FALL | WINTER | 2010

US LAW

pg4

USLAW...Your Home Field Advantage

Factoring Judgement and Settlement in Determining Total Legal Cost

RICO IMMIGRATION

pg6

Is There A Flood Of RICO/Immigration Lawsuits Coming?

pg16

Do You Google Job Applicants?

Best Practices For Employers Choosing to Google Job Applicants

pg20

Security Negligence

Negligent Security in Government Subsidized Apartment Complexes

EFFECTIVE CRISIS MANAGEMENT

pg2

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Table of Contents

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  - Repository of USLAW NETWORK member firm electronic newsletters.
- Opportunity to access USLAW NETWORK's Client Lawsuit Notification System, which alerts clients' of lawsuits filed against them in most jurisdictions around the country.
- Designation of (1) One Designated Contact from each USLAW Member Firm who is responsible for better understanding the client company's business, general scope of legal needs and how client prefers to handle matters when they arise.
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- Automatic Invitation for client and guest to USLAW Dinners and Social Events at USLAW Regional and Practice Group Meetings if located in client's geographic market.
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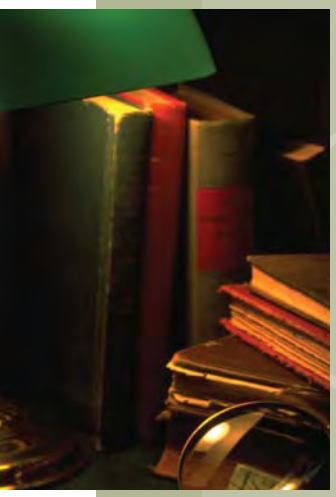
For more information about USLAW Client Membership, please contact Roger M. Yaffe, USLAW Executive Director, at (800) 231-9110 or roger@uslaw.org.

To register for membership, please visit www.uslaw.org.

FROM THE Chair's Desk

As we enter into the 10th Anniversary year of USLAW, a few moments of reflection are appropriate before we look forward. The development of USLAW has been nothing short of remarkable. The combined efforts of many talented people working together with a common vision and goal has established the premier legal network in the nation.

However legal network is not truly a descriptive term for USLAW. Instead it is a group of common-minded individuals who serve the organization and each other, understanding by that service great things can be accomplished. We can all take a full stop for just a moment and be pleased at what the organization has accomplished and done these last 10 years.



The future of USLAW is even brighter. We continue to build on a base of personal relationships both between members and clients with the common goal of providing excellent service. While we have moved forward, we have not forgotten our roots of the importance of member to member and member to client personal relationships.

We continue to foster events both on a national level and practice group level that allows for the exchange of legal knowledge and information that will help us in the end see better results for our clients. We provide that with a continuing opportunity to get to know each other on a personal level that allows us to see opportunities and solutions that would otherwise not be evident.

There are exciting things to look forward to in this upcoming year. We have excellent venues for our national conferences which will serve as a strong foundation for legal education and relationship building. We have a tremendous client membership initiative that will strengthen the organization by making us more responsive to the needs and wants of clients. We continue our initiatives to the website, newsletter, USLAW radio, and other similar projects to help us communicate and be responsive. We continue to expand our international associations and memberships in order to be better positioned to serve our clients in what is truly a global economy. This year will truly be one of many opportunities and hopefully significant accomplishments.

While USLAW is celebrating its 10th Anniversary, we are not resting. We are moving forward and continuing to grow the organization in a way that makes it more valuable to every individual involved. Please join with us to help us continue down a path toward greatness for USLAW.

Sincerely,

John E. Hall, Jr.
Chair, USLAW NETWORK, Inc.
Hall Booth Smith & Slover, P.C.
Atlanta, GA

EFFECTIVE CRISIS MANAGEMENT

John R. Allison Larson • King, LLP

The oil rig explosion and environmental catastrophe in the Gulf of Mexico will cost BP tens of billions of dollars in remediation costs, claims and litigation expenses and lost market capitalization. Toyota's unintended acceleration and other quality problems will cost that company billions of dollars for recalls, litigation, lost market share and damage to its brand. A series of rollover accidents involving Ford Explorers equipped with Firestone tires caused Firestone's parent company, Bridgestone, to suffer a sixty percent loss of market capitalization and seriously damaged the Explorer brand. These examples illustrate the devastating consequences a crisis can have if it is not managed effectively.

PLAN AHEAD

The framework for managing a crisis needs to be in place before the crisis occurs. Playing "catch up" is seldom effective. Ideally, an organization should have a crisis management team, led by a senior executive, that meets periodically to review high risk operations and to anticipate other potential threats to the organization's well being, including changes in legal or regulatory requirements. The team should include a lawyer, a public affairs specialist, a regulatory specialist, and one or two people from the business or staff groups that will most likely be involved in managing a crisis if one occurs.

TAKE BOLD ACTION

The response to a crisis should be thoughtful yet decisive. Public anger over the BP oil spill has been fueled by the impression of a dithering and incremental response, and will likely increase following the description of BP in national media as a company that seems chronically unable or unwilling to learn from its mistakes. Toyota's reputation has been diminished by its slow and inconsistent responses to reports of sudden acceleration by vehicles involved in serious accidents. The litigation exposure of Firestone and Ford was significantly increased by the fact that they ignored a recurring problem until an insurance claims analyst saw a pattern of fatal accidents involving Explorers equipped with Firestone tires; the companies ought to have started an investigation after the first accident was reported to them.

In contrast to these examples, reports of a few deaths in the Chicago area caused by Tylenol laced with cyanide led Johnson & Johnson to recall all of its Tylenol then on the shelves and re-introduce the product in a safer tablet form. When state of the art analytical techniques made it possible to detect parts per billion levels of certain perfluorochemicals, PFOS and PFOA, in people and the environment, 3M Company made a business decision to stop manufacturing those compounds. More recently, Nestle conducted a voluntary and costly recall of its cookie dough following reports that some consumers had become ill after eating raw dough.

Bold action demonstrates that the organization can handle the situation and is willing to make a sacrifice to address the concerns of affected stakeholders. Bold ac-

tion does not need to be precipitous, but can be carried out in stages pursuant to a carefully conceived and flexible plan.

MEET PUBLIC EXPECTATIONS

We can learn from modern jury and public opinion research that people today expect organizations to be authentic, responsible and transparent. Because an acronym may be useful, I suggest practicing the ART of meeting public expectations.

To be authentic is to be genuine and real when communicating. The organization's messengers and message need to communicate a genuine and heartfelt concern about the effects the crisis is having on others. The statement by BP's CEO that "I would like my life back" was clearly out of touch. Arrogance, condescension, defensive messages, attempts to garner sympathy and "corporate speak" should be avoided.

Taking responsibility goes far beyond notions of legal liability. As far as the public is concerned, an organization is responsible for what it can change. That expectation is the reason Johnson & Johnson's 1982 Tylenol recall is still cited as an example of how to handle a crisis. Though it may not have faced significant legal liability, the company did what only the company was in a position to do by taking its product off the shelves. In the process, Johnson & Johnson transformed a significant challenge into an opportunity.

Regrettably, Johnson & Johnson recently neglected to follow its own example. During the past two years the company was slow to recall over-the-counter medications affected by significant quality control problems and reportedly hired a contractor to buy up affected product, secretly. Publicity about its handling of this situation erased much of the reputation gain Johnson & Johnson earned in 1982.

With information readily available on the Internet, people have no tolerance for an organization that withholds information or that seems to dole out information piecemeal. People expect organizations to be open and honest with them. Even an initial response acknowledging that little is known conveys the company's concern and commitment to addressing the problem. Honesty is critical. Once BP was perceived as deliberately understating the amount of oil gushing into the Gulf it lost credibility with the public and regulators and thereby lost the ability to control the situation or its outcome. Toyota's multiple and seemingly inconsistent explanations of sudden acceleration problems associated with some Toyota models have provoked independent investigations of the cause of the problem. If those investigations suggest defects in Toyota's proprietary computer and electronics systems, an even greater adverse impact on the brand will likely result.

DEVELOP AFFIRMATIVE THEMES

Affirmative themes should be developed early to tell the organization's positive story in a way that has emotional as well as intellectual appeal. It is important to proceed cautiously since communications that get ahead of the facts can undermine credibility later on. Initial themes can be developed based on what is known, and refined later as more information becomes available. The affirmative themes, as developed and refined, should guide public communications and support litigation themes.

ADDRESS THE INTERESTS OF ALL STAKEHOLDERS

An effective response to a crisis requires a comprehensive and coordinated strategy that addresses the interests of all stakeholders. It can be fairly easy to identify stakeholders who are directly affected, such as purchasers of a product or individuals and businesses affected by an explosion or an environmental incident. Employees, regulators, other public officials, investors and the media also need to be taken into account. Potential stakeholders, such as labor unions, competitors and special interest groups that may try to use the crisis to serve their own agendas cannot be overlooked. The potential involvement of governments outside the United States should also be considered.

When and how to reach out to stakeholders requires careful thought. Communications with employees about the crisis should usually be prompt, followed quickly by communications with stakeholders directly affected by the crisis and communications to investors. In the United States, it is generally wise to contact interested regulators. Whether it makes sense to reach out to the media, special interest groups and other stakeholders with a more tangential interest in the situation depends on the nature of the crisis and the organization's relationships with those entities.

MAKE REQUIRED DISCLOSURES AND REPORTS

Reports to government agencies, and notices to insurance carriers, need to be filed on time. For publicly traded companies, accurate financial disclosures also need to be made.

ANTICIPATE LITIGATION

If litigation is possible, a team should be formed early and managed in a way that serves the strategic plan for handling the overall issue. The litigation team should include:

- First chair trial counsel and a litigation team;
- A separate resolution or settlement team;
- Experts, both consulting and testifying;
- A jury consultant; and
- A strategic communications firm if the litigation is likely to be widespread, protracted or highly visible.

PRESERVE DOCUMENTS

If litigation is reasonably anticipated, prompt steps should be taken to preserve all relevant documents, including emails and other electronic records. Spoliation of evidence claims can be used to undermine the credibility of a litigant and create a collateral issue to bolster a weak case. If the crisis situation is likely to become the subject of a federal government investigation or proceeding, relevant documents, including electronic records, must be preserved. Failure to do so can result in significant criminal penalties.

SPEAK WITH ONE VOICE

The organization should have consistent messages that are aligned with its actions. Care should be taken to ensure that everyone making public statements about the crisis situation on behalf of the organization is conveying a consistent message. To illustrate what should be avoided, on the same day that an executive vice president said, "[Firestone] made some bad tires and we take full responsibility for those," the CEO said, "We are not admitting any defects with our tires." When different spokespeople contradict each other, the public loses confidence in the organization and plaintiffs' lawyers are likely to have a field day.

STRIVE TO ENHANCE REPUTATION

Though a crisis is unwelcome, if managed effectively the crisis can give an organization the opportunity to enhance its reputation and increase its value over the long term.

John Allison joined Larson • King after having overall responsibility for litigation managed by 3M Company's Office of General Counsel. He led teams handling mass tort and environmental litigation and helped guide 3M's strategy for addressing issues relating to its fluorochemicals business. TMG Strategies LLC provided resource materials for this article.

IT'S ALL ABOUT THE HOME FIELD ADVANTAGE

FACTORING JUDGEMENT AND SETTLEMENT IN DETERMINING TOTAL LEGAL COST

Richard P. Magrath
Global Director, Strategic Partnerships
USLAW NETWORK

Evaluating legal value can be difficult, full of seemingly countless intangibles. Consider value, outcome, expenditures. Consider time spent with your legal team. Conversely, consider time spent away from your daily responsibilities. Now, consider results. Do the scales tip in your favor...or in the favor of the law firm?

Historically, under the typical conventional arrangement wherein the law firm is paid based on time and expense rather than results achieved, the law firm's goals and yours may not be perfectly aligned.

ALIGNING GOALS, MAXIMIZING SUCCESS, BUILDING PARTNERSHIPS

Getting everyone on the same page, with the same goals, and the same approach to success is paramount in today's search for legal value. Finding a way to better partner with your lawyers; ensuring that their goal is to truly help you achieve your goals; and, their remuneration is based on how well they perform or succeed, is key to evaluating and achieving maximum legal value.

The importance of quality legal partnerships cannot be overemphasized. The need for a clear, concise understanding of local jurisdictions, combined with the demand for a pool of nationwide expertise from which to draw, must be priority one in building partnerships and achieving legal value.

Nationally aligned, USLAW Network was created, quite simply, to provide this two-pronged approach to success: local know-how and national expertise.

A PROVEN LEGAL VALUE... NATIONAL COUNSEL RIGHT NEXT DOOR

In the end, it's evidence that makes or breaks a case. When Johnnie Cochran so eloquently reminded the jury in 1995, "If it doesn't fit you must acquit," he meant that if you don't have the evidence to prove the case, everything else is just noise.

Consider Total Legal Cost as a national average. Now consider USLAW Network's. Across the board and around the globe...significantly better. Evidence that by working with USLAW's member firms across the nation and throughout the world, their clients have achieved a significantly lower "Total Legal Cost" than the national average. USLAW Network has partnered with Robert Schneider, Managing Principal and Risk Management Practice Leader of ISO in compiling data to better illustrate USLAW's superior Total Legal Costs when compared to the National benchmark.

The reason for USLAW's success is simple. No other legal network is designed to specifically combine the best legal expertise in every practice and the jurisdictional expertise that is so vital to creating a home field advantage. By working with USLAW, clients are always assured of not just having the practice expertise they require, but also having that expertise delivered by leading local counsel. Regardless if "home" is Los Angeles, Louisville, or Little Rock.

Few understand the home field advantage better than Ed Hochuli, NFL referee and USLAW attorney, "USLAW provides clients with a roster of lawyers

that cover every position with skill and expertise. We are deep at the local level with a group of specialists ready to be called in when needed. It is this type of game plan that provides victory on the legal gridiron."

CASE IN POINT

In a recent presentation by USLAW Chairman John Hall to syndicate representatives, claims managers and underwriters at Lloyd's of London, John noted the local and national strengths of USLAW allows for the best possible results. "First, you have a respected and valued firm in the jurisdiction with the local contacts and experience to make you a home field player, then you also have waiting in the bull pen national experts who can be associated if the complexity of the case requires. This expertise is wide spread including transportation, employment, construction, professional liability, etc.... By working with USLAW, no matter the expertise needed nor jurisdictional knowledge required, you always have the best of both."

