Invitation from the Chair

Sherwin P. Simmons, II
Akerman Senterfitt
Tampa, FL

As Chairman of the Business Law Section’s Young Lawyer Committee, I would like to invite you to join us in Denver, Colorado for the Seventh Annual Institute for the Young Business Lawyer, scheduled for Thursday, April 22, 2010 during the Section’s 2010 Spring Meeting.

In the past the Institute focused on core topics and “nuts and bolts” programming, this has been very successful; however, this year we have expanded the scope to not only include the "nuts and bolts" programming directed towards the New Business Lawyer but also programming for the more advanced Young Business Lawyer. Programming this year will be broken down into four concurrent sessions with one room designated for the "nuts and bolts" programming and the other room designated for the more advanced programming followed by a plenary session focusing on the legal side of the Mile High City's vast professional sports teams.

The day will start off with a networking breakfast where you can meet and mingle with your fellow Institute participants. There will be a lunch in the middle of the day and a brief overview meeting of the Young Lawyer Committee following the plenary session. There will also be an Orientation Session, followed by a Welcome Reception followed by the always fun Young Lawyer Committee annual dinner, this year the dinner will be at Baur’s Ristorante! All of these opportunities are offered for the low cost of $199 plus the cost of the dinner ticket. The program brochure and registration information can be found here.

Due to the economy and the pressures facing Young Lawyers, an opportunity to obtain legal education in the fields you are directly work in and to have the social and marketing opportunities make the Institute and Young Lawyer Committee easy choice. The Young Lawyer Committee provides opportunities to members of the Business Law Section under 40 or whom are in practice for less than ten years to become involved in the Section and provide a common meeting ground. The Committee provides its members with numerous education, training, leadership, business development and social events and opportunities. Our main focus is to integrate members into the framework of the Business Law Section and create future leaders of the Section.

The Young Lawyer Committee has provided wonderful opportunities to me personally and I would like to extend the invitation to you personally to allow us to provide you with these wonderful opportunities. I look forward to seeing all of you on April 22nd in Denver at the Institute.

I am happy to discuss the Institute, the Young Lawyer Committee, the Section and leadership opportunities with you. Feel free to email me at sherwin.simmons@akerman.com or call me at 813.209.5039.

--Sherwin P. Simmons, II
When Is Bankruptcy Right for Your Corporate Client?
Jason L. Boland and Johnathan C. Bolton

The right to file for bankruptcy protection is one of the rights found in Article I, section 8 of the United States Constitution. Bankruptcy protection allows a corporate entity to receive a discharge of its indebtedness so that it can start over again in business or orderly liquidate its assets. There are a multitude of reasons why companies seek bankruptcy protection. For example, a company may find itself in significant litigation with a creditor (whether it be a lender, trade creditor, tort claimant or a governmental entity) or the company may have already suffered an adverse jury verdict or judgment which, if enforced, would put the company out of business. Alternatively, a creditor may be seeking to foreclose on the company’s most valuable assets by virtue of a judgment or because of a default under security documents. In addition, there are many business factors that may lead a company to file for bankruptcy protection including a lack of liquidity, an inability to secure new capital, an inability to collect accounts receivable, increased raw material prices, increased competition, poor location, or the loss of key personnel. Finally, sometimes companies file for bankruptcy protection because of certain disasters which may have crippled their businesses - i.e., September 11th, hurricane Katrina, etc. This article examines some of the benefits of bankruptcy protection for your corporate client and also discusses why bankruptcy may not be the answer.

More...

An Overview of Certain Tax and Non-tax Issues Related to Asset Sales and Stock Sales
Matthew P. McLaughlin

If you have a client that is considering the sale of a corporation or a business, there are certain tax and non-tax issues that should be considered prior to advising the client on how to structure the deal. It is important to recognize that the advantages and disadvantages from the seller's perspective apply when representing the purchaser. While the issues discussed in this article are germane to any type of business transaction when a client desires to sell (or a purchaser desires to acquire) a business from another entity, every situation presents its own issues and difficulties. If you have a client that wants to sell or purchase another business, it is critical to staff the transaction early in the game with appropriate non-legal and legal professionals and advisors.

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Extinguishing the Fire: Tips for Helping Your Client Survive a Data Security Breach
James E. Kurack, Jr.

More...
Over the last year, a record number of organizations suffered a data security breach exposing some type of personal identifiable information. As the number of data breaches continues to rise at an unprecedented rate, organizations increasingly rely on attorneys to navigate the maze of state data breach notification laws and assist them in avoiding potential lawsuits and possible government investigations. This article contains a few basic tips that will help you minimize your client’s risk of liability during a data security breach.

