insights

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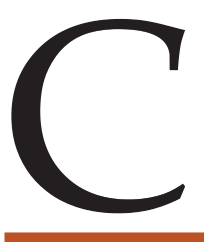
Proposition 65 Amendments Require

Re-evaluation of Products and Warnings



By Mark E. Mercer

and Michael J. O'Callaghan

California's Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly known as Proposition 65, requires consumer warnings for products that contain one or more of numerous "listed" chemicals that are known by the State to cause cancer or reproductive harm. As many companies have discovered the hard way, the law is not limited to businesses physically located in California. Rather, it applies to all products that knowingly and intentionally result in exposures to persons in California. If your product could make its way to California, Proposition 65 may affect you.

The law may be enforced by the California Attorneys General, district attorneys, or city attorneys in larger cities. Importantly, a citizen suit provision in Proposition 65 allows for private enforcement by individuals. Penalties for violating Proposition 65 by failing to provide a required product warning for example, can be as high as $2,500 per violation, per day. In private party actions, the person bringing the action may retain 25% of any settlement and is entitled to attorney's fees and costs. In an enforcement action, the plaintiff must merely show that a listed chemical is present in the product and the burden then shifts to the defendant to demonstrate compliance. Private party enforcement of Proposition 65 compliance remains an active and viable threat. For example, in 2016 private parties collected over $21,000,000 in attorney's fees and costs alone related to Proposition 65 suits.

Proposition 65 was substantially amended in August 2016. Among other things, the amendments repealed and revised all of Article 6 which mandates the "Clear and Reasonable Warnings" requirements. Although the amendments do not take effect until August 30, 2018, given the lead time required for companies to change product packaging and labeling, many are re-visiting their compliance with Proposition 65 requirements well in advance of the effective date.

The Article 6 amendments alter the methods of transmission and form and content of warnings for compliance with Proposition 65. The following contains a brief overview of the current warning requirements in effect since 2008 for certain labels which, as noted above, will change on August 30, 2018.

The current warning requirements for product labels require the following so-called "Safe Harbor" language for consumer product warnings. Safe Harbor levels are those developed by the regulators for many of the listed chemicals that trigger the actual warning requirement.

Current Warning Requirements for Product Labels:

A. **Carcinogens** – "WARNING: This product contains a chemical known to the State of California to cause cancer."

B. **Reproductive Toxicants** – "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."

The word WARNING must all be in capital letters. The warning language can appear on the "label" or "labeling" or an identification of the product at the retail outlet which provides a warning through shelf labeling, signs, menus or any combination of those methods. There is no express font size requirement, but the warning language must be "prominently placed upon a product's label or other labeling. . .with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling. . .as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use."

The amended regulations contain several new requirements for the Safe Harbor warnings for consumer products, in addition to warnings for other exposures. For consumer products, where a label on the product packaging is used as the method of compliance there are two options: a label or an "on-product" warning. A warning provided by a label must now include three new elements: (1) a yellow and black warning triangle; (2) the name of at least one chemical for each endpoint (cancer or reproductive harm); and, (3) a link to the state's Proposition 65 Internet site (www.P65Warnings.ca.gov).

The warning triangle must look like the image to the right. It can also be black and white IF the label for the product does not use the color yellow. The warning triangle symbols can be downloaded here: https://www.p65warnings.ca.gov/warning-symbol. The triangle symbol must be placed to the left of text of the warning, and be no smaller in height than the word "WARNING," which must all be in capital letters and bold.

Amended Warning Requirements for Product Labels:

A. **Carcinogens - "⚠WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov."

B. **Reproductive Toxicants - "⚠WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."

C. **Multiple Chemicals Where one is a Carcinogen and Another is Reproductive Toxicant - "⚠WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."

D. **Single Chemical That is Both a Carcinogen and Reproductive Toxicant - "⚠WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."

Thus, a sample warning for the chemical Bisphenol A (BPA) which is compliant with the amended warning requirements for item B above would read like this:

⚠WARNING: This product can expose you to chemicals including Bisphenol A (BPA), which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

The "on-product" option mentioned above is essentially a form of a label, but is placed on the product itself, on the product packaging, or both. This alternative Safe Harbor method was developed by the State in response to concerns that some consumer product packaging is so small that there is not enough room for the full label warning. The on-product option allows a consumer product to carry a short-form version of the Safe Harbor warning.

Warning Requirements for On-Product Labels:

A. **Carcinogens: "⚠WARNING** - Cancer – www.P65warnings.ca.gov."

B. **Reproductive Toxicants - "⚠ WARNING:** Reproductive Harm – www.P65warnings.ca.gov."

C. **Both Carcinogens and Reproductive Toxicants - "⚠WARNING:** Cancer and Reproductive Harm – www.P65warnings.ca.gov."

If an on-product warning is used, the word "WARNING" must appear in all capital letters and in bold. Additionally, the font size must be no smaller than six point font or the font size of other "consumer information" provided on the product or product packaging, whichever is larger. "Consumer information" means warnings, directions for use, ingredient lists, and nutritional information, but does not include the brand name, product name, company name, location of manufacture, or product advertising. The State believes that vast majority of

Proposition 65 Settlement Summary

Year	Attorney's Fees and Costs
2016	$21,561,113
2015	$17,828,941
2014	$21,047,746
2013	$12,731,262
2012	$15,588,767
2011	$11,941,919
2010	$7,806,539
2009	$9,035,123
2008	$14,607,965
2007	$6,740,856
2006	$8,230,459

Proposition 65 warnings will utilize the longer Safe Harbor warning and that the short-form option will be used when the longer version will not fit on a label on the actual product.

Finally, if the product label includes consumer information in a language other than English, the warning must also be provided in that language in addition to English.

While a general overview concerning label and on-product warnings is discussed in this article, businesses should also be aware that there are numerous other requirements in the Proposition 65 amendments concerning specific categories of goods such as canned and bottled food and water, recreational vehicles, furniture, wood products, prescription drugs, and alcoholic beverages. Similarly, information about products that appear on the Internet or catalogues is also subject to specific requirements set forth in the new requirements.

Businesses should be aware that Proposition 65 is a California consumer warning law that may affect you and your company if your products are ultimately sold in California. Private party enforcement for non-compliance with this law continues to flourish and may result in legal costs, significant penalties, and out of court settlement costs. Companies should review product inventories, distribution networks, and marketing tools to determine if Proposition 65 applies to them. Businesses that are already acquainted with Proposition 65 should quickly become familiar with the new requirements that go into effect on August 30, 2018, or discuss any questions with legal counsel, to avoid unnecessary regulatory compliance issues.

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Privacy Compliance Driven by the European Union

By Regina M. Joseph

and Matthew C. Spaulding

Data is the core of the information age, just as land was essential to the agrarian age and iron ore fueled the industrial age and steel production. Big data is the raw material of deep learning by artificial intelligence, as well as the raw material of social media giants. Big data is, of course, information about you and me--the purchases we make, our choices for health care, choices for music, and choices for other myriad minutia.

The privacy of personal data is rapidly becoming a primary concern. Most countries have new laws on the books or in process. In an interconnected world, an act of ecommerce could implicate laws beyond the sender's immediate geographic borders. For multi-national companies, processing of human resources data and sending it cross-border (either internally or through vendors and supply chain partners) might trigger multiple laws that protect personal data.

In an interconnected world, an act of ecommerce could implicate laws beyond the sender's immediate geographic borders.

Many hope that compliance with the European Union's new General Data Protection Regulations ("GDPR") will serve as a gold standard for many countries. The GDPR and its penalties become effective on May 25, 2018. Companies with any hint of personal data affecting the EU are scrambling to get a handle on exactly where the data is, what the data is, what is being done with it, where it is going, who will see it, who is responsible for it, and whose consent is required.

They are performing this data mapping because the GDPR penalties will be substantial—ranging as high as the greater of 20,000,000 euros *or* 4% of total worldwide annual turnover for the preceding year.

What triggers applicability of the GDPR?

