a summary of best practices for guiding a law firm through this challenging period.

Deepen existing relationships. Spend time with existing clients off the billable clock. Not only will it be a gesture that is appreciated and remembered, it may also uncover potential business areas not being addressed.

Don't neglect marketing and practice development efforts. The current economic storm will pass. Until then, it's all the more critical to maintain your firm's share of mind with existing and prospective clients. Continue to provide content-driven events and seminars, as well as internally generated legal news briefs and articles. Partners and associates should not miss appropriate networking events to develop new business contacts. Be cost conscious, but keep your firm's name and capabilities out there to be seen.

Scrutinize capital expenditures. Review any previously planned capital expenditures and defer or cancel non-mandatory investments. Give particular scrutiny to underutilized technology equipment and excess office space.

Renegotiate office lease(s). With the higher vacancy rates and pricing per square foot falling in major metropolitan areas, it may be the right time to negotiate new lease terms. Depending on where your firm is in its current lease, there may be an opportunity to obtain a rate reduction in exchange for a term extension – especially if the landlord will not have to invest significantly in additional improvements.

David Jochim

Perform your own "stress test." Prepare a detailed "worst-case scenario" of the firm's business activity for the next 12-18 months. Understand how a falloff in billings, lower realization rates, and delays in accounts receivables could increase firm financial pressures. Review the forecast and your budget frequently, and make adjustments as warranted.

Manage operating expenses. Eliminate non-mandatory travel expenses. Identify areas where improvements in technology and digital functionality can reduce costs; consider whether some functions can be outsourced – library maintenance, for example.

Keep closer tabs on accounts receivable. Review your firm's receivables base to identify clients who may be experiencing financial difficulties. Initiate candid conversations early before accounts become significantly past due and potentially uncollectible. Request a retainer from new clients and from clients prone to past due relationships.

Downsize with caution. Carefully evaluate firm personnel, locations, and practice strengths. The time may be right to remove underperforming practice areas and personnel. But also bear in mind the time and cost of building a practice. In some instances, a reduction in compensation may be a better solution than layoffs. You want your practice to be well positioned for a pickup in activity once the economy turns around.

For more information, please contact David Jochim at (949) 553-2520.

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In both good times and bad, your banker should demonstrate a commitment to your industry and should serve as an advisor who understands your business. Your banker is better able to provide responsive service if you provide complete information on your firm's current financial profile. Now is not a good time to surprise your banker. Discuss any problems or areas of concern well in advance of providing financial statements. This will allow your banker to set expectations appropriately within his or her institution and to be in a better position to support your firm's unique needs.

The Ominous Meaning of the Rajaratnam Insider Trading Case

by Wayne Gross, Shareholder, Mike Piazza, Shareholder, and Donald Bunnin, Associate, Greenberg Traurig LLP

Make no mistake about the recent barrage of news regarding insider trading enforcement—what was old is new again and we can expect several more high-profile cases in the weeks and months to come. Just as the 1980s saw Wall Street brought to ground by insider trading cases (Dennis Levine, Ivan Boesky and Michael Milken), expect the current regime at the SEC and the Department of Justice to attempt to make a similar impact by pursuing today's insider trading targets with the same intensity and vigor.

Wayne Gross

Yet the Government's current prosecutorial insider trading endeavors are even more aggressive. The SEC and D0J have shifted their focus from "traditional" insider trading to a "misappropriation" theory that seeks to criminalize "outsider trading" by non- insiders who have routine access to material, non-public information from Wall Street. Such enforcement can be quite problematic if extended too far. It appears that it may become increasingly difficult for both "insiders" and "outsiders" with access to corporate information to determine the appropriateness and use of non-public information.

Securities and Exchange Commission v. Galleon Management, LP et al

In mid-0ctober 2009, Raj Rajaratnam, founder of Galleon Group, was arrested on thirteen counts of conspiracy and securities fraud stemming from an alleged insider trading scheme that netted over $20 million. Executives from IBM, Intel Capital, McKinsey & Company, and New Castle Funds LLC were also arrested. The purported fraud involved the stocks of companies such as Google, Inc., Hilton Hotels Corporation, Advanced Micro Devices, Inc., Clearwire Corporation, Akamai Technologies, Inc., Polycom, Inc., and PeopleSupport, Inc. Based upon the criminal complaints filed and what has been reported thus far, it appears that hedge fund managers, corporate executives. analysts, lawyers and others may have traded tips in exchange for money or other information. According to Robert Khuzami, Director of the SEC's Division of Enforcement, Mr. Rajaratnam "cultivated a network of high-ranking corporate executives and insiders, and then tapped into this ring to obtain confidential details about quarterly earnings and takeover activity."