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Sweat the Small Stuff...and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career
Scott H. Husbands

This article aims to provide a few basic tips that will help you to make a positive impression early in your career regardless of your practice. Learn how to ‘Sweat the Small Stuff,’ but at the same time avoiding missing the forest from the trees. Understand how to ask appropriate follow-up questions and how to listen and understand a response. See the appropriate time to assume and how to explain your assumptions. Use these tips as you see fit and for best results, adapt them to your corporate culture and specific practice.

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Pro Bono and Public Service Subcommittee
YLC is proud to partner with the Colorado Coalition to End Hunger

Each year, the Young Lawyers Committee ("YLC") co-sponsors a public service project benefiting a charity within the host community for the Business Law Section's Spring Meeting. This year, the YLC is proud to partner with the Colorado Coalition to End Hunger in the fight against childhood hunger and malnutrition. Section members may make a direct donation to the Coalition's campaign to provide food and proper nutrition to children from low-income families who typically lose access to school meal programs during the summer months. Even a small donation makes a tremendous difference, enabling the Coalition to provide summer meals to a disadvantaged child for up to nine weeks. To make a donation to this worthy cause, visit: http://hungerfreecolorado.org/ABADonationPage.html. This public service project is coordinated by the Business and Corporate Litigation Committee’s Pro Bono and Public Service Subcommittee, with co-sponsorship by the Young Lawyer Committee and the Section's Committee on Pro Bono.

For more information about the project or to see how you can get involved, please contact Kristin Johnson and Victoria Mitchell.
2010 Institute for the Young Business Lawyer
9 "Business Law Basics" programs plus networking events for only $199.

The ABA Business Law Section, in partnership with the ABA Young Lawyers Division, is proud to present the Seventh Annual Institute for the Young Business Lawyer in Denver! This all-day institute is an incredible opportunity for the young business lawyer to obtain quality, introductory CLE and a wonderful introduction to the benefits of participating in the ABA and the Business Law Section. The Institute will take place at the Sheraton Denver Downtown Hotel on Thursday, April 22, 2010.

Registration  
Travel Information  
Brochure  
Schedule

Thursday, April 22, 2010

- 7:30a.m.-8:15a.m. · Networking Breakfast
- 8:15a.m.-9:30a.m. · Concurrent Sessions 1
  1. The 25 Keys to Ethical Decision Making
  2. Online Privacy & Data Security Soup to Nuts: A Primer and Update on Important Developments for the Business Lawyer
- 9:45a.m.-11:00a.m. · Concurrent Sessions 2
  1. Basics of Consumer Credit Regulation: A Context for Federal Financial Services Reform
  2. LLCs and the Rest of the Legal World
- 11:15a.m.-12:30p.m. · Concurrent Sessions 3
  1. Secured Transactions: Practical Things Every Business Lawyer Should Know About UCC Article 9
  2. E-Discovery for the Young Lawyer
- 12:30p.m.-1:30p.m. · Networking Luncheon
- 1:30p.m.-2:45p.m. · Concurrent Sessions 4
  1. Contract Drafting and the Deal
  2. Financing the Emerging Growth Company
- 3:00p.m.-4:15p.m. · Plenary Session
  1. The Legal Side of the World of Sports Entertainment

Social Events

Hospitality Suites
Wednesday, April 21 -- 9:00PM - 11:00PM  
Thursday, April 22 ◆ 5:00 PM ◆ 6:00 PM (Orientation Reception)  
Friday, April 23 -- 10:00PM - 1:00AM  
Sheraton Denver Hotel, Denver, CO  
Windows, 2nd Level, Tower Building  
» Website

Dinner at Baur's Ristorante
Learn About and Apply for the Business Law Fellows and Ambassadors Programs

The Business Law Section is now accepting applications for the Business Law Fellows and Ambassadors Programs.

The Fellows and Ambassadors Programs are designed to get young lawyers and lawyers of color, respectively, involved in the substantive work of the Section. The Section funds five Fellows and five Ambassadors for a two-year term to participate in three Section meetings each year (Spring and Annual Meetings and a stand-alone committee meeting). Applications are due April 30. For more information about the programs, please click here.

» Ambassadors
» Fellows

Get Published Now! Articles Needed!

