

MARCH 2008 e-BULLETIN

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DAVIS WRIGHT TREMAINE'S REAL ESTATE AND LAND USE GROUP EXPANDS WITH ADDITION OF JOHN BENAZZI

PORTLAND, ORE., Mar. 11, 2008 – Davis Wright Tremaine LLP (DWT) announced today that John B. Benazzi has joined the Portland office as an associate in its real estate and land use practice. Benazzi most recently practiced at McEwen Gisvold LLP, where he represented clients in purchases and sales of real property, real estate finance, commercial leasing, environmental issues and land use matters.

Prior to his tenure with McEwen Gisvold, Benazzi spent time as a law clerk with the Oregon Land Use Board of Appeals, writing draft decisions, researching land use issues and assisting in preparation for oral argument. He also draws on his past professional experience as a geologist and environmental consultant with companies in Virginia and Oregon, which included directing and conducting field investigations of various subsurface contaminants and preparing environmental site assessments for real property transactions.

"Bringing John in adds great value to the services we provide to our clients," said Gene Grant, co-chair of the firm's Real Estate, Land Use and Construction practice group. "His experience working on real estate transactions as well as land use and environmental issues allows us to be flexible and cost-efficient in how we handle work for our clients."

Benazzi also actively serves the community, working as a board member since 2006 for CASA for Children – a local organization committed to advocacy for children who have been abused or neglected and become wards of the juvenile court system.

Benazzi obtained his J.D. from the University of Oregon School of Law in 2004 and a B.S. in geology from Washington and Lee University. He is licensed to practice in Oregon.

For additional information visit www.dwt.com

About Davis Wright Tremaine LLP

Davis Wright Tremaine LLP is a business, litigation and regulatory law firm with approximately 500 attorneys in nine offices: Seattle and Bellevue (Wash.), Portland (Ore.), Los Angeles, San Francisco, New York, Washington, D.C., Anchorage (Alaska) and Shanghai, China.

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FRASER MILNER CASGRAIN ANNOUNCES 18 PARTNERS

Promotions reflect regional strength across Canada

(Toronto, Canada, February 11, 2008) – Fraser Milner Casgrain LLP (FMC), one of Canada's leading business and litigation law firms, has announced the admission of 18 new partners in its offices. The new partners have all been promoted from within the firm and represent expanded depth in FMC's corporate | commercial, financial services, litigation & dispute resolution, securities | corporate finance, tax, mergers & acquisitions, employment & labour, real estate, and corporate governance practices across Canada.

Montréal

Maxime Cloutier
Gentiane Joyal
Jenny Ross
Margaret Weltrowska

Edmonton

Adrian Elmslie
Jonathan Hillson
John Stavropoulos

Calgary

Anne Calverley
Eugene Chen
David Kitchen

Toronto

Mark Evans
Eric Hoffstein
Blair McCreadie
Linda Missetich
Zahra Nurmohamed

Vancouver

Alan Hutchison
Ron Stuber

Admitted to the partnership are:

"At Fraser Milner Casgrain, our people are our greatest strength, and our 18 new partners clearly demonstrate that," says Michel Brunet, FMC's Chair and Chief Executive Officer. "Their admission to the partnership illustrates the local strength of our offices, and FMC's diverse expertise across Canada."

About Fraser Milner Casgrain LLP

For more than 165 years, Fraser Milner Casgrain LLP has distinguished itself as one of Canada's leading business and litigation law firms. With more than 500 lawyers in Canadian offices in Montréal, Ottawa, Toronto, Edmonton, Calgary, Vancouver and an office in New York, FMC offers the essential depth of experience and trusted legal advice to anticipate clients' needs and help them succeed.

For more information visit www.fmc-law.com.

HOGAN & HARTSON PROMOTES SEVEN TO PARTNERSHIP

WASHINGTON, D.C., February 4, 2008 - Hogan & Hartson LLP has announced the elevation of seven counsel to the partnership, effective January 1, 2008. Collectively, these new partners represent six practice areas and four offices worldwide.

"Each of these talented lawyers has been instrumental in the successful growth of our firm's global presence," said Hogan & Hartson Chairman J. Warren Gorrell, Jr. "We are proud of their achievements and their commitment to our firm."

The following counsel were elevated to the partnership:

Berlin

Sascha Herms – Corporate, Securities and Finance, Labor and Employment, Litigation

Los Angeles

Rachel M. Capoccia – Intellectual Property, Litigation

Moscow

Alla Naglis – Corporate, Securities, and Finance, Intellectual Property

Washington, D.C.

Stuart M. Altman – Litigation

Steven B. Datlof – Food, Drug, Medical Device, and Agriculture

Stephanie J. Gold – Education

Douglas B. Paul – Litigation

For more information about the firm, [visit www.hhlaw.com](http://www.hhlaw.com)

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,100 lawyers in 22 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries.

Hogan & Hartson has offices in Baltimore, Beijing, Berlin, Boulder, Brussels, Caracas, Colorado Springs, Denver, Geneva, Hong Kong, London, Los Angeles, Miami, Moscow, Munich, New York, Northern Virginia, Paris, Shanghai, Tokyo, Warsaw, and Washington, D.C.

NAUTADUTILH APPOINTS 2 LUXEMBOURG PARTNERS

Leading Benelux law firm NautaDutilh is pleased to announce the appointment of Jean-Marc Groelly and Jean-Michel Schmit, as partners in the firm's Luxembourg office, NautaDutilh Avocats Luxembourg.

Jean-Marc Groelly is a specialist in international tax law who advises on structured finance, M&A, private equity and real estate transactions. He joined NautaDutilh in January 2006, having spent over six years working in Luxembourg for Anglo-American law and consultancy firms.

Jean-Michel Schmit is an experienced corporate lawyer who has been working with Linklaters in Luxembourg for 11 years. He will join NautaDutilh in March 2008. He specialises in private international M&A transactions and is active in the private equity market.

Pieter Elias, head of NautaDutilh's Luxembourg office said, "*We are delighted with the promotion of Jean-Marc Groelly and appointment of Jean-Michel Schmit as partners. This is a reflection of the rapid expansion of the Luxembourg office, and particularly our focus on high quality client service in the fast growing Luxembourg legal market*".

NautaDutilh has recently moved into larger premises at the Rue Jean Bertholet in Luxembourg to accommodate their continuing expansion.

For more information please [visit www.nautadutilh.com](http://www.nautadutilh.com)

About NautaDutilh

NautaDutilh is one of the leading independent law firms in the Benelux and one of Europe's pre-eminent law firms. It is the largest law firm in the Benelux market with 400 lawyers, civil law notaries and tax advisers in offices in Amsterdam, Rotterdam, Luxembourg, Brussels, London and New York.

NautaDutilh works in close cooperation with leading law firms worldwide on a non-exclusive basis. The firm provides a broad range of high-level legal services and advises a wide variety of clients on complex transactions and legal issues. NautaDutilh is recognized by the major international legal directories, The European Legal 500 and Chambers' Global Directory, both of which recommend NautaDutilh as a leading firm in the Benelux markets.

LOVELLS BOOSTS CHINA COMPETITION LAW CAPACITY

3 March 2008

COMPETITION LAW SPECIALIST KIRSTIE NICHOLSON MOVES TO LOVELLS' SHANGHAI OFFICE AHEAD OF CHINA'S NEW ANTI-MONOPOLY LAW COMING INTO FORCE ON 1 AUGUST 2008

Currently based in Brussels, Of Counsel Kirstie Nicholson will move to Shanghai in April to join corporate partner Andrew McGinty who has been closely involved in the debate surrounding the development of the new Anti-Monopoly Law in China. Kirstie has experience of a wide range of both transactional and contentious competition law proceedings, including merger filings, Commission investigations and litigation before the European Courts. The move to Shanghai will see Kirstie become one of the few competition law experts based in China.

The new Anti-Monopoly Law is generally aligned with major international regimes of competition law, particularly EC Competition Law, so marks an important step toward creating a legal framework for a genuine market economy in China. However, foreign investors have been left pondering whether the current situation, whereby only mergers and acquisitions involving foreign investors are caught by merger controls will be changed into a genuine level playing field. Whilst it is hoped the proposed implementing regulations will clarify many aspects of the new legislation, the need for expert international competition law advice is paramount to the success of significant foreign investments into China. Kirstie joins a team that has been active in advising clients on structuring their businesses to be compliant with the new Anti-Monopoly Law and on potential claims for abuse of IP rights under the new law.

Commenting on the Anti-Monopoly Law and Kirstie's move, Shanghai corporate partner Andrew McGinty, said:

"There are a lot of things which need to happen before domestic and overseas businesses get comfortable with the new system and how it will work; only time will tell whether the system will work in a completely fair, transparent and even-handed way. After this fourteen year long march toward the putting in place of the new anti-monopoly system in China, the watchword may well remain: 'Caveat investor'.

We are delighted to have Kirstie join our team in China and her move reflects the growing demand for competition law advice in China by foreign investors as a consequence of the new legislation. Her experience in advising on EC Competition Law will be invaluable to our clients leading-up to and following the implementation of the Anti-Monopoly Law."

Kirstie added:

"Whilst in many respects the new Anti-Monopoly Law has drawn its inspiration from EC Competition Law there are a number of dynamics at play critical to the development of the law post-August 1. As a competition law specialist this is a fantastic opportunity to apply my expertise in a new legislative regime for the benefit of our clients. "

Commenting further, Asia regional managing partner Crispin Rapinet said:

"We have been closely following the development of the Anti-Monopoly Law in China for many years now, and have been active in the debate surrounding its formulation. We are fortunate to be able to meet the increasing demand for specialist expertise, ahead of the implementation of the new law in August, with a lawyer of Kirstie's calibre and experience.

Lovells is now one of the few international law firms able to offer clients a competition law specialist on the ground in China. Kirstie's background in Brussels will facilitate the effective leverage of our international expertise in handling complex competition issues for our clients.

More generally Kirstie's move continues the expansion of our Corporate practice in China and follows the recent arrival of partner Fred Chang from White & Case along with associates Zhao Ying and Wang Liang."

For additional information visit www.lovells.com

KING & WOOD OPENS SUZHOU OFFICE

King & Wood officially announced the opening of its Suzhou office on January 18, 2008.

Suzhou office is led by Ms. Zhao Xiaohong, partner sent from Shanghai office. Three Partners, four associates and some assistants are working with Suzhou office.

For additional information visit www.kingandwood.com

MUNIZ PROMOTES 3 NEW PARTNERS

Lima, Peru, February 2008

Estudio Muñoz Ramírez Pérez-Taiman & Luna-Victoria is pleased to inform its clients and friends that its lawyers Maritza Reategui Valdiviezo, Augusto Astorga Philippon, and Luis Martinot Oliart have been promoted to partners in recognition of their commitment towards the Firm and clients and their outstanding professional performance.

Maritza Reategui Valdiviezo graduated *summa cum laude* from the Peruvian Catholic University School of Law and earned a Master's Degree in Corporate Law from the University of Lima and a Graduate Diploma in Regulatory Pharmaceutical Matters from the San Marcos University School of Pharmacy. Her practice areas include Intellectual Property and Sanitary Regulation. Ms. Reátegui is an active member of the Lima Chamber of Commerce Cosmetics Committee; the Lima Bar Association Consultative Commission on Industrial Property, Trademarks and Patents; the Inter American Industrial Property Association (ASIPI), and the Peruvian Industrial Property Association (APPI). She also serves as Vice President of the American Chamber of Commerce Intellectual Property Committee and as a Professor at the Graduate Diploma Course given at the San Marcos University School of Pharmacy.

In turn, Mr. Augusto Astorga Philippon graduated *summa cum laude* from the Peruvian Catholic University School of Law and has more than 14 years' experience in the field of foreign investment, specializing in oil and natural gas operations. His practice areas include Natural Resources, Foreign Investment, Administrative Law and Corporate Law. During the last few years, Mr. Astorga has actively participated in major transactions related to the Camisea project and other oil exploration projects carried out in the Jungle.