Mike Piazza

After the arrest of Mr. Rajaratnam, Mr. Khuzami revealed that the SEC is developing a variety of initiatives to monitor hedge fund activities that involve "greater specialization and expertise, improved technological tools to track and analyze trading, better coordination among regulators and law enforcement, new legislative initiatives, and other means to address these areas. It would be wise for investment advisors and corporate executives to closely look at today's case, their own internal operations, and the increasing focus and scrutiny on hedge fund trading activity by the SEC and others, and consider what lessons can be learned and applied to their own operations."

Lessons learned from the Galleon case

The criminal case involving the Galleon Group reveals that the SEC and D0J are not at all hesitant to use the "misappropriation" theory of insider trading. Both the "traditional" and "misappropriation" theories of insider trading seek to prevent the use of material, non-public information in the purchase or sale of securities. Each does so, however, from a different vantage point. The "traditional" theory targets the breach of duty a corporate insider owes to shareholders. The "misappropriation" theory targets the breach of duty an outsider owes to the source of the information. And at times, the duty an outsider, such as a money manager, owes is less than crystal clear; also often less than clear is whether the outsider intentionally misappropriated the information. For example, in the case against Mr. Rajaratnam and his co-defendants, information was not always exchanged for cash; at times it was exchanged for other tips and even for the promise of unspecified future favors. What this means is that it may not always be easy for "insiders" and "outsiders" to know with precision when and how non-public information may be discussed and used.

Donald Bunnin

Equally troubling is the fact that the Government pursued the Galleon case like a mob or political corruption investigation rather than an insider trading investigation. Rather than relying on a pattern of illegal trades after the fact, the investigation relied upon the surreptitious tape-recording of Mr. Rajaratnam by a cooperating informant. This means that the Government for the first time in a major insider trading case was able to get what appear to be quite damaging admissions from the target on tape.

Finally, the Government, rather than preventing unlawful trades from happening in the first instance, allowed illegal trading to take place so that they could monitor the suspects under investigation. This too is a deviation from the historical way in which the SEC and D0J traditionally stepped in to stop insider trading transactions before they happened to protect the markets.

What businesses can and should do to protect themselves

The Galleon Group case, coupled with the statements of Mr. Khuzami, make clear that that the increased enforcement efforts by the SEC and DOJ are profound. While the current focus appears to be hedge funds, the fallout from the Rajaratnam case is already being felt in executive suites and board rooms around the country, in no small part due to the "other parties" who have also been charged, including corporate executives who served as alleged sources of information to Galleon. Because the stakes are high and Government resources are at an all-time peak (both in dollars and manpower available) to seek enforcement of potential insider trading, anyone involved with a public company should be aware of and sensitive to the current climate and enforcement methods. Companies must ensure that adequate and unambiguous insider trading policies are in place and that all employees are provided with such policies. If such policies are violated and questionable information trading appears to have taken place, companies should consider conducting an internal investigation by appropriate outside counsel.

Such actions can make the difference between avoiding government scrutiny in the first instance and getting ensnared in an enforcement action or worse.

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A Catalyst for Safety

by Mark P. Robinson Jr., Partner, and Kevin F. Calcagnie, Partner, Robinson, Calcagnie & Robinson

Product-related injuries and deaths in the United States have been declining for decades. According to the Consumer Product Safety Commission, since the 1970's there has been a substantial reduction in the rate of deaths and injuries associated with consumer products. Traffic fatalities in the United States have fallen to record lows, and between 1966 and 2004 the fatality rate per million vehicle miles traveled declined more than 70%. Similarly, deaths per 100,000 flight hours for general aviation aircraft dropped almost 25% between 1986 and 1998.

Litigation and product safety

Product safety improvements, better regulation and increased public safety awareness have all contributed to preventing deaths and injuries, but there is another factor which is often overlooked. According to the Consumer Federation of America, part of the dramatic reduction in accidental injuries and deaths nationwide has been because of the impact of products liability laws and litigation. Experts in a variety of disciplines, from engineering and economics to epidemiology and public health, have concluded that products liability has played a key role in safer products and injury reduction, and continues to be an important tool for the prevention of injuries in several respects.

Industry groups and manufacturing executives have long acknowledged that litigation has enhanced product safety by changing the way they do business. Surveys and interviews of corporate executives have shown that many manufacturers have instituted programs specifically for the purpose of reducing liability, including improving quality control, labeling and design, and that many have redesigned products as a result of potential liability. For example, a study by the RAND Corporation found that "product liability appears to powerfully influence product design decisions," and that "of all the various external social pressure influencing product design decisions, product liability seems to be the most fundamental."

Kevin F. Calcagnie

Another study, which surveyed 264 chief executive officers of manufacturing companies, revealed that liability experience had caused 1/3 to improve their product lines, 35% to improve the safety of their products, and 47% to improve warnings. Similarly, a survey of over 100 senior level executives showed that over 50% had increased their research and development budgets devoted to product safety, and had added safety features to their products as a result of potential liability. Two-thirds indicated that the principal impact of product liability litigation has been to force companies to be more careful with their products, not to limit innovation.

Mark P. Robinson Jr.

