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- **The "new" business courts**
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  Today, an increasing number of states have a business court or judges assigned only to business disputes. Most of these courts were created in the past 15 years.
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Business Law Today

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The "New" Business Courts

Responding to Modern Business and Commercial Disputes

By Lee Applebaum

Lawyer 1: "I'll say a phrase and you name the first court that comes to mind."

Lawyer 2: "Ok, go."

Lawyer 1: "Business Court."

Lawyer 2: "Delaware Court of Chancery."

Fifteen years ago, the over 200-year-old Delaware Court of Chancery would have been the only response, but today other possibilities exist. If this same word association test was conducted in New York, Chicago, Philadelphia, Boston, or Charlotte, to name a few cities, the subconscious link from the phrase "business court" would no longer inexorably lead to Delaware.

During the last 15 years, various states' trial courts have incorporated specialized business and commercial tracks within their dockets, often starting as pilot programs. Some of these experiments have become institutionalized, with business courts operating for over a decade in Manhattan, Chicago, and North Carolina. Other business courts--in Rhode Island, Philadelphia, Las Vegas, Reno, and Boston--are on their way to the 10-year mark, and a new generation of courts has arisen in the last few years.

Delaware's Court of Chancery remains the bright star in this firmament, and it sets the standard to which other courts aspire: to institutionalize the qualities that make Chancery a great court. Hard work, long development and study of legal issues, intelligence, and integrity are the foundation of its excellence, forming the qualitative archetype for the new business courts.

Chancery's "aspirational model" goes more to the essence than the attributes of these "new" business courts, however, which have taken a distinctly different form. They are not courts of equity focusing on corporate governance and constituency issues, though these issues form part of their jurisdiction. Rather, their jurisdiction covers non-equity actions for money damages, as well as intra-corporate matters that come under traditional equity jurisdiction. Thus, some call these new courts "commercial courts" or "commercial and business courts," reflecting a jurisdictional model that includes both law and equity matters.

Along with not fully capturing this commercial distinction, the rubric "business court" does not precisely describe each state's jurisdictional development. In most states, the word "court" itself is a misnomer. Rather, specialized dockets or programs with a defined jurisdiction have been created within many states' trial courts or their civil divisions. For example, Philadelphia's colloquially known "Commerce Court" is actually designated the Philadelphia Court of Common Pleas' Commerce Case Management Program; a case track created by an administrative order assigning two (later three) judges to hear a specific subset of cases taken from the trial court's general docket.

Whatever the name, manner of creation, or breadth as a program or court division, however, the new business courts have one central common ground: a specific set of judges, assigned to hear a body of business and commercial cases, individually handling a case from beginning to end.

Why Business Courts Now?

The modern business courts' popular history goes something like this. The business court phenomenon arose because business litigants and their counsel wanted to avoid court--more specifically, state trial courts. In the early 1990s, commercial litigants' frustration independently reached boiling points in New York City and Chicago, among other places. Unlike federal courts, cases were placed in master calendar systems with the possibility of multiple judges handling different aspects of the same case as the litigation wended its way through the system. This limited optimal case management, and it also limited the development of judicial expertise in the procedural and substantive aspects of commercial and business disputes. Many believed, whether true or not, that this led to an unpredictable, uninformed, and unreliable process. Doubt and disrespect were said to be evidenced by lawyers advising their clients to litigate in other venues if at all possible.

In 1993, New York City and Chicago began pilot programs assigning business and commercial disputes to an individual judge for a case's duration. In New York, this has become known as the New York County Supreme Court's Commercial Division, and in Chicago it is the Circuit Court of Cook County Law Division's Commercial Calendar. Even earlier, in 1990, California's state bar established an ad hoc committee to study the creation of specialized business courts. That effort ended in 1997, with California eventually opting to create pilot programs to address varied forms of complex litigation, whether or not involving business or commercial law. Notably, California created a specialized case management court rather than a specialized subject matter court. This article focuses solely on those jurisdictions taking the specialized business court route.

As of today, post-1993 business courts are located chiefly on the East Coast, from Maine to Florida. There is some form of business court statewide, county specific, or in a major city in Maine, Rhode Island, Massachusetts, New York, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia, and Florida. Other business courts are located in Chicago, Reno, Las Vegas, and Eugene, and business courts are or have been the subject of serious study and effort in at least Colorado, Michigan, Ohio, and Wisconsin.

How Do the "New" Courts Differ?

The Delaware Court of Chancery is a trial court of equity. During the last 100 years, it arguably has been the nation's leading trial court on issues of corporate governance, and it remains preeminent--or at least penultimate in preeminence to Delaware's Supreme Court--on corporation law. It has, however, no historical jurisdiction over commercial disputes at law solely involving money damages. Rather, multimillion dollar contract or tort actions involving Delaware corporations, litigated in Delaware state court, historically are heard in Delaware's Superior Court, not Chancery.

The distinct commercial and business court models first witnessed in New York City and Chicago are quite different from the Chancery Court model. However, because the Circuit Court of Cook County retains a separate Chancery Division which also hears business cases, this somewhat limits the jurisdictional scope of the Law Division's "Commercial Calendar." Thus, we'll begin the discussion of new business courts with New York's Commercial Division, a model that includes both law and equity cases, unlike the Court of Chancery (equity only) or Cook County Law Division (law only).

The New York Supreme Court's Commercial Division, which now operates in 10 counties or judicial districts, has a broad jurisdictional model. This is not only because it includes both law and equity cases, but because of the quantity and types of cases it hears. Assuming that a jurisdictional minimum amount in dispute is met, the Commercial Division entertains cases that fall within a specified list of business and commercial case types. There is no express requirement that a case falling within this jurisdictional list must be complex in nature to find its way into the Commercial Division; the case must simply be one among delineated categories of business or commercial disputes. Each case is then assigned to an individual judge from beginning to end.

A different, more selective, model was adopted for the North Carolina Business Court, another of the seminal "new" business courts. As in New York, North Carolina's Business Court is designed to have a single judge hear business and commercial disputes, at equity or law, from beginning to end. However, as originally established in 1995, there were no presumptive case categories defining its jurisdiction; rather, the North Carolina Business Court would only hear business and commercial cases if those cases were complex. The Court's protocols set forth criteria as to what made a case complex, along with a judicial gatekeeping mechanism for case selection, which was necessarily more subjective than New York's broad, case matter-specific, jurisdiction model.

North Carolina's jurisdiction has subsequently been amended to include certain specific categories of cases to be presumptively included on the Business Court's docket, including technology-based disputes, but a large swath of unlisted case types must still meet the complexity requirement to find their way into North Carolina's Business Court. By its nature, there will be fewer cases in such a business court; but those should all be complex cases, providing the Business Court judges with an equally demanding individual case load as those found in broad jurisdiction courts like New York's Commercial Division with a greater variety of case types.

The broad jurisdiction model that defines jurisdiction by case type has been adopted in Philadelphia, Rhode Island, Massachusetts, Orlando, Miami, and Tampa. Chicago's Commercial Calendar uses a similar standard. The complex business dispute model has been adopted in Maryland, Las Vegas, Reno, Atlanta, and Pittsburgh. None of the new business courts follow an equity only model as found in the Delaware Court of Chancery.

Most recently, Maine's newly implemented Business and Consumer Docket provides its designated judges with the gatekeeping function as to what cases come within its specialized program; and there will likely be a flexible evolution to shaping that court's jurisdiction. The focus is on claims involving "matters of significance to the transactions, operations or governance of a business entity and/or the rights of a consumer arising out of transactions or other dealings with a business entity," and that "the case requires specialized and differentiated judicial management." Eugene, Oregon's Commercial Court includes a long list of permissible case types (including those going beyond most business court jurisdictional lists), but leaves the decision regarding whether to accept a case to the presiding judge. In South Carolina's new statewide business court pilot program, jurisdiction exists over six specific statutes and "such other cases as the Chief Justice may determine."

The "New" Court of Chancery

A fascinating development among the new business courts is a change in the "old" business court, the Delaware Court of Chancery. In 2003, Maryland implemented its statewide Business and Technology Case Management Program (BTCMP). In doing so, it became the first state with a functioning business court to expressly include technology disputes (e.g., computer technology, biotech, etc.) in its jurisdiction. While technology disputes are typically business based, and thus arguably within a business court's jurisdiction in any event, Maryland's express use of the term, coupled with extensive plans on judicial education, made a statement that Maryland intended to become especially capable in handling cases that would mark the new twenty-first century economy.

Within a few months of the BTCMP's implementation, Maryland's neighbor made significant changes in Chancery's historic jurisdiction to reach over into the law side (i.e., to permit the Chancery Court to become a commercial court as well as a business court). Through executive and legislative effort, the Chancery Court's statutory jurisdiction was expanded to include some forms of solely monetary disputes within its original jurisdiction, expressly including technology disputes. This jurisdiction over purely law-side matters was a significant innovation. Additionally, the new statutes provided that Chancery judges could mediate certain types of commercial disputes, including technology-based disputes, even if the disputes involved solely monetary claims. This was the fruition of a "mediation-only" jurisdiction concept, originally conceived in 2001, that would lend the expertise of these business court jurists to commercial litigants in assisting in the resolution of purely monetary disputes, another significant innovation on the

historic equity only jurisdiction.

These expansive statutes were not so dramatic, however, as to give Chancery concurrent jurisdiction with Delaware's Superior Court over all business disputes. Further, the new jurisdiction includes a minimum amount in dispute of $1 million, and it does not permit jury trials, unlike the new business courts. It does signal that Delaware is making the extraordinary bench and resources of the Chancery Court available in a wider range of case types, including technology-based disputes. Thus, by including some purely commercial actions within its ambit, we might say that Chancery has become part of the new business court trend.

Why Specialized Business Courts?

There is a perceived need to create a stable and reliably informed system for administering and deciding business and commercial cases. In this respect, business courts are part of a greater movement toward specialization. While there are some estimable opponents of judicial specialization, the theory is that a judge who is consistently hearing a limited--though not small--universe of case types will develop a greater knowledge and expertise in both the subject matter of these cases and in their procedural management. This will permit these specialist judges to make more reliable and informed decisions, and to do so with greater efficiency.

While many analogies may be offered--"you wouldn't go to a thoracic surgeon for lower back surgery"—the most common point offered in support of judicial specialization is the fact that lawyers specialize in the areas of the law that they practice. Thus, if it is working for lawyers, it will work behind the bench as well.

From another angle, there is also a concern over appearances; that is, it won't do to have lawyers with decades of experience in an area of the law having their cases decided by judges who have little or no experience with the subtleties of that subject. It theoretically undermines the system when a lawyer on the losing side can tell the client--whether true or not--that the judge simply did not understand the law, implying that the lawyer is an expert in the field so the judge must be wrong, and therefore a court system that allows judges who don't know the law to decide cases must be unreliable.

There are arguments against judicial specialization, such as risks of myopia, lack of cross-pollinating ideas from learning other fields of the law, having the same judge hearing all cases in the same subjects for too long, and so on. Further, there is the argument that all judges already have a specialization that goes beyond any single subject area and encompasses all subjects--judging itself.

In light of the number of criminal cases federal judges have on their dockets and non-business statutory or diversity matters they hear having nothing to do with business disputes, there is yet no great outcry against federal judges hearing business cases. It remains to be seen if the specialized business court judges will start taking cases from federal courts because they pose a lower risk of unpredictable results. If an out-of-state business is sued in one of the business courts, it can remove to federal court. A study on removal, or the lack thereof, in these circumstances would prove useful, as would a study on out-of-state businesses as business court plaintiffs. There is some anecdotal evidence that contracting parties are including state business courts in choice of venue provisions.

Why Create More Business Courts?

A core of business courts have survived their initial pilot phases and developed roots within their court systems. These programs have garnered respect locally, and sometimes regionally or nationally, for their expertise, efficacy, and internal efficiencies, as well as because of the belief that taking business and commercial cases off of the general docket allows other kinds of cases to move more efficiently as well. Such results have merited, and continue to merit, emulation and consideration by other states.

This is not simply a "you've got one so I better get one" attitude, or a competition over which state can have the best court system *qua* court system. However, competitive implications between cities and states are undeniable. The business court becomes a means to give businesses and their lawyers confidence that business and commercial disputes will be decided with informed and deliberate reasoning. This adds a component of stability to a state, region, or city that wants to keep or attract businesses. If a city or state has such a court, and its neighbor does not, that neighboring city or state may come to sense a potential disadvantage. The concentration of business courts along the East Coast may be explained, in some part, by this potential for competitive disadvantage.

Still, not every state court system has adopted a business court when presented with the

possibility. In New Jersey, which has had business court pilot programs in Bergen and Essex Counties for over 10 years, the Supreme Court rejected legislative efforts to create a commercial division within the state trial court. Oklahoma's Supreme Court has not acted on 2003 legislative authorization to create business courts in Oklahoma City and Tulsa, though it has not rejected that concept either. In Colorado, the projected case numbers did not justify a business court, and in Milwaukee, an unusually streamlined business case set of procedures was not utilized by the local bar. Michigan's legislative authorization for a "Cyber Court" was quickly passed, but that program was never funded. As stated above, California chose a complex case management model over any form of business court model, as have Connecticut and Arizona, though there are arguments that such programs need not be mutually exclusive. *See* Mitchell L. Bach and Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 204- 06 (2004). In all of these circumstances, however, the effort to create a business court has evoked considerable thought, attention, and even soul searching in some instances.

The Experiment Continues

One consistent argument for business courts is that they may assist the rest of the court system in a number of ways. Business and commercial cases, whether procedurally complex or not, are removed from the general docket, which should improve case flow for other areas of litigation.

Further, the business courts may become laboratories for innovations that can be used systemwide. There is clear evidence in New York, where the Commercial Division has been such a "laboratory" in the words of business court pioneer Robert L. Haig, and some of its innovations have been recommended for general use in the New York Supreme Court's Trial Division. A visit to the North Carolina Business Court's Web site, www.ncbusinesscourt. net, shows cutting-edge uses of technology on the Internet and in the courtroom that could provide general models. And, back to the source, the Court of Chancery's "mediation only" jurisdiction provides a model that other trial courts may consider.

There is also a potential for interesting synergies as individual business courts reach beyond their borders. The American College of Business Court Judges' national membership includes judges from numerous business and complex litigation courts, who meet at least once a year. Opinions are issuing from a number of business courts which are readily available online nationally. These are just becoming the subject of legal scholarship, initially with the University of Maryland's *Journal of Business and Technology Law*. More obviously, and most significantly, some business court judges' decisions are having regional or national impact beyond the city or county in which they sit.

In sum, the growth of business courts has been and remains a dynamic process, both within the existing business courts themselves and in relation to other courts and communities.

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The History of Delaware's Business Courts

their rise to preeminence

By Donald F. Parsons Jr. and Joseph R. Slights III

Today, an increasing number of states have a business court or judges assigned only to business disputes. Most of these courts were created in the past 15 years. For example, during this period Pennsylvania established a Complex Litigation Center in Philadelphia and later a Commerce Program; the Illinois Circuit Court in Cook County began assigning judges to hear only commercial cases; New York created a division of the New York State Supreme Court devoted solely to commercial litigation; Wisconsin began a pilot program in Milwaukee County and appointed two judges to a special business court; and North Carolina established a business court with judges in Greensboro, Charlotte, and Raleigh, who preside over complex corporate and commercial law cases. A few more states join this list each year.

Delaware houses the nation's oldest business court--the Delaware Court of Chancery established in 1792. The Court of Chancery has broad jurisdiction over disputes involving the internal affairs of Delaware business entities. Otherwise, its jurisdiction is generally limited to traditional equity jurisdiction. Consequently, some complex commercial disputes fall outside its purview. The Delaware Superior Court handles most of those cases, which include, for example, contract disputes where only legal remedies, such as money damages, are sought.