Moreover, Mr. Luis Martinot Oliart graduated *magna cum laude* from the Catholic University of Peru School of Law and earned a Master's Degree in Finance and Corporate Law from the Graduate School of Business Administration (ESAN). His practice areas include Corporate Law, Mergers and Acquisitions, Bankruptcy Law, Foreign Investment, Real Estate and Contracts. Mr. Martinot has actively participated in acquisition and consolidation processes carried out in the fishery sector, in the development of different real estate projects, and in the financial and corporate restructuring of textile, mining and fishing companies.

For further information please visit www.munizlaw.com.pe

LUCE FORWARD ADDS TO ORANGE COUNTY OFFICE

ATTORNEYS DOUGLAS JEVERTZ AND STEVEN C. KNOBLOCK JOIN LUCE FORWARD

February 11, 2008

Douglas J. Evertz and Steven C. Knoblock have joined Luce Forward in the firm's Real Estate Litigation practice group. Evertz and Knoblock will serve as Partner and Of Counsel, respectively.

"Steven and Doug are both valued attorneys who will strengthen our Orange County office and real estate practice group," said Robert J. Bell, Luce Forward's managing partner. "We are thrilled to have them join us and are sure their expertise will provide additional value and insight for our clients."

Evertz has compiled a remarkable record of litigation successes, having practiced law for more than 20 years. During that time, he has specialized in complex litigation matters across a broad range of subjects including real estate, eminent domain, inverse condemnation, land use, environmental, water and construction matters. While at Luce Forward, he will utilize these areas of expertise to counsel and direct private entities, developers and public agencies.

"I am pleased to be joining the new Luce Forward Orange County Office," Evertz said. "Luce Forward has been around for many years and has established an impressive statewide presence with its portfolio of clients and seasoned lawyers. The Orange County Office is positioned to become one of the preeminent firms in Orange County and I look forward to taking part in its future growth."

Prior to joining Luce Forward, Evertz served as head of the Public Law Litigation Department at Stradling Yocca Carlson & Rauth (SYCR), a full service law firm based in Newport Beach. There he built and directed the Public Law Litigation Department. Serving at SYCR for more than 10 years, Evertz represented cities, counties, other public agencies, developers and investors in a special counsel and litigation capacity.

As an expert in the field, Evertz has been requested and recognized as a frequent speaker for CLE International, the Appraisal Institute, the International Right of Way Association, the California Redevelopment Association, the Building Industry Association and the Los Angeles County Bar Association. He has served as a Judge Pro Tem appointed by the Orange County Superior Court. Evertz received his Juris Doctor degree from the University of Pacific, McGeorge School of Law and his bachelor's degree from the University of San Diego.

Knoblock joins Luce Forward with significant experience, having been heavily involved with real estate insurance matters for the past 25 years. Prior to joining Luce Forward, Knoblock served as Assistant General Counsel, Senior Vice President at Fidelity National Financial, Inc. (FNS), an \$11 billion Fortune 200 company. At FNS, Knoblock was responsible for the leasing operations of more than 2,000 FNS sites nationwide. He interacted with all law firms dealing with fidelity issues nationwide and worked with funds upwards of \$100 million.

"Luce Forward has a great regional network of offices and the firm's specialties interface nicely with my client base," Knoblock said. "The reputation, experience, and level of professionalism of the firm are unsurpassed, and I am eager to enhance Luce Forward's presence in Los Angeles, Orange County and Northern California."

In addition to an impressive employment history, Knoblock has been very active in the community. Not only is Knoblock currently a member of the San Clemente City Council, but he also serves on the Board of Directors for the Orange County Fire Authority, which oversees 23 cities and all unincorporated areas of Orange County. Knoblock is also the Deputy Chair of San Clemente for the Orange County Republican Party, as well as the ex-officio alternate to Dick Ackerman, State of California Republican minority leader.

Knoblock received his Juris Doctor from Western State University College of Law and his bachelor's degree from California State University Long Beach.

Both attorneys will work from Luce Forward's new Orange County office, which opened in August 2007. The firm's other Orange County attorneys had been working from a temporary office location until recently when they moved into Luce Forward's permanent office located at 2050 Main Street, Suite 600, Irvine, CA 92614.

For additional information visit www.luce.com

MORGAN LEWIS ADDS ENERGY AND LATIN AMERICA DEALMAKER TO CORPORATE

LOS ANGELES, March 12, 2008: Morgan Lewis today announced the addition of **Dino T. Barajas**—a corporate lawyer who was named *California Lawyer Magazine's* "Attorney of the Year" for his work in the energy sector—to its corporate practice. He will split his time between the firm's Los Angeles and New York offices. Dino's arrival reflects Morgan Lewis's commitment to a corporate practice capable of meeting the growing legal needs of clients in the energy industry. He joins Morgan Lewis from the Los Angeles office of Paul Hastings, where he was co-head of that firm's Latin American Projects Group.

Various publications have recognized Dino's work as counsel to the sponsor on a number of finance projects. These include the Xacbal power project in Guatemala, recognized by *Latin Finance* magazine as the "Latin American Energy/Power Deal of the Year 2007" and by *Project Finance* magazine as the "Latin American Renewable Energy Deal of the Year 2007." Barajas also sponsored the Rio General power project in Costa Rica, recognized by *The Bank* magazine and the *Financial Times* as "Deal of the Year (Costa Rica) 2007." Additionally, Dino was recognized by *Chambers and Partners USA* as a "Leader in the Field of Project Finance" in 2006 and 2007. Dino has also been praised for his work as lead attorney on various transactions by *ProjectFinance* magazine, including the:

- Tuxpan V Project in Mexico—"Latin American Deal of the Year (Power) 2004";
- Altamira II Project in Mexico—"Latin American Deal of the Year (Power) 2002"; and
- Choloma III Project in Honduras—first runner-up for the "Latin American Deal of the Year (Power) 2004".

Dino joins a Business and Finance Practice that already spans the United States, Europe, and Asia, with more than 300 lawyers focusing on a wide variety of areas, including mergers and acquisitions, private equity, finance, and capital markets. Dino's 15 years of experience in energy transactions complement the firm's robust Energy Practice, which represents clients in every major segment of the industry. In addition to his experience in the U.S. infrastructure market, Dino has worked in virtually every Latin American country and is fluent in Spanish.

Dino has extensive experience representing lenders, investors, and developers in a wide range of domestic and international project financings in numerous sectors, as well as in traditional banking, structured finance, mergers and acquisitions, corporate finance, joint ventures and asset finance transactions. His clients include commercial lenders, institutional investors, investment funds, project sponsors, and public and private companies.

In addition to enjoying a stellar reputation for his work on domestic and international project development and finance, Dino is an active member of the Los Angeles bar and is involved in numerous community organizations. He is a current board member of California Rural Legal Assistance, Inc. and a former board member of the American Red Cross (Greater Los Angeles Chapter) and the Constitutional Rights Foundation.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis, please visit www.morganlewis.com

NISHIMURA & ASAHI ADVISER JOINS FIRM

Nobuhiro Nakayama assumes position as adviser at Nishimura & Asahi

We are pleased to announce that Mr. Nobuhiro Nakayama will assume a position as adviser at Nishimura & Asahi as of April 1, 2008.

Mr. Nakayama is professor of the University of Tokyo Graduate Schools of Law and Politics, and University of Tokyo Faculty of Law until the end of March this year. He has been engaged in various educational and research activities and is a member of a variety of government councils, including the Strategic Council on Intellectual Property and Industrial Structure Council. He is a leading member of the academic community on Intellectual Property Law.

We believe his contribution to the firm will greatly enhance our practice in Intellectual Property Law and further the enhancement of legal practice in Japan.

Nobuhiro Nakayama

Education

1969 The University of Tokyo (LL.B.)

Member

Strategic Council on Intellectual Property

Industrial Structure Council

Industrial Property Council

Council for Cultural Affairs

Council on Customs, Tariff, Foreign Exchange and Other Transactions

Chairman of the Institute of Intellectual Property

For additional information visit www.jurists.co.jp/en/

WILMERHALE

EXPANDS PRESENCE ON WEST COAST WITH NEW LOS ANGELES OFFICE

WilmerHale's Los Angeles office expands the firm's leading securities enforcement and litigation, intellectual property litigation, corporate and transactional, and white-collar defense practices into the Southern California market. The office—our second West Coast location, following our expansion into Palo Alto in 2005—is anchored by Randall Lee, former Regional Director of the Pacific Regional Office of the US Securities and Exchange Commission, who also previously served as an Assistant United States Attorney in Los Angeles.

Mr. Lee's significant high-level government experience—reinforced by WilmerHale's preeminent securities enforcement, litigation, compliance and regulatory practices—will provide unprecedented frontline insight to clients facing serious government investigations and regulatory scrutiny. Mr. Lee will build an LA team that is expected to include members of the firm's corporate and transactional, investigations and white-collar defense, and IP litigation practices, offering clients a strategic blend of the firm's key strengths.

With more than 225 lawyers, WilmerHale's securities practice includes numerous former SEC officials, including former Directors of the Divisions of Enforcement, Market Regulation and Investment Management, and a Deputy Director of the Division of Corporation Finance, as well as former officials from the US Department of Justice, FBI and US Attorneys' Offices. In addition to handling the most significant and complex internal investigations, enforcement proceedings and litigation, our securities practice assists broker-dealer and investment management clients in navigating a broad range of compliance and regulatory issues.

WilmerHale has a leading corporate and transactional practice and an intellectual property litigation practice that was recently named The American Lawyer's IP Litigation Department of the Year. Our highly respected Washington DC-based regulatory and public policy practice includes more than 100 lawyers who have held senior government positions. Our LA office is backed by the capabilities of our Palo Alto practice, which has grown to over 30 lawyers.

Randall Lee has joined the firm as a Partner in the Securities and Litigation/Controversy Departments in our newly opened Los Angeles office. Before joining WilmerHale, Mr. Lee was the Regional Director of the Pacific Regional Office of the US Securities and Exchange Commission. As Regional Director from 2001 to 2007, he was responsible for the SEC's enforcement and examination programs in nine western states, including California. During his time at the SEC, Mr. Lee led numerous high-profile SEC enforcement actions involving financial reporting and accounting misconduct, mutual fund abuses, auditor misconduct, broker-dealer violations, municipal bond fraud, insider trading, market manipulation and investment fraud. He also oversaw compliance examinations of broker-dealers, investment companies, investment advisers and transfer agents.

From 1994 to 2001, Mr. Lee was an Assistant United States Attorney in Los Angeles, where he specialized in the investigation and prosecution of complex financial crimes and served as deputy chief of the Major Frauds Section of the US Attorney's Office. Mr. Lee represents public companies, financial services firms, accounting firms, and corporate directors and officers in SEC and other regulatory and law enforcement investigations, examinations and litigation. In addition, he conducts internal investigations on behalf of management and boards of directors, and provides regulatory compliance advice to securities market participants.

Mr. Lee received his B.A. from Yale University and his J.D. from the Boalt Hall School of Law, University of California, Berkeley, where he graduated Order of the Coif and was an Articles Editor on the California Law Review. He was a law clerk to the Honorable James L. Buckley on the US Court of Appeals for the District of Columbia Circuit.



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For additional information visit www.wilmerhale.com

GIDE LOYRETTE NOUËL

ADVISES GROUPAMA IN STRATEGIC PARTNERSHIP WITH OPT BANK IN CENTRAL AND EASTERN EUROPE

12 February 2008

Gide Loyrette Nouel's Budapest and Paris offices, in liaison with its offices in Belgrade, Brussels, Bucharest, Kiev, London and Moscow, have advised Groupama over the wrapping up of its partnership with OTP Bank.

This long term partnership covers the distribution of life insurance, non-life insurance and banking products in Central and Eastern Europe as well as in Ukraine and Russia.

Groupama has agreed to purchase from OTP Bank 100% of the capital of OTP Garancia, one of the largest composite insurance companies in Hungary, and the largest bancassurance partner in terms of premiums sold through banking channels, with insurance subsidiaries in Bulgaria, Romania and Slovakia. This partnership includes the conclusion of agreements of bancassurance and assurbanking which will in the long run cover all of the nine countries in which OTP currently operates. The total consideration for the acquisition and distribution partnership is HUF 164 billion, or EUR 617 million (USD 895 million).