Over 12,000 Young Business Lawyers Want to Hear From You! There are over 400,000 ABA members of which more than 57,000 are Business Law Section members, in addition to the general public, that will have access to your article through high ranking search engine results. Your article will also be memorialized on the ABA website. The Young Lawyer Committee is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Eric Koester at ekoester@cooley.com.

Articles should be 1500 words or less, and on any topic of interest to young lawyers. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.

Committee Leadership

Committee Chairs:

Chair: Sherwin Simmons
Vice-chairs: Stephanie Cohen

Mac Richard McCoy

Subcommittees:

Membership: David Kinman

Newsletter/Technology: Eric Koester

Pro Bono/Public Service: Mac Richard McCoy

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International: Sajai Singh
WHEN IS BANKRUPTCY RIGHT FOR YOUR CORPORATE CLIENT?
by Jason L. Boland and Johnathan C. Bolton

The right to file for bankruptcy protection is one of the rights found in Article I, section 8 of the United States Constitution. Bankruptcy protection allows a corporate entity to receive a discharge of its indebtedness so that it can start over again in business or orderly liquidate its assets.

There are a multitude of reasons why companies seek bankruptcy protection. For example, a company may find itself in significant litigation with a creditor (whether it be a lender, trade creditor, tort claimant or a governmental entity) or the company may have already suffered an adverse jury verdict or judgment which, if enforced, would put the company out of business. Alternatively, a creditor may be seeking to foreclose on the company's most valuable assets by virtue of a judgment or because of a default under security documents. In addition, there are many business factors that may lead a company to file for bankruptcy protection including a lack of liquidity, an inability to secure new capital, an inability to collect accounts receivable, increased raw material prices, increased competition, poor location, or the loss of key personnel. Finally, sometimes companies file for bankruptcy protection because of certain disasters which may have crippled their businesses - i.e., September 11th, hurricane Katrina, etc.

This article examines some of the benefits of bankruptcy protection for your corporate client and also discusses why bankruptcy may not be the answer.

1. A Company Must Choose Between Chapter 7 and Chapter 11

When a company chooses to file a voluntary petition for bankruptcy protection, it must choose between two chapters, Chapter 11 and Chapter 7. Chapter 11 allows current management to remain in control of the company (this is called a "debtor-in-possession") in order to attempt to reorganize the business, restructure the company's debt and emerge from bankruptcy pursuant to a plan of reorganization. Chapter 7 is a liquidation proceeding in which an independent trustee is appointed to replace the board of directors and orderly liquidate the company's assets.

Chapter 11 is available to individuals, partnerships, limited liability companies as well as public and private corporations and railroads. The goal of Chapter 11 is for a company to reorganize its business, restructure its debt and emerge from bankruptcy as a going concern. Some preliminary considerations in the decision to file for Chapter 11 protection, as opposed to a Chapter 7 liquidation, include: (1) whether the company has sufficient funds to pay the costs of a Chapter 11 proceeding, (2) whether there is a realistic projection of future income for the company; (3) whether additional financing is needed or has been obtained; (4) whether the company will be able to pay at least some of its debts; and (5) whether current shareholders will receive any distributions in the bankruptcy.
Under the Bankruptcy Code, debts against the company are organized according to the "absolute priority" rule, which generally means that secured claims get paid in full (in cash, notes or stock) before any unsecured claims receive any distribution; unsecured claims get paid in full (in cash, notes or stock) before shareholders receive any distribution; and preferred shareholders get paid in full (in cash, notes or stock) before common shareholders receive any distribution.

If a company decides to file for Chapter 11 protection, state law generally requires authorization by the board of directors at a board meeting that has been properly called and held. Individual board members or officers cannot file for a corporation on their own.1

2. Benefits of Filing


One of the biggest benefits, and perhaps biggest reason companies choose to file for bankruptcy relief, is the "automatic stay" that is imposed under 11 U.S.C. § 362. The stay is an "automatic" injunction that is effective immediately upon the filing of a voluntary bankruptcy petition under any chapter of the Bankruptcy Code. The stay generally prohibits creditors from taking any act to collect their debts from the company, whether or not the creditor has notice of the stay. The automatic stay is designed to give debtors a "breathing spell" so that they can evaluate their financial condition and attempt to reorganize their businesses. The automatic stay is very broad in scope and provides for a worldwide stay of litigation, lien enforcement and other actions, judicial or otherwise, that are attempts to enforce or collect pre-petition claims, attempts to interfere with property of the estate, property of the debtor or property in the custody of the estate.2

The Debtor Receives a Fresh Start

Generally, the automatic stay remains in effect until (1) the judge "lifts" the stay at the request of a creditor, (2) the debtor gets a discharge, (3) the case is dismissed, or (4) the asset at issue is no longer property of the estate. Section 362(d) of the Bankruptcy Code sets forth the standards by which, after notice and a hearing, a party in interest is entitled to relief from the automatic stay by "terminating, annulling, modifying, or conditioning such stay." Most notably, the stay can be lifted "for cause"3 (which includes the lack of adequate protection), or when the creditor can show that the debtor has no equity in the specific property that is subject to the stay and that the property is not necessary to an effective reorganization.