The Delaware Court of Chancery

In its more than 200 years, the Court of Chancery has become the forum of choice for determining disputes that involve the internal affairs of corporations and other business entities. It has developed a respected body of case law interpreting the Delaware General Corporation Law and earned a worldwide reputation for fairness, experience, and expertise in presiding over corporate disputes.

Until 1792, Delaware's Court of Common Pleas had jurisdiction over both common law and equity

matters. The Delaware Constitution of 1792 divested the Court of Common Pleas of its equity jurisdiction and established a Court of Chancery and the position of chancellor to exercise that jurisdiction. By the late 1800s, most other states had consolidated their equity and law jurisdictions and moved away from having a separate equity court.

During its early years, the Court of Chancery primarily exercised equity jurisdiction and provided relief that was not available in a court of law. Most of the early volumes of the Court of Chancery reporters do not deal with corporation law issues but instead involve decisions condemning property and ordering parties to perform certain obligations or to stop doing certain things.

By the early twentieth century, however, Delaware began to emerge as the preferred forum for incorporation of the nation's businesses. In 1897, Delaware adopted a new constitution, permitting incorporation under general law instead of by special legislative mandate. Under this provision, Delaware enacted a general corporation law in 1899 calling for perpetual corporate existence and general powers. Before then, most of the country's large corporations incorporated in New Jersey. In fact, Delaware modeled its 1899 General Corporation Law largely after the relatively liberal statute New Jersey had at that time.

After the Delaware legislature's adoption of the General Corporation Law, the Court of Chancery began to render decisions dealing with corporation law issues. Because the Court of Chancery does not have jury trials, explained Lewis S. Black, a Wilmington attorney and author of numerous books and articles on corporation and securities law, the judges were called upon to write opinions explaining their reasoning and a body of law began to develop.

New Jersey remained the leading state for incorporation until 1913, when under the leadership of New Jersey Governor Woodrow Wilson, it passed antitrust and other laws inhospitable to corporations. These new laws outlawed attempts to create monopolies or suppress competition and forbade the chartering of any new holding companies. The number of corporations incorporated in New Jersey declined precipitously. Delaware, with its newly adopted General Corporation Law, stood ready to serve as the state of incorporation for the many companies fleeing New Jersey. The Court of Chancery provided an able forum in which to adjudicate and resolve internal corporate controversies.

The chancellor remained the sole judge of the Court of Chancery under the constitution of 1897. He was appointed by the governor and served a 12-year term. In 1939, the Delaware legislature created the position of vice chancellor, to be appointed by the chancellor and to serve much like a magistrate or master. In 1949, the Delaware Constitution provided for the office of vice chancellor as a judge, with nomination by the governor and confirmation by the senate, and a 12-year term. In 1951, the legislature amended the constitution again and created a three-member supreme court with appellate jurisdiction in certain criminal and civil matters, including final judgments and other orders of the Court of Chancery.

Today, the Court of Chancery consists of the chancellor and four vice chancellors. Since 2006, the court also has had two masters, who are comparable to magistrates and hear guardianship cases, real property disputes among individuals, and trust administration cases, thereby enabling the Chancery judges to spend more time on corporate and commercial disputes. With more than 60 percent of the nation's Fortune 500 companies incorporated in Delaware, the Court of Chancery, on average, receives and disposes of 800 to 1,000 civil actions a year, with the vast majority involving business disputes.

A number of features make the Court of Chancery unique. First, the court does not have jury trials, only bench trials. Litigating parties can expect one judge to handle their case from start to finish and, in most instances, to provide a well-reasoned written opinion. Second, the Court of Chancery's equity jurisdiction gives it the distinct ability to create special remedies, beyond money damages, to redress breaches of duty. Although the court generally does not have jurisdiction over matters for which there is an adequate remedy at law, the "clean-up doctrine" gives the court discretionary jurisdiction over legal claims that are joined with other claims within its jurisdiction.

The Delaware legislature expanded the Court of Chancery's jurisdiction in 2003 to include adjudication of technology disputes that arise out of agreements involving at least one Delaware business entity, even if they concern solely claims for damages. The synopsis of the bill enacting this and another statute discussed below, authorizing a separate "mediation only" docket, explained that the legislature intended to provide "additional benefits for businesses choosing to domicile in Delaware" and to "keep Delaware ahead of the curve in meeting the evolving needs of businesses, thus strengthening the ability of the state to convince such businesses to incorporate and locate operations" in Delaware.

The second part of the 2003 legislation authorized the Court of Chancery to create a special mediation-only docket that allows parties to mediate their business disputes before a judicial officer of the court, rather than litigate them. Qualifying business disputes include complex corporate and commercial disputes, as well as certain technology disputes. The requirements to invoke the court's confidential mediation-only jurisdiction parallel those to adjudicate technology disputes: at least one of the parties must be a Delaware business entity, the amount in issue must exceed $1 million, and all parties must consent to the mediation. There is no requirement that any litigation be pending in the Court of Chancery or anywhere else. More than a dozen such cases have been mediated over the past three years, most of them successfully. In addition, the court's voluntary mediation program, established by court rule, allows parties litigating in the Court of Chancery to submit their case for mediation to a judicial officer other than the one assigned to the matter. The success rate in this program exceeds 70 percent. The court has mediated 68 of these cases in the past three to four years, an average of about 20 cases a year.

The Court of Chancery's most notable feature, however, remains its central role in developing an efficient and predictable body of corporation law. Delaware's General Corporation Law is an enabling statute; among other things, it gives directors broad discretion to manage the corporation, subject to fiduciary duty review by the Court of Chancery. As Chancellor William B. Chandler III explained at the International Bar Association's International Mergers and Acquisitions Conference in June 2005, the court views the corporate decision maker as having a dual role of both entrepreneurial risk taker and fiduciary for his principals, the stockholders. That view is reflected in the court's ongoing effort to reach a reasonably efficient and appropriate balance between judicial intervention to protect the rights of shareholders, and judicial restraint to allow boards and officers to pursue corporate interests without meddlesome judicial interference.

The five judges of the Court of Chancery dedicate most of their time to deciding corporate law and alternative entity disputes, which are taken on direct appeal to the state supreme court, also consisting of five judges. The interaction of the Court of Chancery and the Delaware Supreme Court plays an important role in the development of Delaware's corporation law. As Professor Robert B. Thompson of Vanderbilt University Law School explains in 37 CONN. L. REV. 619, 628 (2005), "Piercing the Veil: Is the Common Law the Problem?", "One reason that Delaware fiduciary duty law is both coherent and adaptive in the classic common law tradition is that it is made by an informed group of judges who are repeat players on matters of corporate law." Those judges' "experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law." This expertise enables both the Court of Chancery and the Delaware Supreme Court to respond in a matter of weeks, if not days, to requests for preliminary injunctive and other equitable relief in connection with challenges to complex mergers and acquisitions and other major corporate transactions.

Furthermore, as most recently noted in 2007 by Vice Chancellor Leo E. Strine Jr. in litigation involving the Topps Company, Delaware has an important policy interest in having its courts speak first on emerging issues of Delaware corporate law, such as going-private transactions and options backdating, creating a jurisprudence upon which directors and stockholders may rely with confidence. The members of the Court of Chancery and the Delaware Supreme Court regularly interact with academics, shareholder groups, corporate directors, mergers and acquisitions lawyers, and corporate litigants around the country to keep current on the most recent business developments. These interactions provide valuable insights on the fast-moving business and capital markets, in which the complexity of transactions constantly evolves.

As Chancellor Chandler said in a recent address to the Delaware State Chamber of Commerce, "The Court of Chancery remains the nation's premier business court by maintaining internal standards of excellence, by working with the Executive and Legislative branches of Delaware government to improve business law itself and its application through the Court, and by interaction with our consumers, corporate owners, decision-makers and the corporate Bar." Like its business clientele, the court continues to focus on providing the best possible judicial product.

The Delaware Superior Court

While the Delaware Court of Chancery is known for its expertise in matters of corporate and business law, the Superior Court of Delaware also has an outstanding reputation in the business community for resolving commercial disputes. The Superior Court has original jurisdiction over civil matters at common law and frequently resolves business disputes where an adequate remedy at law exists. Lawyers who are considering pursuing litigation in Delaware should keep the distinction between equity and law in mind when determining in which Delaware court to bring their claims.

The members of the Delaware judiciary enjoy an atmosphere of respect and collegiality that is essential to maintaining an advantageous forum for corporate and commercial litigation. This

collaboration is most evident when cases are transferred between the Court of Chancery and the Superior Court to ensure the appropriate court awards proper relief. For example, in *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989 (Del. 2004), the Court of Chancery transferred a case to the Superior Court upon concluding that the plaintiffs' request for specific performance would not adequately remedy the environmental damage that Pan American's oil drilling allegedly caused to Candlewood's property in Argentina. The Superior Court, likewise, will transfer matters to the Court of Chancery if it determines that the parties seek equitable relief or if the claims involve matters relating to the exercise of fiduciary duties. The transition is seamless and allows the state's bifurcated court system to thrive.

The Delaware State Constitution of 1831 established the Superior Court, which held its first session on April 9, 1832. On April 9, 2007, the 19 current statewide judges of the Superior Court held a special session to commemorate the court's one hundred seventy-fifth anniversary.

Also in 2007, for the sixth consecutive year, Delaware ranked first overall in the State Liability Systems Ranking Study of the U.S. Chamber of Commerce Institute for Legal Reform. The study polls national in-house counsel and senior corporate litigators to evaluate the performance of state court systems in creating a fair and reasonable litigation environment. Delaware ranked first in nine of the 12 categories, including its treatment of tort and contract litigation, class action suits, and mass consolidation suits. The study results reflect the business community's confidence in the Superior Court's handling of its complex tort and commercial litigation dockets.

The Superior Court manages a diverse civil docket, including complex commercial litigation matters. In the 1990s, the court decided large-scale commercial cases involving declarations of rights under insurance coverage agreements arising from environmental and mass product liability exposures. These disputes frequently required the judges to interpret complex insurance policies while applying the law of other jurisdictions. More recently, the court has addressed several disputes involving director and officer liability coverage. Of course, the court regularly addresses claims arising from failed business relationships, including related breach of contract and business tort claims. The amounts in controversy in these disputes range from thousands of dollars to several hundred million dollars, at times reaching more than $1 billion.

The Superior Court continually strives to implement best practices to accommodate large-scale business litigation. For instance, the court introduced the Complex Litigation Automated Docket (CLAD) in 1991. CLAD was the nation's first electronic docketing and filing system for civil cases. In 2000, the Superior Court was the first court in Delaware to allow parties to file briefs on CD-ROM, and e-filing is now available for all civil actions filed in both Superior Court and the Court of Chancery. In addition, the Delaware judiciary's Web site receives more than 2 million hits each month and provides valuable resources to attorneys and their clients, including forms, pattern jury instructions, and case management protocols. Between 2001 and 2006, more than 350 Superior Court civil decisions were made available on the Web site (without cost) each year. The Superior Court Web site also hosts a listserv that accommodates more than 1,700 subscribers and transmits updates regarding recent decisions, rules changes, and case management protocols as they are issued.

The court has experienced great success with alternative dispute resolution (ADR). ADR is mandatory in cases where the amount in controversy is less than $100,000, and in other cases designated for mandatory ADR by the court. The Superior Court uses three forms of ADR: arbitration, mediation, and neutral case assessment. The court educates and trains local counsel to serve as mediators in ADR proceedings. It also has five commissioners appointed by the governor who, among other duties, resolve eligible disputes through appropriate ADR techniques. Superior Court judges also will serve as ADR practitioners when asked by colleagues.

The Superior Court is proud of its record for providing a sophisticated, convenient, and efficient forum for businesses to resolve their disputes. In the last five years, the average time from complaint to trial disposition in civil cases filed in Superior Court was approximately 28 months. The court also recognizes that full-blown, jury trial litigation is not always the most efficient or preferred means by which to resolve a controversy. With the expense and inherent inefficiencies of commercial litigation in mind, the court has developed "summary proceeding rules" that provide for expedited and streamlined discovery, motion practice, and trials for commercial disputes when the parties agree that a more direct approach to adversarial dispute resolution is appropriate and desirable. The President Judge of the Superior Court has appointed six Superior Court judges to the Summary Proceedings for Commercial Disputes Panel, all of whom stand ready to manage these cases through expedited discovery, motion practice, ADR, and trial if necessary. This unique approach to dispute resolution is intended to mirror the Court of Chancery environment by providing learned judges who will facilitate expeditious resolutions of commercial disputes.

Mindful that business litigation requires special attention, the court continues to explore new avenues to accommodate business litigants. Its recently formed Complex Business Litigation Committee, comprised of Delaware's most experienced commercial litigators, is examining the possibility of a separate business court or business docket within the Superior Court. The business court would provide a forum for businesses to litigate disputes for which a legal remedy is adequate and no other basis for jurisdiction in the Court of Chancery exists. The Committee's findings and recommendations are anticipated within the next year. In addition, the court's Civil Rules Advisory Committee currently is evaluating proposed amendments to the Superior Court rules of civil procedure, specifically regarding the use of e-discovery. A report was due by the end of 2007, and the Superior Court is expected to implement any appropriate rule changes soon thereafter.

Conclusion

Both the Delaware Court of Chancery and Superior Court demonstrate a commitment to excellence in adjudication of business disputes that attracts litigants from around the country, including the nation's leading corporations. Delaware is the forum of choice for resolving complex business and commercial issues, in part, because the judiciary focuses so actively on fairness, efficiency, and expertise in corporate law and related business matters. As a result, businesses that choose to incorporate in Delaware enjoy the benefit of a reliable and consistent body of law on which they can rely when conducting their business affairs.

Delaware welcomes the trend among other states to create a business court system similar to its Court of Chancery. As Wilmington attorney Black noted, however, Delaware's system is not easily emulated. "There are elements unique to Delaware that would be very hard to replicate, particularly in big states," he says. Delaware benefits from having a unique combination of an enabling corporation statute, a legislature that keeps the statute up to date and that has developed a long and trusting relationship with the corporate bar, and judges who come from among the best and brightest attorneys in the state, he says. "Any state that can do something close will have done something quite good for itself."

Keys to Success of Delaware's Business Courts

The Court of Chancery is known for:

- No jury trials or punitive damages.
- Frequently handling cases on an expedited basis.
- Extensive and well-developed body of corporate law.
- Well-researched opinions by one of five judges, each of whose docket consists predominantly of business cases.
- Single level of appellate review by Delaware Supreme Court.

Together with the Delaware Supreme Court Justices, the Chancellors benefit from:

- Experience, both before and after becoming judges, that gives them an unmatched expertise in corporate law.
- Regular interactions with shareholder groups, corporate directors, deal lawyers, litigants, and academics regarding important developments in business law.

The Superior Court is known for:

- Introducing the nation's first electronic docketing and filing system for civil cases in 1991.
- Great success with alternative dispute resolution.
- Development of summary proceedings rules, available upon the consent of all parties, for expedited and streamlined discovery, motion practice, and trials for commercial disputes.

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Strangers in a Strange Land

Specialized courts resolving patent disputes

By Lawrence M. Sung, Ph.D.

As the number of cases and disputes involving proprietary technology subject to intellectual property rights has increased in recent years, a decades-old view that such matters should be adjudicated exclusively by specialized courts and judges has experienced a renaissance. This call for specialized, or problem-solving, courts at both the federal and state levels is not unique to the intellectual property field, however. Indeed, there has been a significant movement over the past several years to establish specialized drug courts, community courts, mental health courts, and domestic violence courts. One common element among these efforts is the idea that specialized courts might better address the contextual nature of a dispute because of the judges' experience and familiarity with the underlying issues.