Groupama has equally committed to acquire up to 8% of the existing shares of OTP Bank, a first section of 5% having to be acquired at closing. OTP Bank has entered into a derivative transaction with Deutsche Bank AG to facilitate the acquisition of that 5% stake.

OTP Bank is the largest independent bank in Central and Eastern Europe, operating in Bulgaria, Croatia, Romania, Serbia, Slovakia, Ukraine, Montenegro and Russia. It is the largest bank in Hungary, Bulgaria and Montenegro, with market shares of 20%, 13% and 37% respectively. OTP Bank is the eighth largest bank in Ukraine and the tenth largest bank in Serbia. Groupama is present in Hungary and Romania.

Legal counsel for Groupama:

The teams at Gide Loyrette Nouel were coordinated by Jacques de Servigny (partner in charge of the Budapest Office) and Jean-Gabriel Flandrois (M&A - Paris), with the support of Richard Ghuedre and Orsolya Hegedus (insurance law), Balázs Ferenczy and Edouard Bottling (regulatory and financial aspects), Stéphane Hautbourg, Laurent Godfroid and András Palásthy (competition law), Jean-Charles Albitre, Charles Cruden, László Agai and Cira Caroscio (M&A).

For additional information visit www.gide.com

*43rd International PRAC Conference**Hosted by Gide Loyrette Nouel - April 12 - 15, 2008**Open to PRAC Member Firms**Registration available only online at www.prac.org***Gide Loyrette Nouel**

HOGAN & HARTSON

OBTAINS DIMISSMIAL OF PATENT INFRINGEMENT CASE AGAINST SUN MICROSYSTEMS

WASHINGTON, D.C., February 7, 2008 - Intellectual property lawyers from Hogan & Hartson LLP have obtained a dismissal with prejudice of the patent infringement suit filed against firm client Sun Microsystems, Inc. (NASDAQ: JAVA). The lawsuit was filed in April 2007 by patent holding company Exponential Solutions, LLC, in the United States District Court for the Southern District of Florida.

The technology in the case involved parallel processing (or "grid" computing). The technology is highly specialized, and underlying technical considerations were a key issue in the case.

The firm's lawyers won a critical motion to compel deposition testimony and documents which had been designated and withheld on the alleged basis of attorney work product and privilege. Shortly after this ruling, Exponential Solutions agreed to dismiss its lawsuit and did in fact do so on February 1, 2008.

The Hogan & Hartson attorneys involved in this matter included partner Raymond Kurz, partner Celine Crowson, and associates Robert Weinschenk and Rebekah Osborn, from the firm's Washington, D.C. office, and partners John O'Sullivan and Julie Nevins from the firm's Miami office.

Santa Clara, Calif.-based Sun Microsystems, Inc. develops technologies that power the global marketplace.

For additional information visit www.hhlaw.com

KING & WOOD

ACTS IN FINANCING FOR FUJIAN REFINING AND ETHYLENE PROJECT

King & Wood has acted as Chinese legal counsel to the sponsors group on the RMB30 billion limited recourse financing for the Fujian Refining & Petrochemical Company Limited which is the largest and a world scale integrated petroleum refining and petrochemical project in China. The total investment cost of the project is approximately RMB38.4 billion (approx. USD5 billion) with construction targeted for completion in 2009. The financing is provided by twelve major Chinese banks comprising RMB/USD term Loan Facilities, RMB/USD revolving loan facility and RMB/USD Standby Debt Facility.

The project is sponsored by China Petroleum and Chemical Corporation, Fujian Petrochemical Industry Company, ExxonMobil Corporation and Saudi Aramco Oil Company acting through their affiliates.

For additional information visit www.kingandwood.com

LUCE FORWARD

COUNSELS HOWE BARNES IN ITS ROLE AS LEAD MANAGER IN THE FIRST WEST COAST PUBLIC OFFERING OF TRUST

February 19, 2008

The offering represents the very first public offering of trust preferred securities by a bank holding company on the West Coast in many years. Luce Forward's financial institutions/public securities group counseled Howe Barnes through the entire process over several months. This project was particularly challenging because of the lack of recent precedent in the public securities marketplace for this type of offering. Luce Forward successfully brought to bear both its expertise in complex financing and its experience in the public markets in the successful launch of this offering.

"We added unique value to this transaction because we are one of the few firms able to weave two distinct skill sets into a successful service to the client," said Kurt L. Kicklighter, the leader of the Luce Forward team. "First, we had to be intimately familiar with the myriad of documents and requirements for this type of debt financing. And second, we had to be mindful of the unique interplay of this type of financing with public market regulation and helped assure compliance with FRB, SEC, NASDAQ, Trust Indenture Act, and FINRA requirements."

Rounding out the Luce Forward team were Kate Park Hong (commercial finance), Kurt A. Oreshack (FINRA), and Frank J. Gebauer (securities).

Public offerings of trust preferred securities transactions are uncommon, with only a few taking place nationwide each year. Temecula Valley Bancorp Inc. plans to use the proceeds from the transaction to support its growth, repurchase shares of its common stock, and for general corporate purposes.



Kurt L. Kicklighter, Kate Park Hong, Kurt A. Oreshack, Frank J. Gebauer

For additional information visit www.luce.com

MORGAN LEWIS

MAXIMISES INSURANCE RECOVERY FOR CLIENT PHOTOMEDEX

February 07 2008

Morgan Lewis achieved a significant choice of law victory for policyholder client PhotoMedex, maximizing its ability to recover defense costs.

Policyholders frequently fight to enforce an insurer's duty to defend an underlying claim only to find the insurer refusing to pay reasonable attorneys' fees. Morgan Lewis insurance recovery lawyers Richard F. McMenamain and Carol C. Carty successfully stopped PhotoMedex's insurer from limiting the reimbursement of underlying defense fees to the amount the insurer paid in similar situations as set forth in Section 2860 of the California Civil Code, commonly known as the Cumis statute.

In a 44 page Memorandum and Order issued by Judge William H. Yohn, Jr. of the United States District Court for the Eastern District of Pennsylvania, the court agreed with PhotoMedex's position that Pennsylvania law not California law applies to construction of the PhotoMedex policy. The court held that under Pennsylvania law (a) PhotoMedex was entitled to its reasonable attorneys' fees and not simply the amount that insurers pay in similar situations, and (b) St. Paul had no right to recoup indemnity payments it "advanced" to settle the underlying claim against PhotoMedex.

For additional information visit www.morganlewis.com

NAUTADUTILH

ACTS FOR CITIGROUP GLOBAL MARKETS UNLIMITED, DEUTSCHE BANK AG, LONDON BRANCH AND LEHMAN BROTHERS INTERNATIONAL (EUROPE) IN IPO OF LIBERTY INTERNATIONAL ACQUISITION COMPANY ON EURONEXT AMSTERDAM BY NYSE EURONEXT

NautaDutilh has advised Citigroup Global Markets Limited, Deutsche Bank AG, London Branch and Lehman Brothers International (Europe) as Dutch counsel in connection with the issuance by Liberty International Acquisition Company ("Liberty") of 60,000,000 units. The units were admitted to trading and listing for a price of EUR 10.00 each on Euronext Amsterdam by NYSE Euronext, the regulated market of Euronext Amsterdam N.V.

Liberty is the second 'special purpose acquisition company' ('spac' or 'blank check company') which was admitted to trading and listing in mainland Europe and the third largest spac worldwide. The as-if-and-when-issued trading in the units of Liberty commenced on February 6, 2008 and will start a regular trading as per February 13, 2008. Within a short time frame, the shares and warrants, underlying the units, will commence trading separately. EUR 600,000,000 was raised in the successful initial public offering.

The deal team was lead by Banking & Finance partner Petra Zijp. She was assisted by Andries van der Netten van Stigt, Teun Struycken and Anne Hakvoort.

For additional information visit www.nautadutilh.com

NISHIMURA & ASAHI

ACTS AS COUNSEL FOR CITIGROUP ON SHARE EXCHANGE AGREEMENT WITH NIKKO CORDIAL

Nishimura & Asahi acted as counsel to Citigroup on a share exchange agreement between Nikko Cordial and Citigroup. The transaction, valued at approximately 1.6 trillion yen (including the value of the preceding tender offer), closed on January 29, 2008.

Nishimura & Asahi partners involved in deal include Koichi Kusano and Tatsuya Tanigawa. This transaction was the winning "M&A Deal of the Year 2008" at the Asian Awards 2008, hosted by International Financial Law Review.

For additional information about Nishimura & Asahi visit www.jurists.co.jp/en/

TOZZINI FREIRE

ACTS FOR INFINITY BIO-ENERGY LTD. IN JOINT VENTURE WITH DISA OVERSEAS, LLC.

Summary of Transaction

Infinity Bio-Energy Ltd. has completed a joint venture deal with Disa Overseas, LLC. The company, as result, has acquired interest equities in:

- (i) sugarcane ethanol plants that in the aggregate shall include two additional plants and approximately 3.3 million tons per year in its grinding capacity once the enlargement is completed;
- (ii) a company that shall develop a 30MW biomass power cogeneration plant and hold some agricultural assets; and
- (iii) a company holding agricultural equipment, planting infrastructure, and sugarcane harvesting and maintenance.

Value of deal

Approximately US\$ 75 million

Date of execution of the Joint Venture Agreement

September 14, 2007

Comments

Closing on February 8, 2008

Lawyers of TozziniFreire acting in transaction

Darcy Teixeira Júnior – partner

Luiz Renato Okumura - associate

Bruno Hachebe Schiavoni Guarnieri – associate

For additional information visit www.tozzinifreire.com.br

WILMERHALE

ADVISES TUI ON JOINT VENTURE WITH ROYAL CARIBBEAN

TUI AG, the largest European tour operator, has formed a joint venture ("TUI Cruises") with the Norwegian-American cruise line Royal Caribbean Cruises in order to gain entry into the strong market for premium cruises to German-speaking countries. The first ship to sail under the TUI Cruises flag should enter into service in Spring 2009. The agreement is still subject to review under antitrust laws.

WILMERHALE Partner Ulrich Quack, together with Counsel Dr. Alexander Jüngling und Associate Dr. Florian von Alemann, represented TUI in matters involving the agreement's merger control notification at the European Commission.

WilmerHale advises TUI on a regular basis in its antitrust matters, the most recent example of which is the TUI/First Choice transaction.

For additional information visit www.wilmerhale.com



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SEOUL 2007
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PRAC e-Bulletin is published monthly.
Member Firms are encouraged to contribute articles for future consideration. Send to susan.iannetta@prac.org.
Deadline is 10th of each month.

alert

19 February 2008

Can a company indemnify a director against liability for insolvent trading debts?



A director of failed reinsurer New Cap has failed to get an indemnity for a potential insolvent trading liability.

The Court held that the company's standard director indemnity clause did not - and could not - cover a director's personal liability for insolvent trading by the company.

Background

New Cap's liquidator was pursuing an insolvent trading claim against Mr Williams under section 588G of the *Corporations Act*. Section 588G makes a director personally liable for debts incurred by his company while it is insolvent, if the director has failed to prevent the incurring of the debt. That personal liability will arise when a court, on a liquidator's application, orders the director to pay the company an amount equal to the debt.

New Cap's corporate constitution contained a fairly standard indemnity clause. This indemnified its directors and officers "against all cost losses and expenses which any such Director, Manager, Secretary or other officer may properly incur or become liable to pay by reason of any contract properly entered into or other act or thing properly done by him as such officer or in any way to the discharge of his duties and it shall be the duty of the Directors to pay the same out of the funds of the Company."

Mr Williams claimed that any potential liability under section 588G was covered by this indemnity.

Contravention of section 588G not "acting properly"

The Court held that accruing personal liability by allowing one's company to incur an insolvent debt did not fall within the terms of the indemnity, for two reasons:

- *not part of a director's duties* - the indemnity only covered things done by a director "in the discharge of his duties". The Court said that contravening section 588G was not part of a director's duties;
- *not acting properly* - the indemnity also referred to things "properly" done by directors. The Court said that a director who contravened section 588G was not acting "properly".