As products liability litigation has heightened manufacturers' awareness of the importance of safety in their products, it has advanced the safety of not only motor vehicle equipment such as air bags, child car seats, and seat belts, but many other consumer products such as hot water vaporizers, farm machinery and firearms. Aside from encouraging the safe design, manufacture and labeling of newer products, liability litigation has also been a factor in forcing or hastening the removal of unreasonably dangerous products from the market, through voluntary and involuntary withdrawals of products such as defective automobiles and pharmaceuticals. Some of the more notorious examples include flammable pajamas and tampons linked to Toxic Shock Syndrome, as well as the Ford Pinto, which subjected occupants to risk of injury or death from fire due to fuel system compromise in rear end collisions.

Safety sells

There are other reasons for manufacturers to develop safer products, and other incentives beyond avoiding litigation costs and damages awards. Businesses have an economic stake in their reputation and how they are perceived by the public, and in this respect, products liability litigation can have a significant impact on both competitiveness and profitability. Manufacturers have come to recognize that "safety sells" and that improving product safety will ultimately lead to competitive advantage, and many have incorporated product safety into their business and marketing plans.

Products liability also plays a vital role in complementing the efforts of understaffed and underfunded regulatory agencies such as the FDA, the CPSC and the NHTSA. Earlier this year the U.S. Supreme Court commented on how litigation serves to advance the safety of pharmaceuticals, noting that:

"The FDA has limited resources to monitor the 11,000 drugs on the market…State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information."

The Supreme Court has also pointed out that litigation "can serve as a catalyst" for regulatory action by aiding in the exposure of new dangers, and prompting manufacturers or federal agencies to decide that revised labeling is required. With the court system providing litigants access to otherwise undisclosed information about product hazards, products liability litigation has exposed evidence of unreasonable product risks, leading to greater regulatory oversight in a number of situations. Examples include asbestos, tobacco products, ultra-absorbent tampons, the Dalkon Shield, ephedra, the sleeping pill Halcion, and the prescription drugs Vioxx and Prozac.

Increasing awareness

In addition to encouraging manufacturers to produce safer products, and assisting government agencies regulating product safety, liability litigation has another important role in reducing injuries, which is educating the public and increasing awareness. According to the CPSC, "Each year, 33.1 million people are injured by consumer products in the home. Some hazards are from products the Agency has warned about for years; others come from new products and technologies." Public awareness is also increased through the strengthening of warnings accompanying products, alerting consumers, patients and prescribing physicians to potential hazards which may have been unknown or previously undisclosed.

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Don't Waive Your Claims!

Tips on Recovering Damages for Productivity Impacts

by Rob Marcereau, Attorney, Rutan & Tucker, LLP

Problems often arise that dramatically affect a contractor's prosecution of the work. Differing site conditions, defective plans or specifications, owner-directed changes, and/or other problems can result in additional direct labor, equipment and materials costs, and may also delay project completion. The most difficult impact to measure, however, and one that is often overlooked, is lost efficiency that can lead to productivity damages.

A problem during the project may shut down an entire work area or particular construction operation, requiring the contractor to alter the planned construction sequence or method. Instead of performing the work in an efficient, linear fashion, a contractor is forced to perform work piecemeal, never achieving the momentum and efficiency that was originally planned. On large projects, such productivity impacts can cost a contractor hundreds of thousands or even millions of dollars.

While owners are readily familiar with the immediate, "direct" costs of project impacts, they are often skeptical of productivity claims, and are reluctant to pay for such "indirect" costs. *California law, however, expressly recognizes claims for lost productivity*. In order to maximize recovery of productivity losses, either in settlement negotiations or in litigation, there are a few key things contractors should do during the project:

Put the owner on notice of potential productivity impacts as early as possible

When a problem occurs on the project that may potentially impact productivity, it is important that the contractor immediately notify the owner. Prime contracts (or standard specifications on public works projects) typically contain "notice" provisions that state that claims are waived unless a contractor provides timely, written notice to the owner, typically within a week or two after discovery of a problem. While contractors often alert the owner of costs and time-related impacts for extra work, in many cases they fail to notify the owner of potential productivity losses, usually because the full extent and amount of such losses are unknown at the time, and only come into focus at the end of the project.

Rather than springing a large productivity claim on the owner at the end of the project (and risking waiver of such claim), the better method is to notify the owner in writing early on, explaining: (1) the nature of the problem (e.g., defective plans, differing site condition, etc.); (2) that it may potentially impact productivity; (3) that such impacts are presently unknown and are being analyzed; and (4) that such productivity impacts will be presented after analysis and documentation is complete. This type of letter helps to avoid waiver and will bolster the contractor's claims during settlement negotiations or litigation.

Document the problem and potential impact *during the project*

In addition to putting the owner on notice of potential productivity impacts during the project, it is important to document and describe the nature of these impacts as they are occurring. For instance, if an owner-directed change requires the contractor to change his construction methods (e.g., he now has to work on elevated false work instead of the ground), the resulting inefficiencies (e.g., hauling materials up to the platform instead of using trucks) should be described. The contractor's construction manager or project foreman should note such impacts in project diaries, meeting minutes, and in correspondence with the owner, creating a solid paper trail that will preserve and support the contractor's claims.