Translated to commercial technology matters, such expertise would highlight knowledge of particular industry customs and dynamics as well as the general nature of competitive enterprise. In the past, cost-benefit analysis arguments have been used to support the establishment of a specialized judiciary to address intellectual property rights (e.g., efficiency due to uniformity, expertise, and elimination of forum shopping, balanced against inefficiency due to isolation, hindered access, and due process concerns). Today, however, proponents of specialized courts cite the advantages that a cadre of self-motivated jurists in a novel opt-in approach could bring to the equation.

Patent litigation stands among the most complex, with disputes about cutting-edge technology muddied with esoteric and arcane language, laws, and customs. Even with the assistance of legal and technical experts as well as special masters, generalist judges and juries are often at sea almost from the beginning of a patent case.When compared to other adversarial actions, patent cases benefit significantly from having a judge hear the case who is familiar with technical issues.

What's Old Is New Again

The notion of specialized courts to decide technology disputes has a rich history with noteworthy milestones. Moreover, the United States is not alone in developing a specialized intellectual property judicial system. The United Kingdom, Japan, Germany, South Korea, Singapore, Thailand, and Turkey are among the countries that have instituted some type of specialized process to resolve technology issues. While their relative successes might be debatable, these international efforts demonstrate the growing recognition of the importance of intellectual property rights worldwide.

Among the most noteworthy developments was the creation of the U.S. Court of Appeals for the Federal Circuit (CAFC), a specialized court designed to resolve technology disputes. This court was established in 1982 by the Federal Courts Improvement Act, and was formed by the merger of the Court of Claims and the Court of Customs and Patent Appeals. The CAFC has become the exclusive forum for patent appeals from the federal district courts nationwide. However, after the CAFC was created, efforts to instill similar specialized courts at the trial court level lost momentum instantly.

The CAFC's legislative mandate was to bring uniformity to the administration of the patent laws. Those critical of the CAFC's record in remaining faithful to this charge have arguably lost sight of the unsettled nature of the patent laws in the regional circuits before the Federal Courts Improvement Act. While the CAFC has achieved paradigmatic status in the debate over specialized courts, the question still remains: Does having a specialized appellate court obviate the need for specialized courts at the trial level?

Despite numerous efforts, empirical data to support or refute whether specialized trial judges and courts are needed is still lacking. In 2005, Professor Kimberly Moore (since appointed to the Federal Circuit) presented her survey results before a U.S. House of Representatives subcommittee. Her research indicated that a possible remedy to the problems underlying the CAFC's high reversal rate would be the training and assignment of specialized patent judges at the trial level.

Meanwhile, increasingly critical commentary has focused on the staggering transactional costs of patent litigation and the associated effects across competitive industries, including obstacles to research and development and barriers to public access to patented technology. Widespread forum shopping (for example, filing cases in the U.S. District Court for the Eastern District of Texas) and the CAFC's high rate of reversal of district court judgments in patent cases also helped fuel the push for specialized patent courts. The landscape was ripe for legislative action.

Proposed Solutions

In 2007, the U.S. House of Representatives passed H.R. 34, which would provide for a pilot program within the U.S. district courts to create specialized patent courts. These designated federal patent courts would have jurisdiction to hear cases relating to patents or plant variety protection. In addition to the assignment of all cases filed within a district to the specialized patent court, the judges in other district courts could refer patent cases to these courts.

The legislative framework contemplates at least five district courts in three separate regional circuits. The district courts would be chosen based upon those that have had the greatest number of patent or plant variety protection cases filed in the past year. The proposal embodies an opt-in approach in the sense that, to be eligible, the circuits must have at least 10 district judges and at least three judges who have requested to be designated as patent judges. The bill also provides $5 million in annual funding to support the training of the district court judges and to recruit law clerks with specific expertise in technical matters.

The key advantages of such a program would be to reduce forum shopping, as more district court judges will refer cases involving patents or plant variety protection to these specialized courts. The attendant hope would be that the expertise of these specialized trial courts would result in a decrease in the CAFC's reversal rate. The bill awaits action in the U.S. Senate.

Perhaps less visible, but equally instrumental, has been the practice under Paul Michel's tenure as Chief Judge at the CAFC of incorporating into the exclusive appellate patent forum various judges (sitting by designation) from the regional circuits, particularly the trial judges from districts hearing the greatest number of patent cases (for example, Delaware, Massachusetts, the Northern District of California, the Northern District of Ohio, and the Southern District of Indiana). In addition, various U.S. district courts have begun to consider employing specialized patent law clerks to serve across the district in technology disputes. Furthermore, relying on arbitrators and mediators with technology backgrounds for alternative dispute resolution continues to be explored as an option for resolving technology cases.

Framing the Answer as a Question
A central question in the debate over creating specialized courts to resolve technology disputes tends to be overshadowed. To be most effective, do specialized patent judges need a technical background, an expert understanding of the patent laws, or something more? The focus traditionally has been on the first two aspects; however, the last aspect demands consideration as well. A judge who hears technology disputes regularly will develop an understanding of the role that intellectual property plays in a commercially competitive environment. Moreover, the key bit of knowledge that the experience imparts is that one size does not fit all when it comes to technology markets.

The superficial sense that "you've seen one, you've seen them all" belies the reality that in the intellectual property law arena, particularly involving patented technology, "when you've seen one, you've seen one." A patent litigation relating to a modem chipset bears little resemblance to a case where the invention at issue is the derivation of a yeast species for the production of a recombinant protein nutritional supplement that makes farm-raised salmon pink. Indeed, the same conundrum about how a single statutory framework, largely enacted in the 1950s, can do justice in its application to technologies that were developed decades later (such as computer and molecular genetic technology) pertains here.

Without having a finer appreciation of how businesses use intellectual property rights as tools to gain competitive advantage, a jurist can succumb to the disembodied patent law precepts of claim construction and validity according to one of ordinary skill in the art at the time of the invention (sometimes decades earlier). The imputed technical competency and the temporal distortion are necessary evils in evaluating patent rights that plague even those charged with its administration, namely, the technical experts of the patent examining corps of the U.S. Patent and Trademark Office. Should the goal be to establish a cadre of the federal judiciary that rivals the expertise of the administrative agency?

Such an outcome, even as an unintended consequence of efforts at judicial specialization, would seem unsatisfying. The key, therefore, rests with the feasibility of training judges about the dynamics of commercial competition where exclusivity in the form of patents or other intellectual property is an accepted part of doing business. The need for judges with specialized expertise, however, may or may not coincide with the establishment of specialized courts.

Partly Sunny or Partly Cloudy?
The nature of technology disputes can distract an otherwise inexperienced adjudicator from the crux of the controversy. Indeed, a judge may view a case as merely a business conflict where the exclusivity facilitated by intellectual property rights creates unique competitive dynamics. Resolving a technology dispute should not be a search for scientific truth. If a trial starts heading in this direction, it may be a warning sign that the judicial management of the case has begun to unravel, whether prompted by the parties or not.

The inability to define or otherwise capture the essence of certain technology can no better be addressed by the law than by science. Given the shifting sands presented by the known and unknown limitations of according intellectual property rights to technology, a more informed approach to fairly resolving intellectual property cases may be to recognize self-identified judges who have experience in the business aspects of technology disputes. Employing these judges to resolve technology disputes may indeed improve the legal system.

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The Untold Story of the Bankruptcy Courts

A Positive Resource For Business

By Ronald S. Gellert

The inner workings of bankruptcy courts are a mystery to many people. To some, bankruptcy involves a group of unfortunate people who have lost everything, arrive at court with their pockets turned inside out, and are looking for a way to get out from under their debts. Many people also have similarly misinformed views about corporate bankruptcy, believing that such companies have run out of money and are going out of business, leaving little, if any, assets for their creditors.

Perhaps these misimpressions are not that far from the truth on occasion, but there is often little understanding of bankruptcy as a positive tool for business. This article will debunk these misconceptions and highlight how companies can use bankruptcy courts to improve their business and rectify uncertainties in various industries.

The Evolution of Bankruptcy Courts

Bankruptcy courts are essentially deputies of debt. Unlike other federal courts that exist pursuant to the mandate of Article III of the U.S. Constitution, bankruptcy courts were created under Article I, Section 8, of the Constitution, which gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the country. Because bankruptcy courts are not Article III courts, the judges do not have lifetime appointments. Technically, jurisdiction over bankruptcy cases is first granted directly to the federal district courts, which refer bankruptcy cases to the bankruptcy courts for their district. Thus, bankruptcy courts are arms or specialized divisions of the federal district courts.

Bankruptcy courts were established with the adoption of the Bankruptcy Code in 1978, as revised by the 1984 amendments. Prior to this legislation, under the former Bankruptcy Act, bankruptcy "referees" presided over bankruptcy matters. When the Bankruptcy Code was passed, the referees put down their whistles and picked up gavels to become bankruptcy court judges.

The Bankruptcy Code is located in Title 11 of the United States Code and is separated by chapters. The most popular and well-known chapters include Chapter 7, governing liquidation for individuals and businesses; Chapter 11, providing for business reorganizations; and Chapter 13, dealing with reorganization of individual debts.

Benefits of the Chapter 11 Process

When a company enters, or nears a distressed situation, it should consider some form of bankruptcy protection. In many states, including Delaware, it may be among the directors' and officers' fiduciary duties to consider preserving assets of the estate for the benefit of the company's creditors and shareholders. Although liquidation is an option, bankruptcy may also be used to continue a business, albeit in a different form.

The sale of a company through the bankruptcy process offers many benefits. A Chapter 11 proceeding may even be preferred, or required, by a potential purchaser due to the significant advantages associated with the release of successor liability. In other words, a buyer need not be concerned about the liabilities associated with the seller's operations and can take the assets/business segment free and clear of all liens, claims, and encumbrances, with all such claims being funneled back and attaching to the proceeds of the sale held by the debtor-seller. This is a unique feature of the Bankruptcy Code and has led to a number of cases where a company's operations and employees remained intact, less the overwhelming obligations that hampered the debtor-seller's ability to be successful.

Other significant benefits of a Chapter 11 proceeding include the following: the rejection of underperforming contracts and leases; the assumption of advantageous leases and contracts; orderly liquidation and distribution mechanisms; actions to bring money back into the debtor's estate for equal distribution among creditors; and, most importantly, the time and leverage to deal with creditors.

Even where refinancing of existing debt is sought, lenders may prefer the orderly protections associated with a bankruptcy proceeding and make that a requirement of the financing.

Moreover, bankruptcy courts often help achieve efficiency in the marketplace and are otherwise useful tools for the overall economy. For instance, while extensive competition in an industry may appear to be good for consumers, it may actually be harmful for the economy. For instance, when an entity is dropping its price points below that of the break-even point in order to remain competitive, it tends to have a long-term effect on competitors, all of whom are either dropping margins to stay competitive or holding pat and losing customers. Eventually most, if not all, participants in the industry begin to suffer. This was part of the problem driving the fairly recent wave of telecommunications, commercial airlines, and retail bankruptcies, to name a few. Out of these bankruptcy cases arose consolidation and efficiencies that preserved many jobs and improved overall service, without driving consumer prices through the roof.

In sum, considering bankruptcy protection among a company's options is both wise and may even be a required duty. In addition, bankruptcy courts have helped stabilize segments of the economy through certain downturns while maintaining efficiency in the marketplace.

Breadth of Practice Areas and Interests

Another element that makes bankruptcy courts unique is the wide swath of practice areas that come before the court and the court's ability to effectively juggle the interplay of those issues while guiding an entity through the Chapter 11 reorganization process. Consequently, bankruptcy judges must possess a significant amount of business judgment and knowledge to be able to look at issues from both the debtor's and creditors' point of view.

In addition, bankruptcy courts are presented with practically every issue that a business entity may encounter, from toxic tort cases to intellectual property issues, all while being governed by the provisions of the Bankruptcy Code.

Bankruptcy courts are also adept at evaluating a wide variety of positions held by various parties associated with the bankruptcy case. For example, most debtors have secured lenders who are looking to recover the highest value of their collateral while their unsecured creditors (most of the time formed into "committees" by the U.S. Trustee's office) are looking to maximize distributions on unencumbered assets. Further, most cases also affect employees and retirees, shareholders, bondholders, landlords, equipment lessors, insurers, subcontractors, taxing authorities, and personal injury claimants, to name a few. Bankruptcy courts must permit each party to make its position known and then must weigh the respective and oftentimes competing interests, all in the name of allowing the debtor entity to have a chance to reorganize (or make a successful sale of

its assets).

Ready, Willing, and Able

Bankruptcy courts have been and are becoming more adept at handling cases from the moment they are filed. Considering that a business seeking Chapter 11 protection often has payroll (and morale) needs to meet, suppliers that are demanding payment, and shipments in transit (to name a few examples), bankruptcy courts must be ready to react within a day or two of the filing of a bankruptcy petition.

These issues become even more important where the size of the entity makes the bankruptcy filing a "mega case," which typically includes companies with more than $100 million in assets and liabilities and potentially thousands of creditors. In the context of mega cases, the first step in the process is usually a "first day" hearing with the attendant consideration of "first day" motions. The hearing is usually scheduled within a day or two of the filing of the bankruptcy petition and is expedited so that parties are given prompt notice of how to continue dealing with the debtor company. These motions cover a number of issues, including, but not limited to, payment of wages and other employee benefits, the maintenance and operation of bank accounts, dealing with essential suppliers, and the use of cash collateral (or interim use of debtor-in-possession financing which allows the debtor to become indebted with court approval). Frequently in such cases, courts schedule "omnibus" hearing dates and times for each bankruptcy matter so that all business before the court on that matter can occur at one given time.

Certain cases known as "prepackaged" cases require even more flexibility by the court to evaluate everything from typical motions to a proposed sale or replacement financing on day one. These cases can be handled quickly because the debtor's bankruptcy plan is negotiated and drafted with the debtor's main constituents prior to the filing of the bankruptcy petition.

Most impressive is the bankruptcy court's ability to handle these first day issues without the participation of many affected creditors. The court, with the help of the U.S. Trustee, must not only evaluate the relief requested as it will impact the debtor entity, but also must evaluate how and whether the relief may impact parties who are not yet aware or up to speed about the bankruptcy matter. As a result, the orders entered with respect to first day motions are typically interim in nature, with a final hearing taking place after the debtor provides potentially affected parties with notice of the bankruptcy and the final hearing date.

Perhaps the most well-known court for handling mega cases is the United States Bankruptcy Court for the District of Delaware. Until recently, the two full-time bankruptcy judges, the Honorable Mary Walrath and Peter Walsh, handled nearly the entire caseload. With help from a number of visiting judges who volunteered to assist, the Delaware bankruptcy court was one of the busiest in the country. Now that four additional judges have been sworn in, the Honorable Kevin Carey, Kevin Gross, Brendan Shannon, and Christopher Sontchi, the Delaware bankruptcy court has grown in consistency and capacity. The recent inflow of cases to Delaware undoubtedly is due to the special abilities of the members of the bench and the court's effectiveness in handling larger bankruptcy matters.

Other notable courts for handling mega cases are New York, Chicago, and Texas. Each of these courts has carefully studied the needs of the debtors filing commercial cases and understands the prompt need for certain critical relief from the onset of the filing.

Recently, other districts have adopted certain of the best attributes of the above-mentioned courts and have streamlined their process to handle large cases efficiently. New Jersey, Virginia, California, Florida, and Pennsylvania are among the growing number of districts adopting local rules and practices making the administration of larger Chapter 11 cases more efficient.

Importantly, these courts are also recognizing the national experience of many bankruptcy practitioners whose client's needs are adjudicated in courts around the country. Many bankruptcy judges are visited by out-of-town counsel on a regular basis. In response, bankruptcy courts have streamlined telephonic hearing procedures and pro hac vice procedures. Indeed, especially in districts such as Delaware where local counsel is required at all hearings, the local practitioners have become efficient at walking their co-counsel and clients through the local bankruptcy process in an effort to minimize and avoid duplicative costs.