Indemnity illegal

Even if New Cap's indemnity had been drafted to cover insolvent trading liabilities, Mr Williams would not have been able to rely upon it.

Section 199A(2) of the *Corporations Act* prohibits a company from indemnifying its officers against liabilities owed to the company.

The Court said that this would apply to a liquidator's insolvent trading claim against Mr Williams. Once an order was made against him:

"A liability will then and thereby be owed to [New Cap] by Mr Williams since, in terms of the court's order, a debt will be due to [New Cap]. There will thus exist, in terms of s 199A(2)(a), a liability owed by Mr Williams to [New Cap]. That being so, s 199A(2) will forbid any action by [New Cap] to indemnify Mr Williams against that liability."

Comment

The reason why insolvent trading is a bogeyman for directors is that it is very hard to escape liability once the company has incurred the debt. There are a limited number of defences, but these are very difficult to establish.

In effect, therefore, insolvent trading is close to a strict liability provision. The Court's decision in this case reinforces that harsh economic reality.

Another aspect of the case worth noting is the ruling on the effect of section 199A(2) - that directors' insolvent trading liabilities are owed to the company.

Although the Court didn't refer to them, there have been a number of decisions about the precise nature of monetary recoveries by a liquidator. In dispute has been the issue of whether that money is the company's or the liquidator's. It has been argued that, if it's the company's money, it should be caught by a floating charge and hence payable to secured creditors.

More interesting, however, is the possibility of a private insolvent trading claim. Although insolvent recovery actions are primarily the province of liquidators, individual creditors are allowed to pursue insolvent trading claims against directors (with the liquidator's permission). In that situation, the director is ordered to pay money directly to the creditor.

In such a situation, it is debatable whether section 199A(2) would apply, since the director's liability would not be "owed to the company".

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print

THE NEW AGE OF RETIREMENT

Written by Nicole Mangan

The British Columbia *Human Rights Code* (the "Code") prevents discrimination on multiple grounds in the workplace. Although the Code has always prevented age discrimination, previously, it defined age to exclude those persons younger than 19 and those 65 or older. The Code also protected certain legitimate pension, retirement, and insurance plans. The limitation on the protections against age discrimination and the additional protections in the Code permitted mandatory retirement policies. As of January 1, 2008, however the provisions were changed. The age provision prohibiting discrimination now only excludes those persons under the age of 19. The changes do not apply to any federally regulated employers who are governed by the *Canadian Human Rights Act*.

WHAT HAPPENS TO MY RETIREMENT POLICY?

The key change to understand is that "mandatory" retirement is now prohibited by the Code. Retirement programs or incentives in the workplace can however be maintained. An employer has a right to maintain a program and even have incentives as long it remains up to the employee whether to take advantage of this program or not and no employee over 19 is penalized in any way for not participating.

WHAT ABOUT THOSE WHO HAVE ALREADY RETIRED?

This change is not retroactive which means that an employer would not have to rehire those persons who retired under a mandatory retirement policy that existed before January 1, 2008.

ARE THERE ANY CONSEQUENCES FOR EMPLOYERS OF THIS RETIREMENT POLICY CHANGE?

There are at least three potential consequences to the changes.

1. *The need to monitor and document job performance:*

Previously if an employee was underperforming as he or she approached retirement an employer often "hung in there" waiting for their mandatory retirement policy to kick in. Now that this is no longer an option it will be more important for an employer to properly document poor job performance. Typically this is done through evaluations and written warnings that failure to improve could lead to termination. The employer can also give consideration to providing an appropriate severance package. The courts in a wrongful dismissal action take into account multiple factors in assessing whether proper severance pay in lieu of notice was paid on termination including: an employee's age, years of service, the responsibility of the position, the availability of comparable employment, the employee's education or training and awards in comparable positions. Employees 65 and older have often worked for the same employer for many years and advanced to a responsible position. Even if the position does not entail a managerial or other senior role it is still possible that the combination of years of service, age and the employee's prospects in the job market will warrant a larger severance package. Shorter term employees could also be entitled to greater severance than their younger co-workers as the courts may feel the employee has a lower prospect of obtaining alternate employment than a younger person. If an employer chooses to offer a severance package then proper structuring of severance pay is always important to try and avoid wrongful dismissal claims.

2. The need to justify exceptions as a "bona fide occupational requirement":

If an employer has legitimate concerns a particular position can not be performed by anyone after age 65 then there is potential for a challenge to this policy at the Human Rights Tribunal. A mandatory policy implemented because age is legitimately connected to the ability to perform the job, and is honestly believed to be necessary, may be upheld but only in very special circumstances. To have such a company wide policy the employer will need to be able to prove this is a "bona fide occupational requirement" (a "BFOR"). This means the employer will most likely need empirical evidence from medical or other testing experts showing a legitimate likelihood that people over a certain age will experience an inability to perform the job duties. To show that the employer can't be required to test every single employee to make sure the requirement is a "BFOR" and not an unjust prohibition against a position, the employer will also need to be able to show that it would be an "undue hardship" – which is a legal test of an impact on a business – to justify the blanket requirement as opposed to a procedure that assesses each employee individually. The employer will also likely have to show that it would be an "undue hardship" on the business to move these employees to other positions within the company. Part or flex time arrangements may be one way to allow an employee to meet job demands while allowing younger employees to benefit from their co-worker's experience which can benefit the employer as well as their older and younger employees.

3. The need to educate your workforce about age discrimination:

Employers need to be on guard to ensure their conduct or that of their employees does not attract age discrimination claims. Pressure to accept early retirement or suggestions that not retiring could lead to job loss as well as remarks about a person's age - especially in the context of their ability to do their job - could lead to claims being made against the employer. Even comments about "fresh" "young" employees being appropriate for a position could be problematic. Insensitive conduct can also have other consequences. Terminating any employee always needs to be handled sensitively to avoid extra damages being awarded by a court. When terminating older employees caution must be taken to avoid any comments about age or performance associated with age as this could be enough to attract extra damages for employees in a wrongful dismissal claim.

ADDRESSING THE CHANGE

Be aware of these issues and make sure your business is in compliance with the Code. If you need assistance structuring an employee program, addressing the termination of an employee, or addressing discrimination complaints please consult the RBS Employment Law Group.

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New Rules on Perfection of Mortgage over Movable Properties

By Li Jinnan* and Pan Ye**

I. Background

On October 17, 2007, the State Administration of Industry and Commerce (“SAIC” and its local counterpart “AIC”) issued the “Rules on Registration of Mortgage over Movable Properties” (“New Rules”)¹, which came into force on the same day. As an implementation of the recently effective Property Right Law of the People’s Republic of China (“Property Law”)², these New Rules supersede the previous Rules on Registration of Mortgaged Movable Properties issued by SAIC in 1995 (“Old Rules”)³. We herein set out an introduction on the key features of the New Rules in comparison to the Old Rules.

II. The Scope of Mortgageable Movable Properties

Under the 1995 PRC Security Law (the “Security Law”)⁴, which was partly superseded by the Property Law, only existing movable properties could be mortgaged. Accordingly, the Old Rules only allow the registration of mortgage over existing movable properties. In contrast, the Property Law has broadened the range of mortgageable movable properties by allowing the mortgage of certain kinds of future movable properties, including (i) production equipment; (ii) raw materials; (iii) semi-finished products, and (iv) finished products⁵. According to the New Rules, the mortgage of such existing and future movable properties shall be registered with the county level AIC at the domicile of the mortgagor⁶. The permission to mortgage future properties, as deemed by many practitioners, would provide what is in effect a floating charge over those movable properties.

III. The Legal Effect of the Registration

Under the Security Law and the Old Rules, a mortgage agreement in relation to the mortgage of movable properties may only take effect upon the completion of mortgage registration⁷. The New Rules, along with the Property Law, took a different approach by clearly stating that a mortgage over movable assets would come into effect upon the effectiveness of the relevant mortgage agreement while the mortgage agreement would come into force upon its conclusion⁸. This means the mortgages over movable assets could be effective even without

¹ State Administration of Industry and Commerce order No. 30, October 17, 2007;

² Adopted by the fifth session of the National People’s Congress on March 16, 2007 and effective as of October 1, 2007;

³ State Administration of Industry and Commerce order No. 35, October 18, 1995;

⁴ Adopted by the Standing Committee of the National People’s Congress on June 30, 1995 and effective as of October 1, 1995;

⁵ Article 181 of the PRC Property Law “enterprises, practitioners, agriculture producers may mortgage their existing or future production equipment, raw materials, semi-finished products, and finished products. The creditor shall have priority over the mortgaged moveable property when the debtor cannot discharge its obligations when due or upon occurrence of the circumstance as agreed to enforce mortgage.”

⁶ Article 2 of the New Rules: “mortgage of existing or future production equipment, raw materials, semi-finished products, and finished products provided by enterprises, practitioners, agriculture producers shall be registered at the Administration of Industry and Commerce at county level where the mortgagor locates. Without such registration, the mortgage may not withstand a bona fide third party.”

⁷ Article 41 of the Security Law: “The mortgage of properties falling into the categories listed in Article 42 shall be registered and the mortgage contract goes into effect as of the date of registration.” Article 3 of the Old Rules: “The mortgage of the following moveable properties other than air plans, vessels and vehicles shall be registered at the relevant administration of industry and commerce, and the mortgage contract goes into effect as of the date of registration: ...”

⁸ Article 15 of the PRC Property Law: “Unless otherwise provided by law or in the contract, a contract establishing, modifying, transferring or terminating property rights shall come into effect when the contract is concluded. The effect of the contract is not affected by failure of registration of the property rights.”

registration. However, the mortgagee still needs to perfect such mortgage through registration to guard its security interest against bona fide third parties⁹.

IV. The Registration Fee

Different from Old Rules setting forth how to charge mortgage fees and the default allocation of such fees between the parties, the New Rules are silent on such fee issues. Such silence may signal that the AICs would not charge any registration fees for the registration of mortgage over movable properties. This still needs to be tested in practice.

V. Documents to Be Submitted

For the purpose of applying mortgage registration, the New Rules only requires the submission of (i) mortgage registration form and (ii) identity certificates of the mortgagor and the mortgagee¹⁰. If the mortgagor and the mortgagee entrust a third party to handle the registration, the identity certificate of such third party and a power of attorney will also be required. Previously, under the Old Rules, the mortgagor and the mortgagee were required to submit a large number of documents, including the mortgage contract and the relevant primary agreement¹¹.

VI. Degree of Review

According to the Old Rules, before its acceptance of the registration application¹² the relevant AICs shall check, among other things, (i) whether the properties in question have been repeatedly registered for mortgage; and (ii) whether the security period will extend beyond the period within which the properties will be owned or used by the mortgagor. In contrast with the substantial review approach under the Old Rules, the New Rules seems to only require the relevant AICs confirm the completeness of the application materials presented and the truthfulness certified by both parties of the information therein¹³.

VII. Conclusion

The New Rules shall be applauded for providing a uniform guideline for the county level AICs to make the registrations of the mortgage over movable properties and to make available to the general public the inquiry of such mortgage, which will remarkably enhance the willingness of the banks to grant facility against such movable properties and broaden the finance channels of many production enterprises. However, it does leave several issues to be further explored and clarified, including how to crystallize the floating mortgage upon its enforcement; how long it will take to complete the mortgage registration; and whether mortgage could be registered to secure a debt higher than the value of the movable property. All these unresolved issues need to be further clarified and tested in practice.

(The article was written in Chinese, the English version is the translation.)

⁹ Article 188 of the PRC Property Law: "For mortgage of properties listed in item (4), (6) or vessels or air plans under construction falling under item (5) of Article 181, the mortgage right is created upon conclusion of the mortgage agreement; without registration, the mortgage right may not withstand a bona fide third party."

¹⁰ See Article 3 of the New Rules.

¹¹ See Article 4 of the Old Rules.

¹² See Article 7 of the Old Rules.

¹³ Article 7 of the Old Rules provides documents to be submitted to AIC for review, while the New Rules does not provide such a requirement.

*Li Jinnan is a partner at King & Wood's Beijing office.