Be careful when signing change orders

In many instances, an owner will agree to compensate the contractor for certain, direct costs associated with a problem or change to the work. Such compensation is typically handled via change order. Contractors must be wary of signing such change orders, however, as the fine print may state that the change order settles all claims associated with the item of work described. From the previous example, a change order may pay the contractor for its extra costs in erecting false work, but does not compensate it for the inefficiencies in working on an elevated platform. If the contractor simply signs this change order, it may result in a waiver of its productivity claims.

To avoid this, the contractor should note in the change order that productivity impacts are not included, and that the contractor's claims for such impacts are specifically reserved. Alternatively, the owner may simply issue the change order unilaterally.

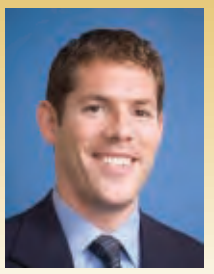
Consider getting a claims consultant involved during the project

Tracking and measuring productivity losses during a heavily impacted project can be extremely challenging. The contractor's personnel are often focusing their energies on trying to keep a troubled project afloat rather than calculating productivity impacts. If expected claims are large enough, it makes sense to engage a claims consultant who can track, document and assemble productivity claims *during the project*, to ensure that such claims and costs are fully captured. Equally important is making sure that the claims consultant hired is qualified for the task. A good claims consultant will typically have an engineering, project management and/or accounting background, and should have experience with the size and type of construction project at issue. Hiring a good claims consultant early in the project can help preserve otherwise valid claims, and will greatly assist the contractor or its attorneys during settlement negotiations or litigation.

Conclusion

Productivity losses, while sometimes difficult to quantify, are a very real component of contractors' costs. If a contractor properly documents these losses during the project, such action will maximize the potential settlement at mediation, or potential recovery at trial or arbitration.

Rob Marcereau



Rob Marcereau is an attorney at Rutan & Tucker, LLP's Orange County office and a member of the firm's Construction Law Group. Mr. Marcereau was recently featured in an August, 2009 cover story in the Los Angeles Daily Journal regarding a string of five arbitration victories over Caltrans totaling over $30 million. Mr. Marcereau and the Rutan construction team represent contractors, subcontractors, materials suppliers and design professionals on a variety of public works and large-scale construction projects throughout California, including highway and bridge construction, light rail, power plants, concrete and steel structures, and other heavy construction projects. Mr. Marcereau may be reached at rmarcereau@rutan.com or by calling (714) 641-3426.

Choosing the Right Litigation Attorney

Winning as a Specialty

by Edward Susolik, Partner, Callahan & Blaine

Specialization in law is frequently misunderstood, especially when it comes to choosing the right litigation attorney.

On the one hand, specialization can be important in selecting a transactional or corporate attorney. For example, tax law, bankruptcy law and probate law are examples of narrow areas of legal specialization in the transactional realm. For the specialist in those narrow areas of law, there is value added to the client for decades of experience of having performed the same activities and utilizing the same forms.

Edward Susolik

Edward Susolik is a partner at Callahan & Blaine, a boutique litigation firm with 23 attorneys. Callahan & Blaine specializes in complex litigation of all types, both plaintiff and defense. Callahan & Blaine's successes include a $934 million jury verdict in a complex business litigation case, a $38 Million employment law settlement and a $50 million personal injury settlement, which is the largest personal injury settlement in United States history. Callahan & Blaine celebrated its 25th anniversary earlier this year. Mr. Susolik can be reached at esusolik@callahan-law.com or 714/241-4444. Callahan & Blaine's web site is found at www.callahan-law.com.

On the other hand, specialization in the area of litigation is much more complex. In the litigation world, there is a tendency of lawyers and law firms to identify themselves as having a niche or sub-specialty in an area of litigation. For example, a lawyer may tout himself as specializing in "real estate litigation," or a firm may have a "real estate litigation" department. Thus, superficially, it would appear to the business person that this a lawyer or law firm that should be retained when faced with a lawsuit arising out of a real estate problem.

Select the best litigator available

The main thesis of this article is that when selecting an attorney, the process a business should use is far different when choosing a litigation attorney than when selecting a transactional or corporate attorney. If a lawsuit has been filed against a business, or if a business has been damaged financially and needs to initiate litigation, that business should not per se select a litigator simply based on their "specialization" in the narrow area upon which the litigation is based. Instead, that business should select the best litigator and trial attorney available. Rather than looking for narrow specialization, the business should look for the litigator whose specialty is winning cases, whether through powerful, one-sided settlements or significant jury verdicts on the defense or plaintiff side. The reality is that while there are tens of thousands of lawyers who do litigation, only a small percentage of such lawyers are true "litigators." An even smaller percentage are true "trial lawyers."