Bankruptcy Litigation

Perhaps at one time you or your clients have been confronted by a preference or fraudulent conveyance action arising out of a bankruptcy case in which the debtor sought to recover payments received prior to the bankruptcy filing. These suits are the primary way that bankruptcy courts attempt to balance the varied interests of multiple parties in administering reorganization

and liquidation proceedings, by bringing money back into the debtor's bankruptcy estate. Preference actions generally seek to recover any funds paid out to creditors within the 90 days leading up to the bankruptcy filing. In brief, fraudulent conveyance actions seek funds expended without an equivalent benefit being conferred upon the debtor.

What is impressive about this litigation is the fact that the litigation matters are typically filed in large volumes, each with its own separate docket number. For instance, in the Fleming Companies, Inc., bankruptcy case, the post-confirmation trusts filed over a thousand individual preference actions. Other bankruptcy cases such as Loewen Group International, Inc., have spawned thousands of such suits at a time.

The ability to handle this voluminous litigation is due, primarily, to the court's adoption of streamlined case management procedures. First, by instituting uniform pretrial schedules and procedures, bankruptcy courts have placed the cases on a track which balances the parties' discovery needs and motion practice, and which facilitates settlement negotiations. Further, districts such as Delaware have instituted a mandatory mediation program which has become an exceptional tool in prompting settlements, thereby whittling down the massive caseload.

In sum, the ability to efficiently handle large numbers of related litigation matters further demonstrates that bankruptcy courts are effective places to conduct business.

Conclusion

Bankruptcy courts do much more than allow businesses to close their doors. They are specialty courts that deal with issues arising in almost every area of law in order to help businesses reorganize or liquidate in an efficient and organized manner. The cases are often complex, involving multiple parties and millions of dollars, but at the end of the day, bankruptcy courts are able to balance competing interests to achieve a result that benefits all parties involved.

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Business Law Today

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Beyond the Border

An International Perspective on Business Courts

By Ralph Peeples and Hanne Nyheim

Business courts are not only found in the United States. They can be found around the globe, and not just in the predictable places. The legal heritage doesn't seem to matter. Courts devoted to matters of business law have appeared--and are appearing--in Europe, Asia, Africa, and the Americas, in countries with common law systems and in those with civil law systems. The World Bank, in its 2007 *Doing Business* report, cited the creation of specialized courts as one of the most common reforms undertaken worldwide from 2005 to 2006. Business courts have been proposed and are under serious study in, among other places, the British Virgin Islands (as the commercial division of the Eastern Caribbean Supreme Court), Peru, Pakistan, and India.

Why have so many countries become interested in establishing business courts? Two reasons frequently surface: expertise and efficiency. These reasons are interrelated, and in many cases a business court will be established for both reasons. For many complex business cases, the need for expertise on the part of the judges is vital; otherwise, the result reached may seem arbitrary to one or more parties. In short, credibility matters.

Efficiency is an important concern as well. It is important for the parties to have not only a fair resolution, but also a timely and cost-efficient resolution of their dispute. For countries with mature, developed economies, the establishment of a specialized court offers a new competitive advantage in the form of speedier, less expensive, and more predictable resolutions of business disputes. For countries with developing economies, a specialized court offers some additional assurance to investors, both domestic and foreign, that disputes will be taken seriously and resolved in a fair way.

First, we need to discuss what a business court is. Any definition of a business court is, in the end, a bit of a compromise. It depends upon how wide or narrow we want the frame of the

picture to be. For example, we can say that a country has a business court if it has a system of "commercial courts"; in other words, a set of trial and appellate courts, available throughout the country, which hear and review disputes involving businesses. In that sense, there is nothing new about business courts; they have existed in a number of countries for many years. France, for example, established a system of commercial courts under Napoleon. Indeed, reliance on a national system of commercial courts is more common in countries with a civil law tradition--although England, with its commercial and admiralty court system, is an exception to even that rule.

In contrast, we can argue that a business court means a division of a larger court (typically a trial court) with a jurisdiction limited to some, but not all, kinds of business disputes, presided over by only a few specialist judges, with an emphasis on aggressive case management and use of alternative dispute resolution (ADR). In this article, we will use this latter definition as a starting point, while acknowledging that any attempt at categorizing is likely to be flawed. Perhaps the problem of agreeing upon a set definition also explains the paucity of scholarly literature on the subject of business courts from an international perspective.

Even with a narrow definition of "business court," we will encounter problems of inclusion and exclusion. Consider the problem of limited jurisdiction. How might it be stated? First, the jurisdictional limit might be expressed in money terms. Ireland, for example, uses a threshold amount of U1,000,000 in dispute for admission to its business court. Second, the limited jurisdiction might instead be expressed in qualitative terms (for example, "complex business cases"), in which it is left to the court to decide whether a particular case qualifies for inclusion. A third approach would be to limit the court's jurisdiction by statute or rule to specific subjects (for example, intracompany disputes, intellectual property disputes, insolvency proceedings, or some combination of topics).

One unifying theme does seem to recur, however. The idea behind the establishment of a business court, whether in London or Dar es Salaam, is to provide a more predictable, more efficient, and less expensive system of resolving certain kinds of business disputes. Limiting jurisdiction to "high stakes" commercial cases (however defined), relying on a limited number of specialist judges, and emphasizing aggressive case management all support the related goals of expertise and efficiency.

There is an additional attraction to the use of business courts. The traditional technique for resolving commercial disputes between two private parties of different nationalities has been arbitration, usually provided for in the contract (if the underlying transaction took the form of a contract), and usually conducted by one of a few select international organizations that offer arbitral services. The prevailing party in the arbitration then seeks enforcement of its award in the courts of the appropriate country. But what if a country offers an alternative: an independent, sophisticated court presided over by specialists, with an emphasis on speed and fairness? A business court, properly administered, might function as an attractive alternative to traditional, commercial arbitration. By offering both efficiency and expertise, a business court could match or perhaps exceed the often-cited advantages of international commercial arbitration. In addition, obtaining a court judgment in the host country avoids the obvious drawback to arbitration: enforcement of the award in the host country's courts.

Next, we present several brief case studies of business courts in various countries. The list is not exhaustive, but it shows the different forms a business court may take. In fact, when it comes to business courts, no two countries do it quite the same way.

England and Wales

It does not yet exist, but it has attracted more attention from business lawyers around the world than any other specialized court could hope to do. The "Business Court," scheduled to open by 2010, will be housed in a new building on Fetter Lane in London, not far from the Royal Courts of Justice. When completed, the new court will incorporate portions of the work of the Chancery Division, the Commercial Courts, and the Technology and Construction Court. Trademark issues, patent disputes, and international contract issues will also be included in the court's jurisdiction. Plans call for the building--to be called the Rolls Building--to include 29 courtrooms, 12 hearing rooms, and 44 public consultation rooms. The new court building will emphasize information technology, and is intended to reinforce London's prominent position in international commercial dispute resolution.

What is new about this development is geography: the idea that different courts, already in existence, will be brought together in one new building, designed specifically for the resolution of business disputes. The Commercial Court is itself a specialist court, dealing with complex business disputes, including matters involving international trade, banking, and commodities; Chancery,

among other things, deals with partnership disputes, insolvency, and issues related to land; and the Technology and Construction Court considers issues of a technical nature. In all three of these divisions, a single specialist judge typically presides over the entire case. By having specialist judges hear business-related cases in a single building designed for that specific purpose and built to make effective use of information technology, the two goals of expertise and efficiency should be served.

Ireland

The Commercial List of the High Court of Ireland was established in 2004. The court is presided over by a single judge, with expertise in business law. To be eligible for the Commercial List, the claim must be a business dispute, and must be for at least U1,000,000. There is no entitlement to use of the court. It is left to the judge's discretion, whether a particular case will be placed in the Commercial List. Aggressive case management and the use of information technology are emphasized, and the results to date have been impressive. In 2006, 50 percent of all cases on the List were concluded in less than 14 weeks; 90 percent of all cases were concluded in less than one year.

The Netherlands

Business courts are not confined to countries with a common law tradition, as the Netherlands, a civil law jurisdiction, illustrates. The Dutch Companies and Business Court functions as a separate section of the general court of appeal in Amsterdam. The court has exclusive jurisdiction in some fields of company law, including conflicts within companies. Since the Netherlands has no counterpart to the American derivative lawsuit, the Companies and Business Court provides a rough analogue, known as an "inquiry procedure." Upon petition of 10 percent of the shares outstanding, the court may order an investigation of a company's challenged policies or conduct. The investigation culminates in a report to the court. The bench consists of five people, three of whom are specialist judges with legal training; the remaining two are lay experts.

Tanzania

The Commercial Division of the High Court of Tanzania was established in 1999 as a specialized court, largely at the request of the Tanzanian business and financial communities. For a case to be heard in the Commercial Division it must have "commercial significance"--although the Division shares jurisdiction over commercial matters with the general division of the High Court. The Division consists of three full-time judges, and sits in Dar es Salaam.

Use of National Commercial Courts

Rather than establish a single specialized court, it is also possible to organize a national system of commercial courts, consisting of both trial and appellate courts. In this type of system, jurisdictional requirements tend to be less rigorous. In general, the matter in dispute simply needs to involve one or more businesses, domestic or foreign, and relate to an issue of commerce. This pattern is older than the business court model discussed above, and is more often found in countries with a civil law tradition.

France offers a good example. France has long had a national system of commercial courts, including both courts of first instance (trial) and appellate courts. In all, there are almost 200 commercial courts throughout the country. The French commercial courts do not impose jurisdictional requirements on litigants. Thus, any commercial case, whether routine or complex, can be heard in the commercial courts. The judge is not required to have specialized knowledge of business law.

This pattern of a national system of self-contained commercial courts is a common one. Belgium, Russia, Serbia, Spain, Turkey, and Ukraine, for example, also maintain a separate system of courts with a jurisdiction dedicated to commercial matters. In some countries, such as Spain, each provincial capital has a commercial court, presided over by a specialist judge. In other countries, the dispute will be heard by a panel of judges, who may or may not be experienced in commercial law.

Conclusion

Establishing a business court, whether in the United States or elsewhere, will not by itself improve the quality of dispute resolution provided to business enterprises. Properly administered, however, a business court can lower the costs of doing business by making the dispute resolution process more predictable and efficient--and thus, less costly for the parties involved. What matters in the end is expertise--the quality of the business judges. Mitchell Bach and Lee Applebaum made the point nicely in their 2004 *Business Lawyer* article on U.S. business courts, observing that "ultimately, a successful business court depends in each instance on the actual judge hearing business court cases." Regardless of the jurisdiction, it is the quality of the judge that matters most.

Obtaining Information About Foreign Business Courts

Traditional methods of legal research do not always work well when you need information about a business court located outside the United States (or if you simply want to know if one exists in a specific country).

Simple searches based on Boolean logic can be perilous, because business courts go by different names in different jurisdictions. They might be called a "business court," a "court of commerce," or, in other places, an "economic court." As a result, consulting a reliable treatise or reference book on the law (and legal structure) of a country—when such is available—is a good starting point.

Much research can be done electronically, but patience is necessary. We found several Web sites particularly helpful, which are listed below. Keep in mind, however, that a simple search using Google or a similar search engine can turn up some useful leads.

Also, consulting the official government Web site for the country or countries you're interested in may yield the information you need.

Some suggested general Web sites:

- www.lawschool.cornell.edu/library/guides/foreign2
- www.loc.gov/law/guide/nations.html
- www.bakernet.com/BakerNet/Practice/DisputeResolution

Each of the Web sites listed above contain links to specific countries and to other databases.

As always, special care must be taken to ensure that the information provided (by whatever means obtained) is up-to-date.

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Business Law Today

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Attorney-client privilege

Pitfalls and Pointers for Transactional Attorneys

By Raymond L. Sweigart

Attorney-client privilege is not just for litigators. Many clients and their lawyers would like to cloak their transactional deals in confidentiality, and the attorney-client privilege appears to be a ready-made vehicle for doing so. But achieving confidentiality in the transactional setting is easier said than done. Simply having a lawyer involved in a transaction does not automatically confer the right to suppress all communications about the deal on the grounds of privilege.

Many clients, and too often their lawyers, are surprised to learn that when a lawyer negotiates a business deal for a client, there may actually be no attorney-client privilege available to shield or protect communications between the client and the lawyer. This may come as a rude awakening if not considered carefully before candid e-mails and memoranda are sent. The key question in determining whether privilege will apply in the transactional setting is whether the transactional lawyer will later be deemed by a court to be functioning solely or primarily as a business negotiator rather than a legal advisor. The answer in each case will turn on the specific facts. However, as a general rule, a lawyer serves solely as a negotiator (which falls outside the cloak of privilege) when the services provided by the lawyer are sufficiently divorced from legal issues and could have been provided by someone who is not a lawyer. Although this appears to be a straightforward matter, it is not. As the cases discussed below illustrate, lawyers serving as negotiators frequently provide their clients with ser-vices that incorporate both legal and non-legal advice. Indeed, many lawyers tout their ability to provide expertise in business--as well as legal--settings. What happens, then, if the deal goes bad, the parties end up in litigation, and one side seeks to discover communications about the deal from the other side's legal counsel?

The courts will often look to what they consider the "dominant purpose" of the communication to determine whether the attorney-client privilege applies. Under this test, if the predominant purpose of the communication is to provide non-legal advice, such as giving clients business

recommendations or strategies, then the attorney-client privilege may not apply. A court's determination as to whether the attorney-client privilege applies may also affect the applicability of the work product protection, although the latter is usually further limited by the requirement that there be a real, tangible threat or anticipation of litigation--otherwise, there's no fallback to shield the lawyer's business strategies and thought processes either. Keep in mind that the painful fact that any deal could conceivably end up in court does not earn a free pass to work product protection.

Defining Attorney-Client Privilege

The classic definition of the attorney-client privilege was articulated by John Henry Wigmore as applying "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection may be waived." While Wigmore's formulation specifically relates to communications made by the client to the lawyer, the modern approach in most U.S. jurisdictions protects communications from the lawyer as well. However, don't be surprised by the argument that the lawyer's answer to the client may only be protected if it, in turn, would reveal the client's question. In any event, the purpose of the privilege is usually stated as meant to ensure full and open communication, candor, and confidentiality between the lawyer and the client.

So, that all sounds rather helpful. Why shouldn't a client in a transaction just as much as in litigation want to have full and open communications, candor, and confidentiality? In applying the attorney-client privilege, however, courts have decided that the privilege does not apply to communications made to or by a lawyer who is transacting business that might have been transacted by another agent who is not a lawyer. The concern, of course, is that privilege is seen as obstructing the search for the truth and depriving the fact finders of relevant evidence. Further, there are obviously clients who may try to cloak non-privileged communications by hiring legal counsel to conduct business negotiations, even though legal advice, strictly speaking, is not actually needed or sought. Courts have also raised the concern that if all communications between lawyers and clients are deemed privileged, regardless of whether legal advice is involved, clients able to hire lawyers to negotiate on their behalf would have an advantage over those who use lay negotiators. Such an outcome could be seen as inherently unfair to clients who cannot afford to hire a lawyer to negotiate on their behalf. This concern was raised in *Montebello Rose Co. v. Agric. Labor Rel'n Bd.*, 119 Cal. App. 3d 1 (Cal. Ct. App. 1981).

In-house corporate counsel face an additional challenge in preserving the attorney-client privilege while functioning in the dual role of legal counselor and business advisor. As the Court of Appeals of New York explained in *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588 (N.Y. 1989), unlike outside lawyers who are retained to provide legal advice for a discrete, particular legal issue, in-house counsel may be corporate officers with a combination of business and legal responsibilities who have a continuing relationship with their corporate clients. In *Rossi*, the court held that in light of the closeness of that ongoing, permanent relationship, in-house counsel should be subject to stricter scrutiny when they assert the attorney-client privilege. As such, in-house counsel should be aware that some courts may demand heightened evidence indicating that the communications between the lawyer and corporate client were for the purpose of providing legal advice.