**Pan Ye is an associate at Banking Group, King & Wood's Beijing office.

ICC INTERNATIONAL COURT OF ARBITRATION TO OPEN OFFICES IN ASIA

The International Chamber of Commerce announced on 12 March 2008 that the International Court of Arbitration of the ICC and the Secretariat of the ICC Court have decided to locate their new offices in Hong Kong and Singapore.

ICC has decided to take two important steps, to be operational by the end of 2008:-

- Hong Kong: to open a branch of the Secretariat of the Court with a case management team to administer cases in the region under the ICC Rules of Arbitration.
- Singapore: to locate the Director, ICC Arbitration and Amicable Dispute Resolution Asia there, and to open a liaison office dedicated to ICC Dispute Resolution Services.

The ICC International Court of Arbitration is one of the leading bodies in resolving cross-border business disputes. The ICC Rules of Arbitration are widely referred to in business contracts.

The ICC decision to establish a branch of the Secretariat in Hong Kong reflects the strength of the arbitral community in both cities and will provide even more user-friendly services to the users of ICC arbitration based in the Far East, as it would allow communications between the Secretariat and parties based here in the same time zone.

Both Singapore and Hong Kong are recognized by international businesses as hubs for international dispute resolution. Lovells has international arbitration specialists based in their Hong Kong and Singapore offices.

If you wish to discuss any of the topics raised in this newsflash, please contact your usual Lovells contact or:

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**TELECOMMUNICATIONS
NEWSLETTER
JANUARY-FEBRUARY 2008**

**AND HOW ARE THE TELECOMMUNICATIONS IN
MEXICO?**

In the telecommunications sector, very few times there have been so many relevant events as in 2007. Technology and the applicable legislation, reached an important intersection point that in the end will result in a real benefit for the users of the telecommunications services, and will open the way for the modernization of the sector. This 2008 will be an interesting year of evolution and achievements for the telecommunications in the country.

The Federal Telecommunications Commission ("**COFETEL**" for its acronym in Spanish) accomplished important regulatory developments aimed to improve the quality of the services to both the users and the providers of the telecommunications services. Among these, it is worth to note two at a national level and one at an international level.

At a national level, an agreement with the Federal Consumer Protection Agency ("**PROFECO**" for its acronym in Spanish) was executed in order to (i) carry out joint inspections of the agreements of the telecommunications companies to comply with the technical requirements as well as with those requirements regarding consumer protection pursuant to the respective legal provisions; (ii) exchange and disclose information for the consumers; (iii) create a method of evaluation of complaints and claims of consumers and implement preventive and counteractive actions in that respect; and (iv) provide training by COFETEL to officers of PROFECO with respect to telecommunications legal provisions and obligations of the telecommunications companies before consumers. Although this agreement is currently still being implemented by PROFECO, it is a good starting point expecting to have results this year.

Also, at a national level, it is worth to note the proposal from COFETEL to implement a deregulation strategy in order to eliminate "bottlenecks" and duplication of procedures with the Secretariat of Communications and Transportations (*Secretaría de Comunicaciones y Transportes*) ("**SCT**" for its acronym in Spanish), for the procedures required to be

carried out by the service providers. When this strategy was designed in April 2007, COFETEL informed that the companies carried out 77 procedures before COFETEL, of which 56 were related to specific procedures and 21 to compliance of obligations; while there were 73 procedures for telecommunications companies before the SCT of which 46 of the jurisdiction of COFETEL and 27 of SCT; and of those 27, 23 required the favorable opinion of COFETEL.

The strategy contemplates the remote operation of 19 procedures and 11 procedures of direct opinion in order to expedite the procedures, before SCT and reduce the terms for issuing a resolution, including compliance of obligations via Internet in order to generate immediate statistics, reduce paper expenses and provide more legitimacy and transparency.

Internationally speaking, SCT, COFETEL and the Department of State of the United States of America signed a protocol to regulate the radiocommunications frequency band (138-144 Megahertz) in the border of Mexico and the United States. The protocol is formed by the sections of satellites, radiodifusion, radiocommunications, international affairs, ASPAN initiative (Bilateral Working Group on the Initiative of the Alliance for the Security and Prosperity in North America) and other matters of telecommunications. Both governments issued a "Joint Declaration" of intended actions. Among the latter, they agreed to promote the trans-border communications and interoperability, prevent harmful interferences to the public security, commercial and radiodifusion services in the highly populated zones of the border and to procure the shared use of the radioelectric spectrum in an evenly manner. This protocol will facilitate the implementation of new technologies, such as the IBOC system (In Band On Channel) under a regulatory framework that responds to the needs of the service providers.

With respect to the technology developments seen during 2007 and that will be materialized during this year, it is worth mentioning the consolidation of the telephonic Local Service Areas (*Áreas de Servicio Local de Telefonía*) (this action will reduce in 18% the charges for national long distance calls); the enactment of the Portability Rules issued by COFETEL in order for the users of mobile and fixed telephony to have the possibility of keeping their telephone numbers if they change of service provider; and the beginning of the transition of the analogical

radio to digital radio through the IBOC (In Band On Channel) system.

It is impossible not to mention the polemic raised by the decision of the Supreme Court of Justice of the Nation ("**SCJN**" for its acronym in Spanish) that on June 7, 2007 resolved the unconstitutionality of several amended articles of the Federal Law on Radio and Television ("**LFRT**" for its acronym in Spanish), the Federal Telecommunications Law ("**LFT**" for its acronym in Spanish) and the decree through which said laws were enacted. This resolution was the result of the unconstitutionality claim filed by 47 senators against several of the amended articles of the LFRT and the LFT, and against several transitory articles to the decree through which said articles were enacted in the Official Daily of the Federation on April 11, 2006 (the "**Decree**"). After 8 sessions, the SCJN resolved on the unconstitutionality of the following articles:

1) **From the Decree: SECOND Transitory ARTICLE of Article ONE.** The unconstitutionality of the ineligibility of the commissioners that integrated COFETEL in order to be appointed for subsequent periods as commissioners, was declared. The foregoing, due to the fact that this provision breaches the freedom of work guarantee.

2) **From the LFT:** (i) **Article 9-C.-** The unconstitutionality of the authority of the Senate of the Mexican Republic to object to the appointments of the commissioners of COFETEL was declared, due to the fact that it limits the authority of the President of Mexico and breaches the principle of Division of Powers. Therefore, the Senate of the Republic no longer has said authority and the President of Mexico will be the one authorized to carry out the designation; and (ii) **Article 16.-** The unconstitutionality of the automatic renewal of the radiocommunications concessions without the need of participating in a public bid process, and the establishment of a fixed 20 year term, was declared. The foregoing, due to the fact that it was considered that the aforementioned provisions affect the economic regulation of the Nation and the sovereignty over the public domain assets.

3) **From the LFRT:** (i) **Article 17-E.-** It was established that the requirement to obtain a concession does not consist in "*filing an application*" but rather in obtaining a favorable opinion from the Federal Competition Commission (*Comisión Federal de Competencia*). The foregoing in order to

guarantee the constitutional prohibition of monopolies; (ii) **Article 17-G.-** It was resolved that the granting of concessions through public auction is unconstitutional due to the fact that it violates the equality and competence principles, because it privileges the economic aspect for their granting. Therefore, the public auction process was eliminated and the bidding process will remain in full force and effect; (iii) **Article 20.-** It was resolved that the broad discretionary authorities granted to SCT for the granting of permits are unconstitutional, due to the fact that they generate legal uncertainty. Therefore, the discretionary authorities that allowed the authority to resolve "at its sole discretion" and "if it considers it convenient" were eliminated from the Article; and (iv) **Articles 28 and 28-A.-** The possibility of a concessionaire to request and receive authorization to render additional services through frequency bands, was declared unconstitutional and therefore was eliminated, due to the fact that certain privileges are established in favor of radiobroadcasting concessionaires over telecommunications concessionaires.

Currently, the Plural Group for the Legislation of Telecommunications and Radiodifusion Matters of the Senate of the Republic is in the process of preparing the draft with the new amendments to the LFRT and the LFT, based on the ruling of the SCJN. The senator Mr. Angel Heladio Aguirre Rivero (president of said plural group) has stated in various media, that approximately on April 2008, they will deliver the document containing the definitive changes to both legislations. All the players of the sector are expecting the new proposals among which it is a must to include the regulation of the radio-electric spectrum, of the monopolies, the enhancement of competition, the technology convergence, the so called triple and quadruple play (to strengthen and expand the rendering of Internet, video, data and telephone services through the same service provider), the regulation of the concessions, permits, public bids and sanctions for infringements.

Likewise, it has been discussed the need of specific amendments to the LFT in order to oblige the cell phone companies to have a users registry. The foregoing, is aimed to avoid, among other things, the extortions and the "virtual kidnappings" carried out through cell phone calls.

SHOULD YOU REQUIRE ADDITIONAL INFORMATION, PLEASE CONTACT THE PARTNER RESPONSIBLE FOR YOUR LEGAL

*MATTERS, OR MR. JORGE LEÓN ORANTES OR
MS. PAOLA MORALES, RESPONSIBLES FOR THE
TELECOMMUNICATIONS AREA.*

The Copyright (New Technologies) Amendment Bill: Delayed by Individual and Big Business Interests?

After receipt of submissions from the public and publication of a select committee report, the Copyright (New Technologies) Amendment Bill is due to be debated in Parliament for a second time. But progress seems to have stalled. What seems to be holding things up?

The Bill

The Bill is a result of the Government's review of the ability of current copyright law under the Copyright Act 1994 to cope with fast-paced technological change. The Bill's intention is to clarify the application of the Copyright Act to digital technology and provide a technology-neutral framework, to maintain the balance between the protection afforded to owners of copyright works and the public's legitimate rights of access to those works.

In summary the Bill:

- extends copyright protection to a technology-neutral category of "communication works";
- introduces new exceptions to allow for format-shifting of sound recordings and time-shifting for private and domestic use, for decompilation and error correction of software, and for transient copying by computers or communication networks as a result of an inevitable technical process, as well as updating existing permitted acts such as fair dealing, library, archival, and educational use to apply to digital works;
- limits the circumstances for potential liability for copyright infringement of Internet Service Providers (ISPs);
- expands provisions relating to technological or informational means of protecting copyright, facilitates the exercise of permitted acts where such protection measures have been applied and introduces offences for dealing in devices designed to circumvent those protection measures.

Rights for Individuals – Format Shifting

A number of common issues with the Bill have been identified by the general public, technology commentators and the select committee, particularly in relation to the right of individuals to format shift.

A key concern emerging from the public submissions was that the provisions permitting format shifting apply only to sound recordings. While the Bill proposes to make it legal for an owner of a sound recording (such as a music CD) to make one copy of the recording onto the

owner's digital play-back devices for personal use, it does not extend that right to other media such as video.

Many feel that this approach fails to take into account that format shifting of video has become increasingly common in New Zealand due to the prevalence of devices such as laptops, mp3 players and iPods. If the Bill does not extend the format shifting exception to video, it will still be "illegal" to transfer content which is subject to copyright (such as DVDs) to video iPods and similar devices.

Failure to do so would mean New Zealand palpably fails in its goal for copyright law to be technology neutral. For example, in the United States, individuals have certain rights to format shift video under the notion of "fair use" (a general exception to copyright infringement for activities which are deemed to be fair, which essentially allows copying to another format, so long as copies are not distributed to others).

The Bill also proposes that copyright holders can choose to contract out of the format shifting exception (ie prohibit consumers from transferring recordings to digital format), provided that this is clearly communicated to consumers. Some critics have questioned the point in having the format shifting provisions at all if copyright holders can simply contract out of them.

Issues for Business - Repeal of Section 88

The Bill has raised issues not just for individual users of portable media devices, but also for businesses, particularly cable and satellite service providers.

During the (now stalled) second reading of the Bill, the Government advised that it had sought a Supplementary Order Paper to repeal section 88 of the Copyright Act 1994. Section 88 permits the reception and immediate retransmission of a free-to-air broadcast by a cable programme service in certain circumstances without infringing copyright. Its repeal was proposed in the original Bill, but later removed by the select committee (who provided no rationale for doing so).