It is these true trial lawyers and litigators that businesses should turn to when confronted with lawsuits or the need to engage in litigation. For example, if a business has a multi-million dollar litigation arising out of a complex lease transaction, it is not going to win or lose that lawsuit because its attorney knows how to read leases, has drafted commercial leases himself or has handled 100 prior lease lawsuits. It will win or lose that lawsuit based on the litigation and trial skills of its attorney.

Using a wide variety of efficient and powerful techniques, a true litigator can learn virtually any specific sub-set of the law. At the end of the day, cases are won and lost not because of a lawyer's 15 year history of having read the same cases or made the same arguments over and over. A case is won and lost because of a litigator's talents and abilities in the courtroom, discovery, the deposition room, law and motion and ultimately trial.

For example, a litigator who specializes in real estate law but cannot take a meaningful deposition is not a good advocate. Any business owner who has been involved in litigation and had their deposition conducted knows the difference between walking out of a deposition happy and untouched because of the questioning lawyer's inability to obtain critical significant information, and walking out of a deposition room bloodied and exhausted, having been cross-examined by a powerful and aggressive litigator/trial lawyer at the peak of his or her skills and talents.

Likewise, the "specialty litigator" who has never conducted a trial or is unable to connect with a judge or jury during trial is a weak advocate. Ultimately, every lawsuit that is litigated must have as its ultimate goal how the facts and legal issues will be decided before a jury and judge. If the "specialty litigator" is not a powerful trial attorney, the entire discovery, law and motion, deposition and pre-trial phase will be handled in a mediocre and unpersuasive manner.

Moreover, the opponent on the other side will feel no intimidation or pressure to settle with a weak legal adversary. Settlement is a powerful weapon in the arsenal of the "litigator/trial lawyer." It is one of the true ironies of litigation that the best settlements come from the lawyer who is an expert at trials and has prepared his case for trial. The trial lawyer who prepares his case for trial is the lawyer who gets the best settlements.

Ultimately, when a business owner is choosing a litigator, the ultimate criteria and "litigation specialty" they should be looking for is to choose a "winner." The following is a checklist of some of the critical factors to look for in selecting a "winning" litigator:

1. Does the lawyer or law firm have a track record of conducting actual trials in front of a jury? A litigator who has never conducted a trial cannot be an effective advocate in the pre-trial and discovery phases.

2. Does the litigator have a track record of winning cases and being successful? Look carefully at the lawyer's record in trial in handling complex cases. This requires some significant due diligence, as some results on the surface may seem compelling but in actuality prove to be less

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For the New Year, Some New HR Approaches

by James J. McDonald Jr., Managing Partner, Fisher & Phillips LLP

The start of a new year provides a natural opportunity for employers to implement changes in policies and procedures to reduce exposure to legal claims and make the business more competitive in this challenging economy. Changes introduced at the beginning of a new year seem less abrupt to employees, and are therefore less disruptive to employee morale. Some changes to consider:

James J. McDonald, Jr.

1. If you don't have an employee handbook, have one prepared and ready to distribute at the beginning of the new year. A good employee handbook makes it clear what is expected of employees. It reduces the likelihood of inconsistent application of policies that can lead to discrimination claims, and it ensures that every employee has been informed of important policies such as the policy against harassment, employment at will and arbitration of disputes.

2. If the overtime exempt status of some employees seems questionable, the new year is a good time to reclassify them as non-exempt. Pay particular attention to office employees who perform mostly routine work, "leads" in manufacturing or service jobs, and retail managers who spend most of their time serving customers. Job descriptions for employees switched to non-exempt status should be revised to more accurately reflect their job duties.

3. Instead of granting automatic pay raises at the first of the year or on an employee's anniversary date, consider implementing a pay-for-performance plan that ties employee compensation to job performance and/or the overall performance of the company.

4. You can save money two ways by revising your vacation policy. First, you can impose a waiting period of three or six months before new employees qualify for vacation benefits. This eliminates the need to pay accrued vacation to short-term employees who do not work out. Second, if you have a "paid time off" or "PTO" policy, split it into vacation and sick leave. This is because while you must pay accrued vacation to terminating employees, you need not pay unused sick leave unless you combine it with vacation time into "PTO."

5. You can eliminate some paid holidays. Some employers have paid holidays such as Presidents' Day, Martin Luther King Day, Christmas Eve and the employee's birthday as paid holidays. Employers are not required by law to provide paid holidays, so you can cut back on some of these paid holidays to improve productivity.

6. Take a look at your employee health plan. Are employees bearing their fair share of the costs of the plan, in terms of premiums and deductible amounts? Is the plan providing adequate coverage, given the cost – or would another plan provide better coverage for the same or lower cost? Consider providing a stipend to employees who may decline coverage under your plan because they can be covered under a spouse's plan.

James J. McDonald, Jr. is managing partner of the Irvine office of the national labor and employment law firm Fisher & Phillips LLP.