The GDPR is designed to reinforce the data protection rights of individuals and to facilitate the free flow of personal data by virtue of a more uniform regulation adopted across the

EU. The GDPR is structured around two central roles, that of the (1) data controller and (2) data processor. A data controller is any natural or legal person, public authority, agency or other body which, alone or jointly with others is tasked with determining the purposes and means of processing personal data.[1] The term "processing" is defined as any operation or set of operations performed on personal data, including by means of automation, including collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.[2] A data processor is any natural or legal person, public authority, agency or other body responsible for processing personal data on behalf of the controller.[3]

The GDPR is triggered for a data controller or processor located within the EU if personal data of individuals located in the EU is being processed in relation to any commercial activity, regardless of whether the processing activity occurs inside or outside of the EU.[4] The GDPR is triggered for a data controller or processor located outside of the EU where it engages in any one of the following activities: (1) offering goods or services to individuals located within the EU ("EU data subjects"), (2) monitoring the behavior of EU data subjects while such individuals are located inside the EU, or (3) employing individuals in the EU.[5] It is important to note that the applicability of the GDPR is not limited to EU citizens, but rather anyone physically within the EU.[6]

My company falls into one of three categories mentioned above, where do I begin?

A company that may be subject to the GDPR is well-served by understanding how data is collected, used, stored and transferred within and outside the organization. Commissioning an experienced vendor to construct a data map is one of the best ways of capturing the manner in which data flows throughout the organization and can be used to confirm whether the organization is subject to the GDPR. The data map may also be used to identify data risk within the organization, prioritize issues for GDPR compliance, and to expose any gaps between how data is practically managed and the organization's documented policies.

What are compliance requirements?

Controllers are required to assess the nature, scope, context and purposes of processing and the risks, likelihood and severity for the rights and freedoms of natural persons and then to implement appropriate technical and organizational measures to ensure and demonstrate that it is processing personal data in accordance with the GDPR.[7] A controller is required to conduct a similar analysis each time it makes a determination about a means of processing personal data and must design technical and organizational measures for that process to meet the safeguards required by the regulation.[8] By default, the controller is also tasked with installing technical and organizational measures to ensure that only the personal data necessary to satisfy the specific purpose of the processing is actually processed, a principle that applies to the amount of personal data collected, the extent of processing, the period of time the personal data is stored, and its accessibility, including implementing measures to prevent unauthorized access.[9]

In addition to design requirements, controllers and processors are also required to implement technical and organizational measures to ensure an appropriate level of security after assessing the cost of implementation, the nature, scope, context and purposes of the processing and the likelihood and severity of risk to the rights and freedoms of natural persons.[10] Controllers and processors are required to implement measures to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services, the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident, and a process for regularly testing, assessing and evaluating the effectiveness of the technical and organizational measures to ensure security of the processing.[11]

The GDPR also imposes substantial record keeping requirements on both controllers and processors. Controllers and, where applicable, their representatives are required to maintain records of processing activities, including the name and contact details of the controller, the purposes of processing, a description of categories of data subjects and categories of personal data, categories of recipients to whom the personal data will be disclosed, any transfers of personal data to a third country or an international organization, time limits for erasure of the different categories of data and a general description of technical and organization security measures.[12] Processors and their representatives, if applicable, are

tasked with maintaining records of name and contact details of the processor or processors of each controller on whose behalf they process, categories of processing carried out on each controller's behalf, any transfers of personal data to a third country or international organization and a general description of the technical and organization security measures.[13] There is an exception to both of these record keeping requirements for controllers and processors where an organization employees fewer than 250 people unless the processing being carried out is likely to result in a risk to the rights and freedoms of data subjects, is not occasional or includes special categories of data (e.g., racial or ethnic origin, political opinions, religious or philosophical beliefs).[14]

Under the GDPR, controllers have information disclosure obligations to EU data subjects once the controller obtains personal data.[15] Requirements vary depending upon whether the controller actually collects the personal data from the EU data subject versus when such personal data is not obtained from the data subject.[16] Generally, the controller is required to provide contact details about itself; the purpose, legal basis for and legitimate interests pursued by the processing; recipients or categories of the personal information; details about any intended transfer of the personal data outside the EU and international organization; information regarding how long the data will be stored; the EU data subject's right to access, rectify, erase, restrict, object, and withdraw any consent given and the right to data portability among other information.[17] These requirements are designed around the principle of processing personal data, which include lawfulness, fairness and transparency, purpose limitations, data minimization, accuracy, storage limitations, integrity and confidentiality, and accountability.[18]

Does my organization need to appoint a Data Protection Officer ("DPO")?

The GDPR requires the controller or processor to designate a DPO where its core activities require regular and systematic monitoring of EU data subjects on a large scale or involve processing a large scale of special categories of data, such as those about criminal convictions or offenses, race, and political or religious beliefs.[19] Unfortunately, the GDPR does not define what might constitute "large scale processing." In lieu of any official guidance or commentary on the GDPR from the EU Data Protection Board ("Data Protection Board"), the Article 29 Data Protection Working Party ("WP 29"), an advisory group on data protection and privacy to the EU Commission, has suggested that organizations consider, in evaluating whether their processing is on a "large scale," such factors as the number of data subjects affected, the volume and range of data and data items processed, the duration of the data processing activity, and the geographical extent of the processing activity. [20]

The term "core activities" is defined in Recital 97 of the GDPR as the "primary activities that do not relate to the processing of personal data as ancillary activities."[21] WP29 has suggested that primary activities may be considered as "key operations necessary to achieve the controller's or processor's goals."[22] An example provided in WP29's guidance is a hospital, whose core activity is to provide healthcare - a hospital could not provide healthcare effectively without processing health data, including an individual's health records.[23] Thus, WP29 concludes processing data should be construed as one of the hospital's core activities.[24]

If it is determined that the organization must appoint a DPO, the individual chosen must have expert knowledge of data protection law and practices and be able to fulfill the tasks and responsibilities specified in the GDPR.[25] The requisite level of expert knowledge is to be determined based on the data processing operations being carried out and the protection required for the data processed.[26] There is no requirement that an organization appoint a DPO from outside the organization.[27] A DPO may be a staff member or may fulfill the tasks on the basis of a service contract.[28] The DPO may fulfill other tasks and duties outside of his or her DPO role, as long as such other tasks and duties do not result in a conflict of interest.[29] Regardless of who is selected as the DPO, the GDPR makes it abundantly clear that the DPO must be able to perform their job tasks in an independent manner, requiring that controllers and processors ensure that the DPO does not receive any instructions concerning the exercise of the DPO's responsibilities under the GDPR.[30] Moreover, a DPO cannot be dismissed or penalized for performing his/her duties as the DPO and must directly report to the highest management level of the controller or processor organization.[31]

Controllers and processors also have responsibility for insuring that the DPO is involved promptly and properly regarding all issues that relate to the protection of personal data.[32] The controller and processor are required to support the DPO in

performing the tasks of the DPO and by providing resources necessary to carry out such tasks, including access to personal data and processing operations and maintaining the DPO's expert knowledge.[33] Reasonable access must be afforded by the controller and processor to the DPO for EU data subjects so that the DPO may be contacted by such subjects about the processing of their personal data and to exercise their rights under the GDPR.[34]

Chapter 8 of the GDPR sets forth remedies, liability and penalties under the GDPR. Article 77 provides the data subject the right to lodge a complaint with a supervisory authority in a particular Member State of his or her habitual residence, place of work or place of the alleged infringement. Article 79 affords each data subject the right to an effective judicial remedy where the data subject's rights under the Regulation have been infringed. Article 79 also provides that a proceeding against a controller or processor is to be maintained in the courts of the Member State where the controller or processor has an establishment or in courts of the Member State where the data subject has his or her habitual residence. Article 82 provides the right to compensation to any person who has suffered damage as a result of an infringement of the Regulation from a controller or processor for the damage suffered. Most importantly, this private right of action is in addition to the administrative fines discussed above.

In conclusion, the EU has demonstrated its commitment to enforcing privacy violations. For example, in May 2017, the European Commission fined Facebook the equivalent of $122 million for privacy-related nondisclosures made in its merger review documentation submitted in 2014 for its WhatsApp acquisition. Separately, the Italian antitrust authorities levied a 3 million euro fine on WhatsApp for allegedly requiring users to agree to share their personal data with Facebook. Although these fines are hefty, they pale to potential GDPR penalties.

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Shumaker works collaboratively with an established vendor to provide a full service international solution, including data mapping and analysis.

FOOTNOTES

1 GDPR, Article 4(7).

2 GDPR, Article 4(2).

3 GDPR, Article 4(8).

4 *See* GDPR, Article 3.

5 GDPR, Article 3(2).

6 *See* GDPR, Article 4(1); GDPR, Recital 2.

7 GDPR, Article 24(1).

8 GDPR, Article 25(1).

9 GDPR, Article 25(2).

10 GDPR, Article 32.

11 *Id.*

12 GDPR, Article 30.

13 *Id.*

14 *Id.*

15 *See* GDPR, Articles 13 & 14.