To ensure that their clients further take advantage of the winning combination of practice and jurisdictional expertise, USLAW is now working with some of the world's leading risk management and insurance companies to create a combined solution allowing their clients to further reduce their total legal costs.

CLIENT NEEDS-DRIVEN STRATEGIC PARTNERSHIPS

Lloyd's of London knows and values home field (or home pitch as the case may be) advantage. Over their 322 year history, Lloyd's has gone out into the world to better understand the nature of the home field and provide insurance solutions for its most challenging risks, building one of the industry's best known and durable brands in the process.

USLAW is now working with Lloyd's to help them utilize an even deeper jurisdictional understanding of what the various "home fields" look like, how they differ, and what are the best strategies to employ when underwriting or dealing with claims within specific jurisdictions.

In November a delegation of six Senior USLAW attorneys, representing the various practice areas (e.g., Professional, Healthcare, Transportation, Employment, Construction, and Products) have been invited to London to present a two-part seminar for the Lloyd's management, claims, and syndicates. This intensive program will focus on the most compelling legal and jurisdictional issues in each practice area and will help Lloyd's syndicates more precisely underwrite the respective risks while learning how to better deal with claims in those jurisdictions.

> "USLAW provides clients with a roster of lawyers that cover every position with skill and expertise. We are deep at the local level with a group of specialists ready to be called in when needed. It is this type of game plan that provides victory on the legal gridiron."
>
> **— Ed Hochuli, NFL referee and USLAW attorney**

Specifically, the USLAW Attorney Team was asked by Lloyd's to present on ten topics:

- Cyber Risks
- Merger and Acquisitions and Transactional Risks
- Employment Liability
- Healthcare Professional Liability
- D&O Professional Liability
- Transportation
- Construction
- Medicare
- Medicaid
- Mediation

In addition to the six senior attorneys on-site, seminar participants will also have access to, via video conference, a broad spectrum of USLAW attorneys representing practices and jurisdictions throughout the U.S. to specifically address questions as they arise.

Hank Watkins, President, Lloyd's America states "Lloyd's appreciates the partnership we're building with USLAW and looks forward to engaging more closely with its members in the future."

Bob Gambell, Executive Vice President and EMCAS/Principal shares in Hank Watkins enthusiasm, "Engle Martin Claims Administrative Services is excited about our partnership with USLAW to provide our mutual clients with an exceptional level of service and effective management of loss costs."

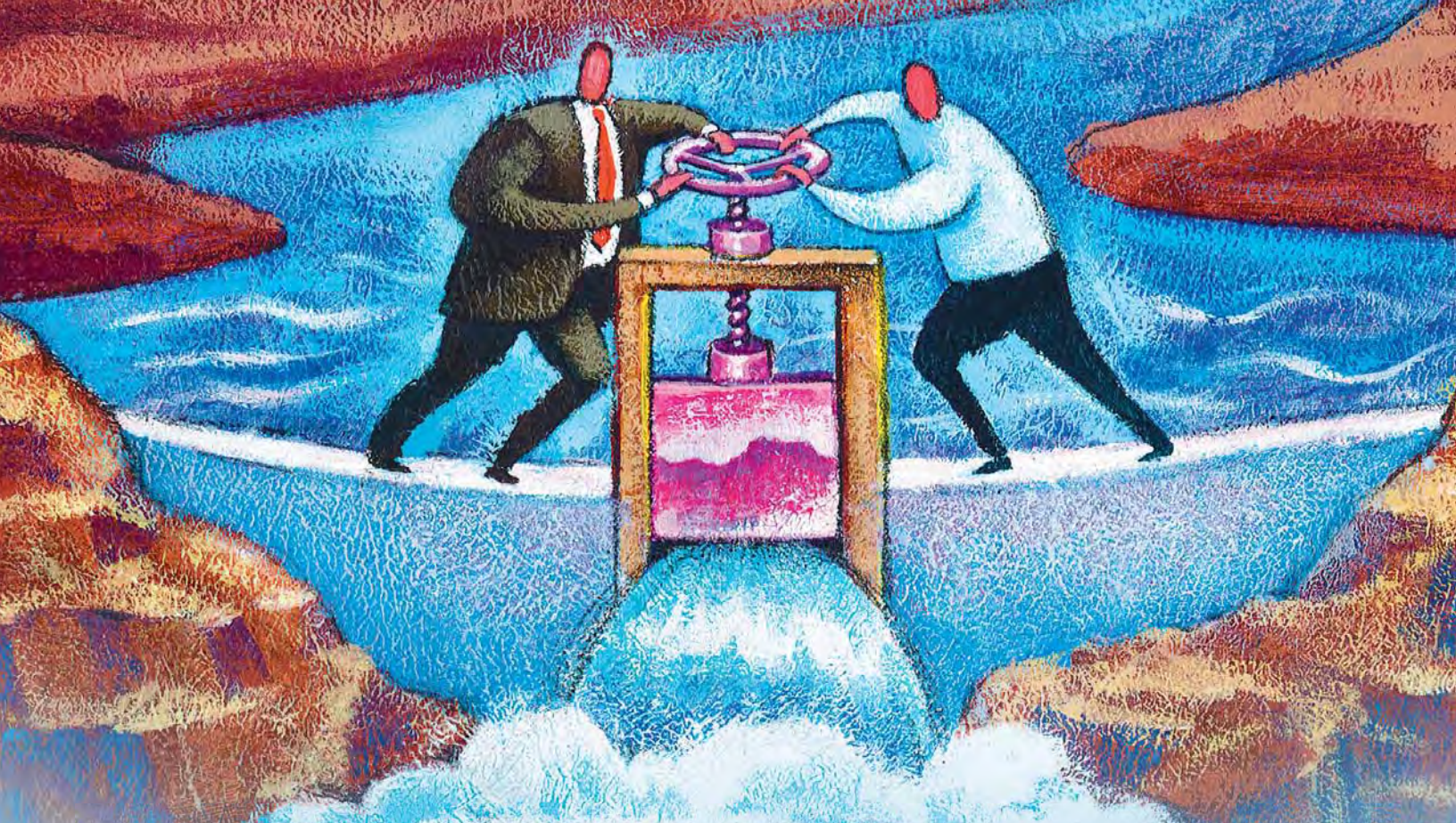
When USLAW partners with such industry leaders as Lloyd's, Marsh, ISO, or Engle Martin, these corporations become players on the USLAW Team. The better the talent on a team...the better the chances for victory.

KEYS TO ACHIEVING THE LOWEST TOTAL LEGAL COST...JURISDICTIONAL EXPERTISE. STRATEGIC PLAYERS. NATIONWIDE REACH.

The USLAW Team provides the best and most comprehensive jurisdictional expertise (the home field advantage) combined with the key position players such as Marsh, Lloyd's, other insurance companies, TPAs and claims experts, all while bringing to bear world class practice expertise. By doing this, USLAW is able to consistently deliver a lower Total Legal Cost (combination of fees, expense, judgment/settlement) on a more uniform basis than any national firm.

Richard P. Magrath has proven himself a successful entrepreneur, leader, and seasoned corporate executive with such diverse firms as Johnson & Higgins and Marsh, ProNvest, Signix, Datatrac and PilotHSA.

In his current role as Global Director, Strategic Partnerships with USLAW, Mr. Magrath cultivates and drives new and current strategic partners and client relationships and directs strategic initiatives.



IS THERE A FLOOD OF RICO/IMMIGRATION LAWSUITS COMING?

Donald W. Benson and Jon Marigliano Hall Booth Smith & Slover, P.C.

Three recent key developments may have opened the flood gates for a new wave of RICO/Immigration lawsuits against employers.

The RICO/Immigration litigation alleges that a large pool of illegal immigrants migrate to an area because an employer, unconcerned about liability, blithely accepts a series of bogus identification documents from workers. By using the Racketeer Influenced Corrupt Organizations Act (RICO) statute, plaintiffs are trying to prove that an illegal criminal enterprise often composed of employers, recruiters, and staffing companies are together benefiting from the increased illegal population brought to the area through the criminal acts of some members of the enterprise. If successful, these large class actions would create a whole new source of potential liability for employers struggling to deal with the current patchwork of immigration and Social Security laws.

A. LARGE MONETARY SETTLEMENT IN MOHAWK.

Mohawk Carpet, Inc. reportedly settled its RICO/Immigration lawsuit for $18 million.[1] After extensive litigation since 2005, and multiple appeals to the U.S. Supreme Court, the shocking settlement amount has two elements that will concern all employers.

First, the sheer size of the settlement dwarfs the next highest reported $1.3 million settlement in the Zirkle Fruit case out of the State of Washington.[2] After almost a decade of such litigation,[3] where employers initially won motions to dismiss and then Plaintiffs became better and better at alleging facts sufficient to withstand such early resolution, this higher settlement amount will undoubtedly encourage more RICO/Immigration litigation against employers.

Second, reportedly $13 million of that $18 million amount was contributed by an insurance carrier. If some insurance will cover defense of a RICO conspiracy, many scenarios will involve a second deep pocket for the plaintiffs to pursue. Perhaps most importantly, the costs of defense may become a deciding factor in resolution of many cases, further encouraging plaintiffs' counsel to invest their time and efforts in such causes of action.

B. RESTAURANTS AS TARGETS.

The Eleventh Circuit Court of Appeals has allowed a RICO/Immigration case to proceed against multiple corporate defendants connected to a Ruth's Chris restaurant in Alabama.[4] This case may prove to be an important precedent for several reasons.

First, the restaurant industry employs large numbers of non-English speaking workers and workers with foreign work authorizations. Many employers in this industry will unfortunately become attractive targets for such RICO/Immigration litigation. Prior RICO/Immigration cases often involved much larger agricultural, food processing, and manufacturer employers.

Second, the factual allegations in the

Amended Complaint are of a type that many restaurants might have problems disproving. Local restaurant employees allegedly:

- Gave illegal employees extra time to submit required I-9 documentation;
- Provided illegal employees with the names and social security numbers of former, legal workers;
- Asked illegal workers to recommend other illegal workers;
- Paid illegal workers in cash in order to help hide them.

Third, the above alleged conduct, if true, was held by the Court of Appeals to be sufficient to state a claim for violations of the immigration statutes and serve as predicate criminal acts for purposes of the RICO statute. Although the Court of Appeals decision rests on highly specific, technical wording of the immigration statute; allegedly providing false names and social security numbers was sufficient to state a cause of action against the employer for encouraging or inducing illegal aliens to reside" in the U.S. "The meat of the matter is that the amended complaint adequately pleads that the defendants encouraged or induced an alien to reside in the United States, and either knew or recklessly disregarded the fact that the alien's residence here was illegal, in violation of § 1324(a)(1) (A)(iv)."[5]

Although you have to love a court that talks about "the meat of the matter" against a steak house, this troubling ruling may practically make it much easier for plaintiffs to prove the "knowledge element" of the immigration violation by merely presenting evidence that an employer helped an applicant present false documentation in the I-9 application process. Subsequent rulings and litigation may well clarify the actual standards to be applied in finding ultimate violations of the immigration statute provisions.

C. FOLLOWING THE MONEY.

On April 1, 2010, plaintiffs' counsel announced a new RICO/Immigration lawsuit filed in the United States District Court for the Middle District of Alabama Southern Division, on behalf of all hourly-paid workers legally authorized to be employed in the United States who are or have been employed by Perdue Farms, Inc. since March 2006 at sixteen poultry processing facilities.[6] Again, the defendant is a large food processor with plants in rural areas where sentiment against perceived illegal workers may be attractive to the plaintiffs: Accomac, Virginia; Bridgewater, Virginia; Concord, North Carolina; Cromwell, Kentucky; Dillon, South Carolina; Dothan, Alabama; Fayetteville, North Carolina; Georgetown, Delaware; Lewistown, North Carolina; Milford, Delaware; Monterey, Tennessee; Perry, Georgia; Rockingham, North Carolina; Salisbury, Maryland; Showell, Maryland; and Washington, Indiana. In that sense, the Perdue lawsuit fits the pattern of several earlier lawsuits filed by attorneys of Foster, P.C.

What is of particular note is that the Foster firm is joined in this lawsuit in the Middle District of Alabama by two well-known, nationally successful, and assumedly well-financed, plaintiffs' firms: "Motley Rice LLC, one of the nation's largest plaintiffs' litigation firms, along with Jacoby & Meyers LLC."[7] RICO/Immigration litigation to date has often evolved into expensive and protracted cases involving large plaintiff classes composed of present and former employees, battles over voluminous document productions, expensive experts opining on the cause and effects of large groups of new workers on the local labor market, and big damages claims. Perhaps no better indication exists that the new RICO/Immigration litigation is increasingly attractive to the plaintiffs' bar than that the Perdue lawsuit involves two well-financed law firms typically representing plaintiffs in some of the traditionally most expensive and high-dollar-recovery types of cases in American torts.

PRECAUTIONS AND CONCLUSIONS.

Employers of all types will be concerned about such RICO/Immigration lawsuits who have facilities in areas where there has been a recent increase in non-English speaking workers. Restaurant and hospitality industry employers may be likely targets given the make-up of their workforces. Particular attention to I-9 training for supervisors can create increased compliance and facts around which to build a defense. Employers who use leasing companies or temporary worker companies should reconfirm that they are using only reliable, immigration-compliant labor suppliers. Employers should devote additional training to make sure that employees have procedures and an anonymous way to report alleged immigration violations. Supervisors must report any complaints and the company must be able to show that it investigates any alleged immigration violations.

Finally, in today's anti-immigrant climate, it is understandable that employers are worried about the risk of greater ICE enforcement and RICO/Immigration lawsuits. However, employers cannot lose sight that there is also the risk of lawsuits from the other side of immigration law obligations. National origin or race discrimination claims can be brought if the employer is overly zealous against non-English speaking applicants, or if the employer does not strictly follow the I-9 regulations about the types and forms of acceptable employee identification and work authorization.[8]

Donald W. Benson is a member of the employment and immigration practice groups of HBSS. Don is a frequent author and speaker on RICO/Immigration litigation and has been interviewed by NPR, The New York Times and U.S. World & News Report on the subject.

Jon Margiliano heads the HBSS restaurant and hospitality practice group.

FOOTNOTES

1 "Mohawk Settlement Could Lead to Spate of Illegal Worker Lawsuits," Peralte C. Paul, *Atlanta Journal Constitution*, April 23, 2010.

2 *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002). See also, Donald W. Benson, *Littler INSIGHT*, "New Wave or Flash Flood: 11th Circuit Allows RICO/Immigration Lawsuit to Proceed," July, 2005.