Financing New Projects Using Immigration Law

by David Hirson, Partner, Fragomen, Del Rey, Bernsen & Loewy, LLP, Global Corporate Immigration Lawyers

In 1990, the U.S. Congress passed a law which provided permanent residence (green cards) for immigrants and their immediate families who invest $1 million or $500,000 in a new project that creates direct employment for at least 10 full-time legal workers. The funds must be from a lawful source. The funds have to be "at risk" and may not be guaranteed by the investment enterprise. A subsequent provision was enacted known as "Regional Centers." The advantage of a Regional Center is that the requisite10 employees can be direct or indirect and do not have to be on the payroll of the enterprise.

Currently 3,000 visas are available annually in the category known as the EB-5 Employment Creation Visas. Many of the Regional Centers have projects which are in a Targeted Employment Area (TEA) allowing for the lower level investment of $500,000. To qualify as a TEA the project has to be in a rural area or where there is high unemployment equivalent to 150% of the national unemployment rate. For November 2009 the rate was 10.2%, qualifying areas with minimum rate of 15.3%.

The investor visa: an excellent alternative

Regional Center projects have raised millions of dollars since inception. With today's difficulty in raising finance by traditional methods, the investor visa has proved to be an excellent alternative. The two challenges when trying to raise money in this fashion are: proving an economists report showing that the investment will create at least 10 direct of indirect employees for each investor; and the attracting investors from abroad. Regional Centers have an international network of representatives. Many of the investors are from Asia Pacific. The minority of the investors come from almost every other country.

Often wealthy investors will utilize the EB-5 program to obtain residence status so that their children can attend school in the United States. If the investor is a limited partner in a limited partnership, then the investor is not required to be directly involved in the day-to-day management of investment enterprise. This permits the investor to also invest or work in other projects.

The cost of registering a regional center can be avoided where an investor chooses to invest in a new business, which the investor will manage or operate and which will hire 10 employees. It is also possible to invest in existing businesses, where the investment will be to save a failing business, including saving at least 10 jobs per investor or expanding an existing business, where at least 10 additional jobs will be created for each investment, and where the investment capital of the enterprise and/or the employees on payroll are increased by at least 20%.

For further information on registering a Regional Center, and applying for individual EB-5 green cards for investors, please contact David Hirson at dhirson@fragomen.com or by calling 949.660.3504. Mr. Hirson is certified by the State Bar of California, Board of Legal Specialization as a specialist in immigration law. Visit www.fragomen.com for more details.

THE ART OF THE BUY-SELL – BREAKING UP IS HARD TO DO

Although limited liability companies ("LLCs") are formed with success in mind, wise business people plan for uncertainty and include dispute resolution mechanisms and/or exit strategies in their LLC documentation. Buy-sell agreements are often used to achieve these goals.

During these challenging economic times, venturers have become more litigious and buy-sells are being triggered with greater frequency. This article addresses the structure of a buy-sell for an LLC formed to acquire real property and issues that need to be addressed in connection with implementing such agreements.

A buy-sell agreement is a contractual relationship between the members. In a two-member LLC, either member can generally implement the buy-sell by delivering notice requesting the other member elect to (i) sell its LLC interest to the initiator or (ii) purchase the initiator's interest. Depending upon the applicable buy-sell, it can be implemented at anytime or only after the expiration of a pre-agreed upon lock-out period (e.g., at anytime two years after LLC formation).

During these challenging economic times, venturers have become more litigious and buy-sells are being triggered with greater frequency.

The initiator generally sets (i) the price that the non-initiator will pay for the initiator's interest if the non-initiator elects to buy and (ii) the amount that the non-initiator will receive if it elects to sell its interest to the initiator. As a result, the initiator is incentivized to set a fair price since it does not know whether it will be the buyer or the seller. If the price is set too low, then the non-initiator may perceive this as a bargain and elect to purchase. If the price is set too high, then the non-initiator is likely to sell since it will perceive that it is selling at a premium. This logic breaks down if the initiator is certain that the non-initiator is unable to purchase for financial or other reasons. In such event, the initiator may try to "low ball" the non-initiator.

Within a set number of days after implementation, the non-initiator is required to deliver notice to the initiator electing to be the buyer or seller. Once the identities of the parties are established, the buyer is required to purchase the seller's interest within 30 to 60 days after such determination. At the closing, the seller is required to transfer its interest to the buyer.

Before electing to implement, or respond to, any buy-sell, the following issues should be considered:

1. Review Buy-Sell. Before electing to invoke the buy-sell, it is essential that initiator thoroughly review the LLC agreement. There are generally time periods in which elections need to be made and notices delivered. There are also various obligations that need to be fulfilled. Likewise, the non-initiator must also review and understand the provisions of the LLC agreement. The failure of either member to timely make elections, deliver notices or fulfill other obligations may prejudice such member's rights.