Lawyer Serving Solely as Negotiator

As a general rule, if a transactional lawyer or in-house counsel serves purely as a negotiator, then the client risks losing the attorney-client privilege. In the seminal case of *Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996), Michael Scott, an environmental lawyer and in-house counsel for defendant GAF, was asked to review various documents related to GAF's proposed acquisition of Georgia-Pacific's assets, and to comment on various environmental issues raised by the acquisition. Scott did that and also served as the negotiator for various environmental provisions in a contract related to the acquisition.The deal fell apart, and Georgia-Pacific filed suit. Georgia-Pacific sought to compel Scott's testimony regarding his recommendations and other communications about the negotiations. In response to GAF's contention that the communications were protected by the attorney-client privilege, Georgia-Pacific argued that Scott was not acting in his legal capacity but rather as a negotiator, and thus the privilege was not applicable.

The court held that the attorney-client privilege did not apply. The court reasoned that Scott was not exercising a lawyer's traditional function. Rather, the court found that Scott was acting as a negotiator on behalf of management in a business capacity. The court concluded that conversations regarding the status and development of the negotiations, the trade-offs that Scott perceived Georgia-Pacific was willing to make, and GAF's options, all involved business judgments of environmental risks. The court held that such reporting of developments in negotiations was

sufficiently divorced from legal advice and not protected by the attorney-client privilege.

Georgia-Pacific has been criticized by some scholars, including Carol A. Needham (*see When Is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations*, 38 S. TEX. L. REV. 681 (1997)). Needham charged that *Georgia-Pacific* was at best, "poorly reasoned," and noted that the facts of the case indicated that Scott provided at least some legal advice. The then-chair of the American Bar Association Section of Litigation, Barry F. McNeil, also complained in an August 1997 ABA Report on Attorney-Client Privilege for In-House Counsel that *Georgia-Pacific*'s ruling would subject in-house counsel to a stricter standard that is unwarranted and misguided. Despite these criticisms, *Georgia-Pacific* suggests that the attorney-client privilege may not apply if the court determines that the lawyer-negotiator is acting only as a negotiator. That should be a sufficient word to the wise--proceed with caution.

More recently, a similar issue arose in *MSF Holdings, Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 Civ. 1818, 2005 U.S. Dist. LEXIS 34171 (S.D.N.Y. Dec. 7, 2005). In this case, two e-mail communications by FTCI's senior vice president and deputy corporate counsel regarding whether to honor a letter of credit were found to fall outside the scope of the attorney-client privilege. In *MSF Holdings*, the court noted that the analysis of whether the e-mails were protected was complicated by the fact that the business decision of whether to honor the letter of credit was influenced by a consideration of FTCI's legal obligations. Reasoning that the attorney never alluded to a legal principle or engaged in any legal analysis, the court determined that the e-mail communications were predominantly commercial in nature and thus not privileged. The court concluded by noting that the attorney simply did what any business executive would do in deciding whether to honor a letter of credit: she collected facts. The attorney thus primarily relied on her commercial knowledge rather than her legal expertise in making her decision.

Dual Purpose Communications

In today's legal marketplace, lawyers frequently claim with some justification that they can "add value" by bringing both legal knowledge and business acumen to work for the benefit of the client. A transactional lawyer's communications thus quite often serve a dual purpose, incorporating both legal and business advice. As the United States District Court for the Southern District of New York noted in a 1995 decision, *Note Funding Corp. v. Bobian Investment Co.*, No. 93 Civ. 7427, 1995 U.S. Dist. LEXIS 16605 (S.D.N.Y. Nov. 9, 1995), commercial entities that engage in large and complex financial transactions are inclined to engage the services of lawyers who have the training and experience to handle sophisticated legal and business issues. However, dual purpose communications can present special challenges for the assertion of the attorney-client privilege.

In *Note Funding*, there was a demand to Bobian Investment to produce several hundred documents related to business negotiations. Note Funding argued that many of the communications handled by Bobian's attorneys concerned business negotiations and analyses and did not involve legal advice; therefore, the privilege should not apply and the documents should be produced. After conducting an in camera review, the court determined that the majority of the documents sought by Note Funding were protected by the attorney-client privilege. The fact that Bobian's attorneys' advice encompassed business as well as legal considerations did not strip the documents of their privilege. The court stated that in cases where the attorney's advice rests "predominantly" on an assessment of legal issues, the privilege should be recognized. In contrast, in cases where the lawyer is consulted solely for business advice based on commercial, rather than legal expertise, the lawyer's communications are not protected.

After reviewing each document separately, the court found that while the majority of the challenged documents included discussions of financial questions and issues of commercial strategy and tactics, they did so in a context that made it evident that the Bobian lawyers were relying predominantly on their legal expertise. The court thus concluded that the documents were protected under the attorney-client privilege. Not all of Bobian's documents were deemed protected, however. The court also found that some documents were simply reports related to the developments of the negotiations, or mere discussions of commercial prospects and financial considerations, and thus were not covered by the privilege. The district court held that the reports on negotiations, divorced from legal advice, were not protected.

So, whether you face a court more persuaded by the *Georgia-Pacific* or the *Note Funding* reasoning, there is clearly no blanket protection available simply because an attorney is involved.

Work Product Protection

A related issue that transactional lawyers who serve as negotiators should keep in mind is the possible loss of work product protection. This protection, strictly speaking, is not a privilege and belongs to the lawyer rather than the client. The work product doctrine protects the notes, mental

impressions, and legal analyses and conclusions prepared by a lawyer during the course of and in anticipation of litigation, whether or not communicated to the client. A determination that the dominant purpose of the ser-vices provided by a lawyer is non-legal may also affect the lawyer's ability to assert work product protection.

An illustrative case is *Watts Industries, Inc. v. Superior Court*, 171 Cal. Rptr. 503 (Cal. Ct. App. 1981). The case involved a suit for rescission of the sale of a condominium on the grounds that the buyers made fraudulent representations about their intentions to live in the condominium in order to close the deal. During the negotiations prior to the sale, an officer of Watts Industries had a telephone conversation with the attorney for the buyers. Watts later claimed that it agreed to sell to the buyers on the basis of representations made by the buyers' attorney during this conversation. In discovery, Watts sought to compel the lawyer's answers and notes about the contents of the phone conversation. The court held that where the lawyer acts "merely as a business agent" by conveying the client's bargaining position to a contracting party, the attorney's notes of the conversation should not be protected. The court reasoned that if the privilege were recognized in this type of situation, there would be increased incentive to use attorneys as business agents, and non-attorneys and clients negotiating for themselves would be at a disadvantage because their notes about negotiations would not be protected. The court concluded that the work product protection applies to documents related to *legal* work performed for a client, "not to notes memorializing acts performed as a mere agent." Accordingly, the court of appeals ordered the trial court to compel production of the attorney's notes of the telephone conversation. Again, we see the important distinction drawn between legal work provided by an attorney and non-legal work that could be provided by any agent.

A final point to keep in mind is that privilege rulings in litigation can be a blunt-edged instrument. If a court finds that non-legal, business purposes predominate, the door can be opened to disclosure of communications that were really entitled to protection but got lost in the static; once the cat is out of the bag, it is very difficult to get it back in.

Conclusion
Transactional lawyers and in-house counsel cannot escape the fact that they often provide business as well as legal advice. Lawyers who serve a dual role as both legal advisers and business consultants should carefully consider whether communications with clients may be protected by the attorney-client privilege. It is never safe to assume that they will be, as a court may limit the applicability of the attorney-client privilege, particularly in negotiation settings. The following practice pointers may be helpful in avoiding an unintended outcome later on:

- Become familiar with your state's approach to the attorney-client privilege. Different states take different approaches regarding whether the privilege applies when a lawyer acts as a negotiator.
- Watch the choice of law and forum selection provisions in the contract, as those could also impact the protection available.
- Communicate with your client. Discuss what advice the client is seeking and for what purpose the advice is being given. Specifically, it is important to warn the client of the possibility that the privilege may not apply to some communications if litigation were to ensue.
- Document the purposes of your engagement and representation with a clear emphasis on the legal aspects.
- Consider thoroughly before mixing legal advice with business advice, and whether doing so will better serve to protect both or may well expose both.
- Avoid the use of blanket privilege legends on every document. These could not only be ignored but may actually come back to harm you and your client.
- Consider having a business person present at negotiations to advise the client and report on the business issues. This will also help to more clearly define and distinguish your separate legal advice.
- Be careful out there.

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Golf and the Law

A Closer Look at the Primary Assumption of the Risk Doctrine

By author

This article is about golf and the law. The specific focus is on negligence and the primary assumption of the risk doctrine. When a golfer hits a golf ball that injures another golfer, the injured player may sue, using one or more of the following theories: (1) an intentional tort, such as assault and battery; (2) recklessness; or (3) negligence.

In most cases, recovery under the theory of negligence is unlikely because of the primary assumption of the risk doctrine. This doctrine is based on the view that golfers who play the game assume the level of risk inherent to the game. Thus, when the doctrine applies, it operates as a bar to an injured player recovering on the theory of negligence.

The objective of golf is to hit a golf ball, which is hard enough to cause injury, from the area called the "teeing ground" into a small hole in the fewest number of strokes. The distance between the teeing ground and the hole varies. It can be anywhere up to five hundred yards or so in length, and is often strewn with natural obstacles, man-made hazards, and other players navigating the course. The game also is challenging because the hole measures only four and one-quarter inches in diameter.

Golfers often describe the flight of the golf ball based on its trajectory. For a right-handed player, a ball that curves to the left is called a hook. One that curves to the right is a slice. For left-handed players, the hook-slice description is just the reverse: left is a slice and right is a hook. If the ball goes straight or where it is supposed to go, most golfers call it a miracle. When miracles don't occur, another player is at risk of getting hit.

As one might expect, an official code governs how the game should be played. This code, the *Rules of Golf*,is supplemented by *Decisions on the Rules of Golf*, which provides answers to

matters not specifically covered in the *Rules*. Taken together, the rules and decisions constitute the jurisprudence to playing the game.

For the Love of the Game

The game of golf is loved by many, tolerated by others, and affirmatively disliked by the rest. H. L. Mencken, America's beloved curmudgeon and full-time satirist, captured his disdain for the sport when he said that, if he had his way, "no man guilty of golf would be eligible to any office of trust or profit under the United States." Obviously, he was not a fan. Mark Twain is probably in the same camp based on his quip that "golf is a good walk spoiled."

Some have a more tolerant attitude toward the game. The humorist P. J. O'Rourke, for example, might be put in this category. He chipped into the debate by observing that golf "combines two favorite pastimes: taking long walks and hitting things with a stick." Aficionados of the sport know that the game is actually played with a "club," which must meet certain promulgated specifications, and not with a "stick."

Others love the game, no matter how fleeting or episodic their success at getting the golf ball to behave properly. In the film classic *Tin Cup*, Roy "Tin Cup" McAvoy, played by Kevin Costner, developed a romantic interest inDr. Molly Griswold, played by Rene Russo. During a practice session on the driving range, Molly undergoes metamorphosis in her attitude toward the game. She initially tells "Tin Cup" that golf is "without a doubt, the stupidest, silliest, most idiotic grotesquery masquerading as a game that has ever been invented." But after hitting a great shot, she broadly smiles at her success. She now gets it. Golf can be fun. It is also a multibillion dollar a year business.

For the Love of the Law

Golfers predictably prefer to avoid entanglements with the law during a round of golf. In fact, the law may be the last thing that a golfer wants to think or worry about on the golf course. This avoidance strategy, however, is not always possible. Like it or not, lawyers and judges get involved, especially when another player is injured by an errant ball.

The variety of legal issues associated with golf is surprising. Contract disputes involving hole-in-one contests, product liability claims for defectively manufactured golf clubs, and patent and trademark disagreements are typical.

In *PGA Tour v. Martin*, 532 U.S. 661 (2001), the United States Supreme Court examined the fundamental nature of the game of golf. It analyzed the application of the Americans with Disabilities Act (ADA) to tournaments sponsored by the Professional Golfers' Association (PGA) Tour. The Tour's "walking-only" rule was challenged by Casey Martin, a disabled professional golfer who had profound difficulty walking. The court found that the ADA applied to tour events. It also found that the "walking-only" rule could be modified to accommodate Martin without fundamentally altering the nature of the game at PGA tournaments. The court held that the tour competition would not be fundamentally altered by accommodating Martin's request to use a motorized cart. This determination required the court to determine what is fundamental to the game.

Inherent Risks of the Game

In the movie *Sideways*,two friends, Miles and Jack, decide to play a round of golf during a California wine-tasting road trip. Their slow play on the golf course prompts the group playing behind them to hit a golf ball near them. Miles returns the favor by hitting the same ball back at the group. His return volley rattles off the offender's golf cart, and things escalate from there. Ultimately, Jack charges the group behind, wildly swinging a club and yelling, "This is going to be fun." Lawyers and golfers alike are sure to recognize that Jack's charge is not the type of risk inherent to the game. But what are the risks assumed by a golfer?

In *Shin v. Ahn*, 42 Cal. 4th 482, 64 Cal. Rptr. 3d 803 (2007), the Supreme Court of California recently examined the question of whether the primary assumption of the risk doctrine applies to non-contact sports, such as golf. It had previously held that the doctrine applied to contact sports, such as football, but had left open its application to non-contact sports.

The facts giving rise to the litigation occurred on the par four, thirteenth hole at the Rancho Park Golf Course. The course, which is a popular public course, is owned and operated by the City of Los Angeles, and was built in the late 1940s. The fairways are lined with mature trees, and the terrain is generally hilly.

On the ill-fated day, Johnny Shin, Jeffrey Frost, and Jack Ahn were playing together as a "threesome." After putting out on the twelfth hole, Jack headed for the tee box of the thirteenth

hole. Johnny and Jeffrey then finished putting out and followed Jack toward the next hole. Johnny took a shortcut up the hill toward the tee box, which placed him in front of Jack and to his left.

Unwilling to be electronically disconnected from the outside world, Johnny stopped to check his cell phone for messages. He was then about 25 to 35 feet from Jack, who was getting ready to tee off, and at a 40- to 45-degree angle from the intended path of Jack's ball. The stage was set for disaster.

Material facts were, however, in dispute. Johnny claimed that Jack saw him standing in front of him. Jack disagreed. He maintained that he did not see Johnny either when he took a practice swing or when he actually teed off. According to Jack, he was focused on hitting the shot, and did not shout "fore" or any other warning.

As golfers know, the traditional warning "fore" is shouted to warn others on a golf course when there is a danger of hitting them with a golf ball. While the exact etymology of the term is uncertain, one popular view traces the term "fore" to military operations. During the seventeenth and eighteenth centuries, the infantry advanced in formation while artillery batteries fired over their heads. When an artilleryman was about to fire, he would yell "beware before." This forewarning allowed the infantrymen to drop and cover to avoid being hit. Golfers have shortened the warning to "fore."

Whether Jack simply mis-hit the ball or hooked it is not clear from the record, but the result was the same. Johnny was whacked in the head by Jack's ball, and suffered what he claimed were "disabling, serious, and permanent" injuries. As a result, Johnny sued Jack for negligence.

The trial court refused to grant Jack's motion for summary judgment on the theory that triable issues of fact remained. The court of appeal affirmed but added that the general principles of negligence applied. It also concluded that the primary assumption of risk doctrine, which provides that a defendant owes the plaintiff no duty to protect against ordinary or simple negligence, did not apply. The no-duty principle, the court said, was limited to cases where the injured golfer was playing with a different group of golfers. Because the golfers were playing together in *Shin*, the court of appeal found that general principles of negligence applied.