3 Donald W. Benson, *Littler INSIGHT*, "RICO/IMMIGRATION or ANTITRUST/IMMIGRATION Lawsuits?" September, 2006; Executive Counsel, "RICO Charges Are Newest Wrinkle In Immigrant Labor Issue," July/August 2006, vol. 3, num. 4, pp. 13-14.

4 *Edwards v. Prime, Inc.*, No. 09-11699, Eleventh Circuit Court of Appeals (April 9, 2010). http://www.ca11.uscourts.gov/opinions/ops/200911699.pdf.

5 *Id.*, pp. 29-30.

6 "Many Perdue Farms, Inc. personnel facing lawsuits involving alleged immigration violations," Motley Rice, http://www.motleyrice.com/news/view/lawsuit-filed-against-plant-managers-and-human-resource-personnel-of-perdue-farms-inc-for-alleged-im.

7 *Id.*

8 HBSS clients may consider a three hour I-9 train-the-trainer course developed by its employment practices and immigration practice groups focusing on specific forms of foreign identification, work authorization forms and self-audit procedures.

DOES TURNING OFF THE LIGHTS MEAN TURNING ON A LAWSUIT?

A LOOK AT IMPLIED COVENANTS OF CONTINUOUS OPERATION

J. Cliff McKinney
Quattlebaum, Grooms, Tull & Burrow PLLC

Everyone knows that we are living in tough economic times. Many retail businesses are looking for ways to cut costs. In some cases, national, regional and local retailers may decide to close some stores to focus resources on more profitable units. However, many retailers lease space that is subject to long-term leases. Rather than break the lease, these retailers may make the economic decision to keep paying the rent on a closed, or "dark," store. However, there can be serious legal consequences for doing so; specifically, the retailer could be subject to a suit for breach of an implied covenant of continuous operation.

Even if the tenant continues to pay rent, a landlord may be very unhappy if a retailer closes shop. First, a vacant store can have a major detrimental impact on the viability of a shopping center. Other retailers may be hesitant to lease space in a shopping center with a high-vacancy rate. Also, if the shopping center falls below certain occupancy levels or if certain key tenants leave, it is not uncommon for other tenants in the shopping center to have remedies against the landlord, such as reduced rent or the right to terminate. Second, many leases provide the landlord with two types of rent: (1) a fixed amount of base rent ("Fixed Rent"); and (2) a percentage of the tenant's sales ("Percentage Rent"). If a store closes, the landlord may continue to receive the Fixed Rent, but the landlord will not get any Percentage Rent if the store is closed.

Ideally, a commercial lease should directly address the consequences of the tenant ceasing operations. However, many leases are silent on this issue. In those cases where the lease is silent, the landlord can argue that there is an implied covenant of continuous operation. An implied covenant of continuous operation, sometimes referred to in the industry as an "implied covenant against going dark," is the concept that the tenant has an obligation to keep its store open for business for the duration of the lease.

Unfortunately, there is no uniform approach utilized by states to determine whether there is an implied covenant of continuous operation. However, there are certain factors that are frequently considered to determine if it is equitable to force a retailer to keep its doors open.

WHETHER THERE IS SUFFICIENT FIXED RENT TO COMPENSATE THE LANDLORD

The single most important factor in most states is whether the landlord is adequately compensated with Fixed Rent. If the Percentage Rent is a major component of the rent formula, courts are more likely to imply a covenant of continuous operation. For instance, suppose a lease calls for $1,000.00 a year in Fixed Rent and 7.5% of gross sales as Percentage Rent. If the Percentage Rent typically pays $99,000.00 a year, closing the store essentially reduces the landlord's rent by 99%. This scenario would weigh heavily in favor of finding an implied covenant of continuous operation.

WHETHER THE TENANT HAS AN UNFETTERED RIGHT OF ASSIGNMENT OR SUBLETTING

If the tenant can assign or sublet the premises without permission from the landlord, then a court is less likely to find an implied covenant of continuous operation because the tenant could walk-away from the premises by assigning or subleasing

to anyone. On the other hand, if the lease restricts the tenant's ability to assign or sublet, then the implication is that the parties intended the tenant to occupy the space during the lease.

WHETHER THE LEASE CONTAINS A RESTRICTION ON THE TENANT'S PERMITTED USES OF THE LEASED PROPERTY

If the lease restricts the tenant's permitted use of the leased property, some states interpret this to mean that the parties intended the tenant to be open and operating in a manner consistent with the limited uses. Conversely, if the lease permits virtually any use, then it implies that the parties did not contemplate that the tenant would always use the premises for a retail store.

WHETHER THE LANDLORD IS SUBJECT TO A NONCOMPETITIVE RESTRICTION

Some leases prohibit the landlord from leasing other space to competitors of the tenant. Courts may find such a clause to weigh in favor of finding an implied covenant. The parties must have intended the tenant to operate its business continuously if the landlord is restricted from leasing to similar businesses. For instance, if the tenant has the exclusive right to operate a sporting goods store, but the sporting goods store closes, then the landlord is prohibited from replacing the tenant with another sporting goods store. The implication is therefore that the parties intended the tenant to stay open to operate a sporting goods store in the shopping center.

WHETHER THE TENANT HAS THE RIGHT TO REMOVE THE FIXTURES

Some states examine whether the tenant has the right to remove fixtures from the premises during the term of the lease. The typical rationale is that the lease probably does not contain an implied covenant of continuous operation if the tenant has the right to remove fixtures from the leased property during the lease. In other words, if the tenant can take its fixtures out of the building, then the tenant must not have an obligation to keep its business open.

WHETHER THE LEASE IS COMPREHENSIVE

Some states look at the comprehensiveness of the lease agreement. If the lease is a comprehensive and detailed agreement, then it is less likely that the parties omitted an intended term such as a covenant of continuous operation. Also, if the lease was heavily negotiated, then it is less likely that the parties accidentally omitted a term. Therefore, a comprehensive, detailed, and thoroughly negotiated lease agreement weighs against finding an implied covenant of continuous operation.

WHETHER THE PARTIES WERE SOPHISTICATED

States that consider the sophistication of the parties typically hold that an implied covenant of continuous operation is less likely between sophisticated parties. Sophisticated parties are less likely to omit an intended term, such as a covenant of continuous operation. Sophisticated parties also have the opportunity to hire advisors, such as attorneys or commercial real estate brokers, who know or should know about a covenant of continuous operation and can assure that the issue is addressed expressly.

WHETHER THE PARTIES INCLUDED AN EXPRESS COVENANT OF CONTINUOUS OPERATION IN UNRELATED AGREEMENTS WITH THIRD PARTIES

A couple states examine whether the parties included an express covenant of continuous operation in unrelated agreements with third parties. These states rationalize that the presence of an express covenant in other leases indicates that the parties knew how to draft a covenant of continuous operation and include it when desired. Therefore, if there is an express covenant in third-party leases, then this factor weighs against finding an implied covenant.

WHETHER THE LANDLORD MADE A SUBSTANTIAL INVESTMENT IN THE LEASED PROPERTY FOR THE TENANT

If the landlord made a substantial investment to attract a particular tenant, such as a custom build-out, courts are more likely to find an implied covenant of continuous operation. This is particularly true if the custom build-out is not suitable for other tenants.

WHETHER THE TENANT IS AN ANCHOR IN THE SHOPPING CENTER

An anchor tenant is a popular retailer that is likely to draw traffic into the shopping center, such as Wal-Mart, Target, Dillard's, JC Penney's, etc… These retailers sometimes receive preferential treatment from the landlord because they are essential to the success of the shopping center. If the tenant is an anchor in the shopping center, or there is some other strong economic dependence on the tenant (other than paying rent), then courts are more likely to imply a covenant of continuous operation.

WHETHER THE LEASE IS LENGTHY

Several states examine whether the lease is lengthy. However, states weigh this factor differently. Some states weigh this factor against implying a covenant, especially when the lease is a ground lease. In other words, if the lease is for a large number of years, then it is more likely that the tenant's business interests or plans may change during the lease and necessitate a shutdown. Other states, however, view this factor differently. Some states interpret a long-term lease as meaning that the parties intended the tenant to remain in business the entire time.

CONCLUSION

While most states examine some combination of the factors listed above, there is relatively little consistency among the states in interpreting these factors. At the risk of overgeneralizing, most states are relatively hostile to the concept of implied covenants of continuous operation and the landlord has a difficult burden to prove its case. However, a few states, notably Kentucky, Tennessee and Connecticut, are more likely to side with the landlord.

Ideally, every lease should directly address whether the tenant has an obligation to continuously operate during the lease. However, in those instances where the parties fail to express their intent, these factors help guide a court in deciding how to interpret the lease.

For more on implied covenants of continuous operation, see J. Cliff McKinney, *Are You Trying to Imply Something: Understanding the Various State Approaches to Implied Covenants of Continuous Operation in Commercial Leases*, 31 UALR Law Review 427 (2009).

J. Cliff McKinney is a partner at Quattlebaum, Grooms, Tull & Burrow in Little Rock, Arkansas. He holds a B.A. from Baylor University, a M.P.A. and a J.D. from the University of Arkansas and an LL.M. from Southern Methodist University. He is licensed in Arkansas, Mississippi and Texas. He is a LEED® Accredited Professional and an adjunct professor at the University of Arkansas at Little Rock's law school.

Successful Recent USLAW Law Firm Verdicts

Quattlebaum, Grooms, Tull & Burrow PLLC (Little Rock, AR)

Steve Quattlebaum and Chip Chiles of Quattlebaum, Grooms, Tull & Burrow PLLC with lawyers from Sidley Austin LLP, represented several AstraZeneca entities in the trial court and on appeal against a putative class action regarding the advertising and marketing of the drug Nexium. The Supreme Court of Arkansas affirmed the dismissal of the putative class claims and resolved issues of first impression regarding the state's Deceptive Trade Practices Act. Steve Quattlebaum and Chip Chiles, with lawyers from Morgan Lewis & Bockius, are also representing several AstraZeneca entities against claims by the State of Arkansas relating to reimbursement for prescriptions for the drug Seroquel.

Johnson Trent (Houston, TX)

Congratulations to Chris Trent, Rafe Taylor of USLAW Member Johnson Trent of Houston, TX for a defense verdict in the matter of Trenado v. Cooper Tire & Rubber Company in the United States District Court for the Southern District of Texas. Plaintiffs alleged that there were numerous design and manufacturing defects in a tire designed and manufactured by Cooper Tire that caused an accident where two people died and three were injured. After a 7-day trial, the jury deliberated for less than four hours before completely exonerating Cooper Tire from all liability.

Pierce Couch Hendrickson Baysinger & Green, L.L.P (Oklahoma City, OK)

Pierce Couch Hendrickson Baysinger & Green, L.L.P Partners, Rusty Hendrickson and Elizabeth Sharrock, obtained a unanimous defense verdict on behalf of an anesthesiologist following a week-long wrongful death/medical malpractice trial. Plaintiff's decedent, a 45-year old woman, was admitted to Baptist Medical Center in Oklahoma City for a pancreatic transplant. Plaintiff claimed that the defendant, physician, negligently traumatized the patient's airway through repeated intubation attempts over an approximate two-hour period. After finally being intubated, the patient developed pulmonary edema causing her surgery to be cancelled. When she was extubated the following day, the patient's airway collapsed and she could not be resuscitated, despite the performance of an emergency tracheostomy. Plaintiff claimed that the defendant's negligent intubation efforts were the direct cause of the patient's death. The defense argued that the patient's airway had not been traumatized during the intubation attempts and that she died as a result of an anaphylactic reaction to Lidocaine during her extubation procedure. The jury deliberated for one hour before returning the defense verdict.

SmithAmundsen (Chicago, IL)

SmithAmundsen's professional liability attorneys, lead by Andrew Seiber, recently recovered a verdict in a construction defect case against a non-settling party. The case arose out of the partial collapse of a building in Chicago resulting in the death of two workers when two floors of a precast concrete building came crashing down upon them. The client (general contractor) and a co-defendant settled with the family of one plaintiff, a deceased workers' wife and his three young children, for $11M, only $4M of which we paid, a positive ending considering the suit included a faultless plaintiff. Following the settlement, the team went on to sue a masonry contractor who was refusing to pay its fair share. As a result of the contribution case, the non-settling party was found responsible for approximately $1.32M, an amount greater than what was being offered by the non-settling defendant during the underlying case. The building at issue was eventually torn down.

Bingham McHale (Indianapolis, IN)

Bingham McHale partner and USLAW primary contact, James Hinshaw, successfully prosecuted a counterclaim for abuse of process in a copyright infringement case, which resulted in several orders from the

District Court for the Southern District of Indiana repeatedly sanctioning the plaintiff, awarding the firm's clients their attorneys fees, and ultimately leading to the dismissal of the infringement lawsuit.

Dillingham & Murphy, LLP (San Francisco, CA)

Carla Hartley of Dillingham & Murphy, LLP successfully defended a law firm and name partner in a sexual/racial harassment and retaliation case before the California Fair Employment and Housing Commission. The alleged harassment included an email of an Ann Coulter column entitled "Irony" concerning the Muslim boycott of U.S. Airways after an incident in which several Imams were removed from a flight due to terrorism concerns; an email of a cartoon depicting a business named "Raul's 21 Foot Ladder Rentals" near the border fence between U.S. and Mexico which was captioned: "A real business man. The next Mexican Millionaire;" an email purportedly of a California poll on whether illegal immigration was a problem in which 61% of respondents answered "yes" and 59% responded "no es un problema serioso;" and using the term "rice rocket" to refer to modified Japanese cars. The administrative law judge hearing the case found in favor of the respondents on all claims except the obligation to prevent harassment, denied all damage claims, but ordered the respondent to undergo sexual harassment training.

Poyner Spruill LLP (Raleigh, NC)

Steve Epstein, who joined Poyner Spruill LLP earlier this spring as a partner, successfully represented his client in a landmark decision with profound implications for the statewide business community. In State ex rel. Commissioner v. Custard the Court concluded that officers and directors of a company cannot be held personally liable for taking on risks they believed in good faith were in the company's best interests, even if those decisions are proven "wrong, stupid, or egregiously dumb" and led to results which proved "disastrous" to the company's shareholders. The Judge dismissed all claims asserted against the former officers and directors of an insolvent insurance company through which the NC Commissioner of Insurance as liquidator sought to collect over $40 million to reimburse policyholders and creditors.