2. Setting the Purchase Price. In setting the purchase price, contingent liabilities of the venture and costs that will eventually be incurred by the LLC in connection with the sale of its assets need to be taken into account. For example, if the LLC owns real estate, then brokers' commissions and other costs that will be incurred in connection with the eventual sale of the property must be considered since they affect value.

3. Property Tax Reassessment and Documentary Transfer Tax. In California, and notwithstanding the current economic downturn, many ventures have property tax base years that are below their current values. A transfer of an interest in an LLC may cause a reassessment. Any reassessment will increase operating expenses. In certain instances, the restructure can be achieved without reassessment. If it cannot, then the increased taxes need to be taken into account in determining property value. Likewise, the transfer of an interest in an LLC may cause a documentary transfer tax to be imposed. However, in certain instances, the transfer can be structured to avoid such tax. Any documentary transfer tax that will be imposed also needs to be considered in determining the purchase price.

4. Loans and Other Agreements. If the Project is encumbered, then the loan documents need to be reviewed to determine whether there are any restrictions on the transfer of interests. If there are, negotiations with the lender should commence immediately. In addition, if the seller is a guarantor, it will want to be released from all liability. If a release cannot be obtained, then the seller should request an indemnity from the buyer. Proper due diligence should be conducted to ensure that the indemnitor has assets sufficient to satisfy such indemnity. Likewise, other contractual obligations of the LLC (e.g, leases, franchise agreements, etc.) should be reviewed to ensure that the consummation of the buy-sell does not require third-party consent.

5. Title Insurance. The purchaser should review existing Owner's Title Insurance Policies to verify that the transfer of the seller's interest will not invalidate the policy. If there is an issue, the LLC can usually obtain an endorsement to prevent denial of coverage.

The issues above are a summary of some items that need to be analyzed before electing to implement, or respond to, any buy-sell.

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About the Public Law Center

The Public Law Center **(PLC)**, Orange County's non-profit *pro bono* law firm, is committed to providing access to justice for low-income residents. Through volunteers and staff, the PLC provides free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices.

Who we are

- We are 14 staff attorneys, 10 paraprofessionals and others working in cramped offices in Santa Ana
- We are 700 volunteers fitting pro bono work into our extremely busy schedules
- We are tireless advocates who constantly seek access to justice for our clients
- We are Gary, Alexis, Quyen, Charlotte, Evelyn and many, many others
- We are the Public Law Center

What we do

- We represent the immigrant mother of three who wants to stand up to the pattern of domestic abuse she has suffered for too long
- We fight for the elderly tenants whose landlord laughs when they complain about the rats, roaches, leaky roof and poor security
- We speak up for the young couple who desperately wants decent, affordable housing near where they work so they can raise their new family
- We educate the struggling nonprofit organization on how best to navigate the complex rules and regulations that hamper its efforts to better the community
- We help the family struggling to stay above water as they face foreclosure of their home following a recent job loss and huge medical bills
- We seek access to justice for the poor and underrepresented in Orange County

Why we do it

- Because our clients deserve high-quality, effective assistance of counsel
- Because access to our justice system ensures that this fundamental pillar of our democratic system of government remains strong
- Because we can leverage the resources of a small staff to help thousands of clients every year through the efforts of pro bono volunteers
- Because mobilizing the pro bono resources of the private bar provides the legal community the opportunity to do good while doing well
- Because "injustice anywhere is a threat to justice everywhere." *Rev. Martin Luther King, Jr.*

PLC invites you to join the more than 700 volunteers and PLC staff who, in 2008, provided 50,000 hours of free legal services in handling more than 3,200 cases, serving a total of 14,000 low-income children, adults and seniors in Orange County. We estimate that the value of free legal services provided by PLC staff and volunteers in 2008 is worth more than $16 million.

For additional information regarding the Public Law Center and opportunities to provide pro bono legal services to the low income residents of Orange County, contact Ken Babcock, executive director, at (714) 541-1010 ext. 272 or by sending an email to kbabcock@publiclawcenter.org. To make a contribution to PLC contact Charlotte Finklea, director of fund development at (714) 541-1010 ext 277. Additional information may also be found on our website at www.publiclawcenter.org.

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than persuasive when examined closely.

3. Does the attorney have experience and expertise in handling both plaintiff and defense cases? A true litigator is not relegated to one perspective or one point of view. A lawyer who is equally adept at both plaintiff and defense work is a very powerful asset, as that lawyer is able to understand the perspective and mindset of both sides of the litigation. Moreover, many cases have both a complaint and cross-complaint, so the attorney must be able to wear both plaintiff and defense hats.

4. Does the lawyer or law firm have brilliant legal writing skills? Powerful and persuasive legal briefs are the *sine quo non* of a great lawyer. If a litigator cannot communicate to the court via the written word in a powerful and effective manner, don't hire that lawyer. Ask to see examples of the lawyer's written work and results.