16 *Id.*

17 *Id.*

18 GDPR, Article 5.

19 GDPR, Article 37(1).

20 Article 29 Data Protection Working Party, *Guidelines on Data Protection Officers ('DPOs')*, WP243 rev.01, Section 2.1.3, page 8, available at: http://ec.europa.eu/justice/data-protection/index_en.htm.

21 GDPR, Recital 97.

22 Article 29 Data Protection Working Party, *Guidelines on Data Protection Officers ('DPOs')*, WP243 rev.01, Section 2.1.2, page 6, available at: http://ec.europa.eu/justice/data-protection/index_en.htm.

23 *Id.*

24 *Id.*

25 GDPR, Article 37(5).

26 GDPR, Recital 97.

27 GDPR, Article 37.

28 GDPR, Article 37(6).

29 GDPR, Article 38(6).

30 GDPR, Article 38(3).

31 *Id.*

32 GDPR, Article 38(1).

33 GDPR, Article 38(2).

34 GDPR, Article 38(4).

welcome

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SHUMAKER is **pleased** to **announce** the addition of the ***attorneys*** from Fraser Clemens Martin & Miller LLC to the firm.

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As specialists in intellectual property and technology law, including patents, trademarks, copyrights, trade secrets, licensing, technology transfer, intellectual property management, and infringement issues, the addition of the group allows Shumaker to add depth and breadth to an already strong Intellectual Property Practice and increases the total number of IP attorneys to more than 30 across the firm.

Employee “No Poaching” Agreements Meet the Antitrust Laws:

Protection of Employees in the New Economy

By Michael M. Briley

For centuries employers have maintained a strong interest in trying to protect their most valuable asset, their key employees, from solicitation by and loss to other employers, especially competitors. As a result, “no poaching” (i.e., “we agree to not solicit or hire each other’s employees”) agreements have become prevalent, not only in contracts between competitors, but also in many vendor/ buyer agreements. The “new economy” (post 2008), however, has brought with it an intensified national focus on jobs and employment opportunity, as evidenced dramatically in the recent election cycle. The national policy of our country has always been in favor of employee mobility and any efforts by employers to limit or impede that mobility have been disfavored and limited by most courts. Recently, however, in the employment market, this provision has become a focus the magnitude of which has not been seen since the end of the Great Depression. This reality is especially important today in assessing the likely future legal viability of no poaching agreements between employers.

> ... no-poaching agreements are across-the-board, they are entered into between the employers themselves and they are primarily designed with and motivated solely by a desire to not lose highly trained employees...

We need to start with the recognition that these agreements are fundamentally different from the typical non-competition, customer non-solicitation (of the employer’s customers) and confidentiality agreements found in employment contracts, which agreements are commonplace between employers and individual employees, and which are designed with and motivated by a desire on the part of the employer to protect its trade secrets (and other intellectual property) and key customers from solicitation and diversion by employees who decide to leave or who are terminated by the employer. These agreements are typically enforceable and are assessed under state law. Conversely, no-poaching agreements are across-the-board (i.e., they apply to all employees or all employees within a class of employees), they are entered into between the employers themselves (as opposed to between employers and employees) and they are primarily designed with and

motivated solely by a desire to not lose highly trained employees (as opposed to the protection of intellectual property, customer good will and trade secrets). As such, they enjoy much less policy approval by courts and juries than restrictive covenants in individual employment agreements between employers and employees. No poaching agreements also sometimes have the intended effect of eliminating competition between the parties in the market for the procurement of highly trained employees, which intent runs directly and head-on into the competition law and policy of the U.S.

In recent years the federal antitrust enforcement agencies (the Antitrust Division of the Department of Justice ("DOJ")) and the Federal Trade Commission ("FTC") have become more interested in no poaching agreements, which they generally regard as anticompetitive and unlawful violations of the Sherman Antitrust Act. Their thinking is as follows:

1. All contracts, combinations and conspiracies in restraint of trade are *per se*, criminal violations of Section One of the Sherman Antitrust Act. Historically, for example, an agreement between two competitors to not solicit (or take orders from) customers of the other is a criminal violation of Section One, subjecting the parties to substantial criminal as well as civil penalties (e.g., *United States v. Topco*, 405 U.S. 596 (1972).
2. Similarly, agreements between buyers to eliminate competition for the purchase of goods or services are equally unlawful as are agreements between sellers concerning their end products (e.g., *Mandeville Island Farms v. Am. Crystal Sugar Co*., 334 U.S. 229 (1948); *Knevelbaard Dairies v. Kraft Foods*, 232 F.3d 1979 (9th Cir. 2000)).
3. In the business of finding and hiring employees, all employers within a relevant geographic area are in fact competitors of one another for the purpose of attracting and hiring trained employees, regardless of whether the employers actually compete with each other for the sale of goods or services.
4. Ipso Facto, any agreement between any two employers (whether they are competitors for the sale of their goods or services or not) to not solicit or hire the employees of one another is a *per se* violation of Section One of the Sherman Act, subjecting the parties to criminal and civil penalties.

Most recently, in a joint position statement issued by the DOJ and the FTC, the agencies issued a policy statement that:

> "Companies which collude to set industry hiring and compensation standards and which enter into no-poaching or wage fixing arguments with each other will face criminal and civil investigations and enforcement."
>
> In its press release, the FTC stated: "[w]orkers are entitled to the benefits of a competitive market for their services. They are harmed if companies that would ordinarily compete against each other to recruit and retain employees agree to fix wages or other terms of employment, or enter into so-called 'no-poaching' agreements by agreeing not to recruit each other's employees." *

Historically, the focus of the DOJ in this area has been to challenge no-poaching agreements between competitors. For example, in the case of *U.S. v. Adobe*, et al (U.S.D.C D.C. 2010), case no-/:10CV-01629) (available at http://www.justice.gov/atr/public/press_release/2010/262648), the DOJ brought suit against the major technology firms (Adobe, Apple, Google, Intel, Intuit and Bixer) for agreeing to not solicit for employment each other's highly trained technology employees. According to the Complaint filed by DOJ in this case:

> "The effort of these agreements was to reduce Defendants' competition for highly skilled technical employees (high tech employees), diminish potential employment opportunities for those same employees and interfere in the proper functioning of the price-setting mechanism that would otherwise have prevailed."

The defendants entered into a consent judgment with the DOJ that included an injunction against such behavior in the future. The basis of the Complaint in the *Adobe* case was that the poaching agreements eliminated an element of competition between the competitive employers, and also, that they collusively deprived their employees of "employment opportunities." The same year, the DOJ successfully attacked similar no poaching agreements in the motion picture film industry (for technical film operators) and enjoined Lucasfilm from using such agreements (Dec. 21, 2010) (available

at: http://www.justice.gov/atr/public/press_release/1010/262648.htm).

This has also been the subject of private class action litigation over the years. As far back as the early 1980s, a class action suit was brought against a number of corrugated box and paper manufacturing companies in the South who were alleged to have collusively prevented migratory and transient wood cutters from moving (i.e., changing their employment) from one paper mill to another, in an effort to keep down the wage levels paid to such workers. This author defended one of the paper mills involved in that case, which settled for a payment of a substantial amount of money. Also, a class action was filed recently against Carl's Jr. Restaurants, LLC and its parent company alleging that Carl's and its independent franchises colluded through a series of "no-hire agreements" to prohibit competitive franchisees from soliciting or hiring the employees of other franchisees. In a very recent action, the FTC enjoined the American Guild of Organists (AGO) from maintaining rules that restricted members' freedom to solicit or accept work from any "consumer" who was currently utilizing another member. The FTC challenged this no poaching arrangement under Section 5 of the FTC Act as a method of unfair competition that increased prices for consumers (*American Guild of Organists*, FTC ¶17,676 (2017); CCH Trade Reg. Repts. No. 1506, p. 7, April 13, 2017).

The concept that employers cannot fix the wages (or set wage rates or wage ceilings or ranges) of employees has been long established and the subject of much litigation (e.g., see the recent Michigan Nurses wage fixing cases), but the focus of the DOJ and FTC (as well as plaintiff's lawyers) on no poaching agreements between non-competitors is new and emergent.