Lashly & Baer (St. Louis, MO)

In a medical malpractice case, Stephen G. Reuter of Lashly & Baer in St. Louis, MO won a jury verdict in favor of SLUCare. The patient's family alleged that a doctor at the Saint Louis University Liver Transplant Center should have evaluated the patient for a liver transplant sooner. The patient was referred to St. Louis for liver transplant evaluation by a physician in Arkansas. The SLUCare Hepatologist diagnosed autoimmune hepatitis, an element of the patient's liver disease which had not been worked-up before referral. He attempted treatment of this, but the patient failed to follow doctor's directives. Her liver disease progressed and ultimately the doctor did determine she would need a liver transplant. However, due to Medicaid rules, the evaluation and transplant surgery would have to take place in Arkansas, where the patient lived. The woman died six weeks after the transplant evaluation began in Arkansas. Mr. Reuter and his experts took the position that the diagnosis of autoimmune hepatitis was correct and that the treatment, when taken, was working. The patient's non-compliance prevented further improvement and postponement, for years, the need for transplant. The defense also questioned why the Arkansas Liver Transplant Center did not complete the evaluation in the six weeks following their initial meeting with the patient. Experts testified at the trial that a transplant evaluation could be completed within one to two weeks. The jury deliberated for 53 minutes before returning their verdict. (Stephanie Daniels et al v. Saint Louis University)

Copeland Cook Taylor & Bush, P.A. (Ridgeland, MS)

On June 3, 2010, Copeland Cook Taylor & Bush, P.A.'s healthcare group won an appeal to the Mississippi Supreme Court on behalf of their client Madison HMA, Inc., which operates Madison County Medical Center in Canton. Madison HMA had sought leave to intervene in a suit brought by St. Dominic-Jackson Memorial Hospital, where St. Dominic claimed an option to purchase the rights to operate an ambulatory surgery center. Madison HMA claimed it had an option to purchase the same assets, but the Madison Chancery Court denied Madison HMA the opportunity to state its claim in court. CCTB attorneys Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry appealed the chancery court's decision to the Mississippi Supreme Court, which reversed the chancery court 6-2 and remanded the case back to the Madison County Chancery Court for further proceeding.

McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, PC (New Orleans, LA)

Michael Sistrunk, Kyle Kirsch, and Craig Canizaro recently won a victory for Winn Dixie Montgomery, LLC in the case entitled Goodluck Edibiokpo v. Peterman, et al, 2010 WL 1930081 (E.D.La. 5/10/2010), where plaintiff sought damages from Winn Dixie under 42 U.S.C. 1983 and La Civil Code article 2315. The plaintiff, a commercial truck driver, claimed Winn Dixie violated the Federal Motor Carriers Act by asking him to leave its premises following the completion of his delivery and that Winn Dixie was liable for the injuries he allegedly sustained as a result of alleged actions by police officers when they arrived to escort plaintiff from the property. The Court granted Winn Dixie's F.R.C.P. Rule 12(b)(6) Motion to Dismiss, agreeing with Winn Dixie that plaintiff failed to state a claim under either 42 U.S.C. 1983 or Louisiana law. Specifically, the Court held Winn Dixie did not have a duty to prevent plaintiff's injury at the hands of police officers. Accordingly, the Court found that Winn Dixie could not be found to be the legal cause of plaintiff's injuries.

Dispute Resolution Considerations When Drafting Cross-Border Contracts

Ronald S. Kopp Roetzel & Andress, LPA

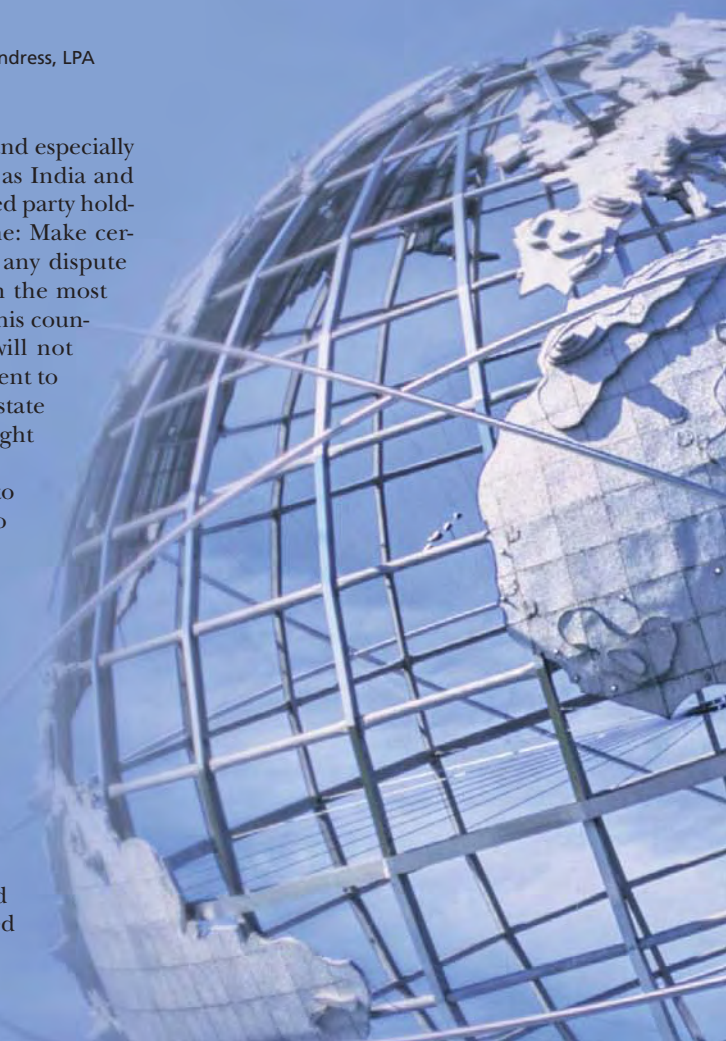
Cross-border contracts for goods and services have become part of our daily lives as business people and lawyers. In drafting and agreeing to the terms of such contracts, though, we too seldom pay attention to how and where a dispute will be resolved should it arise.

While lawsuits are common in the United States, they are far less so in other countries where our clients might do business. A contractual dispute resolution provision stating that litigation or arbitration must be pursued in the foreign country can lead to a very hollow remedy—if any remedy is available at all.

For example, the law of China provides that if a contract between a Chinese business and an American business requires arbitration to be held in China, the arbitration is invalid unless it specifies the particular arbitral body to be used in deciding the dispute. The particular arbitral body, such as CIETAC, must be designated. If not, the claimant may find itself in limbo.

Of course, agreement to any provision permitting or requiring dispute resolution in a foreign country should be avoided at nearly all costs. The vagaries of litigating or arbitrating in a foreign land, and especially in developing countries such as India and China, often leave the aggrieved party holding an empty bag. Bottom line: Make certain to negotiate the situs of any dispute resolution procedure to be in the most appropriate state possible in this country. If the foreign company will not agree, at least attempt agreement to venue in some other U.S. state which the foreign company might regard as being more neutral.

Considerations as to whether one should agree to an arbitration provision are largely based upon personal preferences, though arbitration in lieu of litigation in international contracts is generally the preferred route—especially if the forum is to be in the foreign country. If agreement cannot be achieved as to particular arbitration rules to be utilized, an acceptable compromise might reference the Revised Arbitration Rules of the United



Nations Commission on International Trade Law. (The revisions to those rules became effective on August 15, 2010.)

It should be noted that nearly all developed and developing countries (a notable exception being Taiwan) are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. This Convention is generally thought to be the fundamental instrument providing a foundation for international arbitration.

As importantly, the contract should provide for application of the law most helpful to one's business or client. Do not agree to application of the law of a foreign land. Such laws will be unpredictable and will require retention of the services of a foreign lawyer to help in addressing application of those laws.

If unable to elicit agreement to application of the law of a given state in this country, and assuming the contract is one for the purchase or sale of goods, then reference to the United Nations Convention on the International Sale of Goods is recommended. The CISG is based largely upon the Uniform Commercial Code and will be familiar to any U.S. commercial law practitioner working with it. A convenient resource for reference to the CISG is contained at www.cisg.law.pace.edu.

DO NOT AGREE TO APPLICATION OF THE LAW OF A FOREIGN LAND. SUCH LAWS WILL BE UNPREDICTABLE AND WILL REQUIRE RETENTION OF THE SERVICES OF A FOREIGN LAWYER TO HELP IN ADDRESSING APPLICATION OF THOSE LAWS.

Of particular concern in negotiating any contract with a foreign company should be the concept of *force majeure*. While most courts and arbitrators around the world will defer to any definition of *force majeure* in a contract, failure to define the term will (absent agreement to any other law) generally cause deference to the CISG. That law will permit declaration of *force majeure* in a situation where there is an "impediment" to performance under the contract. As might be imagined, defining the term "impediment" has been challenging to scholars and courts across the globe, and there is significant inconsistency in application of that term.

When doing business with companies regulated by totalitarian or semi-totalitarian regimes, government interference with contractual relations can be especially troublesome. As one example, China's Chamber of Commerce often imposes minimum export prices that any number of Chinese companies has claimed to constitute a "*force majeure*" when applied to pricing in a long-term contract. Many will argue that the China Chamber of Commerce is an arm of the Chinese government and that, therefore, a minimum export price imposed by the CCC constitutes a "government regulation" amounting to a "*force majeure*." The argument is, then, that in spite of a long-term contract, the purchaser of goods must pay a price at least equal to the minimum export price, or the seller will be permitted to declare *force majeure* and renege on the contract.

While this argument should not hold water when presented by a Chinese selling company (the CCC generally does not apply minimum export pricing to long-term contracts entered prior to imposition of the pricing scheme), the issue presented is one calling for resolution not at the dispute stage, but at the contract drafting stage. A *force majeure* clause in an international contract should be tightly written, containing a specific description of events which will excuse one from performance. The provision should contain clear language that *force majeure* may not be imposed upon presentation of a mere "impediment," but rather, that the triggering event must be one causing the other party to be "unable to perform."

Finally, given the expense of arbitration or litigation when the parties are in different countries, consider a mandatory mediation provision. The concept is common when drafting construction contracts, and it makes sense in other areas of commercial law, also. The provision should require that before any arbitration or litigation proceedings may be commenced, the parties must engage in good faith mediation presided over by a qualified mediator.

At the time of contract negotiation, these concepts may seem somewhat trivial when compared to meat-and-potato terms like price and quantity. They are anything but trivial, though, when a dispute arises. Venue, choice of law, type of dispute resolution (including mandatory mediation), and tight definition of such terms as "*force majeure*" may provide substantial leverage during negotiation of disputes—and they may constitute the difference between a meaningful remedy and no remedy should the dispute proceed to trial or arbitration.

Ronald S. Kopp is a graduate of The Ohio State University College of Law. A partner with Roetzel & Andress (practicing in its Cleveland and Akron offices), he has practiced in the area of business litigation for over 30 years.

HARMLESS ERRORS

COLLECTABILITY ISSUES IN LEGAL MALPRACTICE LITIGATION

Michael R. Vescio SmithAmundsen LLC

In most jurisdictions, in legal malpractice cases involving an allegation that the plaintiff-client lost a cause of action and a right to a judgment against a third party, damages are not presumed. Instead, the plaintiff-client has the burden of proving that he or she suffered actual damages. One issue that frequently arises is the issue of the collectability of the individual or entity who would have played the role of the defendant in the underlying lawsuit if the plaintiff-client's cause of action and right to a judgment had not been lost. Without a defendant to sue who could actually pay the amount of an award reflected in a judgment, the plaintiff-client's right to a judgment against such a defendant had little value in the first place, and it follows from that fact that the defendant-lawyer has caused no loss for which the law should make the lawyer account. In legal malpractice litigation where collectability becomes an issue, numerous related issues must be resolved by practitioners and the courts.

THE BURDENS OF PRODUCTION AND PERSUASION

A threshold issue that arises in cases where collectability is an issue is whether the plaintiff-client or the defendant-lawyer has the burden of coming forward with some evidence of the underlying defendant's collectability and the burden of persuading the trier of fact that, if successful, the plaintiff-client would really have collected money from the underlying defendant. Virtually all jurisdictions that have addressed the issue of collectability have concluded that a plaintiff-client's right of recovery against the defendant-lawyer should depend upon the extent to which the underlying defendant was collectable. If the law allowed the plaintiff to recover from a lawyer more than the plaintiff could have collected from the defendant in the underlying lawsuit, the plaintiff would unfairly receive a windfall as a result of the legal malpractice. Since the law's purpose in awarding damages in legal malpractice cases is to restore the plaintiff to the same condition that the plaintiff would have enjoyed if the plaintiff had not suffered any injury, the law tends to avoid results that confer windfalls.

But while there is unanimity that an underlying defendant's collectability or non-collectability should determine the extent to which the plaintiff may recover from the plaintiff's former lawyer, the authorities are split on the manner in which the judicial system should take account of the underlying defendant's collectability or non-collectability.

The majority rule among jurisdictions holds that the plaintiff-client has the burden of coming forward with at least some evidence, and of ultimately persuading the trier of fact to believe, that—absent the lawyer's negligence—the plaintiff would have successfully recovered money. Decisions adhering to the majority rule place the burdens of production and persuasion on the client on the theory that the client must prove all of the elements of the legal malpractice claim, including the element of damages. A plaintiff who cannot prove that the underlying defendant was collectable has not proven that the plaintiff suffered anything more than a harmless loss of a technical legal right. A judgment that cannot be collected has little value.

The minority rule among the jurisdictions that have resolved this question holds that the defendant-lawyer has the burden of production and persuasion on the non-collectability of the underlying defendant. One justification given for this alternative allocation of the burdens is that oftentimes legal malpractice cases involving an allegation of a lost cause of action and a lost right to a judgment are cases in which the lawyer delayed commencement of the client's lawsuit for so long that the statute of limitations ran on the client's claims. The resulting lapse of time makes proving any aspect of the case more difficult—memories fade, and records are lost. Under the minority rule, the lawyer who caused such a delay is the party who must contend with the evidentiary problems created by the delay. In addition, a lawyer who claims that the underlying defendant was non-collectable is claiming that the lawyer originally took up a client's cause against the underlying defendant even though any judgment the lawyer obtained would ultimately prove worthless. Since this sort of assertion seems the sort of extraordinary claim that requires extraordinary proof, the minority rule requires the lawyer to supply the requisite proof.