At the same time, Mr Gordon Copeland, an independent member of Parliament, produced a Supplementary Order Paper which proposed not only the retention of section 88, but its expansion to apply to additional technologies. This Supplementary Order Paper appears to pick up on the lobbying efforts of Sky Television and TelstraClear.

Sky Television and TelstraClear made submissions to the select committee that retention of section 88 would allow free-to-air broadcasts (such as Prime Television) to be delivered effectively and conveniently, and improve reception quality for consumers in isolated areas. Sky Television also sought expansion of section 88 to digital satellite retransmission (including via emerging broadband technologies). This would allow it and other satellite broadcasters to simulcast free-to-air channels (and thus expand their audiences and advertising revenue). Sky Television also argued that it would encourage viewers to move from analogue to digital television, which is in line with the Government's stated objectives.

However, the Government did not find the submissions compelling on the basis that they address a different set of concerns than those that section 88 was intended to achieve. (The original purpose of Section 88 was to encourage investment in telecommunications and improve reception quality, and the introduction of a broader range of transmission technologies has allowed for this.)

What's Next?

It is not known when the second reading of the Bill will resume, and exactly what further amendments are in store.

The Government seems keen to repeal section 88 of the Copyright Act. However, the introduction of Mr Copeland's Supplementary Order Paper means that this issue may be hotly debated in Parliament.

It seems unlikely that the format shifting provisions will change, based on the Government's view that format shifting of copyright works other than sound recordings is not widespread. This will disappoint those who believe that the Government's view is unrealistic and fails to take into account fast growing trends here and overseas in the portable media players market. Perhaps the Government is waiting to see whether Australia extends its format shifting exception to video content when its own recently amended copyright laws come up for review in the first half of this year.

We will keep x-tech readers informed of progress of the Bill and its proposed implementation.

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Note: *The information provided in this article is intended to provide general information only. This information is not intended to constitute expert or professional advice and should not be relied upon as such. Specialist legal advice should always be sought for your particular circumstances.*

March 2008

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TAIWAN - Amendments to the Collective Agreement Act

Lee and Li, Attorneys-at-Law

March 2008

To reinforce three basic labor rights, i.e., the freedom of association, the right to collectively bargain, and the right to strike, the Council of Labor Affairs proposed amendments to the Labor Union Act, the Collective Agreement Act and the Labor Dispute Resolution Act to the Legislative Yuan (the Parliament).

On December 14, 2007, the Legislative Yuan passed the proposed amendments to the Collective Agreement Act ("New Collective Agreement Act"). The Executive Yuan (the Cabinet) may decide the date on which the New Collective Agreement Act takes effect and may postpone its effective date until the proposed amendments to the Labor Union Act ("Labor Union amendment bill") and the Labor Dispute Resolution Act (Labor Dispute Resolution amendment bill") are also passed into law because some provisions under the New Collective Agreement Act will not become enforceable until the two amendment bills are passed into law.

It is difficult to tell whether and when the two amendment bills will be passed into law. Even if the two amendment bills are welcome by any major political party, it will still take at least one year or more for the Legislative Yuan to pass them into law.

In view of the lengthy legislation process, the Executive Yuan, if pressured by labor groups, might decide to have the New Collective Agreement Act take effect at any time. The major amendments to this Act are summarized below:

1. To be in line with the Labor Union amendment bill, a party to a collective agreement shall be a labor union formed in accordance with said amendment bill. Group(s) of employees, irrespective of its size, shall not be a party to a collective agreement unless they represent a legally recognized labor union pursuant to the Labor Union amendment bill (Amendment to Article 2).
2. Both employers and employees must negotiate a collective agreement unless with justifiable reasons. An administrative fine and a rectification order will be imposed if any failure to negotiate is found to be unreasonable under the Labor Dispute amendment bill. If the violator does not correct its failure within the specified time limit, consecutive fines and rectification orders will be imposed until the failure is corrected. (Amendment to Articles 6 and 32)
3. The relevant parties must follow certain procedure for the appointment of representatives to negotiate a collective agreement and for the execution thereof. (Amendment to Articles 8 and 9)
4. The employees entering into a collective agreement should deliver the collective agreement to the competent authority for its record. If a party to the collective agreement is a government department, a public school or a public enterprise, it must obtain prior approval from a competent authority before entering into the collective agreement (Amendment to Article 10).
5. Both parties to the collective agreement should make the agreement public after said agreement is delivered to the competent authority, and should further provide a copy to the concerned parties. (Amendment to Article 11)
6. Certain terms and conditions may be incorporated into a collective agreement, such as (1) salary, work hours and other employment benefits; (2) outplacement services; mediation and arbitration of labor disputes; (3) negotiation procedures for a collective agreement; (4) union operations; (5) employee participation of company operations; (6) procedures for handling issues regarding health, safety and complaints; and (7) other mutually agreed terms and conditions (Amendment to Article 12).
7. The collective agreement is only binding on the employees who are members of the subject union (" Union 's Members"). To prevent the employer from offering better employment conditions to non-Union Members in the hope of causing Union Members to withdraw their memberships from the Union , the collective agreement may include a provision prohibiting the employer from adjusting the non-Union Members' employment conditions without justifiable reasons. (Amendment to Article 13)
8. If any party to a collective agreement is composed of multiple unions/employers, each of these multiple unions/employers shall not enter into any other agreement that are in conflict with the collective agreement. (Amendment to Article 16)
9. The Civil Code should be the governing law in the event of any breach of a collective agreement that is not related to employment conditions unless it is otherwise stipulated in the collective agreement. (Amendment to Article 20)
10. The Union may bring a lawsuit on behalf of its members on any matters arising out of a collective agreement. If any

member is sued for a matter related to the collective agreement, the Union may intervene in the lawsuit. (Amendment to Article 25)

11. If a party to a collective agreement experiences financial crisis after the signing of the agreement, which may frustrate the purpose or object of the agreement, such party may request amendment to or termination of the agreement. (Amendment to Article 31)

We have established a practice group focusing on labor law. If you have any questions related to the above, or wish to know the recent development of relevant regulations, please approach your regular contact at Lee and Li or our Labor Law Practice Group leader, Ken-Ying Tseng, Esq.

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This alert sheet is to provide an overview on the latest legal development. Due to the generality of this overview, the information contained may not be applicable in all situations and should not be acted or relied upon without special legal advice. For more information or advice on specific legal issues, please approach your regular contact at Lee and Li.

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PHARMACEUTICAL AND BIOTECHNOLOGY UPDATE

HOGAN &
HARTSON

Clinical Trial Registration and Results Posting Under the Food and Drug Administration Amendments Act of 2007

In the midst of heightened allegations regarding the suppression of unfavorable results by pharmaceutical and biotechnology companies, in September 2007, Congress significantly expanded the obligations of clinical trial sponsors to submit information regarding their trials to the federal data bank. Some of these new requirements have already become effective, while others will be imposed incrementally over the next several years. Particularly in light of the addition of civil penalties for noncompliance, sponsors must make proper registration a priority.

Background

In 1997, Congress required National Institutes of Health (NIH) to establish a repository of clinical trials information, housed at www.ClinicalTrials.gov, to serve as a tool for patients seeking access to investigational drugs.¹ However, this initial foray of the federal government into clinical trials registration imposed obligations only on sponsors of trials for drugs intended to treat serious or life-threatening diseases. It also lacked an enforcement mechanism for failure to submit information, and it did not require the submission of information regarding trial results.

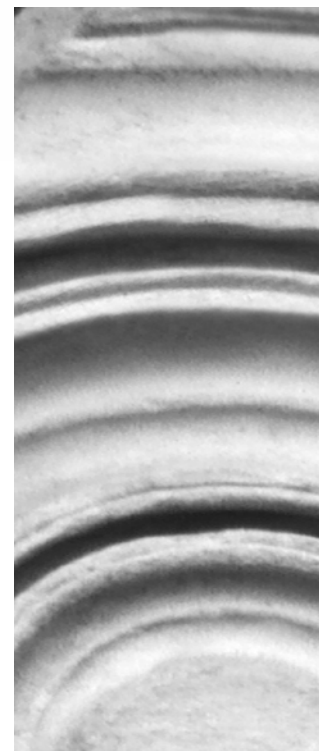
At the state level, only Maine has been successful in imposing unique clinical trial registration requirements of its own, although several state legislatures have introduced proposals to do the same. Importantly, Maine's law is more onerous than the 1997 federal law, and it does not overlap entirely with the new federal legislation. For jurisdictional reasons, however, Maine's requirements apply only to approved drugs dispensed, administered, delivered, or promoted in that state.²

Finally, since 2004, the International Committee of Medical Journal Editors (ICMJE) has also played a significant role in this area.³ Publications such as the New England Journal of Medicine, the Journal of the American Medical Association, and many other non-member journals that have adopted the ICMJE policy, now categorically refuse to publish articles regarding trials that were not properly registered at or before initiation.

¹ 42 USC 282(i).

² 22 M.R.S.A. 2700-A; Code Me. R. 26-239, Ch. 111, § 1.01.

³ See www.icmje.org.



— TAKE A CLOSER LOOK —

03.10-11.2008
Hogan & Hartson lawyer, Hector Armengod to speak at the Latin America Clinical Trials Conference in Miami. ([details](#))

03.13-14.2008
Hogan & Hartson to sponsor Biotechnology Industry Organization's General Counsels' Committee Meeting and Dinner in San Francisco, CA.

04.03-04.2008
Hogan & Hartson Partner, T. Clark Weymouth to speak at the Anti-Corruption for the Pharmaceutical industry in London. ([details](#))

04.17-18.2008
Hogan & Hartson Partner, Stuart Langbein to speak at Advanced Reimbursement Symposium in Chicago, IL. ([details](#))

04.29-30.2008
Hogan & Hartson Partner, Linda Horton to speak at FCPA and International Anti-Corruption for Pharma & Life Sciences in New York. ([details](#))

The New Law

Title VIII of the Food and Drug Administration Amendments Act of 2007, expands the federal registry in several important ways. First, it is no longer limited to trials of drugs intended to treat serious or life-threatening diseases, but rather requires registration of all clinical trials, other than Phase I, and requires significantly more content. As of December 26, new data points for initial registration became required, even reaching back to include some clinical investigations that began before the law was passed.⁴ NIH has also been directed to expand ClinicalTrials.gov to include trial results.⁵ By this fall, sponsors will have to submit results information about approved products, and soon thereafter, adverse event data will be required on the site.

Additionally, the law directs the promulgation of regulations by September 2010, further expanding the results database “to provide more complete results information and to enhance patient access to and understanding of the results of clinical trials.”⁶ These regulations are mandated to require certain additions to ClinicalTrials.gov, and must also determine whether results requirements should be extended to unapproved products. However, their most important impact will be that states may no longer establish or continue in effect any requirement for the registration of clinical trials or the inclusion of results information upon the regulatory expansion of the federal data bank.

While preemption of state law will certainly streamline the registration burden, sponsors must recognize that the federal registration requirements now have teeth. Not only will failure to submit the required information in a timely fashion be posted on ClinicalTrials.gov, but sponsors may also face civil fines up to \$10,000 for all violations adjudicated in a single proceeding. If noncompliance continues thirty days after notice, the fine may be increased \$10,000 each day until the matter is resolved.

For the time being, Maine also imposes a \$10,000 fine for each day its law is violated, and even states without specific trial disclosure laws of their own have shown activism in this area. New York, for example, has relied on consumer protection and fraud statutes to reach substantial settlements with pharmaceutical companies and medical device manufacturers for failure to disclose information gathered in clinical studies. Whether application of these state laws would be preempted by compliance with the new federal disclosure requirements is yet to be seen.

* * *

Transparency with regard to clinical trials and their results is essential for all sponsors, and Congress has reasserted that message through its 2007 law. Going forward, trial sponsors must ask themselves the following questions:

- **Which of the company’s trials fall under the scope of federal registration requirements?**
- **Have all of the company’s trials subject to the December 26, 2007 deadline been appropriately registered with ClinicalTrials.gov?**

⁴ 42 USC 282(j)(2).

⁵ 42 USC 282(j)(3).