The California Supreme Court affirmed the court of appeal, but remanded the case with directions that litigation should continue under the primary assumption of the risk doctrine. The court of appeal reached the right result that summary judgment was incorrect, but its legal reasoning was wrong.

According to the supreme court, being hit by a carelessly struck golf ball is an inherent risk of the game. Therefore, the primary assumption of the risk doctrine may operate as a complete bar to a plaintiff's recovery on the theory of negligence. It reasoned that golf balls after being hit by a player often have a mind of their own. A ball that goes astray and strikes another is a risk that all golfers assume when they play the game. Holding golfers liable for controlling their shots, in the court's view, only would encourage lawsuits and prevent players from enjoying the game.

The *Shin* court looked to sister-state decisions for support, and found it. Cases from Ohio, Pennsylvania, New Jersey, Massachusetts, Texas, and Hawaii confirmed that California was not alone in its approach.

In 1990, the Supreme Court of Ohio decided *Thompson v. McNeill,* 53 Ohio St.3d 102, 559 N.E.2d 705 (1990). The plaintiff in the case, who was playing in the same group as the defendant, was injured when the defendant "shanked" the ball, causing it to head off at an oblique angle to the intended path. The *Thompson* court reasoned:

Shanking the ball is a foreseeable and not uncommon occurrence in the game of golf. The same is true of hooking, slicing, pushing, or pulling a golf shot. We would stress that '[i]t is well known that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost. It is common knowledge, at least among players, that many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatsoever.'

The *Shin* court also consulted the *Rules of Golf.* The etiquette section to the *Rules* contains several provisions on safety, such as shouting "fore" to warn others when the danger of hitting another exists, as well as not hitting until those in front are out of range. In what may be surprising to golfers, the court reasoned that these "guidelines" on how the game should be played do not create a basis for legal liability. In the words of the court, "the sanction for a violation of a rule of etiquette is social disapproval, not legal liability."

Having clarified the application of primary assumption of the risk doctrine to golf, the supreme court remanded the case. *Shin* does not foreclose basing liability on intentional or reckless conduct. In this sense, a golfer continues to have the duty to refrain from conduct that creates a higher degree of the risk of injury than created by simple negligence.

In order to prevail, Johnny would have to prove to the jury that Jack acted either intentionally or recklessly. The record was too sparse to support a finding, as a matter of law, that Jack had acted intentionally or recklessly. On remand, the jury would have to consider the totality of circumstances surrounding the shot. Jack should not have hit his shot without checking to see whether Johnny was likely to be struck. Once having addressed the ball, however, Jack is not required to break his concentration by checking for Johnny's whereabouts.

A cause of action for negligence is based on the idea of preventing an unreasonable risk of harm to another. Under the primary assumption of the risk doctrine, a golfer assumes the ordinary risks inherent to the game by choosing to participate. This necessarily requires a court to determine the nature of the risk that a golfer willingly assumes. Although a golfer may assume some risks associated with playing golf, such as being inadvertently struck by a golf ball, other risks may not be inherent to the game. When a risk is not inherent to the game, the negligence standard continues to apply.

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The Supreme Court's Decision in *KSR v. Teleflex*

New Concerns for Patents

By William H. Honaker

Whether you are a business owner, corporate officer, or legal counsel, you need to understand how the Supreme Court's decision in *KSR v. Teleflex* may affect your company's patent portfolio. It is possible that your patent portfolio is at risk of being ignored by your competition and potentially subject to being invalidated by the courts. It is also possible that the patents in your portfolio are not as strong now as you thought, and that your new technology may not be as patentable due to the *KSR v. Teleflex* decision.

What happened? The Supreme Court recently struck down the Court of Appeals for the Federal Circuit's (CAFC's) standard for determining whether a patent should be issued. If the older standard was applied in obtaining patent protection for your technology, your patents now are suspect. The new standard promulgated by the Supreme Court, which is actually an even older standard resurrected, is a tougher standard.

What if anything can be done? Your patent portfolio needs to be reviewed and a determination made as to whether the older standard was applied in obtaining patent protection. If so, those patents may need to be re-examined by the United States Patent and Trademark Office (USPTO). Although this is a somewhat draconian step, for important patents it may be necessary. When applying for patent protection on new technology, additional preliminary work will need to be done to ensure that the patent being sought will meet the tougher standard that will now be applied.

Overview of the Decision

The *KSR v. Teleflex* decision has important ramifications for both future and existing patent applications and patents. In many if not most patent applications and patents, the main inquiry is whether the invention would have been obvious to one of ordinary skill in the art under 35 U.S.C.

§ 103. To obtain a valid patent, the following three basic questions must be answered in the affirmative: (1) Is the invention useful? (2) Is the invention novel? and (3) Is the invention obvious to one of ordinary skill in the art? The answer to this last inquiry--"Is it obvious?"--is the most common basis for refusing patent protection by the USPTO. Typically, a USPTO examiner will search for prior art, published patents, and other published literature to establish that the claimed invention would have been obvious to one of ordinary skill in the art in view of the prior art. "Ordinary skill in the art" is determined by the examiner, and generally said "to be the skill possessed by one normally practicing in a given technology" (for example, engineers, scientists, software programmers, pharmacologists, doctors, etc.). The examiner will typically locate two or more patents or published articles and refuse patent protection arguing that based upon what has been found, a person of ordinary skill in the art would have been able to combine the prior art to arrive at the claimed invention. This would indicate that the invention is obvious and therefore not patentable.

Under the "teaching, suggestion, motivation" (TSM) test, the examiner was constrained as to the prior art that he could use in refusing patent protection. The examiner had to find patents that not only showed the features of the claimed invention, but also showed the solution to the same problem(s) that the inventor was trying to address.

The TSM test was an attempt by the CAFC to develop a rigid rule to make the obviousness inquiry more uniform. Before the *KSR* case, TSM had become a regular mantra of patent attorneys arguing against obviousness rejections by the USPTO. Many times, by making the argument that the prior art did not meet the requirements of the TSM test, the examiner simply capitulated and allowed the patent. In practice, the TSM test had yielded a shortcut to patent protection.

The recent Supreme Court decision in *KSR v. Teleflex*, 550 U.S. _____, 1275 S. Ct 1727 (2007) has definite consequences for those interested in obtaining patents, and for those who presently have patents. The Supreme Court, in a unanimous decision, reminded the Court of Appeals for the Federal Circuit that the Supreme Court's 1966 decision in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966) controls the "obviousness" inquiry. The Supreme Court in *KSR* rejected the rigid approach of the CAFC in its application of the TSM test, stating:

Helpful insights, however, need not become rigid and mandatory formulas; and when it is so applied, the TSM test is incompatible with our precedents. The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way. In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends. Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.

Brief Review of the Facts
The *KSR* dispute involved adjustable pedals for vehicles with electronic control systems where the engine and brake were controlled without traditional cables. Adjustable pedals are pedals that can be moved forward and back with respect to the driver, instead of or in addition to repositioning of the driver's seat. In electronic systems, the brake and gas pedals are depressed and an electronic signal is sent to either the engine or brake. To translate the pedal movement, a sensor is used. The sensor senses the amount of pedal movement and sends a signal to either the engine or the brake.

Teleflex obtained a patent, the "Engelgau patent," to an electronic adjustable pedal assembly with a modular sensor mounted upon a fixed pivot point on the pedal assembly. With a fixed pivot point, the pedals can be moved forward and back with the pivot point staying fixed as well as the sensor. By fixing the sensor, there is reduced wear on the sensor wires and according to Teleflex a simpler, smaller, cheaper system.

The USPTO applied the obviousness standard to the prior art they located. The prior art showed adjustable vehicle pedals as well as modular sensors to determine and translate the pedals' position. What the USPTO did not find was an adjustable pedal assembly having a fixed pivot point. The USPTO felt that this missing feature, a fixed pivot point, would not have been obvious to a person of ordinary skill, so the USPTO allowed the patent. However, the USPTO missed the Asano patent which taught the use of a fixed pivot point in an adjustable pedal assembly.

KSR found the Asano patent and argued successfully to the district court that it would have been obvious to one of ordinary skill in the art to attach a sensor to the fixed pivot point of Asano. The

district court agreed and held Teleflex's invention obvious and invalidated the patent.

The CAFC reversed the district court. The CAFC rigidly applied the TSM test and held that Asano was solving a different problem than that being solved by Teleflex. Even though Asano showed adjustable vehicle pedals with a fixed pivot point and that it was known to attach sensors to adjustable pedals for use in electronic adjustable pedals, the CAFC didn't feel it was enough under TSM to make Teleflex's invention obvious. Asano, in the CAFC's view, was solving the problem of ensuring that the force to depress the pedal was the same no matter how the pedal is adjusted and therefore used a fixed pivot point. The fixed pivot point was not used to solve the problem that Teleflex was trying to solve. Teleflex sought to provide a simpler, smaller, cheaper adjustable electronic pedal. The CAFC further found that the sensor prior art was solving different problems and therefore would not have taught, suggested, or motivated one of ordinary skill in the art to attach a sensor to the fixed point of the Asano adjustable pedal. The CAFC also held that it was wrong for the district court to conclude that one of ordinary skill in the art could have found the answer, adding a sensor to the fixed point of an adjustable pedal, through experimentation. The CAFC strictly applied the TSM test and held that the Teleflex patent was valid.

The Supreme Court's Opinion
The Supreme Court found four significant errors with the CAFC's holdings and its application of the TSM test.

- The first error was the holding that patent examiners should look only to the problem the patentee was trying to solve.
- The second error was the holding that a person of ordinary skill would only be led to those elements of the prior art designed to solve the same problem.
- The third error was the holding that the test "obvious to try" was not an appropriate standard.
- The fourth error was the court's decision to apply rigid rules (the TSM test) to avoid hindsight reconstruction and prevent the use of common sense by the fact finder.

The Effect on Existing Patents
The effect of the Supreme Court's decision on existing patents should be of great concern for patent owners. Many patents in a company's portfolio may now be susceptible to a validity challenge. In dicta, the Supreme Court stated:

We need not reach the question whether the failure to disclose Asano [the prior art that taught adjustable pedals] during the prosecution of Engelgau voids the presumption of validity given to issued patents, for claim 4 is obvious despite the presumption. We nevertheless think it appropriate to note that the rationale underlying the presumption--that the PTO, in its expertise, has approved the claim--seems much diminished here.

The Supreme Court thus is suggesting that the presumption of validity may not be as strong if the best prior art was not considered by the USPTO.

Generally, every issued patent is presumed to be valid, and to invalidate a patent--with a heavy burden of proof— one must show that the patent is invalid by clear and convincing evidence. The fact that the USPTO missed the Asano patent diminished the presumption of validity in the view of the Supreme Court. It is not a great stretch to argue that if the wrong legal test was applied by the USPTO to determine obviousness (i.e., the TSM test), then the presumption of validity would be diminished as well. Therefore, one can expect that a patent challenger will argue that the presumption of validity should not apply or at least not be as strong if the TSM test had been applied by the USPTO in issuing the patent. This will open the door to broad challenges to existing patents.

Regardless of whether the presumption has been diminished, the argument that the wrong test was applied in issuing the patent will be argued (by alleged infringers) if the TSM test had been used in obtaining the patent. And, since TSM was the CAFC's standard test, regularly used by patent applicants when trying to overcome an obviousness rejection by the USPTO, it is likely that many portfolios contain patents that were obtained under the TSM standard, and those patents now are at risk.

It would be prudent to review at least the most important patents in a portfolio to determine whether the TSM standard was relied upon to obtain patent protection. A review of the arguments

made before the patent office which are contained in the file history will indicate whether TSM was applied.

The patent owner should ask the question, "Would the patent have issued had the *Graham* analysis (the correct analysis) been applied?" If the answer is "yes," and the TSM test had been argued before the Patent Office, the patent owner should then ask, "Do I want the judge or jury to apply the correct test, or have the USPTO re-consider the issuance of the patent under the *Graham* test?" As stated above, although somewhat draconian in the patent world, requested formal reconsideration by the USPTO may be warranted in instances of truly important patents because their validity may be in question and because the presumption of validity that normally attaches may have been affected.

The Effect on Future Patents
What impact will *KSR* have on obtaining patents in the future? For one thing, it will be more difficult. In effect, we are "back to the future." The Supreme Court has clearly stated that *Graham* is the correct standard to be applied when determining obviousness. Accordingly, a broader range of prior art is now applicable to the determination of whether a patent should issue because the less-rigid *Graham* test has replaced the narrower, more-rigid TSM test. Where the TSM test literally constrained the examiner in the application of prior art, the examiner now will be able to apply prior art that may solve a different problem, but arguably be within the realm of prior art that one of ordinary skill in art should have been aware of and considered in developing the claimed invention. Additionally, common sense will once again be available to the examiner in determining whether to issue a patent in view of the Supreme Court's decision. The examiner will be able to opine on what would be common sense to one of ordinary skill in the art without actually having patents or literature to support that opinion. Moreover, in some circumstances, the examiner will be able to refuse patent protection based upon the argument that one of ordinary skill in the art would find it obvious to try a combination asserted by the examiner (i.e., to experiment).

How will an examiner's refusal be overcome? Refusals will once again be overcome by the standard arguments that were common before the TSM rule. The standard arguments provided by the decision in *Graham* will once again be the arguments for overcoming obvious rejections by the PTO. For example:

- The combination of prior art asserted by the examiner is hindsight reconstruction.
- The prior art teaches away from the combination.
- The invention solves long felt but unresolved needs.
- The invention is a commercial success.

These are all arguments that *Graham* and its progeny suggest as the arguments that may overcome a refusal based on obviousness. Overall, it will be more difficult to obtain meaningful patent protection, but patents that are obtained will be stronger and more meaningful to the owner.

Conclusion
The Supreme Court has established that the *Graham* standard, not the TSM standard, is to be applied in determining whether an invention is obvious. Patents in the future will be tougher to obtain. Existing patents that were obtained under the TSM rule are open to new challenges. Existing patents may well be of questionable validity if the TSM test was used in obtaining the patent because it was the wrong test to use. Further, the presumption of validity may have been weakened if the TSM test was used. Patents that are important to an owner's patent portfolio therefore need to be evaluated in view of the Supreme Court's decision. In some cases, corrective measures will be warranted to obtain reconsideration by the USPTO to strengthen those patents.

In the future, greater care will need to be taken when seeking patent protection. Additional evidence to overcome obviousness rejections by the USPTO may and likely will be required. The pre-TSM arguments will once again be the arguments that are needed to overcome obviousness refusals by the USPTO.

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Courting the Suicide King

Closing Opinions and Lawyer Liability

By Donald W. Glazer and Jonathan C. Lipson

What are you willing to risk when you represent a client in a major transaction? Your law practice? Your firm? When you deliver a closing opinion to the party on the other side, are you—unwittingly—courting the Suicide King (read on)?

Third-party legal opinions (opinions to be relied on by non-clients) date back to the late nineteenth century. At that time, underwriters of railroad bonds hired prominent lawyers to give opinions, printed on the bonds, confirming that the bonds had been duly authorized. In those days, the opinion givers were putting their reputations on the line--but little else. Lawyers were professionals, and professional courtesy, as well as legal concepts such as privity, made suits by third parties against opinion givers rare, if not unthinkable.

Today, lawyers, prominent and otherwise, routinely deliver closing opinions to non-clients in financial transactions. Unlike in the past, however, the prospect of being sued is no longer a theoretical possibility. Lawyers today too often are seen as deep pockets when a deal goes bad and the acrid aroma of financial fraud fills the air.