PLEADING ISSUES

Since the majority rule allocates the burdens on collectability issues to the plaintiff-client, in most collectability cases the plaintiff has the obligation to plead the collectability issue in accord with the jurisdiction's rules of pleading and practice. However, in cases where the minority rule governs the allocation of the parties' burdens, the defendant-lawyer should make sure that the non-collectability of the underlying defendant is asserted as an affirmative defense. Jurisdictions applying the minority rule treat non-collectability as an affirmative assertion, a means of defeating an otherwise valid legal malpractice claim, instead of a negative assertion about a deficiency in an element of the client's legal malpractice claim. Since non-collectability qualifies as an affirmative defense in jurisdictions adhering to the minority rule, a defendant's failure to timely plead non-collectability as an affirmative defense risks a waiver of the right to present the defense.

DISCOVERY ISSUES

Another issue that might arise in a collectability case is how to obtain information about the underlying defendant's capacity to pay the allegedly lost judgment. In some sense, this discovery issue is not limited to collectability cases. In legal malpractice cases more generally, a plaintiff must successfully prevail in a "trial within a trial"—litigating all of the issues that would have been litigated in the original action against the underlying defendant. As a result, information in the possession of the underlying defendant is often critical to the existing parties in legal malpractice lawsuits. However, since the legal malpractice case exists because the right to litigate against the underlying defendant has been lost, the underlying defendant is usually a stranger to the legal malpractice litigation. Fortunately for the litigants in the legal malpractice lawsuit, the civil justice system adheres to the general maxim that everyone has a right to every person's evidence, and the litigants can ordinarily compel the underlying defendant to provide the relevant testimony and documentary evidence that the underlying defendant possesses.

Collectability issues in legal malpractice lawsuits further complicate discovery of information and documents in the possession and control of the underlying defendant. Information about the underlying defendant's collectability—that is, the underlying defendant's capacity to pay money over to a plaintiff holding a valid judgment against such person—has a special status. Most people regard information about their finances and wealth as confidential and sensitive information, and the law oftentimes gives special recognition to the reasonable expectation that people have to a zone of privacy with regard to such sensitive materials and information.

In light of the special confidentiality and sensitivity of information about the underlying defendant's finances and wealth, the litigants in a legal malpractice case where collectability is an issue should consider the use of special procedures to protect the underlying defendant's privacy concerns. For example, the parties may enter into confidentiality agreements with the underlying defendant, or offer to stipulate to the entry of a protective order for the underlying defendant's benefit, in order to gain the underlying defendant's cooperation in efforts to obtain the requisite evidence of collectability. And if the parties cannot secure the cooperation of the underlying defendant, the parties should be cognizant that their general right to every person's evidence might not suffice by itself to grant them wide access to evidence of the wealth and finances of the underlying defendant.

EVIDENTIARY ISSUES

The evidentiary issues that may arise in cases where collectability is an issue are too numerous to attempt to list in any sort of exhaustive fashion. In terms of documentary evidence, the collectability of an underlying defendant might be revealed through the presentation of things like accounting reports, balance statements, and tax returns. Litigants might also present witnesses with personal knowledge about the underlying defendant's capacity to pay a judgment. For example, in cases involving an underlying defendant who is a corporation or other business entity, the company's accountant or chief financial officer could likely testify from personal knowledge about the entity's capacity to pay a judgment.

Another fairly obvious factor in any collectability case is whether insurance exists which might have provided coverage sufficient to indemnify the underlying defendant for the allegedly lost judgment. On the one hand, a plaintiff-client might prove that the underlying defendant's insured status made him or her collectable. On the other hand, the defendant-lawyer might raise as a defense against the plaintiff's claims about collectability any insurance coverage defenses that the underlying insurer might have raised. As a result, the possibility exists that the parties in the legal malpractice case could find themselves litigating a special sort of "trial within a trial," a "coverage trial within a trial."

Something else that might complicate the issues in a collectability case is the possibility that a settlement might have been reached in the underlying litigation if not for the alleged malpractice. A plaintiff might maintain either that the defendant in the underlying case made a settlement offer, or that the lawyer should have and could have obtained such an offer, and that, if informed of such an offer, the plaintiff would have accepted it. If the plaintiff can prove this, and if the defendant cannot prove that the underlying defendant lacked the capacity to make good on any settlement the parties might have reached, the plaintiff in the legal malpractice case could recover from the former lawyer the difference between the value of the hypothetical settlement and the amount, if any, that the plaintiff actually recovered at the conclusion of the underlying litigation.

Finally, in an appropriate case, parties should consider using opinion testimony from expert witnesses to prove the collectability or non-collectability of the underlying defendant. For example, a forensic accounting expert might be used to impeach the computations or conclusions of an adverse party, or to reconstruct the underlying defendant's finances or capacity to pay a judgment after a lapse of time or a change in circumstances—like an intervening bankruptcy or other sort of insolvency—makes proof of collectability or non-collectability elusive. Such testimony would obviously need to satisfy the admissibility requirements applicable to expert testimony in that particular jurisdiction.

CONCLUSION

The potential relevancy of collectability issues in a legal malpractice lawsuit complicates the litigation at nearly every stage. Case law provides some guidance in resolving some of the most frequently recurring issues, but perhaps not to the same extent as in other areas of the law. In the past, in many jurisdictions, plaintiffs brought legal malpractice actions against their lawyers relatively infrequently. This began to change in the 1990s, when there was an increase in the frequency of malpractice claims against lawyers and other professionals. This trend continues today. Nationally, 5 percent to 6 percent of lawyers become the subject of a legal malpractice claim in an average year.[1] In the resulting legal environment, involving increasingly frequent legal malpractice claims and a relative paucity of legal guidance on how to resolve complicated issues, practitioners and courts will spend the next few years, at least, resolving the numerous unresolved issues—including collectability issues—that are unique to legal malpractice cases.

Michael Vescio is a partner in the Milwaukee, WI office of SmithAmundsen LLC. He concentrates his practice in insurance coverage litigation, professional liability and malpractice defense, insurance tort defense, complex civil and commercial litigation, and appellate law.

1 See Harold Nedd, "Lawyers Insure Themselves In Case They Get Sued," Pacific Business News (Honolulu) (September 1, 2006) (citing Insurance Journal: The Property Casualty Magazine).

Best Practices For Employers Choosing to Google Job Applicants

Peter J. Pizzi Connell Foley LLP

At first blush, using Google searches as part of an employee selection process appears to be a great idea. In 2009, Careerbuilder.com reported that about 45 percent of companies were turning to the Internet to screen candidates. The *Personal Branding Blog* predicts that by 2012 close to 100 percent of companies will be doing so. Additionally, employers recognize a duty to hire "safe employees" and turn to Internet search to mitigate the risk of workplace violence.

Despite its attractions, using Internet search tools in hiring is fraught with danger for employers. While information found on the web is readily available and appears to be "public" in nature, employers risk violating various state and federal laws when considering web content in hiring.

The most significant hazard an employer faces when using search tools in hiring is increased exposure to discrimination claims. An Internet search may retrieve information which employers are legally prohibited from considering when evaluating a candidate, such as age, race, disability and medical history. Once obtained by a web search, this information cannot be "un-

learned" and may potentially expose an employer to claims of discrimination. Therefore, state and federal laws and regulations against discrimination must be considered in using search in hiring.

Another risk employers face follows from the inherent unreliability of the Internet itself. An employer should critically assess the nature and source of web content.

While the Fair Credit Reporting Act ordinarily does not apply when an employer uses a Google search in the hiring process, it may have some application if the employer relies upon the investigative work of a third-party agency.

Circumventing access protections to view private content posted by job applicants can also result in increased exposure to various novel theories of legal liability. Claims involving employer access to private web content have been litigated in the employer/employee arena. *See Pietrylo v. Hillstone Restaurant Group* (U.S.D.C., D.N.J. 2009). Using someone else's username and password to access private information behind web "firewalls" may trigger claims under federal statutes, such as the Computer Fraud and Abuse Act, the Stored Communications Act, and analogous state statutes, and may also create exposure to common law claims of invasion of privacy.

The bottom line is that information from Internet searches may or may not be directly tied to the candidate's ability to perform the essential functions of the position, placing the prospective employer at risk of creating an inference that it relied upon prohibited criteria in making the selection decision.

If an employer, weighing the risks and rewards, decides to make a Google search part of its hiring process, the following precautions should be considered as part of a protocol aimed at reducing exposure to failure-to-hire, privacy, and other claims:

Inform applicants that an Internet search will be conducted and obtain written consent. Many employment law commentators have suggested the easiest way to avoid potential problems is for the employer to inform job applicants that an Internet search will be conducted. (See John Hyman's *Ohio Employment Law Blog*.)

Adopt uniform guidelines for Internet screening. If one applicant is to be screened in a certain manner, all applicants should be similarly, if not identically, screened. Further, employers should adopt a clear policy that explains what is "off-limits" in an Internet search of candidate.

A non-decision maker should do the "search." To ensure that protected characteristics are not considered in the ultimate hiring decision, employers should designate a non-decision maker to perform the Internet search. The person conducting the web search should be instructed to filter out information related to protected characteristics before passing the search results on to the hiring decision maker. (See Robert Sprague's *Labor Law Journal* article on this subject.).

INFORM APPLICANTS THAT AN INTERNET SEARCH WILL BE CONDUCTED AND OBTAIN WRITTEN CONSENT.

Consider designating certain social sites off limits. Limiting the screening to information collected from a Google search, and excluding information found on social networking site profiles, may provide more useable results and limit an employer's exposure to the type of protected and deeply personal information that can often form the basis of invasion of privacy and failure-to-hire claims. Searches should be focused on professional and verifiable information such as newspaper articles, magazine, and trade publications.

Keep records. Creating a reasonable record keeping system now could help avoid potential problems later.

Independently verify harmful information. If damaging information is uncovered about an otherwise worthy candidate, take the time to verify that information. In using the Internet as a screening tool an employer must be forever mindful of the fact the information is not necessarily factually accurate or may contain facts taken out of context. The Internet should never be an employer's only form of background checking.

Job-Related Screening. Although obvious, it should be noted that information gleaned from the Internet that is used to reject a candidate should pertain to the candidate's job-related qualifications. It may be helpful to create a list of certain characteristics or criteria to which the employee performing the screening may refer. At a minimum, the employer should review applicable job descriptions when considering the effect of Internet information on a candidate's overall qualifications for a position.

Determine when during the hiring process to use a web search. Some commentators suggest conducting a web search of a candidate only after a conditional job offer has been made. This allows the initial hiring decision to be based upon traditional information, such as a resume and interview, with the web search serving only as a simple way of confirming opinions of the candidate and verifying certain facts learned.

Certainly, the Internet has transformed the modern world, enabling countless millions to live better and more fulfilling lives. It is, perhaps, impractical to suggest that hiring and screening job applicants is the lone sphere of modern life in which the resources of the Internet may never be utilized. As outlined above, however, conducting a web search of a job candidate is a risky proposition. The above practice points may enable employers to better manage those risks.

Peter J. Pizzi, a partner in Connell Foley in Roseland, represents clients in labor and employment law matters, unfair competition, technology and IP litigation, and securities and financial services litigation. He frequently writes and lectures on subjects relevant to these practice areas and can be reached at (973) 533-4221 or ppizzi@connellfoley.com.

UPDATED INSIGHTS ON ARBITRATING DISPUTES WITH CHINESE BUSINESS ENTITIES

Tom Klitgaard Dillingham & Murphy, LLP

A headline in the *Wall Street Journal* on May 18, 2010, proclaimed:

> "Chinese Steel Firm to Enter US"
> "Ashan Forges Alliance with a Mississippi Company Ahead of Sino-U.S Talks on Global Economy"

DEVELOPING CURRENTS

There are two developing broad, and widely divergent, currents that are affecting, or will soon affect, a growing number of lawyers in the United States whose clients have dealings with Chinese business entities.

One current is the increasing under the radar purchases by Chinese business entities, controlled or owned by the Chinese central or local government, of established medium sized businesses in the United States. This represents a form of forward integration by Chinese entities into the United States. It uses China's increasing financial resources to acquire a foothold in United States markets.

A second current is, or soon will be, the establishment of manufacturing and marketing facilities by Chinese firms from scratch in the United States. The purpose is to avoid claims of dumping into United States markets and to Americanize product lines. A side benefit is gaining increased political support for China from local communities.

DIFFERENCES IN THE LEGAL AND PHILOSOPHICAL STRUCTURES OF CHINA AND THE UNITED STATES

The legal and philosophical structures of China and the United States are profoundly different. A United States business that believes that it can resolve disputes in China, or involving Chinese business entities, in the same way as in Europe, South America, or the United States may be in for a rude surprise.

The legal system in China is based on a form of the civil law. It is intermixed with the concepts of Confucianism, which is not a religion but a type of philosophy. Confucianism is not based on law, but on relationships, moral principles, and a hierarchy which is entitled to respect.

IMPACT OF DIFFERENCES ON RESOLUTION OF DISPUTES WITH CHINESE ENTITIES

The impact of the differences in the legal systems and philosophical structures begins with the choice of law. If Chinese law is chosen, the Western party is buying into a system based in part on the principle of fairness, not entirely on the principle of rights. This is often hard for the Western parties to understand.

A brief diversion is useful. A court judgment in one country is generally

not enforceable in another country. There are no international principles of full faith and credit applicable to enforcement of the judgment an American court in China, or vice versa.

Arbitration then becomes the appropriate mechanism for resolving disputes if one party wishes a judgment—called an award in arbitration—that that might be enforceable outside the country of the tribunal.

If the American party agrees to arbitrate in China, and then seeks to enforce the domestic Chinese arbitral award in China, the American party will need to be aware of section 260A of the Code of Civil Procedure of the People's Republic. Section 260A provides that if the People's Court determines that the enforcement of the award is against the "social and public interest" of the country, the People's Court will not enforce the award.

If the American party agrees to arbitrate outside of China in the United States or some other country, wins, and then seeks to enforce the award in China under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which the People's Republic is a party), the American party needs to look to Article V 2.(b) of the Convention. This Article provides that enforcement of the award may be refused if the competent authority (the People's Court) in the country where enforcement is sought (China) finds that recognition or enforcement of the award would be contrary to the "public policy" of the country.

If the American and Chinese parties agree to arbitrate in the United States, receive an award, and then seek to enforce the award in the United States against the assets of the other party, it would be highly unusual for an American court to refuse enforcement of the award on grounds of public policy, unless enforcement of the award had some impact on national security. The American court would probably never refuse to enforce a pure money award.

However, this is where the initial choice of law in the contract, i.e., that of China or the United States, may have an important effect.