⁶ There will be a public meeting no later than March 2009, to obtain input on the required regulations.

- Will all other company trials not yet required to register be appropriately registered by the applicable deadline?
- Will results information be required for the company's trials and by what date?
- Who within the company will be responsible for ensuring compliance and serve as the point of contact for information on the company's registered trials?
- Will any registration responsibilities be delegated to Principal Investigators?
- What are the most important issues concerning the posting of results information that the company would like to see addressed in the required federal regulations implementing the new law?
- Are the company's trials subject to Maine's requirements, prior to preemption?
- Will the company be impacted by the ICMJE requirements?

Now is the time for pharmaceutical companies to establish or reevaluate their clinical trial disclosure policies, ensuring that their trials are in compliance with each requirement and deadline set by statute, as well as those imposed by medical journals and regulations yet to come.

For more information about any of the topics discussed in this Pharmaceutical and Biotechnology Update, please contact the Hogan & Hartson attorney with whom you work or one of the authors listed below.*

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****A special thanks to Holly Lynch for her contribution.***

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Department of Labor Proposes Comprehensive Changes to Family and Medical Leave Act Regulations

March 4, 2008

As we previously reported, on February 11 the U.S. Department of Labor (DOL) issued proposed regulations under the Family and Medical Leave Act of 1993 (FMLA) that are subject to a 60-day public comment period. We have now reviewed the proposal in detail, and provide a more in-depth analysis of the most significant provisions.

As a general matter, the proposed regulations make many changes, albeit technical ones, to the existing regulatory landscape. While some of the clarifications, if finalized, may enable employers to better manage FMLA use and prevent abuse, the proposal stops short of the major overhaul that many employers had hoped for.

In any event, we expect an active comment period, which expires on April 11. Employers should consider commenting not only on the provisions they are not happy with, but also on those that they support, as DOL is likely to receive many comments to attempting to dissuade it from moving forward with any of the reforms viewed as “employer friendly.” Moreover, if there should be a Democratic administration as a result of the upcoming presidential election, employers may see a paid-leave mandate over the next four years, which will make some of the “employer friendly” technical changes that have been proposed even more critical to employers.

Definition of “Serious Health Condition”

DOL acknowledges in its proposal that the definition of “serious health condition” continues to draw fire, in part because that definition is broad enough to cover seemingly minor illnesses, like colds and stomachaches. DOL, however, fails to make any changes that as a practical matter address this concern. Rather, DOL proposes modest clarifications, as follows:

- A clarification of the time period within which an employee must have two visits with a medical provider when there have been three consecutive days of incapacity. While some courts have required employees to complete two visits within the three days of incapacity, DOL’s proposed clarification requires instead that those two visits be completed within 30 days of incapacity.
- A clarification that “periodic” means visiting a physician twice or more per year for the same condition. The current regulations define a chronic serious health condition as one that requires “periodic visits for treatment,” but fail to define what “periodic” means.

Use of Intermittent Leave

In its proposal, DOL stated that “[n]o issue received more substantive commentary” in response to its Request for Information (RFI) on the FMLA than “employee use of unscheduled intermittent leave.” Because intermittent leave is recorded in increments as small as the employer’s payroll system will capture, DOL explains, employers complain that such small increments create administrative problems and create difficulties finding replacement employees to cover short absences. Nevertheless, DOL was not persuaded to make substantive revisions, and opted *not* to increase the minimum increment of intermittent leave, as many employers hoped would be the case.

DOL proposes one helpful clarification in connection with the use of intermittent leave by modifying its interpretation as to when overtime hours taken as intermittent leave can be counted against the FMLA entitlement. Under current regulations and DOL interpretation thereof, it is unclear whether an employee who presents a note that he or she cannot work more than 40 hours a week (and therefore cannot work overtime) is taking “leave.” *See* preamble discussion to current 29 C.F.R. § 825.203. In the proposal, DOL clarifies that if the employee would be required to work the overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to (but did not) work may be counted against the employee’s FMLA entitlement.

Substitution of Paid Leave

Enforcing Terms and Conditions of an Employer’s Paid Leave Policy

One of the more notable changes in DOL’s proposal is to make clear that the terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave, including paid vacation, personal leave, family leave, sick leave, and paid time off. Under the current regulations, employers cannot impose such terms and conditions except in a limited manner in connection with the use of paid leave. *See* 29 C.F.R. § 825.207(c) and WH Admin. Op. FMLA 2004-3-A (Oct. 4, 2004). Therefore, under the proposal, if an employer’s policy requires vacation leave to be taken in full-day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation leave. Or, for example, if an employer requires a two-day notice before taking personal leave, an employee seeking to substitute personal leave for FMLA leave would need to meet the two-day notice requirement.

Employers will be required to make employees aware of any such restrictions associated with paid leave use *in writing*, and will also have to inform an employee that he or she remains entitled to unpaid FMLA leave even if he or she chooses not to meet the terms and conditions of the paid leave policy.

Interplay of Paid Leave with Disability Benefits

Under the proposal, it remains the case that the FMLA substitution provisions are not applicable when an employee receives disability benefits while taking FMLA leave if applied unilaterally. *See* 29 C.F.R. § 825.207(d)(1). DOL clarifies, however, that the employer and employee *may agree to have paid leave also run concurrently* with FMLA leave to supplement disability benefits (e.g., where an employee only receives two-thirds of his or her salary from the disability plan) provided that such an agreement is permitted under applicable state law.

Eligibility Requirements

Consecutive Employment

The current regulations require that, in order to be eligible for leave, an employee must have been employed by the employer for at least 12 months, must have provided at least 1,250 hours of service during the 12 months preceding the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. 29 C.F.R. § 825.110(a).

The existing regulations also provide that the 12-month eligibility period need not be continuous, 29 C.F.R. § 825.110(b), which has left open for debate how an employer would combine nonconsecutive periods of employment, including periods separated by years. In *Rucker v. Lee Holding*, 471 F.3d 6 (1st Cir. 2006), the United States Court of Appeals for the First Circuit held that an employer was required to consider for FMLA eligibility purposes a five-year separation of service. Based on this decision, DOL experience, and RFI comments received, the proposed rule establishes that employers need not count breaks in service of five years or longer except for any break in service of any length resulting from either:

- the employee's fulfillment of military obligations; or
- a period of approved absence or unpaid leave for, by way of example, education or childrearing, where a written agreement or collective bargaining agreement exists concerning the intent to rehire the employee.

Because the FMLA's recordkeeping requirements extend only three years, the proposal puts the burden on the employee, *not* the employer, to establish that he or she is an eligible employee where the employee relies on a period of employment that predates the employer's records.

Counting Leave as "FMLA Leave" When Eligibility Commences "Mid-Stream"

DOL also proposes to clarify existing rules relating to employees who meet the 1,250-hour requirement but not the 12-months-of-employment requirement at the start of a leave for an FMLA-qualifying reason. The existing regulations do not make clear whether, in that case, the employee would become eligible for leave if he or she reached the 12-month employment period during the course of his or her leave. DOL proposes that the period of leave prior to meeting the statutory eligibility requirements be treated as non-FMLA leave and that the period of leave after the statutory requirement is met be treated as FMLA leave.

Definition of "Worksite"

In response to the Court of Appeals' decision in *Harbert v. Healthcare Service Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), DOL proposes to modify existing regulations with respect to defining the "worksite" of individuals working for joint employers. Current regulations provide that an employee's worksite is the primary employer's office from which the employee is assigned or reports. 29 C.F.R. § 825.111. In *Harbert*, the court held that the existing regulation was "arbitrary and capricious" because, among other reasons, it wholly failed to incorporate the common understanding of "worksite" as the site where an employee actually works. Accordingly, the DOL proposal modifies existing regulations to state that after an employee, who is jointly employed, is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of the employee's eligibility is the actual physical place where the employee works.

DOL specifically declined to make any modifications to existing regulations with respect to employees who work out of their homes.

Coverage to Care for a Family Member

DOL proposes three clarifications with respect to coverage of a spouse, parent, or child with a serious health condition and the documentation that can be requested in connection with such requests:

- In response to a district court decision, *Bryant v. Delbar*, 18 F. Supp. 2d 799 (M.D. Tenn. 1998), the determination of whether an adult child has a disability should be made at the time leave is to commence. In *Delbar*, the court conducted an analysis of whether an adult child had a disability for purposes of FMLA coverage based on facts and circumstances that occurred well *after* the leave commenced.
- The proposal adds to the language of 29 C.F.R. § 825.113(d), listing among the examples of reasonable documentation to support a qualified family relationship a signed tax return as evidence of an *in loco parentis* relationship.
- Rejecting a number of comments received in response to its RFI that proposed that an employee who requests leave to care for a family member with a serious health condition establish that he or she is the *only* family member available to provide such care, DOL makes clear that the employee need *not be* the only family member who can qualify to provide such care. DOL explained, “it will often be the case that there are multiple potential care givers none of whom is the only care giver without alternative but all of whom would need to take FMLA leave in order to provide care.”

Counting FMLA Leave

Retroactive Designation

As expected, DOL addresses the United States Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which invalidated the penalty provision in 29 C.F.R. § 825.700(a). The provision states, “[i]f an employee takes . . . leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.” The Court noted that in such circumstances, an employee could receive more than 12 weeks of leave, which is well beyond the statutory leave requirement. The Court did not invalidate the notice provision, however, and reached its decision in part because such a “categorical” penalty did not take into account individualized harm. Since *Ragsdale*, courts have been taking an individualized look at whether the employee was harmed as a result of the employer’s failure to timely designate leave.

Incorporating this new legal standard, DOL proposes that employers now may retroactively designate leave, provided that there is no individualized harm to the employee caused by doing so. This will often be the case where an employee’s own serious medical condition is at issue. Such employees will frequently be unable to postpone or forgo the leave entirely and, therefore, a late designation has no operative impact. On the other hand, where an employee plans on taking leave for the care of a family member, he or she may plan with a spouse how to allocate their collective leave requirements and, therefore, a late designation may disrupt that schedule and cause harm.

If there is a violation, DOL proposes to incorporate a monetary liability (as opposed to extended leave) where the employee is able to demonstrate individualized harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required.

Treatment of Holidays

In its proposal, DOL reaffirms its interpretation that when a holiday occurs during an employee's scheduled workweek and an employee is taking a full week of leave, the holiday counts against the employee's 12-week leave entitlement. *See* 29 C.F.R. § 825.200(f). DOL clarifies in its proposal that this rule does *not* apply when the employee is taking leave in increments of *less than* a week. For example, if an employee who regularly works Mondays through Fridays requires only Wednesday, Thursday and Friday for leave, that employee would use only 2/5 of a week if that Friday was a holiday. If that same employee needed Monday through Friday for leave, the employer may deduct a full week of leave despite the Friday holiday.

Light Duty

Current regulation 29 C.F.R. § 825.220(d) states that when an employee accepts a light-duty assignment, "the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of light duty." DOL is aware that this provision has caused confusion as to whether such a light-duty assignment counts against an employee's FMLA entitlement. Given this confusion and comments it received on this issue in response to its RFI, DOL proposed to delete this language with the intent of making clear that when an employee is working a light-duty assignment, the employee is not on "leave" and therefore no time performing such light-duty work should count against the employee's FMLA entitlement.

Employer Notice Requirements

DOL's proposal incorporates a revised framework and lexicon for employer notice requirements. The proposed notice provisions are grouped into three main categories—general notice, eligibility notice, and designation notice—and will create new obligations that employers will need to incorporate in the FMLA administrative process.

General Notice Requirement; Electronic Postings Allowed

The new general notice requirements under the FMLA combine current 29 C.F.R. § 825.300 guidelines with the written guidance required in current 29 C.F.R. § 825.301(a) and mandate that an employer (1) post a notice explaining the FMLA's provisions and complaint filing procedures (i.e., the "posting notice") and (2) provide employees this same notice (i.e., the "distribution of general notice").

Posting Notice

Under the proposal, the posting notice requirement could be satisfied through an electronic posting of the notice, provided that (1) the electronic posting is in a conspicuous place on the employer's website, (2) it is accessible to all applicants and current employees (not just on an internal intranet site), and (3) all employees have access to company computers that post the information in a conspicuous manner.