In order for a company to successfully restructure its business in Chapter 11, the company must raise cash (by secured borrowing, equity financing or through a sale of assets), reduce debt (by cutting costs, selling assets and rejecting above-market leases and contracts), and formulate a feasible business plan that realistically projects positive future cash flow that will enable the company to pay its debts as they come due in the future.
In a Chapter 11 case, a "plan of reorganization" is the mechanism by which this is achieved. The debtor is given the initial opportunity to propose a plan that will be voted on by creditors who are impaired by the plan. If the debtor does not propose a feasible plan within its "exclusivity period", or if the debtor’s exclusivity period has expired or been terminated by the court, any creditor or party-in-interest may propose a plan.

A strategic plan of reorganization will either pay down or restructure existing debt. If the company is fortunate, it can implement its plan through consensual negotiations with its major creditors or creditor constituencies. It may be necessary, however, to force implementation of a plan in the bankruptcy proceeding through a "cram down" if a class of creditors votes against the plan. The intended culmination of Chapter 11 is to give the debtor a "fresh start" through the binding effect of the order confirming the plan of reorganization which allows the company to emerge from bankruptcy.

3. Bankruptcy May Not Always Be the Best Answer

An Out of Court "Workout" May be More Beneficial to A Company

The time and expense of a bankruptcy proceeding can sometimes be avoided through an out-of-court "workout" process. Through this workout process, a debtor and its restructuring professionals can attempt to negotiate with major creditors in an attempt to reach an agreement about the restructure of its debt outside the bankruptcy process. Such a process can be very attractive to both parties as it will be significantly cheaper and less onerous than a bankruptcy case. However, for an out-of-court "workout" to be successful, all parties must be in agreement.

Bankruptcy Requires Full Disclosure

If the "workout" process is unsuccessful and negotiations have broken down, the company may be left with no alternative other than filing for bankruptcy relief. However, companies must keep in mind that there are numerous disclosure requirements that force a debtor to reveal a lot about its business. For example, debtors must provide an initial debtor report, detailed schedules of assets and liabilities, a statement of financial affairs (including information about transactions with insiders) and monthly operating reports. Debtors may also be required to make additional reporting to secured creditors. In addition, debtors must ultimately propose a disclosure statement which is filed in connection with the confirmation of a plan and contains all of the information about the company that would entitle a creditor to make an informed decision about voting on the plan.

Creditors have the opportunity to review all of the information disclosed by the debtor and can also seek the examination of the debtor under Federal Rule of Bankruptcy Procedure 2004 which is a federally-created "fishing expedition." Additionally, the information disclosed by the debtor may indicate possible fraud or gross mismanagement which, if true, may justify the appointment of a Chapter 11 trustee to take the place of current management.
a. The Initial Debtor Report

In Chapter 11 cases, the Office of the United States Trustee (which is a part of the United States Department of Justice that supervises bankruptcy cases) (the "US Trustee"), requires the debtor to complete an initial debtor report.5 These initial debtor reports require the debtor to provide an organizational overview, balance sheets, tax returns, financial statements, and proof of insurance on the debtor's assets. Some US Trustees also require that the debtor be interviewed to discuss the initial report.

b. Schedules of Assets and Liabilities and Statement Of Financial Affairs

All debtors, regardless of whether they file for bankruptcy under Chapter 7 or Chapter 11, are also required to file Schedules of Assets and Liabilities ("Schedules") and a Statement of Financial Affairs ("SOFA").6 These Schedules and SOFA, which can be quite lengthy in larger Chapter 11 cases, are filed under penalty of perjury and describe all of the debtor's assets, liabilities, obligations, and financial affairs as of the date of the filing.