A. CONCEPT OF FAIRNESS

The usual Western contract is rooted in the principle of caveat emptor, leaving it up to the parties to decide what is fair as to them. If there is a difference in bargaining power in the West, fairness may become an elastic concept. It is nonetheless bounded by a fence of rights, which often leads to arbitral and judicial abstention in adjudicating disputes.

A harsh, but nonetheless clear treatment of the concept of fairness in the United States may be found in a long standing California case (and in cases in other States), Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Company (1964), 228 Cal. App 2d 810, 815. The Court rejected the unfairness of a contract as the basis for decision: "Respondent points to the unfairness of the situation to justify the finding of an implied covenant * * *. The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably."

However, in either arbitrating or litigating a dispute with a Chinese business entity in China, or arbitrating or litigating in the United States where the American party has chosen Chinese law as the governing law—perhaps out of feeling a need to show good faith or to close the deal—the American lawyer and the American client will need to be prepared to address the basic principle of fairness in the context of the transaction.

In China, Article 4 of the General Principles of the Civil Law of the People's Republic provides that in civil activities, the principle of fairness shall be observed, adding the further accompanying principles of voluntariness, making compensation for equal value, honesty and credibility.

Article 145 provides that the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. Article 150 provides that the "application of foreign laws in accordance with this chapter [Chapter VIII, Articles142-150] shall not violate the public interest of the People's Republic of China."

In China, the public interest is expressed in Article 5 of the Contract Law, i.e., the parties "shall abide by the principle of fairness" in defining the rights and obligations of each party. It is also expressed in Article 7, that in concluding and performing a contract, the parties shall observe social ethics, and that neither party may disrupt the socio-economic order or damage the public interests, and in Article 8, that neither party may unilaterally rescind the contact.

B. CONCEPT OF MODIFICATION

Article 54 of the Contract Law grants the arbitrator (or the People's Court) power to modify a contract in addition to revoking the contract, where the contract was concluded as a result of a "serious misunderstanding," or "obviously unfair" at the time concluded, or concluded against the other party's "true intentions" through, inter alia, the exploitation of the other party's "unfavorable position."

Article 54 provides that where a party requests modification, the arbitration institution or the court may not revoke the contract. The concept of modification by the tribunal, where the circumstances also warrant rescission, is unique. American law, or at least California law, does not grant the arbitrator of judge a similar power.

A recent California case emphasizes the distinction in sharp language: "We cannot and will not create a term of a contract between the parties that the evidence does not show was ever agreed upon by the parties. (Code Civ. Proc., Section1858 ['In the construction of a * * * [a]n instrument, the office of the Judge is simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted * * *']).” (Mitri v. Arnel Management Co. (2007), 157 Cal. App. 4th 1164, 1173).

In Article 54, the reference to the other party's "unfavorable position" is another way of addressing the concept of fairness. It allows for some discretion in the decision making process. The law does not ask why the position was unfavorable (such as through the party's own doing), or how much it was unfavorable, but only if it was in fact unfavorable. The legal analysis calls for attention to the business underpinning of the transaction and thoughtful, perhaps innovative, lawyering. Hyperbole will not suffice.

A foreign arbitrator in China or the United States will need to be aware of the power to modify the contract. The awareness will be important to understanding the mindset and arguments of the Chinese party which need to be in accord with China's public policy.

Tom Klitgaard is a partner in Dillingham & Murphy, LLP, San Francisco, California. He is an experienced domestic and international arbitrator and mediator and a member of the panels of arbitrators and mediators of the Beijing Arbitration Commission and the International Centre for Dispute Resolution in New York. He is an Adjunct Professor of Asian Law at the University of San Francisco Law School.

NEGLIGENT SECURITY IN GOVERNMENT SUBSIDIZED APARTMENT COMPLEXES

Richards H. Ford and Michael R. D'Lugo Wicker, Smith, O'Hara, McCoy & Ford, P.A.

One of the fastest growing areas of litigation in the United States today is the proliferation of negligent security claims arising out of personal injuries or wrongful deaths that occur in and around government subsidized apartment complexes. The reason for this increase is the combination of tax incentives to encourage investors to support low income housing, the limitations that are placed upon property owners in order to qualify for those tax incentives, and the sheer demographics associated with low income housing. This mixture results in fertile ground for litigation in which both the numbers of claims and the value of each claim is steadily rising.

The Low Income Housing Tax Credit ("LIHTC") is a product of the Tax Reform Act of 1986. In those amendments, changes were made to the Internal Revenue Code designed to encourage investment in low income housing. Dollar for dollar tax credits, as opposed to less advantageous tax deductions, were awarded to largely corporate investors who poured money into the development of low income housing, creating a rapid rise in the development of these properties. The result was a welcome proliferation of property development to meet a housing need that had previously been largely ignored.

The specific requirements of the statutory provisions governing the entitlement to a LIHTC insures that the neediest portion of the population will be properly served with adequate housing options. In order to qualify, an investor must agree that 20% or more of the residential units will be rent-restricted and occupied by individuals whose income is 50% or less of the median gross income of the area. At least 40% of the residential units in the development must be both rent-restricted and occupied by individuals whose income is 60% or less of the median gross income of the area. Low income tenants can only be charged a maximum rent of 30% of the maximum eligible income, which is 60% of the gross median income of the area. These restrictions guarantee that these property developments will be occupied by individuals from the low end of the economic spectrum. These restrictions also guarantee that the resources available to provide services to the tenants of these properties will be limited.

Because these properties are by statutory definition occupied by individuals at

the lowest end of the economic spectrum, the properties are generally developed in urban settings close to other individuals who are in the same economic stratum. Unfortunately, these areas also can be located in urban areas that experience a higher than average crime rate. The development of these properties for low income individuals increases the density of the population in sections of urban areas that already experience a high crime rate, coupled with the restrictions on the ability of property owners to raise rents, result in a perfect recipe for civil litigation.

Throughout the United States, property owners are held to a certain standard of care in order to prevent personal injuries or death to people who are on those properties, whether those individuals are business invitees, residents, or even trespassers on the property. Typically, a landowner is held to the standard of acting as a reasonable person would under like circumstances. This is also a non-delegable obligation on the part of the property owner, and so even hiring a security service does not immunize the property owner from liability exposure. In fact, experience shows that not hiring the right security service may actually exacerbate a property owner's liability exposure.

The issues that arise when a person is injured or killed on government subsidized property usually begin with an analysis of the crime grid for the area in which the property is located. The higher the crime rate in a given area, the higher the obligation becomes for the property owner to retain an appropriate security service to meet that threat. The property owner can be held accountable for a personal injury or death on its property if it fails to retain a security service, and the property owner can be held liable if it does retain a security service that ends up committing a tort while performing its security services.

There are numerous arguments that a plaintiff will raise in support of the claim that a corporate defendant should be held liable for injuries or death that are the result of a crime committed on the defendant's property. In addition to the general assertion that the defendant failed to provide adequate security, plaintiffs argue that the defendant failed to perform any type of periodic security audit to assess ongoing security issues. If there is a history of violence on or near the property, plaintiffs will take the position that the defendant was aware of these prior violent incidents and failed to take necessary action to prevent similar occurrences in the future. Such an argument may also take the form of an assertion that the crime committed was foreseeable and thus preventable. A plaintiff may argue that the defendant failed to follow internal protocols for reporting incidents on the property, thereby simply ignoring the risk. In certain cases, a plaintiff will take the position that the defendant failed to budget adequate resources in order to provide reasonable security measures on the property.

There are a series of arguments that defendants raise in response that are designed to limit or completely eliminate the potential exposure to liability in the negligent security context. For example, defendant property owners will often take the position that they have no common law duty to prevent the intentional acts of third parties over whom they can exert no control. Under this theory, crime is not foreseeable, and therefore is not preventable. Some defendants may try to limit liability by taking the position that the corporate entity that owns the property had no knowledge of any unsafe condition that existed on the property, although this argument may only insulate the corporate defendant from punitive damages, not compensatory. If applicable, the defendant may argue that the prior crimes committed on the property or in the area were only minor offenses, and thus did not put the defendant on notice of the reasonable possibility of the commission of a major offense. The defendant can take the position, if warranted by the specific facts of the case, that the defendant took reasonable steps to limit access to the property with fencing, an automated gate, or some other restriction. Adequate lighting is often an issue in negligent security cases, and proper lighting can be used as a defense in the appropriate case.

As more and more negligent security cases are being filed throughout the country, more and more experts are being used both to support and to defend against these claims. These experts come from many different backgrounds and not just from the field of providing security. Lighting experts are often crucial in negligent security cases in order to establish the adequacy of the lighting on property. Criminologist testimony often comes into play in order to establish the criminal history of the area in which the property was located, and to opine on whether the steps that the defendant took to protect the residents, invitees, or even trespassers were reasonable under the circumstances. Finally, psychiatric testimony is often employed in order to establish the damages in the case, by helping the jury to understand the impact that a crime has had on a victim or a victim's family.

Damages can be significant in the negligent security context. In 2008, a Florida jury awarded more than $8,000,000.00 to the family of a decedent who was shot in an apartment complex parking lot at 3:30 a.m. Examples exist throughout the country that demonstrate the explosive nature of this type of litigation. Especially in cases of murder and rape, evidence of corporate indifference in the face of obvious signs of criminal activity in the area can lead to runaway jury verdicts.

In response to the pressures exerted by the Internal Revenue Code and the civil tort system in this country, property owners are turning to security providers that are less and less experienced in the field of protecting residents from the harm that can befall them in a high crime area. Unfortunately, in this line of work, inexperience does not necessarily translate into passive behavior; instead, inexperience often breeds overly aggressive behavior that can lead to serious bodily harm or death not only to criminal trespassers but to residents as well. This type of litigation is rapidly growing. We anticipate that the numbers of this type of litigation will only continue to grow as a poor economy forces more and more people into low income housing, while crime rates in economically deprived areas increase. Given the societal benefits of providing adequate housing to low income individuals, it is doubtful that we will see a reversal of this trend in the future.

Richards H. Ford, managing partner in Wicker Smith's Orlando office, has tried over 100 civil jury trials, including professional negligence, products liability, construction litigation, medical malpractice, automobile liability, transportation liability and general civil litigation cases. He is a board-certified civil trial lawyer and civil trial specialist with the National Board of Trial Advocacy.

Michael R. D'Lugo, a partner in Wicker Smith's Orlando office, has handled over 100 appeals in state and federal court, including the United States Supreme Court, the Florida Supreme Court, the Eleventh Circuit Court of Appeals, and each of Florida's District Courts of Appeal. He is Board Certified by the Florida Bar in Appellate Practice.

Avoid Malpractice by Asserting Admiralty Law Claims

Robert Shannon and Kevin Abernethy Hall Booth Smith & Slover, P.C.

Imagine your client sends you a products liability claim. The suit involves stoves that exploded while being transported on a ship on a river. The explosion caused serious injury to several people on board. The first thing you check is when the incident occurred in order to determine whether or not the statute of limitations has run. Fortunately, if you are a defense attorney, the accident occurred two and a half years ago and your state, like most, has a two year statute of limitations on personal injury claims. Unfortunately, if you are the plaintiff's attorney, you are barred from filing suit.

The clients are advised accordingly: there is no claim; the statute of limitations has run. The corporation closes its file, and the potential plaintiff walks away without remedy. However, the potential plaintiff does not like hearing "no" for an answer and decides to seek a second opinion. The second plaintiff's attorney tells the injured plaintiff it is a great case: clear liability. The plaintiff asks why the state's two year statute of limitations will not prevent the filing. His attorney tells him, "Hey, not a problem. We can assert an admiralty claim and admiralty law has a three year statute of limitations for maritime tort. Also, by the way, you have a potential malpractice claim against your first lawyer."

The products liability suit is filed. The first plaintiff's attorney is sued for malpractice. The corporate client fires its defense lawyer and sues him for malpractice. Sound far fetched? It is not.

We recently defended a lawyer who was being sued for legal malpractice due to his failure to assert admiralty law claims. This lawyer did not practice in a coastal city and was not representing an entity connected to shipping, the ocean, or any obvious maritime activity. He was an experienced, successful, and well-respected trial lawyer. Nonetheless, his former client sued him because he failed to assert an admiralty law claim in a complaint, and therefore, was not able to take advantage of the three year statue of limitations for wrongful death actions in admiralty law / maritime tort. 46 U.S.C. App. § 763(a).

This is serious business. Admiralty law has a number of nuances that can dramatically change the shape of litigation. For example, there is the *Pennsylvania* Rule. The *Pennsylvania* Rule shifts the burden of proving tort liability from plaintiff to defendant. The *Pennsylvania* rule, "shift(s) to the defendant the burden of disproving the causation…". See generally Poulis-Minott v. Smith, 388 F.3d 354, 363 (2004). Another "gottcha" in Admiralty law is it recognizes pure comparative fault. Lewis v. Timco, Inc., 716 F.2d 1425 (1984). Pure comparative fault is a departure from the statutory scheme enacted in most jurisdictions.

This article is intended to place lawyers on notice of potential admiralty law claims and provide a survey of the same.

BACKGROUND

Admiralty law is a uniform set of rules for governing the activity of navigable waterways. Damages and remedies found in

admiralty law have "no requirement that the maritime activity be exclusively commercial." Foremost Insurance v. Richardson, 457 U.S. 668, 674, 102 S.Ct. 2654 (1982). The U.S. Supreme Court in Foremost also held the negligent operation of a vessel on navigable waters—including a pleasure boat—"has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction."

1. Navigable Waterway Defined

The traditional domain of admiralty law is the sea over all "navigable waters." The determination of "navigability" is usually a question of fact. The test for resolving this issue of fact is the presence of an "interstate nexus", i.e., the waterbody in question must be available as a continuous highway for commerce between ports and places in different states (or between a state and foreign country). Additionally, substantive admiralty law applies to waterbodies that have "navigability-in-fact", i.e., they must be used or capable of being used for the "customary modes of trade and travel on water"—this is met by the proof of present or potential commercial shipping.

2. Vessels Defined

Vessels are defined as structures built to transport goods and passengers over water. 1 U.S.C. § 3. Navigable waters for purposes of admiralty jurisdiction are waters that are used, or could be used, as an artery of commerce. Adams v. Montana Power Co., 528 F.2d 437, 440 (1975). Accordingly, there are no impediments, for example, to plaintiff seeking relief under admiralty tort law for a wrongful death that resulted from a purely recreational boating activity on a navigable waterway.