Distribution of General Notice

DOL also proposes an important change to the distribution of general notice requirements. Under the existing regulations, covered employers with eligible employees must distribute the general notice either by including it in the employee handbook or, where there is no employee handbook, by providing specific written guidance to an employee when an employee gives specific notice of his or her need for leave. The proposed regulations are markedly different where the employer does not maintain a handbook: those employers need to distribute a copy of the general notice to each employee at least once per year, either in paper or electronic form. *It will no longer be sufficient to distribute this general notice in connection with an FMLA leave request.*

DOL has developed a new prototype notice, and expects to make the notice available to employers in multiple languages.

Eligibility Notice Requirements

DOL proposes to label the notice of rights and responsibilities an employer must provide an employee when the employee requests FMLA leave pursuant to 29 C.F.R. § 825.301 as an “eligibility” notice. DOL proposes several modifications to the content and timing of this notice as follows:

- It must be provided within five business days of the start of an FMLA leave (compared to the two day turnaround required by the current regulations).
- It must notify the employee whether the leave is still available in the applicable 12-month period and, if not, *must indicate the reasons why the employee is not eligible or has no FMLA leave remaining (not required by current regulations).*
- It must notify the employee of his or her right to take unpaid leave if the employee does not qualify for substitute paid leave under the employer’s policies.
- It should include a statement of the employee’s essential job functions with the eligibility notice, if the employer will require that those functions be addressed in a fitness-for-duty certification.

DOL has also drafted a new prototype eligibility notice that reflects the changes in the proposal.

Designation Notice

A “designation notice” informs the employee whether the particular leave requested will be designated as FMLA leave. *See* 29 C.F.R. § 825.208(c). The proposed regulations would increase the time for an employer to provide the designation notice from two days to five days. The proposal also would require employers to inform the employee of the number of hours, days, or weeks, if possible, that will be designated as FMLA leave. When the amount of leave needed is unknown (e.g., intermittent leave for a chronic serious health condition), the employer must inform the employee every 30 days that leave has been designated and protected under the FMLA and advise the employee as to the amount so designated if the employee took leave during that 30-day period. The employer must also notify the employee if the leave is not designated as FMLA leave due to insufficient information or a nonqualifying reason. DOL has also drafted a new prototype designation notice that reflects the changes in the proposed regulations.

Employee Notice Requirements

Enforcement of Employer Call-In Procedures

DOL proposes an important change related to the employee's obligation to provide notice when leave is unforeseeable. Under the current regulations, the standard is "as soon as practicable." 29 C.F.R. § 825.303. "Ordinarily," the regulations explain, this notice should happen within one or two days of when the need for leave becomes known to the employee. DOL has interpreted this language to mean that an employer can wait up to two business days to report the FMLA absence from the time the employee becomes aware of the need for such leave. *See* WH Admin. Op. FMLA-101 (Jan. 15, 1999), Wage & Hour Manual 99:3114, 3115-16. Along with this interpretation, DOL has taken the position that employers cannot enforce normal call-in procedures in such circumstances. Courts have disagreed as to whether this position is correct.

DOL proposes to change its position, stating that employees may be required to follow established call-in procedures for calling in absences and requesting leave. Failure to notify employers of absences, according to DOL, may cause a delay or denial of FMLA protections. For example, the proposal explains, if an employee who is on intermittent leave for migraine headaches fails to call the employer's designated call-in number indicating that the employee will be absent, that employee may be disciplined in the same manner the employer normally would treat such an infraction. In addition, the employer may delay FMLA-protected leave until the employee complies with the call-in procedures.

Clarification of What Constitutes Sufficient Notice

Although DOL proposes to retain in 29 C.F.R. § 825.302(c) and § 825.303(b) the standard that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for leave, DOL proposes to clarify the standard as to what constitutes sufficient information from the employee to trigger the employer's obligations to consider whether the FMLA is at issue as follows: (1) that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), (2) the anticipated duration of the absence, and (3) whether the employee (or family member) intends to visit a healthcare provider or is receiving continuing treatment.

Medical Certification Process

Time Frame to Correct Deficient Certification

The proposal also includes clarification on the process for curing an incomplete or insufficient certification. The revision requires that when an employer determines a certification is incomplete or insufficient, the employer must state *in writing* what additional information is necessary and allow the employee seven calendar days to cure the deficiency. Additional time must be allowed if the employee notifies the employer within the seven-calendar-day period that he or she is unable to obtain the additional information despite diligent, good-faith efforts. If the deficiencies are not cured in the resubmitted certification, *the employer may deny leave*.

Content of Medical Certification; New Form Proposed

As to the content of the certification, DOL has proposed a simplified form, building within it new areas for medical providers to provide sufficient medical facts—symptoms, doctor visits, medical treatment

regimen—for employers to make a determination as to eligibility. The form specifically allows doctors to provide a diagnosis, which is not permitted under the current regulations.

Frequency of Recertification

Employers will also be allowed to require recertification every six months in circumstances where the certification indicates that the condition will last for an “unknown” or “lifetime” duration. Under the existing regulations, there is uncertainty as to whether an indefinite period of time constitutes a “set” period of time for purposes of the recertification rules. *See* 29 C.F.R. § 825.205. The regulations also confirm what DOL already has stated in a 2005 opinion letter, that each new leave year gives the employer the opportunity to obtain a new “initial” certification, and thus obtain a second and third opinion if there is a reason to doubt the validity of the certification. Under the current (as well as the proposed) regulations, employers may not obtain second opinions upon recertification.

Contact with Healthcare Provider as Part of Clarification Process

Under the current regulations, employers can only contact an employee’s healthcare provider to authenticate a certification or obtain clarification of the information provided with the employee’s permission and through the employer’s healthcare provider. *See* 29 C.F.R. § 825.307. The proposal eliminates the need for employee permission to authenticate the certification. The proposal also eliminates the need for an employer to use its healthcare provider for the clarification process. Thus, under the proposal, it would be acceptable for the employer’s human resources department to make such contact.

Background Information in Connection with Second-Opinion Process

DOL proposes that employees (or family members) be required to authorize the release of relevant background medical information regarding the condition for which leave is sought from the employee’s (or family member’s) healthcare provider to the second or third opinion provider. Currently, it is unclear whether such information may or must be provided.

Fitness for Duty

Fitness for Duty in Connection with Intermittent Leave

Current 29 C.F.R. § 825.310(g) provides that an employer cannot obtain a fitness-for-duty certification in connection with intermittent leave absences. The proposed regulations contain a significant shift in this regard. DOL proposes that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period *and* reasonable safety concerns exist. The employer may not terminate the employment of the employee while awaiting such a certification of fitness for duty for an intermittent or reduced-schedule leave of absence.

Information to Be Obtained as Part of the Fitness-for-Duty Certification

The proposed regulation retains the basic fitness-for-duty certification procedures with one important modification. In the past, the certification need only contain a “simple statement” regarding an employee’s fitness for duty. 29 C.F.R. § 825.310. Under the new proposal, when an employer (1) provides the employee with a list of the employee’s essential job duties together with the eligibility

notice (described above) and (2) advises the employee of the necessity for a fitness-for-duty certification, the employer may require the employee's healthcare provider to certify that the employee can perform those duties. When providing a fitness-for-duty certification, the healthcare provider must assess the employee's ability to return to work against these identified essential functions.

Perfect-Attendance Awards

Under the current regulations, employers cannot disqualify an employee from a perfect-attendance award because the employee has taken FMLA leave. *See* 29 C.F.R. § 825.215. In the proposal, DOL modifies this requirement, specifying that an employer may disqualify an employee from a bonus or award predicated on the achievement of a specific goal (e.g., hours worked) where the employee fails to achieve that goal as a result of an FMLA absence.

Waiver and Release of FMLA Claims

DOL makes clear in its proposal that it disagrees with the United States Court of Appeals' decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), which held that employees cannot voluntarily settle their past FMLA claims based on the language in current 29 C.F.R. § 825.220. The proposed regulations explicitly state, in response to *Taylor*, that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of DOL or a court.

Family Military Leave Amendments

While DOL did not propose regulatory language related to employers' new obligations under the military leave amendments to the FMLA, DOL does discuss its "initial view" as to how certain terms in the statutory amendments should be interpreted. It also poses a number of questions to the public for comment on issues it views as unclear based on a reading of the amendments. Highlights of the issues DOL discusses include the following:

Definition of "Next of Kin"

One of the proposals DOL indicates is under consideration is to define "next of kin" based on an existing Department of Defense interpretation that would include the following family members in order of priority: (1) unremarried surviving spouses, (2) natural and adopted children, (3) parents, (4) remarried surviving spouses (except those who obtained a divorce from the servicemember or who remarried before a finding of death by the military), (5) blood or adoptive relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, (6) brothers or sisters, (7) grandparents, (8) other relatives of legal age in order of relationship to the servicemember according to civil laws, and (9) persons standing *in loco parentis* to the servicemember. Alternatively, DOL asks the public for comment as to whether an employee should be able to designate "any blood relative" as his or her designated "next of kin" for purposes of FMLA entitlement.

Certification for Wounded Servicemember Leave

DOL looks again to the Department of Defense or Department of Veterans Affairs to provide the standard for what constitutes a "serious illness or injury" that *may* "render the member medically unfit to perform the duties of the member's office, grade, rank, or rating." Because the military branches already regularly provide, when requested, a medical certification to family members of covered

servicemembers certifying that the member is seriously injured or ill and is actively receiving medical treatment, DOL proposes that it may be appropriate to use this same certification to determine FMLA leave eligibility.

Definition of “Son or Daughter”

DOL questions whether the definition of “son or daughter” needs to be changed for purposes of family military leave provisions. Given that servicemembers are, by law, age 17 or above, the current definition of “son or daughter” (i.e., under the age of 18 or older than age 18 and incapable of self-care because of a mental or physical disability) would disqualify most parents or adult sons or daughters from qualifying for leave under the amendments, which does not seem consistent with Congressional intent.

Definition of “Exigency”

DOL seeks comment on how it should define qualifying “exigencies” for purposes of the family military leave provisions. It is DOL’s initial view that not every exigency necessarily will entitle a family member to leave, but rather, there must be some nexus between the eligible employee’s need for leave and the servicemember’s active-duty status. DOL also opines that leave for qualifying exigencies likely should be limited to nonmedical-related exigencies. DOL seeks specific input about whether the following circumstances are sufficiently “exigent” for purposes of leave: making arrangements for child care; making financial and legal arrangements to address the servicemember’s absence; attending counseling related to the active duty of the servicemember; attending official ceremonies or programs where the participation of the family member is requested by the military; attending to farewell or arrival arrangements for a servicemember; and attending to affairs caused by the “missing” status or death of a servicemember. DOL drew upon this list from statements made in the Congressional record when the bill was being introduced and considered.

Calculating Single 12-Month Period During Which Leave Is Taken

DOL also seeks comment on how the “single 12-month period” should be measured for purposes of determining the 26-week leave entitlement to leave to care for an ill or injured covered servicemember. According to DOL, it is not clear whether the 12-month period utilized to determine when the existing 12-week FMLA leave is used should be the same for this entitlement. In addition, DOL asks if an eligible employee receives one 26-week entitlement per servicemember, or if he or she is limited to one 26-week entitlement, no matter how many ill or injured servicemembers are to be cared for.

Conclusion

We welcome the opportunity to discuss these proposed changes with you, and we encourage employers to consider submitting comments to address any issues that are significant to their operation. If we can secure sufficient client interest, we plan to assemble a coalition of client companies and submit comments on these proposed regulations by the end of the comment period, April 11. Please contact Michael Ossip at 215.963.5761 if your organization is interested in participating.

You Are Invited to a Webcast

Please join us for a webcast presentation “DOL Proposes New Family Medical Leave Act (FMLA) Regulations: What Employers Should Know,” on March 20, 2008 at 1:00 p.m. ET/10:00 a.m. PST. To register, please visit <https://morganlewis.webex.com/morganlewis/onstage/g.php?t=a&d=667139254>.