Among other things, in the Schedules the debtor must disclose all of its real property (including an estimated current value of the property), personal property (including an estimated current value of the property), intangible property, all creditors holding secured claims (including an indication of whether such claims are contingent, unliquidated or disputed), all creditors holding unsecured priority claims, all creditors holding unsecured non-priority claims, all executory contracts, all unexpired leases and any co-debtors. These documents must be supplemented and amended as necessary throughout the entire bankruptcy case.

c. Monthly Operating Reports

The Office of the US Trustee also requires that Chapter 11 debtors complete monthly operating reports ("MORs"). These MORs detail the debtor's financial condition while in Chapter 11. For a public company, the task of completing the MORs can be significant and expensive. The MORs, as with the Schedules and SOFA, must be signed under penalty of perjury by the debtor's representative and filed with the bankruptcy court. Once filed, these MORs are available to the public for review.

As evident from the sheer amount of information that must be provided (and continually supplemented) in the MORs, employees in the financial department of Chapter 11 debtors often find themselves consumed with such tasks. In such cases, the employees may become overworked and leave the already struggling company because, in some cases, they will find that their workload has effectively doubled. Other times, a debtor may choose to hire an outside financial restructuring firm to assist or take over such tasks. Outside assistance of course means more fees and expenses will be incurred.

The MORs, along with the Schedules, SOFA and all other major pleadings, will be closely scrutinized by the court and all parties-in-interest.
Bankruptcy Will Not Fix a Broken Business Model

Most importantly, although the bankruptcy process can be beneficial to a company in numerous ways, it is not magic. A company must carefully assess its business and determine what its problems are, why it is in the position it currently is in, and how those problems can be fixed. Such careful consideration is integral in making any determination of whether to proceed with the filing of a bankruptcy case, as the mere filing of a bankruptcy case, in most situations, will not fix poor management, will not bring in new customers and will not cause lenders, creditors or vendors to loosen their credit terms. To the contrary, the stigma and negative connotations that are often associated with a bankruptcy filing may scare off existing customers and may cause employees to leave due to the fear of job stability. Replacements employees may not be easy to find as most individuals are not often eager to go to work for a bankrupt company. Similarly, vendors may tighten up credit terms, request security deposits or letters of credit, or may stop doing business with the company due to the fear, whether justified or not, of non-payment.

Business Bankruptcy Cases Can be Very Expensive

Before filing, companies must also consider the cost of filing for bankruptcy, especially under Chapter 11, since legal fees alone in a relatively simple Chapter 11 business case could easily cost in excess of $100,000. In addition to paying its own counsel's legal fees, the debtor may also have to hire financial advisors and other professionals to help guide it through the bankruptcy process. In addition, the debtor's estate may also be required to pay the fees of other parties including any official committee,7 trustee,8 examiner,9 health care ombudsman,10 and/or future claims representatives,11 just to name a few. The combination of these fees can reach well in the millions (if not hundreds of millions) of dollars if enough people are involved and if the case is highly contested.12

4. Conclusion

In this Bankruptcy article, we have discussed the basics of why a company might file for bankruptcy protection, some of the benefits to filing and why bankruptcy may not be the answer to all of a company's problems. To the contrary, there are several problems, such as a poor business model, which bankruptcy alone cannot fix on its own. While the bankruptcy process may provide certain tools to facilitate such solutions, a company must strategically analyze all of its options, especially any non-bankruptcy options, and consult with an appropriate bankruptcy professional prior to filing for bankruptcy.

About the Authors: Mr. Boland and Mr. Bolton are associates in the Bankruptcy, Reorganization and Creditors' Rights Practice Group of Fulbright & Jaworski L.L.P. in Houston, Texas. Mr. Bolton is Board Certified in Business Bankruptcy Law by the Texas Board of Legal Specialization and is the Chair of the Bankruptcy Section of the Young Lawyer's Division of the American Bar Association.
Footnotes:


3 "Cause" is not defined anywhere in the Bankruptcy Code.

4 Under 11 U.S.C. § 1104(a) a "party in interest" may seek appointment of a trustee, among other things, "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management."


6 See FED. R. BANKR. P. 1007.

7 Section 1102 of the Bankruptcy Code provides that, as soon as practicable after the entry of an order for relief under chapter 11, the US Trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or equity security holders. 11 U.S.C. § 1102(a)(1).

8 If the facts of the case warrant trustee appointment, then the debtor-in-possession is ousted, and the trustee takes over operation of the business. See 11 U.S.C. § 1104. Likewise, at any time before confirmation of a plan, the court may also terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business. 11 U.S.C. § 1105.