To be sure, cases against opinion givers are still rare. And cases that go to trial and result in an award of damages are even rarer. But that does not mean that lawyers can blithely ignore the risk of giving opinions to non-clients. Although any particular opinion is unlikely to give rise to litigation, small risks run often enough cease being small, and during the last few years cases such as *CFS*, *Enron*, and *Dean Foods* have demonstrated all too clearly the willingness of investors, lenders, and acquirers, including major financial institutions, to sue the law firms that gave them opinions for amounts (up to $1 billion) that threatened those firms' very existence. Major floods may be rare, but every year, somewhere, a one-hundred-year flood wreaks havoc.

Apart from the usual bromides about avoiding unworthy clients, not giving opinions when red flags are flying and taking care to exercise customary diligence in preparing opinions, little has been written about what opinion givers might do to protect themselves in the brave new world of today's opinion practice. In this article we will describe how the current situation developed and explore ways to address the problem.

Cost-Benefit Analysis

When lawyers discuss whether an opinion should be given, they usually consider the cost to their client and the benefit to the recipient. (*See, e.g., 2004 Report on the Remedies Opinion by the Section of Business Law of the State Bar of California.*) The cost to their client includes the legal expense of preparing an opinion and performing the customary diligence to support it. The benefit to the recipient is the assurance that legal issues of concern to it have been satisfactorily addressed. An opinion on a stock offering, for example, provides an investor comfort that the stock it is acquiring has been duly authorized and validly issued by the company.

A cost-benefit analysis can help weed out opinions that are overly expensive to prepare or of little value to recipients. But a client's perspective is not the only one that should count from a cost-benefit standpoint. To be complete and accurate, the cost side of the equation must take into account the potential cost to an opinion giver of being sued. And, as discussed in the next section of this article, increasing litigation risks make that cost difficult to quantify.

Inability to Quantify the Risk

In an era when opinion givers had no practical exposure to liability, the cost-benefit equation could ignore litigation costs because the likelihood those costs would ever be incurred was essentially nil. That era, however, has passed. Today, the risk of being sued on an opinion is real, and litigation-related costs (including not only the expenses of defending an action but also the possibility of having to settle or pay damages) must be considered if the equation is to have any value.

Despite the need to take litigation costs into account, an effort to state those costs in dollar terms faces serious obstacles. These include:

- The absence of reliable statistics because of the paucity of reported judicial decisions involving third-party opinions;
- The lack of public information about settlements and defense costs (although we understand anecdotally that settlements can be in the high eight figures or even more);
- The inability to translate into dollar terms the impact a suit can have on a firm's practice and the productivity of the lawyers who worked on the challenged opinion; and
- Most importantly, the inability to place a value on the continuing existence of a law firm as an institution when a suit jeopardizes its future.

If litigation costs to opinion givers cannot be quantified, a cost-benefit analysis in and of itself cannot identify the circumstances when the true cost of giving an opinion exceeds the benefit. Nor can it be helpful in determining how much extra, over and above a law firm's standard hourly rates, an opinion giver would have to charge to balance the equation.

The Dilemma

The knowledge that someone is struck by lightning every year does not keep golfers off the golf course. Although the consequences are dire, the perceived risk is too small. Similarly, the knowledge that lawyers are now sued on opinions and that the damages sought can be catastrophic has not kept lawyers who work on financial transactions from giving third-party legal opinions. Lawyers see the risk to their careers of not giving opinions as large and the risk that they might be held liable for a substantial amount as small. Thus, they accept the risk of liability as going with the territory. Like golfers setting out on a rainy day, however, lawyers would do well to take what measures they can to protect themselves from the elements when they are proceeding, as they are now, under increasingly threatening skies.

Before proposing a solution, we want to make clear that we do not blame the current situation on the legal rules for establishing liability (as set forth, for example, in the *Restatement of the Law Governing Lawyers*). Lawyers are no different than anyone else who has a duty to exercise care, and lawyers who are negligent (or worse) should not get a pass on liability. The sine qua non for an opinion giver is to exercise care in preparing opinions. Unfortunately, however, for an opinion

giver, exercising care is not the whole story.

One of the challenges opinion givers face when sued is winning a motion to dismiss. Actions against opinion givers are fact specific, and judges generally have been unwilling to dismiss a complaint before giving an opinion recipient an opportunity to develop the facts. The consequence has been to expose opinion givers to defense costs of potentially tens of millions of dollars and damages claims that far exceed what they can afford to lose. When a firm faces the possibility of a catastrophic loss at trial, the pressures to settle are intense.

Some Alternatives

As with any question of loss allocation, the exposure of opinion givers to firm-threatening claims can be addressed in two ways: through regulation or through markets. As a practical matter the prospects for a regulatory solution appear remote. Moreover, even if adopted, a regulatory solution would be less likely than a market solution to allocate costs to those who benefit from them.

A standard market solution for addressing risk is insurance. Law firms maintain general liability insurance and, if an excess coverage policy specifically addressing their liability for closing opinions were available on financially reasonable terms, they could then seek to pass the premium on to their clients as a transaction cost. At least to our knowledge, however, no such insurance is currently available. Moreover, if it were, one cannot help but wonder whether clients would balk at paying what could be a substantial premium.

Another alternative is procedural. An opinion giver might seek to establish a mechanism for dispute resolution similar to the mechanism investment bankers include in their engagement letters. Thus, a recipient that sees arbitration as a quicker, private and more efficient way to resolve a dispute might agree that, if it were to bring an action relating to the opinion, it would do so before an expert or a panel of experts on opinion giving. Arbitration would reduce the pressure on a law firm to settle when it is comfortable that it exercised due care but concerned about having that question decided by a jury. However, even a procedure in which disputes are resolved by experts will not protect an opinion giver from having to pay potentially ruinous damages if it did make a mistake and, in fact, was negligent.

Today, many law firms routinely give opinions on transactions involving hundreds of millions and even billions of dollars. In doing so, for a fee that is only a small fraction of the dollars involved, they expose themselves to potential liability to third parties for an amount (i.e., the full amount of the transaction) that is well in excess of what even the largest law firms can afford. The magnitude of the exposure, we believe, is the crux of the problem. Even the criminal law does not exact the ultimate penalty for negligent homicide.

The solution we propose addresses the disproportionality of lawyers' exposure head on. It is for opinion givers to negotiate a cap on the dollar amount of the damages the recipient can recover for the opinion and to include that cap in the agreement between the parties and the opinion letter itself. The cap we envision would be large enough to assure that the opinion giver takes its responsibilities seriously (and would not apply to recklessness or willful misconduct). It would not be so large, however, as to put a firm's future into jeopardy. We would expect the cap to vary depending on the firm and the transaction. We also would expect it to vary depending on the opinions being given. Some opinions--for example "negative assurance" (which technically is not even an opinion)--have spawned more litigation than others. When giving those opinions, lawyers might press harder for inclusion of a cap than they do for less risky opinions.

We are well aware that ethical rules generally prohibit lawyers from limiting their liability to clients. Our proposal, however, is to limit opinion givers' liability to non-client opinion recipients, and we are aware of no ethical rule that prohibits a lawyer from asking a non-client, represented by its own counsel, to agree, as a condition to receiving an opinion, to limit the amount it can seek as damages.

When a privately held company is sold, the acquisition agreement normally subjects the selling shareholders to an indemnification claim for only a portion of the purchase price, thus allowing them to keep much of the consideration paid to them notwithstanding misrepresentations in the agreement. Moreover, the obligation to indemnify normally expires after a stated period of time, often a year or two. In the current environment in which opinion givers have potential liability for the entire purchase price, a law firm receiving a legal fee for giving an opinion on behalf of selling shareholders has greater exposure to liability than its clients, and for a longer time. A cap would help remedy that inequity.

Although the benefit to an opinion recipient of agreeing to a cap may not be obvious at first

glance, opinion recipients, like everyone else involved in the opinion process, have a stake in its smooth functioning. Transactions involving opinions are not one-off events, and over the long run forcing law firms to risk their futures each time they give an opinion is in nobody's interest. Moreover, as a practical matter, putting a firm's back to the wall if something goes wrong may prolong litigation and even lead to a scorched-earth policy under which a firm exhausts its financial resources on defense costs rather than settle for an amount that exceeds its insurance coverage. Thus, we are hopeful that clients will support the efforts of their counsel to manage the liability counsel takes on when giving third-party opinions on their behalf. In addition, we are hopeful that institutions, which often receive third-party opinions from the same firms they rely on for representation in other transactions, will take a longer-range view of what is in their self interest and not dismiss a proposed cap out of hand.

An Epilogue--The Suicide King

We invite you, the readers of this article, to join us in a simple card game. We'll call it the Suicide King game after the King of Hearts, the card in which the King holds a sword to his head, apparently poised to do himself in. The game will begin with your placing your initial stake, let's say your life savings of $5 million, on the table in front of you. You then will shuffle a deck of cards and draw one card from the deck. If the card you draw is not the Suicide King, you will win and we will pay you cash in an amount equal to 5 percent of your $5 million. From that 5 percent (initially $250,000) you will pay yourself 40 percent (initially $100,000) as a salary for playing the game and add the balance (initially $150,000) to what you have on the table. If you draw the Suicide King, we will win and you will give us your $5 million.

The game will continue on the first day of each subsequent calendar quarter, with your drawing one card from a new deck. If you win, we will pay you 5 percent of your initial stake and accumulated profits; you will pay yourself 40 percent as salary and add the remainder to your stake on the table. If we win, you will turn over to us what you then have in front of you.

After the first year, assuming, as is likely, that you do not draw the Suicide King (the odds are about one in 13), you will have made over $600,000 and paid yourself a salary of over $400,000. You will be feeling rich and happy. If, as is still likely, you do not draw the Suicide King in the second year, you will be richer still, and may even start to brag to your friends about your financial acumen. And so it may go for many years. But no matter how many years pass, no matter how large your salary and the pile of cash in front of you, we know one thing for sure: at some point you will lose. And when you do, you will lose your life savings and all your profits. You will lose everything.

Now, we readily concede that lawyers are professionals, not gamblers. When they deliver closing opinions, they do not—and should not—regard themselves as playing a game of chance. But no matter how professional they may have been in preparing their opinions, at least three major law firms have been targets of potentially catastrophic suits in the last few years. And that should give everyone pause. We, therefore, end with the question we asked at the outset of this article. The question is whether, in light of your practice, the opinions you give, and the procedures you have in place, you have fully considered the risks you have been running when delivering third-party opinions. The question is whether—unwittingly—you have been playing the Suicide King game.

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Business Law Today

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Keeping Current: government enforcement

By Thomas F. O'Neil III and Melinda H. Waterhouse

Chief compliance and legal counsel caught by False Claims Act

As enforcement authorities pursue companies and corporate officers with ever-increasing fervor, they are developing novel theories of liability to expand their roster of targets. Over the past decade, chief legal and compliance officers have found themselves in the spotlight previously beamed on colleagues in accounting and finance. A recent case in the health care sector highlights the potential exposure.

In September 2007, the United States Department of Justice (DOJ) filed a lawsuit against Christi Sulzbach (Sulzbach), former general counsel to Tenet Healthcare Corp. (Tenet or the Company), seeking tens of millions of dollars under the False Claims Act (FCA or the Act). The complaint alleges that Sulzbach submitted false compliance declarations required by a corporate integrity agreement imposed on Tenet's predecessor, National Medical Enterprises, Inc. (NME), thereby causing the government to pay claims erroneously.

Sulzbach was not involved in any of the claims at issue, so the lawsuit highlights the zeal of current recovery initiatives. It also raises important questions regarding internal investigations, settlement agreements, and voluntary disclosures.

The Corporate Integrity Agreement

In June 1994, NME settled an investigation of alleged kickbacks and entered into a corporate integrity agreement (CIA) with the Office of Inspector General of the Department of Health and Human Services (HHS). Sulzbach executed the settlement agreement and the CIA on behalf of NME.

The CIA required NME to submit to HHS annual compliance reports, which would include

certifications regarding the company's compliance with federal program requirements and the status of any relevant ongoing investigations. The CIA remained in effect after NME and American Medical Holdings, Inc. merged in 1995 to form Tenet. Sulzbach became Tenet's associate general counsel and corporate integrity program director.

The Internal Investigation
According to the complaint, in February 1997 an executive at Tenet drafted a memorandum on the legality of certain contracts with physicians. The executive met with Sulzbach, and she retained outside counsel to conduct an internal investigation.

In or about June 1997, the law firm submitted its report, determining that the contracts had violated the Stark Law, a federal statute which prohibits kickbacks and payments for physician referrals. Tenet did not disclose those findings to authorities.

The CIA Compliance Reports
The DOJ contends that after receiving the report from outside counsel, Sulzbach submitted declarations under the CIA in 1997 and 1998, in which she certified that Tenet was in compliance with the CIA and federal program requirements. Sulzbach filed the 1997 compliance report four days after receiving outside counsel's findings on Stark Law violations.

Notably, the complaint also details an effort by Sulzbach to correct the situation. A month after she submitted to HHS the 1997 compliance report, Sulzbach issued an internal memorandum to a colleague whom the executive had originally contacted, directing him to implement corrective action, advising him that failure to do so could trigger the CIA's disclosure provisions, and requesting that he send her a written status report. The complaint suggests that Sulzbach failed to follow up and that violations then continued.

The Qui Tam Litigation
A former Tenet employee filed a qui tam action against the Company in May 1997, claiming that it had violated the FCA by billing Medicare for referrals from the physicians who had been identified by the executive several months earlier. Tenet denied the allegations and, during discovery, asserted evidentiary privileges for over 15,000 documents, including the outside counsel's report and Sulzbach's internal memorandum to her colleague.

The government intervened and filed a motion to compel production of documents identified on the privilege logs; this motion was pending when the litigants settled in 2004.

The 2006 Settlement
In 2006, the Company settled a Medicare fraud inquiry by the government. Tenet agreed to pay $920 million and to produce certain documents that had been withheld as privileged, including some materials from the qui tam action. That concession resulted in the disclosure of two versions of the 1997 report from outside counsel and the internal memorandum thereafter authored by Sulzbach.

The following year, the DOJ sued Sulzbach under the FCA in a three-count complaint seeking treble damages and civil penalties.

The Act
Congress enacted the FCA during the Civil War so that citizens could pursue fraud claims against contractors, usually in situations where contractors had made false claims or falsified records to receive payment from the government. By the late 1990s, the Act had become a significant weapon for federal enforcement officials and private-sector whistleblowers.

The FCA prohibits:

1. knowingly presenting or causing to be presented to the government a false or fraudulent claim for payment or approval;

2. knowingly making, using, or causing to be made or used a false record or statement to receive payment or approval for a false claim from the government;

3. conspiring to defraud the government by obtaining approval or payment from the government for a false or fraudulent claim;

4. intending to defraud the government or conceal property from the government by delivering less property than the receipt indicates;

5. intending to defraud the government by certifying a receipt for property used by the government without knowing the truth of the information in that receipt;

6. knowingly buying or receiving public property from the government when this acquisition is unlawful; or

7. knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit property to the government.

Under the FCA, the United States can recover civil penalties of $5,000 to $10,000 per violation and, in certain circumstances, is entitled to recover treble damages.

Ramifications

The DOJ essentially claims that Sulzbach, as associate general counsel and corporate integrity program director, was personally responsible for investigating alleged violations of any federal program requirements and for reporting to HHS the existence and status of any internal inquiry.

That factual assertion has given rise to a new theory of liability under the FCA. The DOJ's ardor in this case quite clearly was fueled by the alleged failure to follow through on the corrective measures and by the vigorous defense of the qui tam action.

Given this aggressive pursuit of Sulzbach under the Act, compliance and legal officers operating in regulated industries should review this case carefully. The imposition of a CIA is a serious matter, as is the subsequent submission of contractually mandated compliance reports. And the potential consequences of a privilege waiver in a settlement agreement must be analyzed comprehensively before negotiations are concluded.