By way of example for the broad nature of admiralty jurisdiction, if an aircraft transporting passengers or goods over navigable waters crashes at sea due to engine failure, the resultant claims for property damages and personal injury and death will be within admiralty jurisdiction. Smith v. Pan Air Corp., 684 F.2d 1102, 111, 1983 AMC 2836 (5th Cir. 1982); Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 1974 AMC 1341 (8th Cir. 1972).

PROCEDURE

Like traditional tort cases, plaintiffs must establish personal jurisdiction over the defendant(s). Courts acquire personal jurisdiction, in admiralty cases, when plaintiffs properly serve defendant(s) with process pursuant to a statute or rule, and the service does not violate standards or due process. Hedrick v. Daiko Shoji Co., 715 F.2d 1355 (9th Cir. 1983). Due process is determined primarily by whether or not there are "minimum contacts" between the defendant and the forum. Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 2002). State and federal courts are bound by due process limits under admiralty jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Importantly, under Bell v. Hood, 327 U.S. 678 (1946), if a complaint seeks admiralty jurisdiction, then the Court must entertain the suit and can only dismiss the action for failure to state a claim.

Subject matter jurisdiction is conferred to the federal district courts. 28 U.S.C. § 1333. Claims in maritime law may be based on federal question, diversity, or FRCP 9(h). However, admiralty claims are not federal question cases. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). If there are multiple bases for federal jurisdiction, then a claimant may specifically assert admiralty jurisdiction based on FRCP 9(h); this triggers special remedies found within maritime law. For example, there are special remedies to enforce cargo claims, mortgage foreclosures, claims for seamen's wages, collision damages, supplies, repairs, pilotage, salvage, towage, wharfage, stevedoring, breach of a charter party, unseaworthiness, and/or maintenance and cure.

SUBSTANTIVE AREAS OF LAW

The substantive law applicable in admiralty cases is generally the federal maritime law. Federal maritime law comes from both statutes passed by Congress and case law. The four primary categories of substantive admiralty law are: 1) the General Maritime law; 2) Federal statutes; 3) International Agreements; and 4) some state law.

1. Products Liability

When a vessel is involved in an accident on navigable water, then admiralty jurisdiction probably exists. The fact the defective product was manufactured on land or the wrongful act occurred on land is of no significance. For the maritime relationship to exist, it is enough that the allegedly defective product in fact causes an accident involving a vessel or inflicts damage or personal injuries on navigable waters. Sperry Rand Corp. v. Radio Corp. of America, 618 F.2d 319 (5th Cir. 1980).

The products liability theory may also be employed when defective machinery causes personal injury or death without damage to a vessel. Admiralty tort jurisdiction is present if the injury occurred on navigable waters and there is a significant relationship to maritime activity. Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969).

2. Wrongful Death

Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, is the leading U.S. Supreme Court case on wrongful death actions under admiralty law. Yamaha holds when a nonseafarer (a person who is neither a seaman nor a longshoreman) is killed within state waters (generally within three nautical miles of shore), the remedies under general maritime law can be supplemented by state law remedies, including state statutory wrongful death and survival remedies. A limit on the applicability of such state law remedies, however, is that they do not conflict with or alter the essential character of maritime law.

3. Damages

The damages under admiralty law look at three basic factors: 1) loss of earning capacity; 2) medical and other expenses; and 3) pain and suffering.

Punitive damages can also be awarded in maritime claims. To recover punitive damages the claimant must show deliberate wrongdoing—willful, wanton, grossly negligent, or unconscionable conduct so as to show callous disregard for the rights of others.

CONCLUSION

When a suit involving a potentially navigable waterway comes across your desk, think about admiralty law. Its application is broad and, in some instances, may provide you better remedies or defenses. Asserting it may also prevent a legal malpractice claim against you.

Robert Shannon is a senior partner at Hall Booth Smith & Slover. His practice concentrates on large, complex litigation and international transactions; he has tried over forty cases to a jury. Mr. Shannon is a Brigadier General who serves in the Georgia Air National Guard.

Kevin Abernethy is an attorney at Hall Booth Smith & Slover. He is a general litigator who has successfully handled a variety of cases from trial through appeal. Mr. Abernethy has extensive trial experience throughout the southeast. His practice concentrates on high exposure cases.

Firms on the Move

New Hampshire USLAW Firm **Gallagher, Callahan & Gartrell, P.C.** congratulates Shareholder-Director R. Matthew Cairns on beginning a one-year term in October 2010 as President of DRI – The Voice of the Defense Bar. Mr. Cairns represents the interests of individuals, insurers, manufacturers, transportation and other companies in diverse commercial, complex and traditional litigation matters in all state and federal courts.

The Chair of USLAW Indiana member firm **Bingham McHale**'s Appellate Practice Group, Karl Mulvaney, was selected by Indiana's Judicial Nominating Commission as one of three finalists whose name was submitted to the Governor of Indiana as a candidate to fill a vacancy on Indiana's Supreme Court.

Gary Zhao, a partner in **SmithAmundsen**'s Chicago office, received the prestigious Asian American Bar Association's Member of the Year award at this year's Installation Ceremony and Reception. Mr. Zhao was recognized for his professional achievement as an attorney, his mentoring of law students, and his pro bono service to AABA's Chinatown legal clinic and the Chicago Volunteer Legal Services.

Donald L. Myles, Jr., a partner at **Jones, Skelton & Hochuli, P.L.C.**, was recently elected a Vice President for the Federation of Defense and Corporate Counsel (FDCC).

Corporate Counsel's annual survey of Fortune 500 Companies has identified **Murchison & Cumming, LLP** as a Go-To Law Firm® in the Litigation category. The firm was nominated by Avis Budget Group, Inc., which operates two of the major brands in the global vehicle rental industry.

USLAW Minnesota member **Larson • King** welcomed David C. Linder to the firm in May. David was a founding member of Larson • King and returns to Minnesota after practicing for a number of years and serving as Managing Partner of the Chicago office of the international law firm Lovells. David represents domestic and foreign insurance and reinsurance companies in complex litigation and arbitration proceedings. He also focuses his practice on environmental and business disputes.

Michael McCormack of **Hinckley, Allen & Snyder** in Hartford, Connecticut has been appointed Vice Chair of the Insurance Law Committee of the Connecticut Bar Association, a group comprised of private practice attorneys and insurance company representatives who practice in the area of insurance law and coverage. In his insurance coverage and recovery practice, Mr. McCormack counsels clients on insurance coverage issues and represents clients in insurance coverage and recovery litigation, as well as bad faith litigation.

Ray McNamara a shareholder with **Copeland, Cook, Taylor & Bush, PA** (Ridgeland, MS) was recently named Vice President for the Southeast Region of the American Board of Trial Advocates ("ABOTA"), at its regional meeting in Nashville this year. The Southeast Region of ABOTA is comprised of 12 chapters from Virginia to Louisiana. ABOTA, comprised of plaintiff and defense lawyers with significant trial experience, serves to preserve the right to a trial by jury, and to enhance the legal profession by promoting professionalism and civility in the practice of law.

Andrea M. Bartko of **Pietragallo Gordon Alfano Bosick & Raspanti** of Pittsburgh, PA assisted a large, national company in obtaining official certification as a women-owned business (WBE). This nationwide certification will allow the client to more fully participate in markets where customers who contract with federal and state government organizations are required to utilize such certified businesses for outside vendor work.

Patricia Rocha and Nicole Dulude of USLAW Rhode Island Member **Adler Pollock & Sheehan** co-authored the Rhode Island chapter of the new book "A Practitioner's Guide to Class Actions" published by the American Bar Association. The book is a comprehensive guide providing practitioners with an understanding of the intricacies of a class action lawsuit and includes a state-by-state analysis. The Rhode Island chapter provides practitioners with an analysis of the ways in which Rhode Island Rule of Civil Procedure 23 differs from its federal counterpart.

Wicker, Smith, O'Hara, McCoy and Ford P.A., is pleased to announce that Richard E. Ramsey, senior partner in the Jacksonville, Florida office, has been inducted as a Board Certified Civil Trial Lawyer by the National Board of Trial Advocacy (NBTA). Board Certification through the NBTA is a rigorous approval process that officially recognizes the extensive education and courtroom experience of the attorney.

James D. Myrick of **Buist Moore Smythe McGee P.A.** (Charleston, SC) became chair of the ABA/TIPS Business Litigation Committee. Myrick is serving a one-year term that will conclude at the close of the association's 2011 Annual Meeting Aug. 10 in Toronto. Mr. Myrick has previously served the ABA/TIPS Business Litigation Committee as Vice-Chair and Chair-Elect.

Welcome New Members

CENTRAL LAW CENTRAL AMERICA AND DOMINCAN REPUBLIC

Central Law has recently been selected as USLAW NETWORK' Central American and Dominican Republic Affiliate. The firm includes more than 100 lawyers and is the only regional law firm in Central America and the Caribbean with eleven offices in seven countries including Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama and the Dominican Republic. The distinctive characteristic of Central Law is multinational coordination, which allows clients to manage their legal needs for the seven countries from a single contact point, at the office of their choice.

Central Law is a full-service law firm, with particular strength in General Corporate, M&A/Transactions, Litigation, IP, Environmental Law, and Free Trade among others. Central Law is proud to assist very prestigious international clients, such as: 3M, Abbott Laboratories, AES, Alcatel-Lucent, AmBev, Ashmore Energy, Bacardi, Benetton, British Telecom, Bristol Myers Squibb, Andrade Gutierrez, Ericsson, ExxonMobil, France Télecom, GNC, Honda, Howard Johnson, IFC, Jasper Energy, Marriott, McDonald's, Mizuho Bank, MCI, Microsoft, Mitsubishi, Motorola, Panasonic, Radisson, RDC, Roche, Sandals, Scotiabank, Standard Bank of London, World Bank, Yamaha, and U.S. embassies in the region.

"Central Law is very proud to be announced as an affiliate of USLAW" stated Mario Bucaro, Central Law's Managing Partner. "USLAW is one of the most important legal networks in America and we are committed to providing the high level service clients expect throughout the region."

RATTAGAN MACCHIAVELLO AROCENA & PENA ROBIROSA ABOGADOS ARGENTINA

Rattagan Macchiavello Arocena & Pena Robirosa Abogados, a leading international full-service Argentinean firm based in Buenos Aires, has become USLAW NETWORK's first South American based member law firm.

The firm includes more than 40 lawyers and has been considered by several different legal and business publications as one of the top five firms in the country. The firm's primary areas of practice include mergers and acquisitions; corporate law; the environment; mining; oil and gas; energy; government relations; infrastructure; construction and real estate; antitrust law; labor and social security law; securities and capital markets; debt restructuring and bankruptcy; complex litigation; damages; banking and finance, trusts and foreign exchange; insurance and reinsurance; intellectual property; tax and customs law; arbitration; and aeronautic law.

Rattagan Macchiavello represents several of the top multinational companies on its investments in Argentina including several from the U.S., Europe, Brazil and Asia, as well as different Argentine companies investing and doing business both in Argentina and abroad.

"All my partners are very enthusiastic about joining such a prestigious network," stated Jun Martin Arocena. "We are certain that our clients will benefit greatly from our association with USLAW NETWORK, and the fact of being able to provide them high quality professional services in all the U.S. and Europe. Our firm is the first South American law firm to join USLAW and we expect to be able to contribute in its expansion throughout our region."

ABOUT USLAW

In today's global marketplace, legal needs often transcend geographic boundaries.Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States.

When a complex legal matter emerges — whether it's in a single jurisdiction or nationwide — USLAW is there. We represent some of the country's leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is a national organization composed of over 65 independent, defense-based law firms with over 4,000 attorneys covering the United States and Latin America. Among the firms, there are over 150 offices in 47 US states. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us access to 25 European law firms each representing its own jurisdiction and a similar relationship with ALN Limited enables USLAW to partner with 10 firms in East and Central Africa.

USLAW NETWORK law firms:

- Are fully vetted and subject to a rigorous review process prior to admission;
- Become part of the USLAW NETWORK by invitation only;
- Possess broad commercial legal capabilities;
- Have substantial litigation and trial experience.

Using a USLAW NETWORK firm provides clients with national access to some of the best trial lawyers in the country when needed for the litigation and trial of complex, difficult issues and cases. These law firms are highly skilled at early case evaluation and resolution, when possible, while providing cost effective representation.

The commitment of member firms is to provide high quality legal representation to major corporations, captive insurance companies, insurance carriers, and to both large and small businesses across the United States.

USLAW NETWORK is founded on the relationship between its lawyers and their clients throughout the organization.

Working with USLAW NETWORK firms helps clients:

- Streamline the law firm procurement process;
- Access top-quality CLE and ongoing legal education opportunities through our Spring and Fall client conferences, regional meetings, and virtual programs.
- Access a variety of USLAW-sponsored resources, including our Rapid Response Handbook, our web site and a series of compendiums on US law and other issues.