9 If the bankruptcy court finds it necessary to have third-party oversight, but prefers to keep administrative costs minimal, the court can choose to appoint an examiner instead of a trustee (of course, some cases may warrant both). See Fuller, Chapter 11 Examiner: When, Why, What And How, Parts I and II, AM. BANKR. INST. L.J. (March & April 2005); Zaretisky, Trustees and Examiners In Chapter 11, 44 S.C. L. REV. 907 (1993); Gumport, The Bankruptcy Examiner, 20 CAL BANKR. J. 71 (1992); see also 11 U.S.C. §§ 1104, 1106 (discussing the appointment and duties of an examiner).

10 A major addition to the Bankruptcy Code under BAPCPA is a new Section 333, entitled "Appointment of patient care ombudsman." Under Section 333, an ombudsman may be appointed to monitor the quality of patient care and represent the interests of the patients.
A future claims representative is a court-appointed official or agent charged with the representation of the as-yet-unknown future claimants who have been injured by pre-petition conduct of the debtor.

AN OVERVIEW OF CERTAIN TAX AND NON-TAX ISSUES RELATED TO ASSET SALES AND STOCK SALES
By Matthew P. McLaughlin

If you have a client that is considering the sale of a corporation or a business, there are certain tax and non-tax issues that should be considered prior to advising the client on how to structure the deal.

Advantages of Stock Sale

There are a number of advantages, from the seller’s perspective, in structuring a transaction such as a stock sale as opposed to sale of assets. Generally, the seller benefits from the following:

1. The seller realizes and recognizes income taxed at a capital gain rate on the sale of the stock in a corporation. This general rule is subject a certain exceptions, namely when a portion of the purchase price is allocated to a covenant not to compete. In such a situation, the seller generally recognizes ordinary income and is taxed accordingly not at the preferential capital gains rate.

2. One non-tax advantage to a stock sale is that the seller does not have to liquidate or otherwise dispose of the corporate entity. The purchaser is acquiring the corporation or other business entity and will either maintain its existence or liquidate it.

Disadvantages of a Stock Sale

There are certain disadvantages to the seller when selling stock. Such can include:

1. From a tax perspective, the sale of stock can cause a seller to lose any net operating losses that it may have prior to the stock sale. If the seller wants to utilize these net operating losses, a stock sale would not be the recommended way to structure the transaction.

2. There are some practical non-tax problems created by selling stock, namely when the seller is financing the transaction for the purchaser or when the seller has a desire to continue a particular line of the business. If the seller is financing the sale for the purchaser, issues can arise in the collateralization of the transaction. If the seller desires to continue a particular line of the business, an asset sale may be better way to structure the transaction or the seller will have to spin off that particular line prior to the closing of the stock sale.

Advantages of an Asset Sale

Some of the advantages from the seller’s perspective when selling assets can include:

1. The seller may wish to only sell certain assets and an asset sale affords it the opportunity to sell only what it wants to sell to the purchaser. This would be an
advantage to a seller that wants to maintain and continue a line or a division of its business.

2. If the seller is a corporation that does not have significant built in gain with respect to its assets, an asset sale may provide both parties more flexibility. A purchaser typically prefers an asset acquisition because the purchaser gets cost basis (which is generally fair market value) in the assets it is purchasing.

Disadvantages of an Asset Sale

There are certain disadvantages to the seller when selling assets. These disadvantages can include the following:

1. There is a potential double tax problem if the seller is a corporation. When the seller sells the assets, such is a taxable transaction. When the seller distributes the proceeds from the sale as a dividend and/or liquidates, the shareholders can be taxed upon the receipt of a dividend distribution, liquidating or otherwise.

2. A paramount disadvantage to the seller in an asset sale is that typically, the purchaser does not assume any of the seller’s liabilities. Generally, the purchaser of assets of another corporation is not responsible for the liabilities and debts of the seller.

It is important to recognize that these advantages and disadvantages from the seller’s perspective apply when representing the purchaser. While the issues discussed above are germane to any type of business transaction when a client desires to sell (or a purchaser desires to acquire) a business from another entity, every situation presents its own issues and difficulties. If you have a client that wants to sell or purchase another business, it is critical to staff the transaction early in the game with appropriate non-legal and legal professionals and advisors.

Such non-legal professionals and advisors can include certified public accountants, financial advisors, business brokers and insurance agents. The legal teams need to include, as applicable, individuals with experience and expertise in the following areas: real estate, labor and employment, tax, securities, antitrust/Hart-Scott-Rodino, environmental, intellectual property, regulatory, ERISA and employee benefits and litigation.