We absolutely expect to see more litigation and claims attacking no-poaching agreements (even involving non-competitors for end product or service sales). These cases are hard to defend from a policy perspective because there are substantially less restrictive alternatives to such agreements. For example,

1. individual employee confidentiality and non-solicitation (of the employers' customers) agreements provide an effective restraint on both the ability of employees to leave, but also on the incentive of some employers to hire them;
2. claw-back provisions that require employees to re-pay training expenses (as long as they are reasonable and not punitive), are generally upheld when applicable and can serve as a deterrent to poaching;
3. non-compete agreements with individual employees, which are tested under state law, are upheld in most states as long as they are reasonable as to duration and scope;
4. active human resource monitoring of competitive wage levels can thwart successful poaching; and
5. predatory attempts by a competitor to weaken or destroy one of its competitors by specifically targeting that company's key employees are remedial under both state unfair competition and business tort laws.

In summary, we see no poaching agreements as becoming increasingly risky for employers. It is recommended that they never be entered into with a competitor and only very carefully, if at all, with non-competitors.

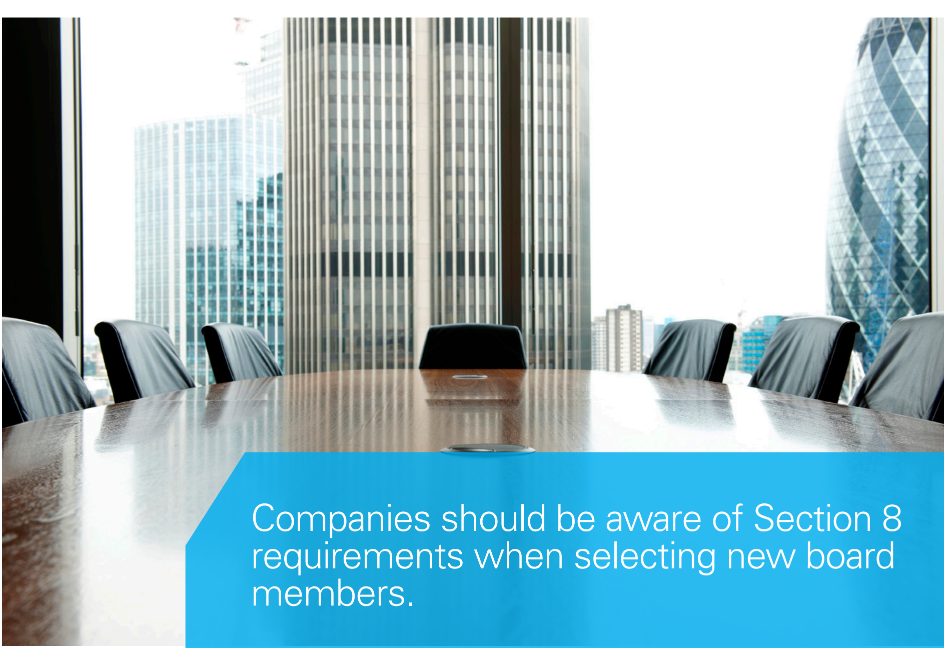
For additional information, contact Mike Briley at* mbriley@slk-law.com *or 1-800-444-6659, ext. 1325.

* Note that the FTC referred to " . . . companies that would indirectly compete against each other to recruit and retain employees" – not "companies that compete against each other in the same product or service industry." This is an important, and not coincidental, choice of words by the agency.

Interlocking Board Members and Officers: What You Need to Know

Antitrust laws are designed to ensure robust competition among companies. Most often, antitrust laws are considered when interacting with competitors, dealing with distributors, or considering a merger or acquisition. But there is an often overlooked antitrust consideration that extends into the Board: Section 8 of the Clayton Act. With some exceptions, Section 8 prohibits the same individual from serving as an officer or director of two competing corporations. Like other portions of the Clayton Act, Section 8 was designed to "nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates." *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953). Similar to collusion among horizontal competitors, Section 8 is a *per se* restriction that does not require proof that the interlock results in harm to competition.

By Mark Wagoner



Companies should be aware of Section 8 requirements when selecting new board members.

Some history is helpful for context. When enacted in 1914, Section 8's interlock ban was virtually absolute: any two corporations worth more than $1 million with competing lines of business could not share a board member even if the interlock was not likely to harm competition. So extreme were the early prohibitions that an impermissible interlock occurred even if different individuals served on the respective boards, creating an indirect interlock. Fortunately, advocates for reform argued that the low bar for interlocks discouraged qualified individuals from serving on boards, even when the risk to competition was low. As a result, Congress in 1990 amended Section 8 to raise the jurisdictional threshold from $1 million to $10 million, and to create safe harbors to permit interlocks involving very small competitive overlaps. Even with these changes, however, if the jurisdictional thresholds are met and no safe harbor applies, the ban on interlocks remains absolute.

The amendment provides that Section 8's higher jurisdictional threshold is now adjusted every year based on changes in gross national product ("GNP"). In January 2017, the Federal Trade Commission raised these jurisdictional thresholds to exclude corporations that have capital, surplus and undivided profits aggregating less than $32,914,000. In addition, there are three *de minimis* exceptions to the interlock ban that permit horizontal interlocks for two companies with few overlapping products:

1. the competitive sales of either corporation are less than $3,291,400 (also adjusted annually for changes in GNP),

2. the competitive sales of either corporation are less than 2 percent of that corporation's total sales, or
3. the competitive sales of each corporation are less than 4 percent of that corporation's total sales.

Because the thresholds change annually and the exceptions require an assessment of relative competitive sales levels, any company with an interlock will need an effective compliance program to monitor the firm's capital position, as well as each firm's sales of overlapping products. This is especially true if either (or both) firms are changing in ways that result in more of their business competing with the interlocked competitor. Depending on the size of the company, even small increases in competitive sales (or decreases in overall sales) may push a company outside the safe harbors.

Note that these thresholds and exemptions only apply to horizontal interlocks that would otherwise violate Section 8. Other statutes, such as Section 1 of the Sherman Act, still apply without exception to limit collusive behavior or unreasonable information sharing among competitors, including when such conduct occurs in the context of an exempt interlock. In addition, Section 5 of the FTC Act may also reach interlocks that do not technically meet Section 8's interlock requirements but violate the policy against horizontal interlocks expressed in Section 8. For example, Section 5 can reach interlocks involving banks, which are exempt from Section 8, and competing non-bank corporations. *In re Perpetual Fed. Savings & Loan Ass'n*, 90 F.T.C. 608, 657 (1977)).

Lessons from Section 8 Enforcement

The Federal Trade Commission has recently issued guidance on Section 8 compliance. Generally, the FTC relies on self-policing to prevent Section 8 violations and, as a result, litigated Section 8 cases are rare. Usually the issues are resolved through negotiations with the FTC. For example, the FTC closed an investigation into interlocks involving Google and Apple after a common member resigned from Google's board and Google's CEO resigned from Apple's board. A resignation that eliminates the interlock may effectively bring each company back into compliance with Section 8 and may lead the FTC to determine that there is no need for any further action where there is little risk of recurrence. Fortunately, Section 8(b) provides a grace period of one year for an interlocking director or officer to resign if there is a change that renders him or her ineligible to serve on both boards.

There are certain practices that could help companies avoid interlocks that run afoul of Section 8. These steps could also help companies avoid creating potential Section 8 issues as part of a proposed acquisition that grants management rights that could, if exercised, create an illegal interlock.

1. **Monitor your company's assets and check annually against the adjusted jurisdictional threshold.**

   Be wary of unintentionally growing into a Section 8 problem. As discussed above, the FTC announces adjustments to the minimum thresholds for Section 8 each January, to take effect immediately. If your company relies on staying below the minimum size threshold, be sure to do an annual assessment of your company capital, surplus, and undivided profits and compare those figures to the adjusted amount. Also note that the threshold goes up and some years it goes down because the thresholds adjust to changes in GNP, some years.

2. **Track new products or offerings for each interlocked company that may create new areas of competitive sales.**

   Section 8 applies to "competitors" in the sense that "the elimination of competition by agreement between them" would violate the antitrust laws. But courts have rejected the argument that this is the same as the market definition analysis found in other antitrust cases. In *TRW, Inc., v. Federal Trade Commission*, the Ninth Circuit found that, especially in emerging industries, competition in the Section 8 sense can encompass more than an assessment of the cross-elasticity of demand for existing products.

   In a developing industry in which product variation is just beginning and customer needs are not yet standardized, it is unlikely that two companies will produce products nearly equivalent in their ability to satisfy the needs of a range of customers. Nonetheless, these companies compete. Their competition consists of the struggle to obtain the business of the same prospective customers, accompanied by representations of a willingness to modify their respective products. Competition also consists of efforts to make a sale, even if neither succeeds in persuading the buyer to purchase.