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USLAW NETWORK firms and their member attorneys include:

- Lawyers who have the highest professional and ethical standards exemplified by the "AV" rating in Martindale-Hubbell
- Lawyers who are active members as well as presidents and past-presidents of various industry and trial organization, including:
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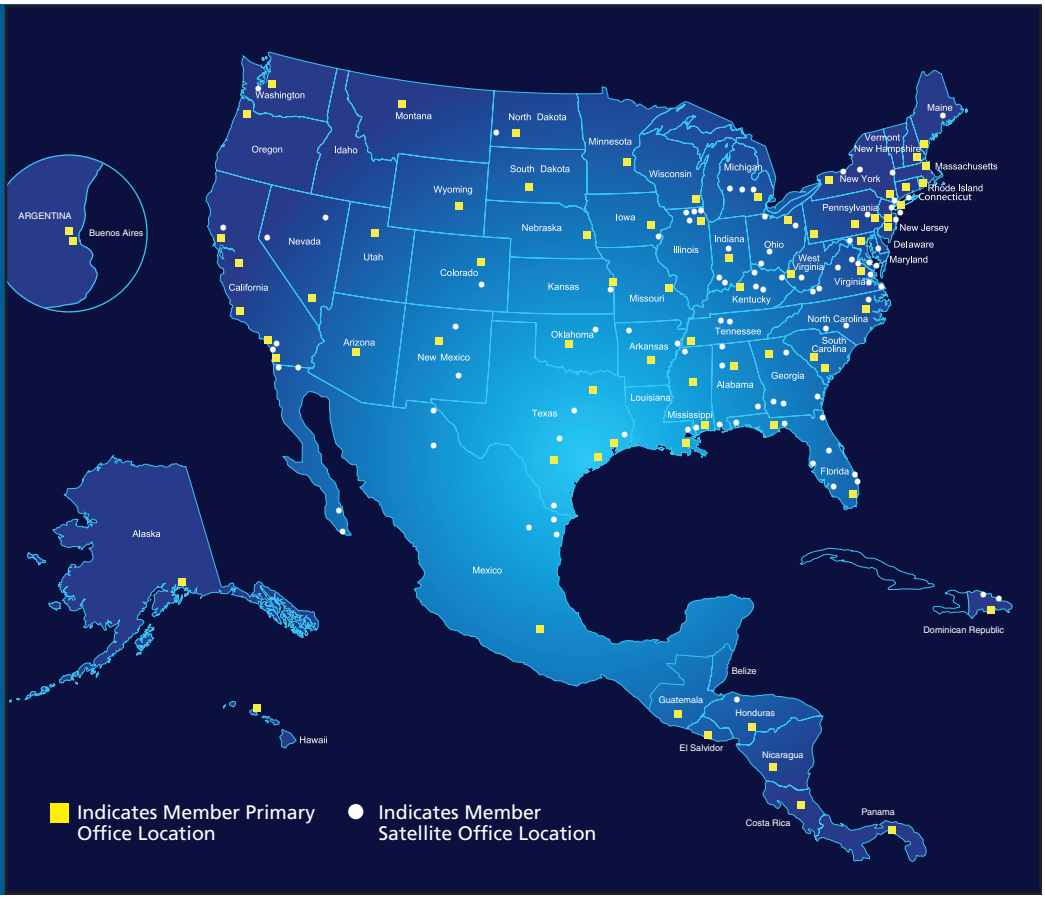
  - American College of Trial Lawyers
  - Federation of Defense and Corporate Counsel
  - International Association of Defense Counsel
  - Association of Defense Trial Attorneys
  - Defense Research Institute
  - Professional Liability Underwriting Society
  - American Bar Association
  - Local associations of defense and trial counsel in their respective states



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jcb@robinsonwood.com

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bsnyder@snyderlaw.com

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nallen@haslaw.com

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Nicholas E. Christin.....(305) 448-3939
nchristin@wickersmith.com

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Carr Allison
Christopher Barkas.....(850) 222-2107
cbarkas@carrallison.com

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tbenedict@goodsill.com

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kvisser@simmonsperrine.com

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msr@gdm.com

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Michael R. Sistrunk.....(504) 846-8338
msistrunk@mcsalaw.com

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dscully@clarkhill.com

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msolheim@larsonking.com

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dbagwell@carrallison.com

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J. Tucker Mitchell.....(601) 856-7200
tmitchell@cctb.com

MISSOURI | KANSAS CITY
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Robert P. Numrich.....(816) 360-8102
bnumrich@batyholm.com

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Stephen L. Beimdiek.....(314) 436-8303
sbeim@lashlybaer.com

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max.davis@dhhtlaw.com

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jrackerman@bairdholm.com

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Brian K. Terry.....(702) 366-0622
bterry@thorndal.com

NEW HAMPSHIRE | CONCORD
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R. Matthew Cairns.....(603) 545-3622
cairns@gcglaw.com

NEW JERSEY | ROSELAND
Connell Foley LLP
Kevin R. Gardner.....(973) 533-4222
kgardner@connellfoley.com

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Clyde & Co US LLP
Jeffrey L. O'Hara.....(973) 210-6720
Jeffrey.Ohara@clydeco.us

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Douglas G. Schneebeck.....(505) 848-1869
dschneebeck@modrall.com

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Michael Rabus.....(646) 536-5748
michael.rabus@admlaw.com

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Neil A. Goldberg.....(716) 566-5475
ngoldberg@goldbergsegalla.com

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Stephen D. Straus.....(914) 347-2600, ext. 705
sstraus@traublieberman.com

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Poyner Spruill LLP
Randall R. Adams.....(252) 972-7094
rradams@poynerspruill.com

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Ebeltoft . Sickler . Lawyers
Randall N. Sickler.....(701) 225-5297
rsickler@eskgb.com

OHIO | CLEVELAND
Roetzel & Andress, LPA
Bradley A. Wright.....(330) 849-6629
bwright@ralaw.com

OKLAHOMA | OKLAHOMA CITY
Pierce Couch Hendrickson Baysinger & Green, L.L.P.
Gerald P. Green.....(405) 552-5271
jgreen@piercecouch.com

OREGON | PORTLAND
Williams Kastner
Eric J. Neiman.....(503) 944-6943
eneiman@williamskastner.com

PENNSYLVANIA | HARRISBURG
Thomas, Thomas & Hafer LLP
Todd B. Narvol.....(717) 237-7133
tnarvol@tthlaw.com

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Sweeney & Sheehan, P.C.
Warren E. Voter.....(215) 963-2439
warren.voter@sweeneyfirm.com

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Pietragallo Gordon Alfano Bosick & Raspanti, LLP
Joseph J. Bosick.....(412) 263-1828
JJB@pietragallo.com

RHODE ISLAND | PROVIDENCE
Adler Pollock & Sheehan P.C.
Richard R. Beretta, Jr.....(401) 427-6228
rberetta@apslaw.com

SOUTH CAROLINA | CHARLESTON
Buist Moore Smythe McGee P.A.
James (Jim) D. Myrick.....(843) 720-4643
jmyrick@buistmoore.com

SOUTH CAROLINA | COLUMBIA
Sweeny, Wingate & Barrow, P.A.
William O. Sweeny, III.....(803) 256-2233
wos@swblaw.com
Mark S. Barrow.....(803) 256-2233
msb@swblaw.com

SOUTH DAKOTA | PIERRE
Riter, Rogers, Wattier & Northrup, LLP
Robert C. Riter.....(605) 224-5825
r.riter@riterlaw.com

TENNESSEE | MEMPHIS
Martin, Tate, Morrow & Marston, P.C.
Lee L. Piovarcy.....(901) 522-9000
lpiovarcy@martintate.com

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Donean Surratt.....(409) 838-6412
sds@obt.com

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Fee, Smith, Sharp & Vitullo, L.L.P.
Michael P. Sharp.....(972) 980-3255
msharp@feesmith.com

TEXAS | HOUSTON
Johnson Trent
John E. Spalding.....(713) 222-2323
jspalding@johnsontrent.com

TEXAS | SAN ANTONIO
Cox Smith Matthews Incorporated
Brett W. Schouest.....(210) 554-5269
bwschoue@coxsmith.com

UTAH | SALT LAKE CITY
Strong & Hanni, PC
Stanford P. Fitts.....(801) 323-2014
sfitts@strongandhanni.com

VIRGINIA | RICHMOND
LeClairRyan
Charles G. Meyer, III.....(804) 783-7535
cmeyer@leclairryan.com

WASHINGTON | SEATTLE
Williams Kastner
Sheryl J. Willert.....(206) 628-2408
swillert@williamskastner.com

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Huddleston Bolen LLP
Richard J. Bolen.....(304) 691-8420
rbolen@huddleston bolen.com

WISCONSIN | MILWAUKEE
SmithAmundsen, LLC
Patrick J. Lubenow.....(414) 282-7103
plubenow@salawus.com

WYOMING | CASPER
Williams, Porter, Day and Neville PC
Margo H. Sabec.....(307) 265-0700
msabec@wpdn.net

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Rattagan, Macchiavello, Arocena &
Peña Robirosa Abogados SC
Juan Martin Arocena.....+(5411) 4010-5007
jma@rmlex.com

CENTRAL AMERICA AND THE DOMINICAN REPUBLIC
Central Law
Mario Bucaro.....+(502) 2383-6000
mbucaro@central-law.com

MEXICO | MEXICO CITY
Bryan Gonzalez Vargas & Gonzalez Baz
Aureliano (Kir) M. Gonzalez-Baz.....+52 (55) 5279-3601
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J. Kenneth Corwin, National Account Executive
Email: jcorwin@sealimited.com
7349 Worthington-Galena Road, Columbus, OH 43085
Phone: (614) 888-4160, Fax: (614) 885-8014

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Phone: (215) 546-5600, (800) 966-6099,
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The Center for Forensic Economic Studies is a leading provider of economic and statistical analysis and expert testimony. Center economists analyze damages and liability issues in injury and death matters, mass torts, commercial litigation, employment actions and insurance-related issues. In addition, the Center consults in non-litigation areas such as labor-law compliance, business valuation, feasibility studies and wage negotiation.

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www. uslegalsupport.com
Charles F. Schugart, President & CEO
Email: cfschugart@uslegalsupport.com
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Phone: (832) 201-3834, Fax: (713) 653-7172

Pete Giammanco
Division President - CA Reporting
Email: pgiammanco@uslegalsupport.com
15250 Ventura Boulevard, Suite 410,
Sherman Oaks, CA 91403
Phone: (818) 995-0600, Fax: (818) 880-4248

LeeAnn Watson, Divisional President - TX Records & Reporting
Email: lwatson@uslegalsupport.com
363 N. Sam Houston Parkway E., Suite
900, Houston, TX 77060
Phone: (832) 201-3872, Fax: (713) 653-7172

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USLAW AND ALN JOIN FORCES

This summer, USLAW NETWORK and ALN (Africa Legal Network) formed a cooperative affiliation to better serve their member firms' clients.

The relationship between USLAW and ALN will enhance the ability of each organization to meet their mutual goals of quality, service and reach. The two organizations will promote their relationship through their various business development and communication efforts and will be invited to participate in each other's meeting and events.

ALN is a close association of law firms in Botswana, Burundi, Ethiopia, Kenya, Mauritius, Mozambique, Rwanda, Tanzania, Uganda and Zambia founded by Anjarwalla & Khanna Advocates.

The member firms include Collins Newman & Co (Botswana), A&JN Mabushi (Burundi), Teshome Gabre-Mariam Bokan Law Office (Ethiopia), Anjarwalla & Khanna (Kenya), BLC Law Chambers (Mauritius), Fernanda Lopes & Associados (Mozambique), Kamanzi, Ntaganira & Associates (Rwanda), Adept Chambers (Tanzania), MMAKS (Uganda) and Musa Dudhia & Company (Zambia) are all rated as leading firms in their respective jurisdictions.

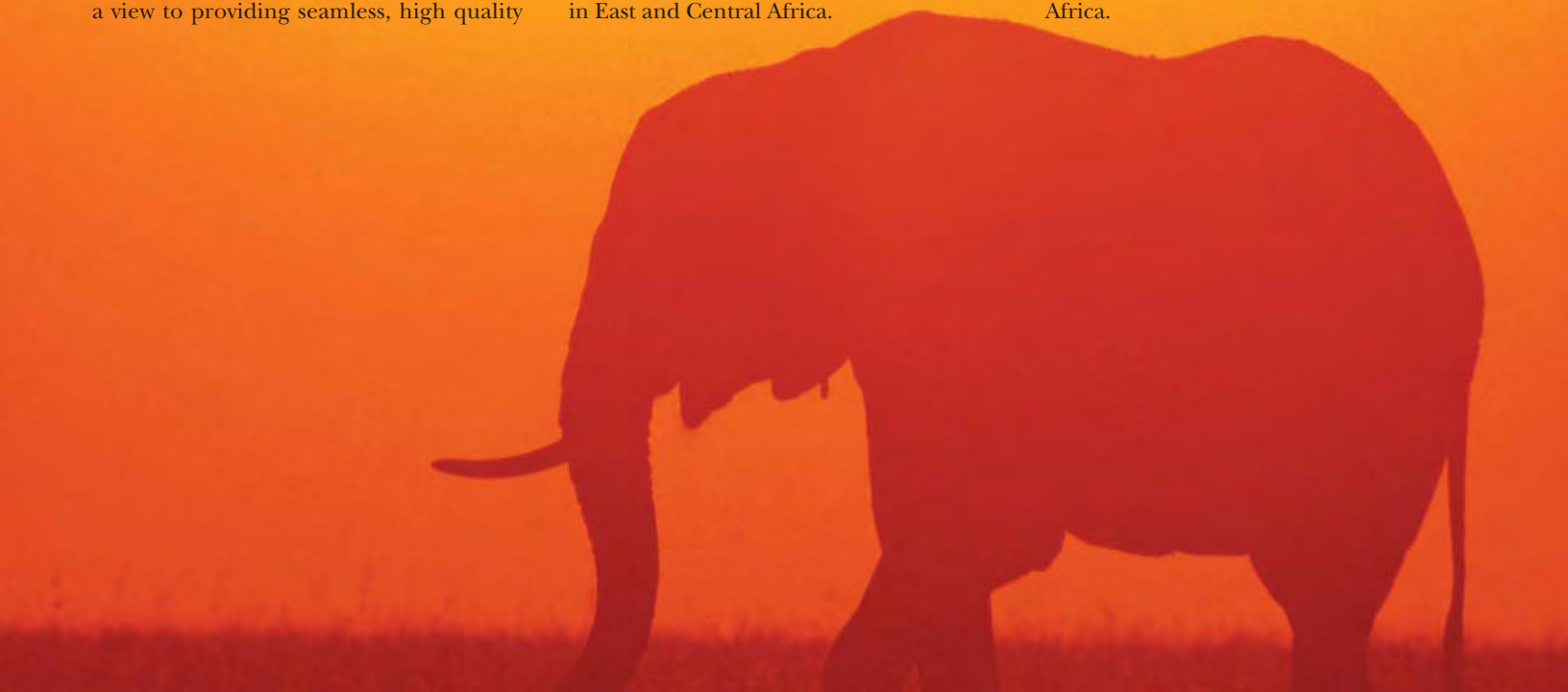
Africa Legal Network was created with a view to providing seamless, high quality and efficient legal services to clients in the countries that Africa Legal Network is currently located as well as to those who may from time to time require legal advice in one or more jurisdictions. The association is structurally set up to operate as if it were one firm. It is the only association of its kind in East and Central Africa.

In this regard, the member firms of Africa Legal Network work very closely together. For example, the member firms:

- Share library and precedent resources;
- Operate similar accounting and time recording programmes;
- Undertake joint professional training and development and second staff to each other on a transactional as well as a longer-term basis;
- Operate common marketing and administrative systems; and
- Operate similar quality assurance methods.

Increasingly, the member firms of Africa Legal Network work together on multi-jurisdictional assignments which require the specialist skills in the country of one member firm of a lawyer in another member firm. The member firms also regularly work together on large transactions which require a team of professionals, for example, due diligence exercises and large mergers and acquisitions.

Each member firm of Africa Legal Network aims to be a leading provider of corporate and commercial legal services in its country resulting in Africa Legal Network being the leading provider of corporate commercial services in East and Central Africa.



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