Seeing the transaction through the due diligence phase to closing can be made easier by considering some of the tax and non-tax issues discussed herein. In addition, pulling together the non-legal and legal professional team in the infancy of the transaction can certainly mitigate and even eliminate certain issues throughout the entire negotiating, document drafting and closing process.

About the Author: Mr. McLaughlin is an associate with the Jackson, Mississippi office of Balch & Bingham LLP where he focuses his practice on advising emerging businesses and existing companies on federal and state financing incentives as well as representing clients in mergers
and acquisitions. Mr. McLaughlin is admitted to practice in the State of Mississippi and is a member of the American Bar Association Sections of Business Law, Taxation and Real Property, Probate and Trust Law.
EXTINGUISHING THE FIRE: TIPS FOR HELPING YOUR CLIENT SURVIVE A DATA SECURITY BREACH
By James E. Kurack, Jr.

Over the last year, a record number of organizations suffered a data security breach exposing some type of personal identifiable information. As the number of data breaches continues to rise at an unprecedented rate, organizations increasingly rely on attorneys to navigate the maze of state data breach notification laws and assist them in avoiding potential lawsuits and possible government investigations. Below are a few basic tips that will help you minimize your client’s risk of liability during a data security breach.

Determine Which State Data Breach Notification Laws Apply

Over forty states have some type of data breach notification statute requiring organizations to notify individuals whose personal information has been compromised. In many cases, organizations are subject to the data breach notification law of each state in which their customers reside. Organizations that conduct business globally may be required to comply with the data breach notification laws of foreign countries. Therefore, do not make the mistake of simply complying with the data breach notification law of the jurisdiction in which your client is located. Given that certain jurisdictions require notification within a specified period of time, the issue of what state laws apply should be determined within days of learning about the data security breach.

Do Not Forget that State Data Breach Notification Laws Differ

State data breach notification requirements differ in several respects. For instance, some states such as Massachusetts and New Jersey require organizations to notify state agencies of a data security breach while states such as Pennsylvania do not. States also differ with respect to the time in which notification must be provided. Some states also require different information to be contained in the data breach notification letter. Given the differences in state statutes, do not assume that compliance with one state data breach notification statute will result in compliance with all statutes.

Determine Whether Notification Is Required

From a customer relations view, nothing can be worse than providing notification of a data breach when no personal identifiable information has been accessed. Consequently, make sure that the incident you are responding to requires your client to provide notification before sending thousands of data breach notification letters. Many states require notification when personal identifiable information is acquired or accessed by an unauthorized individual. In cases where personal data is lost or misplaced, you must advise your client to immediately investigate into whether the data has been acquired or accessed by an unauthorized person. If your client has absolutely no reason to believe that personal information has been accessed, you should document the reason for this belief in detail and refrain from sending notification letters if you are not required to do so.
Coordinate with Appropriate Law Enforcement Authorities

Careful consideration must be given as to when and how to coordinate with law enforcement. Ideally, you should gain an understanding as to how and when the data breach occurred to determine the most appropriate law enforcement agency to notify. Many state data breach notification laws allow organizations to delay notification if law enforcement determines that notification will impede a criminal investigation. Before relying on this exception, make sure you receive written confirmation from law enforcement that the notice would impede their investigation.

Carefully Draft Notification Letters

Notification letters should clearly describe: (1) the incident, (2) the type of personal information compromised, (3) the steps your client is taking to protect individuals against further data security breaches, (4) guidance as to how the affected individuals can protect themselves against identity theft in the future and (5) a dedicated telephone number to answer questions about the data security breach. Before sending notification letters, you should advise your client to designate customer service representatives to answer questions about the data breach. Of course, all representatives should provide consistent responses to any inquiries. Consideration should also be given to offering a period of free credit monitoring services to the individuals affected.

About the Author: James E. Kurack, Jr., is a senior associate with the law firm of Obermayer Rebmann Maxwell & Hippel LLP. He focuses his practice on representing businesses and individuals with respect to privacy and data security issues. Mr. Kurack maintains a blog dedicated to privacy and data security issues affecting Pennsylvania businesses at www.paprivacyanddatasecurity.blogspot.com. He can be reached at james.kurack@obermayer.com.
Sweat the Small Stuff . . . and a Handful of Other Tips to Help You Make a Positive Impression Early in Your Career

By Scott H. Husbands

Advice from seasoned practitioners plays a large role in the development of junior lawyers. In fact, the relationship between a senior and junior lawyer - that of the teacher and the student - forms the backbone of our profession.