   Companies need to be aware of changes not only in their own competitive portfolio but also those of any firms with which there is an existing interlock. Using public information to keep tabs on offerings of interlocked firms may reveal new areas of competitive sales that will need to be assessed and possibly added in to calculations of relative

sales levels. With so many changing data points, companies need a plan for monitoring changes in the market.

3. **Be sure to check with employees who are knowledgeable about market participants and review documents that track market developments.**

   An accurate assessment of competitive sales should include review of ordinary course business documents that reveal how closely the interlock companies compete, as well as discussions with front-line employees who monitor the competitive offerings of the interlocked competitor. High-level corporate documents or interviews with high-level executives may not contain sufficient detail to determine each company's relative market position. For instance, in a recent matter before the FTC, high-level executives indicated that certain products did not compete with the interlocked company; company documents we obtained pursuant to compulsory process showed otherwise. The FTC took no action in that matter because the companies involved had attempted to comply with Section 8, removed the interlock upon learning of our investigation, and improved their compliance efforts. Nevertheless, the interlocked companies were subject to a significant investigation. In the past, the FTC has also issued a consent order requiring IBM to consult with "appropriate personnel in IBM's manufacturing, marketing and other divisions most knowledgeable regarding the source and nature of products and services in competition with" IBM and its subsidiaries.

   In addition, if you are relying on the other company to report its competitive sales in order to comply with the "less than 4 percent" requirement, check with your own employees to see if the competitive assessment comports with your own assessment of which products or services compete. The FTC will not necessarily excuse a company from its obligation to comply with Section 8 merely because it relied on representations of the interlocked company. Relying solely on the representations of the interlocked firm may not be sufficient to maintain compliance with Section 8 safe harbors. Indeed, it may be necessary for outside counsel to share information on a confidential basis to ascertain that an unlawful interlock is not created.

4. **Take care when acquisitions create interlocks.**

   Acquisition agreements sometimes include a provision that grants one party the ability to appoint a board member to another firm. Occasionally, if this right is exercised, an interlock violating Section 8 would be created. Even before the rights are exercised, such provisions may raise antitrust concerns. Recently, the U.S Department of Justice required Tullett Prebon and ICAP to restructure a $1.5 billion transaction that would have resulted in ICAP owning nearly 20 percent of Tullett Prebon and having the right to nominate one member of its board of directors. In its press release announcing the changes, the DOJ noted that Section 8 requires that firms that compete remain independent. Because the two firms would continue to compete after completing the proposed transaction, the revised agreement left ICAP without an ownership stake or the right to appoint a member to the Tullett Prebon board.

   Sometimes, there are antitrust concerns with the underlying merger as well as any potential interlock. For instance, in *United States v. CommScope Inc.*, Case No. 1:07-cv-02200 (District of Columbia) the DOJ alleged violations of both Section 7 and 8 of the Clayton Act in a proposed merger between CommScope and Andrew Corporation, a transaction that included Andrew's interests and management rights in another company, Andes Industries, Inc. CommScope competed with Andes in the U.S. market for drop cable used by cable television companies. Andrew's interest in Andes included a 30 percent equity position, plus warrants to acquire additional stock, as well as several governance rights, such as the ability to designate members of Andes' board. According to DOJ, CommScope's acquisition of Andrew's holdings in Andes would violate Section 7, by giving CommScope both the ability and incentive to coordinate with Andes or undermine its competitive decision making. The proposed purchase agreement with Andrew also violated Section 8 by giving CommScope the ability to appoint Andes board members, a firm with sufficient competitive sales to trigger Section 8. To settle charges related to both sections, CommScope agreed to divest Andrew's entire ownership interest in Andes, and forfeit any rights to appoint members of Andes' board.

Conversely, a spin-off of a business unit or other assets may lower your company's total sales in a way that increases the percentage of competitive sales above the 2 percent safe harbor. This is all the more reason to make Section 8 compliance part of an annual audit.

Conclusion

Companies should be aware of Section 8 requirements when selecting new board members. Any competitive overlaps should be addressed before a member joins the board. Thereafter, effective compliance programs should be established to ensure that Section 8 requirements are met during the invariable ebbs and flows of business.

Section 8 compliance is just one of many areas a robust antitrust compliance program must monitor. We can help to ensure that antitrust compliance remains a priority for your company, especially during complex mergers and acquisitions where control provisions may inadvertently trigger antitrust exposure.

For additional information, please contact Mark Wagoner at mwagoner@slk-law.com or 1-800-444-6659, ext. 1412.

Diversity at Shumaker

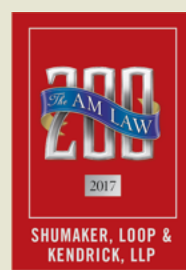
Shumaker awarded its first diversity scholarship to Matthew Ceriale. Matthew is a first-year law student at Stetson University College of Law in Gulfport, Florida and is participating as a 2017 Summer Associate in our Tampa office.

To be eligible for the scholarship, applicants had to submit an application, among other requirements, such as law school transcript and resume, legal writing sample, letters of recommendations and a description of why the student believes that diversity is important.

To learn more about the Shumaker Diversity Scholarship, visit our website at: http://www.slk-law.com/About-Shumaker/Diversity/Shumaker-Diversity-Scholarship.

Matthew, pictured with Linda Vandercook, Shumaker's Director of Professional Development & Recruitment.

congratulations



Shumaker ranked #179 in the annual Am Law 200 survey, which is a ranking of U.S. law firms by gross revenue and is published annually by *American Lawyer* magazine.

Law360 Top 400
Shumaker ranked #173 among the nation's largest law firms in the Law360 Top 400 annual ranking. The list ranks the largest U.S.-based law firms and vereins with a U.S. component as measured by domestic attorney headcount.

Shumaker was ranked #1 by the *Tampa Bay Business Journal* in its annual ranking of Tampa Bay area law firms, based on number of attorneys as of January 2017.

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***Franchise Times Magazine* 2017 "Legal Eagles"**

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MITIGATING REGULATORY RISKS AFFECTING THE WOOD AND FURNITURE INDUSTRIES:

The Lacey Act

The wood industry is both ever-changing and global in scope. And, as companies involved in the industry can attest, they are also heavily regulated. The Lacey Act[1] is a significant piece of this regulatory patchwork, and, as a recent case involving Lumber Liquidators illustrates, the Lacey Act carries heavy penalties for non-compliance.

By Joshua M. Hayes

A. The Lacey Act: A Background and History

The Lacey Act was passed in 1900 and is the United States' oldest wildlife protection law. Under the Lacey Act, it is unlawful to import, export, sell, receive, acquire, or purchase in interstate and foreign commerce fish, wildlife or plants that are taken, possessed, transported, or sold in violation of U.S. law.[2] A 2008 amendment to the Lacey Act also allows Lacey Act provisions to be prosecuted domestically in cases where covered timber and plants are illegally taken from federal land, or illegally taken from state or private lands and then entered into interstate or foreign commerce. Thus, the Lacey Act applies to both importers of covered timber and plants as well as domestic companies that engage in interstate commerce.

In addition to its prohibition of possessing or transporting certain plants, the Lacey Act also requires the declaration of plants imported to the United States from other countries on a Plant and Product Declaration Form or "PPQ 505" form,. This declaration must include the scientific name of the plant (including the genus and species) contained within the import as well as a description of the value of the import, the quantity of the plant therein, and the country or countries (if made from more than one plant) of origin.[3]

Failure to comply with the Lacey Act's importation, declaration, and reporting provisions can result in steep civil[4] and criminal penalties,[5] The Lacey Act's civil and criminal penalties make it necessary for companies that import wood to understand and monitor their supply chains in the exercise of due care. Every link in the supply chain is potentially liable for failing to exercise due care.

B. Lumber Liquidators: A Cautionary Tale

The U.S. Department of Justice ("DOJ") has recently made clear the high cost of failing to exercise due care. In February 2016, Lumber Liquidators Inc. paid one of the highest Lacey Act fines in the law's history after pleading guilty to several Lacey Act violations.[6] The DOJ brought the action after lumber imported by Lumber Liquidators was discovered to be from illegal logging in eastern Russia in the habitat of an endangered species, the Siberian Tiger.[7]

The fines assessed by the DOJ totaled more than $13.15 million, including $7.8 million in criminal fines, $969,175 in criminal forfeiture and more than $1.23 million in community service payments.[8] Lumber Liquidators also agreed to a five-year term of organizational probation and mandatory implementation of a government-approved environmental compliance plan and independent audits as part of its settlement.[9] In addition, the company will pay more than $3.15 million in cash through a related civil forfeiture.[10]

The nature of these charges, and the steep cost of failing to exercise due care, illustrate how critical well-developed and implemented compliance procedures are to doing business in the wood industry.