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Business Law Today

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Keeping Current: jurisdiction

By Francis G.X. Pileggi and Danielle S. Blount

Non-Delaware lawyers can be sued for giving advice on Delaware Law

In *Sample v. Morgan*, 2007 WL 4207790 (Del. Ch. Nov. 27, 2007), the Delaware Chancery Court provides a scholarly and practical analysis of Delaware's long-arm statute. The court determined that a non-Delaware lawyer and a non-Delaware law firm who provided advice on Delaware law to a Delaware corporation, and who caused a charter amendment to be filed with the Delaware Secretary of State, are both subject to personal jurisdiction in Delaware courts. This decision should be of great interest to the many lawyers all over the country who give advice on a daily basis about Delaware corporate law. (Some wags suggest that there are more lawyers in New York City who give advice on Delaware corporate law than all the lawyers in the state of Delaware who do so.)

This opinion also addresses the issue about when a corporate officer can conspire with the corporation he or she serves, and under what circumstances a corporate act can also create liability for those who caused the corporation to act. Corporate lawyers risk liability by entangling themselves in schemes that may be viewed as having entrenchment of incumbent management as their goal as opposed to actions taken in the best interests of the corporation.

The court itemized the factual foundation on which the issue presented was based. The non-Delaware lawyer and his non-Delaware firm:

(1) prepared and caused corporate documents to be filed in Delaware;

(2) advertised themselves as nationwide experts in matters of corporate governance;

(3) provided extended legal advice regarding Delaware law to a Delaware company;

(4) undertook to direct the defense of the Delaware lawsuit related to the advice on Delaware law; and

(5) faced allegations of aiding and abetting top managers in breaching fiduciary duties based on Delaware law.

In connection with finding that a non-Delaware lawyer may be sued on claims arising out of providing advice and services to a Delaware corporation, the court reasoned that Delaware has an interest in ensuring that Delaware corporations and their stockholders have access to its judicial system. Extensive factual details about this case are provided in an earlier opinion in the case that outlines a scheme in which the court described some of the directors as "unwitting and uninformed accomplices." *See Sample v. Morgan*, 914 A.2d 647 (Del. Ch. Jan. 23, 2007).

The court described as a "graceless position" the non-Delaware lawyer's argument that it would be "constitutionally aggrieved" if the suit proceeded in Delaware. The position was belied by his overt actions in providing a Delaware corporation advice relating to Delaware law. Delaware's long-arm statute applied in this case because the non-Delaware lawyer transacted business in the state by causing the filing of the certificate with the Delaware Secretary of State and by providing a broad range of services to the board and officers of a Delaware corporation. Additionally, a due process argument was not viable because when a Delaware corporation is financially injured by the faithless conduct of its agents, the corporation is injured in its legal home for purposes of the long-arm statute.

The court acknowledged that the facts of the case were unusual, but warned that "lawyers and law firms, like other defendants, can be sued in [Delaware] if there is a statutory and constitutional foundation for doing so." The court also noted that the non-Delaware lawyer's assertion that he had "no cause to enter Delaware nor did he file any documents with any court or agency in Delaware in connection with this representation" was implausible because of his direct facilitation of filing the certificate amendment.

Moreover, the jurisdictional issue was impacted by the non-Delaware firm's active role in drafting the briefs in the summary judgment motion in defense of the claims against it. Even its Delaware local counsel had to concede that at least one of the arguments in the non-Delaware firm's brief lacked any "plausible basis in law or logic."

The court found it unnecessary to rely on the conspiracy theory of personal jurisdiction in light of the actions being committed by the non-Delaware lawyer himself. The court rejected the argument that it was really the corporation that committed the alleged actions in Delaware, because the lawyer allegedly was acting only as the corporation's agent. The court analyzed the situation as follows:

- When well-pled facts support the inference that a person caused a corporation to take jurisdictionally-significant conduct in Delaware and that conduct is an element in a scheme by corporate fiduciaries to unfairly advantage themselves at the expense of a Delaware corporation and its stockholders, our case law has consistently held that the long-arm statute may be used to serve that person.

In essence, if a lawyer or law firm facilitates or arranges, directly or indirectly, through its use of Delaware situated agents the filing of corporate documents with the Delaware Secretary of State and those facilitated transactions are ultimately challenged, Delaware courts have repeatedly recognized that these acts alone are sufficient to constitute the transaction of business under the Delaware long-arm statue. The Delaware Supreme Court has opined that trial courts must provide a broad reading to the terms of the long-arm statute in order to effectuate the statute's intent.

In addition, the non-Delaware lawyer attempted to assert the "intra-corporate conspiracy doctrine" and/or the "agent's immunity rule" where corporate officials are deemed incapable of conspiring with the corporation they serve and/or that they should not be held personally liable when acting in their official capacity. However, the court observed that the alleged conspiracy did not include the corporation. Rather, the corporation was a victim of the scheme between the lawyer and the directors whose plan was to "enrich" and "entrench" themselves at the expense of the corporation. Further, the court explained:

- The doctrine on which the moving defendants rely does not even apply on its own terms. Well-pled facts support the inference that the moving defendants were not acting within the appropriate scope of their agency. The moving defendants were in fact acting to unfairly advantage the Top Managers at the expense of their real client, the company.

The court also included a brief analysis of decisions discussing the viability of an intra-corporate conspiracy argument involving a corporation and its agents. "It is well-settled that 'a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility.' . . . The policy behind the intra-corporate conspiracy doctrine "is to preserve independent decision-making by business entities and their agents free of the pressure that can be generated by allegations of conspiracy." *See Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv. Inc.*, 2004 WL 877599 at *11 (R.I. Super. 2004). "Because an attorney is an alter ego of his or her client, a conspiracy between the attorney and the client is not possible." *See Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 778 (Mo. App. 2003).

In sum, the court reasoned that Delaware's public interest would not be served by adopting a rule that insulates advisors of managers of a Delaware corporation from accountability if the advice assisted managers of the corporation in breaching their fiduciary duties.

Additional Resources

Blogs:
Francis G.X. Pileggi's blog at www.delawarelitigation.com summarizes all the key decisions on corporate and commercial law from the Delaware Court of Chancery and Delaware Supreme Court. His blog summary of the prior decision in this case is available here.

Larry Ribstein, Professor of Law at the University of Illinois College of Law has commented on the case here.

Stephen Bainbridge, Professor of Law at UCLA, provides his insights on the case here.

Articles:
For similar content, you can retrieve the following article on the *Business Law Today* Web site at: www.abanet.org/buslaw/blt. All issues since 1995 may be accessed under the "Past Issues" heading at the bottom of the Web page.

Keeping Current: Limited Liability Companies—What's your opinion on Delaware opinions?
by Norman M. Powell
Business Law Today
May/June 2007
Volume 16, Number 5—page 50

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Business Law Today

Volume 17, Number 4 March/April 2008

Pro Bono in action

By Allyn M. O'Connor

A pro bono-neighborhood partnership

If you walked through Kansas City's Ivanhoe neighborhood in the early 1900s, you would have passed beautiful homes wrapped by crisply painted porches and surrounded by well-tended lawns. Middle-class neighbors would greet each other with a wave and a smile. By the 1990s, however, Ivanhoe had changed dramatically. Over 40 percent of the homes had been demolished or were abandoned. Absentee landlords neglected many of the remaining homes, and illegal drug activity was thriving. Today, though, this is changing--thanks to tough abandoned housing legislation, a strong neighborhood group, a legal aid organization, and a team of volunteer lawyers.

The Missouri Abandoned Housing Act (the Act) permits courts, upon petition, to transfer ownership of vacant, neglected, tax-delinquent properties to nonprofit organizations for rehabilitation. The Ivanhoe Neighborhood Council (INC), the organizing entity and voice for area residents, viewed the legislation as a tool to implement its strategic plan: economic development, crime reduction, and neighborhood beautification. Around the same time, lawyers at the Kansas City office of Bryan Cave LLP were seeking a targeted, sustained pro bono opportunity in which firm lawyers could concentrate their efforts and see the impact of their work. Bryan Cave's Perry Brandt approached Legal Aid of Western Missouri (LAWMo) for pro bono partnership ideas. LAWMo's Gregg Lombardi had already been working with INC to help identify properties as candidates for rehabilitation under the Act, and suggested INC as a client.

With the help of LAWMo and these volunteers, INC began a coordinated effort to obtain possession of eligible properties. The effort starts when INC, along with LAWMo and the volunteer lawyers, identify the single-family residential properties that are good candidates for rehabilitation under the Act. According to INC Executive Director Margaret J. May, volunteer

lawyers tour the Ivanhoe neighborhood and become familiar with the properties. They note the problems associated with the property, such as delinquent taxes and housing code violations. With the volunteer lawyer's assistance, INC notifies property owners that certain deficiencies make the property eligible for acquisition and rehabilitation. Volunteers also provide assistance negotiating with property owners, and when it appears the homeowner does not intend to cure these deficiencies, the volunteer will prepare and file the petition necessary for INC to acquire the property under the Act.

INC's May indicates at least two properties will be move-in ready by mid-2008. May explains that INC's goals are for the majority (at least 70 percent) of Ivanhoe neighborhood homes to be owner-occupied with families. A handful of owners have voluntarily repaired and improved their properties as a result of INC's efforts. May concedes that the process is slow and deliberate. And LAWMo's Lombardi comments that there have been some setbacks--instances where a property owner may cure one, but not all, of the deficiencies that make the property eligible for transfer to a nonprofit for rehabilitation. Yet Jeremiah Morgan, a Bryan Cave volunteer who has worked with INC since mid-2006, advises pro bono lawyers "[not to] quit even if the results aren't what you want." Morgan indicates there has been no shortage of lawyers volunteering to work with INC, and suggests that law firms seeking pro bono opportunities reach out to the people and organizations that know the legal needs in the community--for them, it was LAWMo.

"Ivanhoe is at the tipping point," says LAWMo's Lombardi. Both he and May note that, given its accessibility and proximity to downtown Kansas City, Ivanhoe stands a good chance of once again becoming a desirable neighborhood for working-class residents. Bryan Cave's Morgan agrees that Ivanhoe will again be a great neighborhood, and notes that the lawyers who assisted on a pro bono basis can claim a piece of that success.

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Business Law Today

Volume 17, Number 4 March/April 2008

Snap Judgments

By Molly Thomas

If it makes you happy

Do candied apples and milkshakes really compete in the race to attract top young talent? Yes, reports the *New York Times*. No longer reserved for partners, perks are now viewed as necessary to recruit and retain associates. These little treats represent the essential lifestyle change that many young lawyers are truly looking for, that is, not just BlackBerrys and sports tickets, but more practical and long-term lifestyle solutions such as on-site child care and personal counseling. (However, the ever-powerful cash bonus has not lost its popularity.) While certain benefits may seem extreme to some, for instance, hybrid car reimbursements, on-site tailoring, and personal concierge services; the sentiment behind them really is simple and sincere—keeping associates happy and healthy. Hence, the aptly named committee behind the recent surprise treats of candied apples and milkshakes on the Perkins Coie staff members' desks--the "happiness committee."

Hedge failures: No fun for anyone

The year 2008 isn't looking up for hedge funds or their investors, as litigation against the funds is expected to continue to climb, reports *New York Lawyer*. Said Ross Intelisano of the New York firm, Rich & Intelisano, "Anytime a hedge fund blows up, you are going to see class actions and a lot of cases are going to end up in [U.S. Securities and Exchange Commission] receivership and bankruptcies." Investigations into possible asset-value manipulation and conflicts of interest are up markedly, from around 20 per year nationwide for the past five years, to, in the Northeast alone, 30 ongoing investigations in 2007. The increase in investigations reflects the spike in hedge fund growth. Some estimates put the number around 9,000, while the hedge fund total was only a few hundred in the last decade. And out of those 9,000 funds, as many as 2,000 could see investors seeking redemptions. The reality of an increase in litigation

surrounding the hedge fund industry means that some firms are seeing that area of their practice grow, such as Morrison & Foerster, which last year created a hedge fund recovery team specifically to address the anticipated issues surrounding hedge fund failures; in particular, bankruptcy, fund liquidation, and restructuring. Regulators in California are pushing a registration requirement for unregulated funds, perhaps an indication that even more changes are afoot for the private investment vehicles.

Going green for good

In the effort to go green, small and steady wins the race. Charging ahead with this credo is the president of the Massachusetts Bar Association, David W. White Jr., who is implementing change with his start-small-for-big-effect efforts to make "the practice of law the most environmentally friendly business in Massachusetts," reports the *Boston Globe*. Energy use in his law office is already down 10 percent simply by starting with directives as easy as turning off lights and equipment when the office is empty, and using office equipment that is energy efficient. Attentive recycling alone can make a big difference in a notoriously paper-heavy industry. White believes that his goal is not only good for the environment, but good for the bottom line, because green initiatives can ultimately save firms money. He also feels that lawyers need to show the way to their clients who "will be looking to law firms to demonstrate leadership in energy conservation." A task force established by White plans to release "green guidelines" meant to apply to the whole of the legal industry, with examples such as minimizing printing by utilizing only e-mail, reducing emissions while traveling by renting hybrid cars, or reducing travel needs altogether by holding meetings via teleconference. White believes in the reality of his vision, and in fact, the green initiative has already caught on at Nixon Peabody. Carolyn S. Kaplan was recently appointed "chief sustainability officer," with responsibility for minimizing the environmental impact of Nixon Peabody's 17 offices nationwide. Kaplan was previously with the firm as a lawyer in their energy and environmental group, and said of her new post, "Taking this type of position perhaps is unusual now, but at some point soon this is going to be business as usual."

Ascot arguments

The truly fashion-devoted aren't unaccustomed to suffering for their personal flair. But rather than a too-tight waist or wardrobe-induced foot pain, neckwear was the source of anguish in a recent three-hour courtroom delay--or rather, the definition of "necktie" was to blame. To ascot, or not to ascot? That was the question, and a Milwaukee County circuit judge's answer was a firm "no," although he was concerned less with the technical definition of the neckwear than in maintaining the "integrity of the court," reports the *Milwaukee Journal Sentinel*. The lawyer in the hot seat has been warned in the past that the only acceptable deviation from long ties is the bow tie. While Hugh Hefner appropriated the ascot as a part of his pajama-suit uniform, fashion experts contend that the ascot is a formal tie, although most popularly worn to dinner parties and at weddings.

Goodbye boom as deals dip

The *New York Law Journal* reports that corporate lawyers are anticipating an activity dip after a busy mergers and acquisitions year, as markets are uncertain in 2008. While in 2007 private equity firms were a powerful force behind deals, at almost 20 percent of the year's volume, only 9 percent of fourth quarter deals were reported to be backed by private financial sponsors. Chairman of Sullivan & Cromwell, H. Rodgin Cohen said, "It's hard to be an optimist. With the markets where they are, it is going to be a tough year." Cohen's firm has no plans to cut bonuses or begin layoffs, however, as he also said that it is too soon to tell how lawyers will be affected by the mergers and acquisitions slowdown.

Survey says . . .

Isn't technology supposed to make things faster and easier? But the convenience of electronic communication means an increase in information volume, which can also mean a lot more time spent poring over it down the road. Perhaps this is what the lawyers who responded to the Robert Half Legal survey were thinking when asked what they felt "would have the biggest impact on the practice of law over the next five years," as one in four respondents cited electronic discovery, with globalization on its heels, cited by 23 percent of those surveyed. Executive director of Robert Half Legal, Charles Volkert, explained the ways electronic discovery has and continues to change the practice of law saying, "Changes to document retention and e-discovery rules have placed greater demands on companies. To prepare for litigation, legal teams must review massive amounts of material in short periods of time and determine relevancy to the case. The complexity and cost of the task . . . make this a challenge."

Keeping correct

In our January/February 2008 issue, the e-mail address for Craighton Goeppele, author of "Second This! A Personal Look Back at My Secondment," was listed incorrectly. Those wishing to contact Mr. Goeppele may do so at cgoeppel@starbucks.com.

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