This article does not aim to take the place of that relationship. Additionally, it will not detail the ins and outs of your first few years of practice as a young lawyer. There are many other fine articles that provide excellent practice-specific pointers. Instead, this article aims to provide a few basic tips that will help you to make a positive impression early in your career regardless of your practice. Use them as you see fit and for best results, adapt them to your corporate culture and specific practice. Use them well and you will develop a strong ability to issue-spot like a seasoned practitioner. What do you do with those issues once you've spotted them? The last tip will answer that question.

Sweat the small stuff

This should, first and foremost, be the credo of every junior lawyer. For starters, working through the details is a great learning process. Only through complete immersion can you hope to understand the big picture. More importantly, most senior lawyers expect junior lawyers to chase down the minutiae. Having an answer ready for a detail-oriented question will create a very strong first impression and a feeling of confidence in your abilities. So, sweat the small stuff. But do so with caution as the next tip advises.

Sweat cautiously and proportionately

There's a fine line between sweating the small stuff and losing the forest for the trees. In fact, an incomplete or non-existent perception of the big picture will alter your understanding of the details and create a counter-productive learning experience. Also, sweat the small stuff proportionately in relation to the issue or assignment. In other words, don't boil the ocean to draft a one-page letter. That type of behavior displays bad judgment and will damage your reputation.

Contemplate follow-up questions

This piece of advice goes almost hand in hand with sweating the small stuff. Think each of your issues through and anticipate follow-ups from the client and senior lawyers. Understanding the natural follow-up to an issue is the hallmark of a well-prepared junior lawyer and well-prepared junior lawyers often transform into successful junior lawyers. Proportionality is important here too.
Listen and reflect

We all know that listening is an important skill. But do we all practice reflective listening? Reflective listening is the art of repeating what you are hearing to the speaker. It can drastically cut down on misunderstandings or miscommunications and it plainly shows the other person that you are in fact listening. Reflective listening can be particularly important when a person is communicating a question or assignment to you. And don't be bashful - most speakers will appreciate the exchange!

Take advantage of a blank slate

As a young lawyer, it is critical to remember that you are working with most people for the first time. Your colleagues and clients are virtually a blank slate when it comes to your work ethic and reputation. Deadlines, accuracy, and attention to detail are critical. People will remember your performance. Work hard and do well and you will establish a reputation for quality work. Do a sloppy job and your reputation will suffer even if your reputation for quality work happened to precede you. Work hard to mold your reputation and peoples' expectations and you will enjoy a long successful career as a lawyer.

Never assume anything

Assume without saying and everyone loses or so the G-rated version of the old saying goes. Assumptions create a number of problems for young lawyers. Young lawyers are not often equipped with enough experience to make the proper assumptions. Additionally, those who you are working with may not want you to assume anything. If you make an assumption, it may completely alter the result or your analysis. This tip applies across the board from your work product to professional relationships. Assumptions about colleagues or clients can be the most disastrous. So, avoid them at all costs. And if you simply must assume, then follow the next piece of advice.

If you absolutely must assume, explain

It may sometimes be necessary to make an assumption or a series of assumptions. If you find yourself in this situation, explain the assumptions that you are making. This will help the other person or party to better understand your result or analysis. It will also clear up any ambiguities by defining the scope of your work. It also lets others know that your analysis contains layers that can be peeled back or added for a different result. And here's a bit of irony - if you fail to explain your assumptions, someone else may assume you didn't assume anything and you'll find yourself in a downward spiral headed toward miscommunication that no amount of reflective listening or follow-up questioning can resolve.

If you apply the foregoing tips to your daily routines, you'll find it easy to discover relevant issues. And when you do discover those issues, here's one more piece of advice.
Escalate issues you find - Do it early and do it often

The practice of law is a practice in decision-making that takes years to perfect. Young lawyers often feel uncomfortable making judgment calls alone. The following advice came from a colleague of mine in the context of a due diligence assignment. Do your work and sort out the details noting any issues you discover. Bring those issues, and perhaps a suggested solution, to your senior colleagues for their perspective at an appropriate time. They will welcome the opportunity to discuss the issues with you. Let it linger and a minor issue may become a huge problem. The worst case scenario can happen when a young lawyer fails to raise an issue that later surfaces without the lawyer's involvement. None of us want to answer a colleague or client who is asking whether we knew about the issue and if so, why we failed to act. If you do happen to find yourself answering that question, at least your answer won't be that you weren't sweating the small stuff because you assumed without saying that someone else was.

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