C. Mitigating Lacey Act Liability: Due Care and Risk Mitigation

As the *Lumber Liquidators* case illustrates, in the same way that *ignorantia juris non excusat* ("ignorance of the law is no excuse") applies to liability under the law generally, ignorance of illegal behavior in your supply chain is no defense against charges of a Lacey Act violation. However, there are several steps companies can take to mitigate this risk.

First, a company should never, under any circumstances, knowingly purchase, transport, or store illegally obtained wood or wood products. Doing so incentivizes unregulated, illegal logging, which harms the sustainability of the legal wood importing industry and damages the business reputation of everyone involved in the supply chain and the public perception of the industry as a whole.

Second, industry participants should take measurable and attainable steps to exercise due care in sourcing their wood materials and products. It is the importer's responsibility to investigate and ensure that the wood is legally sourced. This can be done by researching, investigating and auditing the companies that are growing (if plantation grown) or harvesting the wood. In addition to familiarizing oneself with the specific players in their supply chain, importers should be familiar with broader regional, national, and international industry trends, reputations and risks associated with doing business in certain nations or even certain regions within nations. It is also critical to understand that this risk analysis is an ongoing process that should be dutifully maintained in the exercise of due care.

Third, after the risks associated with doing business within a particular region, and the reputations and business practices of the players in a specific supply chain are understood, businesses should develop formalized, written compliance programs for establishing best practices. Ensure that those practices are written and well documented. This should include informing your suppliers in writing of your intent to purchase only legally sourced wood and insist that they obtain certification programs from their government or an established non-governmental organization to the extent possible.

Last, companies should understand that ensuring that a compliance program is properly designed, implemented, documented, and followed is first and foremost the responsibility of the company's management and owners. Top management should actively participate in their company's regulatory compliance team, and work to develop and maintain a culture that treats compliance with these procedures as integral to the way their company conducts business. Following these procedures can help establish evidence of due care, which may help shield a company from liability associated with Lacey Act violations.

For additional information, contact Josh Hayes at* jhayes@slk-law.com *or 1-800-797-9646, ext. 2925.

FOOTNOTES

[1] 16 U.S.C.§ 3371 *et seq.*

[2] 16 U.S.C. § 3372 (a)(1)-(2).

[3] 16 U.S.C. § 3372 (f)(1)(A)-(C).

[4] 16 U.S.C. § 3373 (a)(1).

[5] 16 U.S.C. § 3373 (d).

[6] *Lumber Liquidators, Inc., Sentenced for Illegal Importation of Hardwood and Related Environmental Crimes*, UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENT AND NATURAL RESOURCES DIVISION, Feb. 1, 2016, available at: https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

Shumaker Advisors, LLC Launches in Florida

Shumaker launched Shumaker Advisors Florida, LLC, a public affairs group that provides advocacy, issue management and business-to-government and business-to-business services.

Headed up by Shumaker partner and business lawyer Ronald Christaldi, president and CEO of Shumaker Advisors in Florida, the public affairs practice provides public and private sector clients services at the federal, state and local levels.

The formation of Shumaker Advisors Florida comes in addition to Shumaker Advisors, LLC in Columbus, Ohio that was established in 2013. The Ohio group, led by Andy Herf, is a government relations consulting firm that works closely with clients in the food and beverage, health care, retirement planning and related industries to provide a bridge to government, government agencies and legislators that shape the future of business in these highly regulated markets.

Shumaker Advisors Florida has also added public affairs specialists Patrick Baskette, Ed Miyagishima and Carlye Morgan to its newly created team.

The Uniform Voidable Transactions Act in a Nutshell

In December of 2016, Michigan became one of currently 15 states,[iii] including North Carolina,[iv] to adopt the Uniform Voidable Transactions Act ("UVTA.")[v] In 2014, the Uniform Law Commission promulgated the UVTA, which amends the Uniform Fraudulent Transfer Act ("UFTA"). The UFTA is the most widely adopted statute in the United States (including Ohio[vi] and Florida[vii]) addressing fraudulent transfer law. Briefly, fraudulent transfer law permits creditors to void a debtor's transaction in two situations: when a debtor engages in a transaction with the intent to hinder, delay or defraud any creditor, or when a debtor makes a transfer without receiving "reasonably equivalent value" under certain conditions.

By Dave Slenn[i]

and Mark Hildreth[ii]

With the UVTA, an unsecured lender can rely on the law of the location of the borrower/guarantor in order to ascertain rights and remedies, as opposed to the law of some other jurisdiction...

Modern fraudulent transfer law traces its roots to the Statute of 13 Elizabeth, enacted by the English Parliament in 1571. Although most states have adopted the UFTA, there are still differences among the states, such as the availability of costs for creditors, longer statutes of limitations for creditors, liability for those who assist with a fraudulent transfer, or protections for charities that receive proceeds of fraudulent transfers.

The UVTA provides four significant changes to the UFTA. The first change is a choice of law provision, requiring the voidable transaction law of the debtor's "location" to govern the voidable transaction claim. Second, the UVTA clarifies that the creditor's burden of proving intent to hinder, delay or defraud is by a "preponderance of the evidence" as opposed to "clear and convincing evidence" – a standard used by some courts. Third, the UVTA identifies "series" LLCs, and clarifies that transactions between a series and another series can be viewed as

voidable transactions. Fourth, the term fraudulent is replaced with "voidable," reflecting the fact that fraud (in its common law sense) is not a requirement for setting aside a transfer.

Other than these and a few other changes to the UFTA, the UVTA also features updated "Official Comments" reflecting the aforementioned changes, as well as citations to updated case law. This is important because the UFTA Official Comments (adopted in 1984) do not contain case law examples beyond the early 1980's. Among the updates in the Official Comments include analysis related to limited liability companies (LLCs) and domestic asset protection trusts – entity forms that were not popular (or even in existence) in 1984.

The driving force behind the amendments to the UFTA was the choice of law provision, as the test for determining which jurisdiction's law would apply to cross-border fraudulent transfers is not clear. In these situations, parties often use a multi-factor test under the Restatement Second of Conflicts of Law. With the UVTA, an unsecured lender can rely on the law of the location of the borrower/guarantor in order to ascertain rights and remedies, as opposed to the law of some other jurisdiction, like the Cook Islands, when attempting to seek relief. The same holds true for involuntary creditors, such as tort victims or spouses in divorce,[viii] who would otherwise experience great difficulty seeking relief (if any) in pro-debtor jurisdictions like the Cook Islands.

TrustCo Bank v. Mathews[ix] is a recent case out of Delaware that illustrates how lenders can be injured by an unfavorable choice of law decision, as well as a debtor's use of vague notice to toll the one–year statute of limitations applicable to certain fraudulent transfers. In *Mathews*, the debtor, a guarantor, created an asset protection trust in Delaware and then transferred assets prior to the borrower's default on the loan. The Delaware court did not apply the lender's preferred choice of fraudulent transfer law, and also found sufficient notice was provided to the bank when the debtor submitted a financial statement that included a reference to "estate planning." Once a bank officer received the statement, the statute of limitations began to run, to the lender's detriment.

The UVTA reflects an update to creditors' rights law, and serves as a reminder that as transactions become more sophisticated, creditors, too, must be vigilant in protecting their rights. As transactions continue to expand beyond state and country lines, creditors of the parties involved must understand the consequences of such expansion. Creditors in all jurisdictions, especially those without the UVTA, must be increasingly aware of how a debtor can force a creditor to seek relief under the law of a pro-debtor location.

For additional information, contact David Slenn at* dslenn@slk-law.com*, 1-800-677-7661, ext. 2247, or Mark Hildreth at* mhildreth@slk-law.com*, 1-941-366-6660, ext. 2747.

FOOTNOTES

[i] Dave Slenn was appointed by the American Bar Association's Business Law Section as an Advisor to Uniform Law Commission's Drafting Committee for amendments to the Uniform Fraudulent Transfer Act that produced the Uniform Voidable Transactions Act (UVTA), as well as a member of the Florida Bar's Business Law Section task force that analyzed and supported the adoption of the UVTA in Florida. Dave also testified on behalf of the Florida Bar's Business Law Section before the Florida Senate's Committee on Banking and Insurance in favor of Florida's adoption of the UVTA.

[ii] Mark Hildreth is board certified in business bankruptcy law by the American Board of Certification and is a member of the UVTA task force of the Florida Bar Business Law Section.