5. Is the lawyer an expert in depositions and discovery? The testimony of a witness at deposition is what the witness must say at trial. Consequently, a litigator who is not able to conduct an aggressive and effective deposition is an ineffectual lawyer. Likewise, document production, third party subpoenas, interrogatories and other discovery devices frequently make or break a case. Again, a true litigator must be an expert in discovery, in order to win your case.

6. Does the attorney have a track record of success in multiple areas of litigation? One of the indicia of a true trial lawyer and litigator is spectacular results in multiple disciplines of litigation. For example, my law firm, Callahan & Blaine has won a $934 million jury verdict in the area of complex business litigation, which is the largest jury verdict in Orange County history. At the same time, my firm also has a $50 million settlement in a complex personal injury/municipal liability case. That is the largest personal injury settlement in United States history. Furthermore, the majority of our cases are on the defense, and we have obtained numerous significant defense verdicts in areas such as employment law, especially when large corporations have "bet the company cases" that need to be won at trial. This type of multi-faceted success demonstrates that one of the most important signs of great litigators – success in diverse and multiple areas of litigation.

Conclusion

In conclusion, when a business becomes embroiled in a lawsuit, the legal specialty they should look for is the lawyer who is an expert in the art and science of litigation, and, more importantly, in winning.

Who is Trial Counsel Under *Seagate*?

by Kerri A. Rich, Associate, Thomas Whitelaw

In one of its most significant decisions in recent years, the Federal Circuit in *In re Seagate Technology, Inc.*, 497 F.3d 1360 (Fed. Cir. 2007), held that the advice of counsel defense to a claim for willful patent infringement does not generally constitute a waiver of the attorney-client or work product privileges as to trial counsel. *Seagate*, however, did not protect all communications between in-house and trial counsel. Rather, *Seagate* held that "trial courts remain free to exercise their discretion in unique circumstances to extend waiver to trial counsel..." [*Id.* at 1374-1375.]

The question of who is and who is not trial counsel under *Seagate* was recently addressed by the Eastern District of California in *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.* ("Duhn"). *Duhn* held that a party's in-house counsel, despite a continual presence in the litigation, was not considered trial counsel for purposes of *Seagate*. [October 15, 2009, *Case No. 1:05-cv-01411*.]

Kerri A. Rich

Duhn sued Cooper Cameron ("Cameron") for willfully infringing its patent for technology related to a wellhead device for oil and gas wells. As a defense to the claims of willful infringement, Cameron asserted the advice of counsel. In response to discovery requests, Cameron produced only one unredacted document—an opinion letter authored by outside counsel, and withheld all in-house counsel documents. Duhn filed a motion to compel production of all documents and depositions regarding advice of counsel from the in-house counsel. Cameron opposed the motion on the ground that its in-house counsel also served as trial counsel and thus argued that the documents and information were protected from disclosure under *Seagate*.

The Court rejected Cameron's argument that its in-house counsel was actually trial counsel. Despite his role in the case by appearing at most of the hearings, presenting substantive arguments, and authoring dispositive motions, Cameron's in-house counsel was not listed on the pleadings, was not admitted before the Court until just prior to the hearing on the motion, and was repeatedly introduced to the Court as in-house counsel. The Court found that in-house counsel was not trial counsel and thus, the protections of *Seagate* did not apply and any claims of privilege were waived when Cameron asserted the advice of counsel defense. In its reasoning, the Court expressed serious concern with the "sword-and-shield litigation tactic [being] employed" when Cameron simply designated its in-house counsel as trial counsel in order to avail itself of the protections of *Seagate.*

Finding that Cameron waived the attorney-client and work product privileges by asserting the advice of counsel defense, the Court ordered the production of documents and the depositions of Cameron's in-house counsel. Overall, the Court refused to extend the protections afforded by *Seagate* to in-house counsel, despite an allegedly active role in the litigation, where it appeared that the first effort to designate its in-house counsel as trial counsel occurred after the assertion of the advice of counsel defense in an effort to shield discoverable communications under *Seagate*.

About Thomas Whitelaw

Thomas Whitelaw is one of the nation's premier boutique law firms specializing in complex, high-stakes intellectual property, business and real estate litigation. With a growing bench of nationally-recognized attorneys, the firm provides exceptional legal and trial expertise to Fortune 500 and mid-sized companies around the country and in Canada. Thomas Whitelaw, with headquarters in Irvine, California and offices in San Francisco, was voted a "Go-To Litigation Firm" by general counsels across the nation. Visit www.twtlaw.com to learn more.

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Products liability laws have been and continue to be a significant force influencing positive change. Litigation arising from defective and unsafe products has encouraged and compelled manufacturers to remove defective products from the market, to develop safer designs and improve quality control, and to provide better warnings to consumers. At the same it has complemented and provided invaluable assistance to the efforts of regulatory agencies overseeing product safety. Products liability litigation has also increased access by regulators and the public to critical safety information and heightened public awareness of the dangers involved with certain products, which has led to better, stronger regulations, safer new products, and the removal of dangerous products from the market.

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