[iii] Michigan Uniform Voidable Transactions Act, effective April 10, 2017. *See* Mich. Comp. Laws Ann. § 566.31, *et seq.*

[iv] North Carolina Uniform Voidable Transactions Act, effective October 1, 2015. *See* G.S. § 39–23.1, *et seq.*

[v] The UVTA is currently pending in eight states.

[vi] Ohio Uniform Fraudulent Transfer Act, Ohio Rev. Code Ann. § 1336.01, *et seq.*

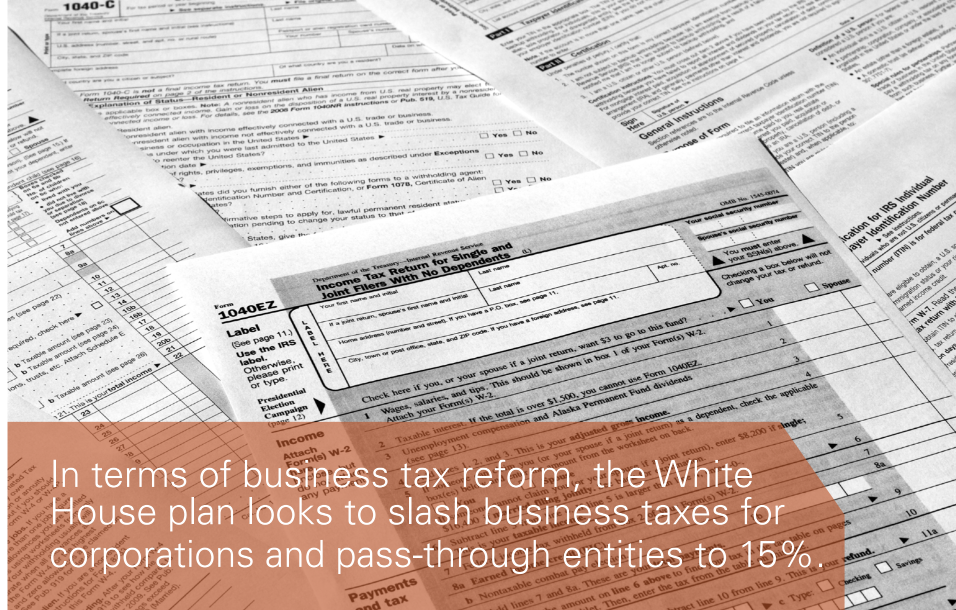
[vii] Florida Uniform Fraudulent Transfer Act, Fla. Stat. Ann. § 726.101, *et seq.*

[viii] *Riechers v. Riechers*, 178 Misc. 2d 170, 174, 679 N.Y.S.2d 233, 236 (Sup. Ct. 1998), aff'd, 267 A.D.2d 445, 701 N.Y.S.2d 113 (1999).

[ix] *TrustCo Bank v. Mathews*, No. CV 8374-VCP, 2015 WL 295373, at *2 (Del. Ch. Jan. 22, 2015).

Tax Reform Update

Tax reform stands as a top priority for the White House and the Republicans in Congress. Although differences exist, some fundamental similarities appear to be on track if reform moves forward. If the parties can agree, taxpayers can expect major changes in terms of individual, business, and international taxation.



In its one-page release on tax reform, the White House listed simplification of the tax code and tax relief as its main goals. To that end, the White House has proposed to reduce the seven current tax brackets down to three with rates of 10%, 25% and 35%. The GOP plan termed "A Better Way" also aims to reduce the number of brackets to three, but with rates of 12%, 25% and 33%. Both plans also envision increasing the standard deduction to effectively create a 0% tax rate for individuals with lower income.

John P. Dombrowski

In regard to the tax rate on investment income (qualified dividends and capital gains), the Better Way plan proposes cutting the ordinary income rates in half for each of the three income brackets (i.e. 6%, 12% and 16.5%). The White House plan keeps the current investment income rates, but proposes an overall reduction of tax on that income by way of elimination of the 3.8% Net Investment Income tax, thereby reducing the cumulative rate for high earners from 23.8% to 20%.

A shared vision to simplify the tax code includes an elimination of all itemized-deductions except for the home mortgage interest deduction and the charitable deduction. Both plans also envision repealing the Alternative Minimum Tax and the Estate Tax.

In terms of business tax reform, the White House plan looks to slash business taxes for corporations and pass-through entities to 15%. The GOP plan will reduce the tax rate on pass-throughs (and sole proprietorships) to 25%, while reducing the tax on corporations to 20% to reduce the effect of double-taxation on shareholders. The more fundamental change comes in the way businesses will be taxed on more of a cash flow basis.

Both the GOP and White House plans propose an immediate deduction for capital investments.

Rather than continuing the use of depreciation schedules to deduct the decline in an asset's value over time, the full cost of an investment will instead be deducted in the year of purchase. The immediate investment deduction is accompanied by an elimination of the business interest deduction. While an immediate deduction encourages business investment, the elimination of the interest deduction aims to equalize the tax treatment of different types of financing.

The White House and GOP plans aim to overhaul the way income is taxed across borders. The U.S. is currently one of the few countries that taxes its residents, including U.S.-based companies, on worldwide earnings, while giving a credit for foreign taxes paid on that income. If the current plans go through, the U.S. will join all of its major trading partners in assessing tax on a territorial basis and only tax residents and U.S.-based companies on the income earned inside its borders.

In order to bring home the estimated $2 trillion in foreign earnings companies have stashed overseas to avoid paying deferred tax liabilities upon repatriation, the GOP plan calls for a one-time 8.75% tax on all money brought back to the U.S. The White House plan supports a one-time tax, but fails to specify a rate. Both plans believe this one-time tax will encourage companies to bring back money to reinvest in the U.S.

Finally, both plans call for a border adjustment tax. The GOP plan terms this a "destination-based tax" since it will levy a 20% tax on imported goods, while exempting all exports from the tax. Although it was a primary issue in President Trump's election campaign, support within the Republican Party has fallen off to the point that House Speaker Paul D. Ryan, R-Wis., has recently conceded that the eventual tax reform package may not contain this tax.

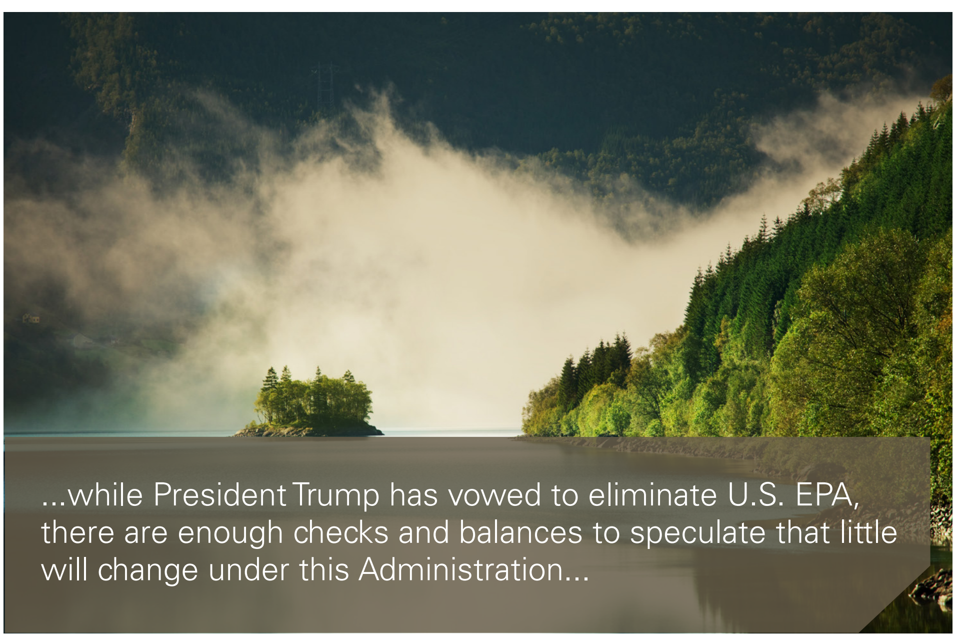
For additional information, please contact John Dombrowski at jdombrowski@slk-law.com ***or 1-800-444-6659, ext. 1411.***

ENVIRONMENTAL LAW:

What to Expect from President Trump's Administration

During the campaign, President Trump vowed to eliminate the U.S. EPA. In an interview on Fox News, Donald Trump stated the "Environmental Protection [Agency], what they do is a disgrace. Every week they come out with new regulations." Once elected, President Trump named Scott Pruitt, the Attorney General of Oklahoma, as Administrator of the U.S. EPA. Mr. Pruitt has been well known to challenge U.S. EPA's regulations and have a pro-industry stance when it comes to environmental issues. So many people have asked, what would happen to the U.S. EPA and environmental regulation of industry?

By Cheri A. Budzynski



In March, President Trump proposed to cut the U.S. EPA by 31%, lay off 25% of the employees, and eliminate 56 programs. He also signed an executive order to repeal most of President Obama's rules and policies related to climate change. However, the recent budget revealed that only $208 million was cut from the $8.2 billion that U.S. EPA requested for the 2017 fiscal budget. So at least in the short term, U.S. EPA is spared from the drastic cuts proposed by U.S. EPA.

Even if President Trump gets his way, that does not mean that industry would be free from environmental regulations. In fact, industry could find it more costly operating under a deregulated U.S. EPA for some of the following reasons.

Expect More Citizen Suits and State Enforcement. Every major environmental statute includes citizen suit provisions that allow a citizen to stand in the shoes of U.S. EPA to enforce environmental law. If there is a concern that a source of pollutants is violating environmental laws or regulations, a citizen can give notice to U.S. EPA that it should take appropriate enforcement or the citizen will file suit in the federal district court. Thus, even if President Trump decreased enforcement on the federal level, non-governmental organizations (NGOs) such as Sierra Club or Natural Resources Defense Council will seek to enforce the environmental laws and regulations in the federal courts. Not only is enforcement more costly

in the court system, NGOs will seek more stringent terms and can obtain attorney fees, which is permitted under the citizen suit provisions. Many NGOs have publicly stated that there will be more citizen suits under President Trump's administration.

In addition, the top administrative officers of Democratic-majority states have indicated that they will increase enforcement at the state level if President Trump reduces federal enforcement. Environmental statutes allow states to have their own agencies to oversee rulemaking and enforcement. Therefore, even if President Trump could dismantle U.S. EPA, there are still state agencies to protect the environment. There is some concern, however, that U.S. EPA could drastically cut funds that go to the state agencies and this could have an impact on enforcement.

Expect Challenges to President Trump's Rules. While President Trump has signed several executive orders that could impact the U.S. EPA, U.S. EPA has not revised or rescinded any major rules since he has taken office. To make changes to any regulation, U.S. EPA is required to promulgate the regulations as "proposed rules." Once proposed, the law requires a public comment period. U.S. EPA must then review and respond to those comments before finalizing the regulations. Once finalized, individuals who submitted comments can petition a U.S. Circuit Court to review the rules. If the court finds that there was no technical or legal justification for the regulation (known as the arbitrary or capricious standard), the court can vacate it and remand it back to U.S. EPA for further consideration. Under both Democratic and Republican administrations, this has been the fate of all significant environmental laws. This will not change under President Trump's administration.

Expect to Continue Compliance. The take-home message is that industry must continue to comply with the environmental laws and regulations that are currently in place. Further, if there is no administrative or judicial stay of environmental regulations that have implementation dates in the future, industry must move forward in planning and implementing those rules. In short, while President Trump has vowed to eliminate U.S. EPA, there are enough checks and balances to speculate that little will change under this Administration; if there is change, expect it to come slowly.

For additional information, contact Cheri Budzynski at* cbudzynski@slk-law.com *or 1-800-444-6659, ext. 1332.

slknews

Thad Adams and **Alex Long** represented Variety Stores Inc. in its lawsuit against Wal-Mart Stores Inc. The U.S. District Court for the Eastern District of North Carolina ruled in favor of Variety, ordering Wal-Mart to disgorge $32.5 million in profits earned by Wal-Mart and resulting from Wal-Mart's willful infringement of Variety's "Backyard" trademark rights. This case was listed among Law360's Top 10 Trademark Rulings of 2016.

Erin Aebel was a panelist on the Practitioners Panel at the Tampa Bay Chapter of the Federal Bar Association's presentation "Staying in the Game: Getting to the Top."

Steven Bimbo was appointed to a 2-year term to the Charlotte Business Inclusion Advisory Council.

Mike Born, Kevin Braig, Cheri Budzynski, Wyatt Holliday and **Greg Lodge** presented a seminar to the Association of Corporate Counsel Central Ohio Chapter members in June and offered "Insight for Business from the First 100 Days of the Trump Administration" covering topics such as changing times in environmental law and labor issues.

Mike Briley will be teaching an antitrust law course at The University of Toledo College of Law in Fall 2017.

Doug Cherry co-presented "Data Breach: Expert Advice on Mitigating the Consequences and Protecting the Brand" to the Association of Corporate Counsel at its Annual Corporate Counsel Spring Symposium in Streamsong, Florida in April. Doug presented "Legal Insights for Designers and Developers" to the Front End Design Meetup group in St. Petersburg, Florida. Doug also presented "Protecting Intellectual Property" to the Lakewood Ranch Business Alliance for the March Executive Briefing.

Doug Cherry and **Adria Jensen** presented "Social Media Issues in Family Law" at the Sarasota County Bar Family Law Section meeting.

Ron Christaldi has been appointed by Tampa Mayor Bob Buckhorn to the City of Tampa Charter Review Commission. The Charter Review Commission is a 9-person commission whose purpose is to review the Home Rule Charter and propose any amendments or revisions for placement on the ballot for consideration by voters.

David Conaway was elected to the Board of Directors of Globaladvocaten, ranked by *Chambers Global* 2017 as a leading law firm network, and which is a collaboration among 24 independent law firms. The network includes over 800 lawyers working out of 41 cities in 27 countries. Member firms are based in major cities worldwide including Amsterdam, Barcelona, Charlotte, Dublin, Geneva, Istanbul, Lisbon, Copenhagen, Madrid, Milan, Moscow, Paris, Prague, Rome, San Francisco, Vienna, Warsaw and Zurich.

Kate Decker, Wyatt Holliday, Greg Lodge, Rebecca Shope and **Mechelle Zarou** presented an employment law seminar titled "Understanding the HR Implications of the New Administration" in Toledo and a repeat presentation in Columbus in March.

Chris Delp spoke at the Sarasota Manatee Manufacturers' Association meeting in March and discussed "Going Solar: Legal Considerations for Industrial Power Users."

Jon Ellis and **Kathleen Reres** hosted Condominium and HOA Board Certification Training seminars in February and April.

Jack Gillespie spoke on "Drafting and Negotiating Purchase and Sale Agreements" in Columbus, Ohio.

Tyler Gordon and **Dave Slenn** spoke to the Tampa Bay Chapter of the Society of Financial Service Professionals about the use and abuse of captive insurance in March.

Katie Gromlovits is actively involved in the Trademark Specialists group of the North Carolina State Bar and is also hosting an upcoming roundtable for the International Trademark Association (INTA). She has recently written two articles "Why Should I Register My Trademarks?" and "Top Ten Urban Legends of Intellectual Property."

Dan Hansen recently rotated off the Board of Advisors for the non-profit organization, Real School Gardens. He remains as advisory legal counsel, however. Dan was a presenter and primary author of a paper and presentation regarding Electronic Discovery and ESI at the Southern Surety Conference in Nashville, Tennessee in April.

Josh Hayes was appointed Director and Secretary of ArtPop for a 2-year term. Josh was also named Summer Clerk Coordinator for the Charlotte office and has also been placed on the Shumaker Social Media Committee.

Michele Leo Hintson was the program chair of the 28th Annual Southern Surety & Fidelity Claims Conference held in April in Nashville, Tennessee.

Wyatt Holliday and **Scott Newsom** were presenters at the University of Toledo Center for Family & Privately-Held Business Mini-Forum in March. Topics included: the state of Affordable Care Act ("Obamacare"); ACA Penalties and Reporting; Qualified Small Employer Health Reimbursement Arrangements; and a Wellness Programs Update.

Andrew McIntosh spoke at the Tampa Bay Organization of Women in International Trade (TBOWIT) April luncheon and provided a Canadian perspective on President Trump's First 100 Days.

Scott Newsom, Jan Pietruszka and **Maria Ramos** presented an employment law seminar in Tampa, Florida in April. Topics included: the Future of the Affordable Care Act, Employment Based Immigration Reform; and Florida's Amendment 2: Medical Marijuana in the Workplace.

Jan Pietruszka was a panelist at the "Game Changer: Workplace Safety Awareness" seminar in April.

Maria Ramos was selected as *TAMPA Magazine's* Top Lawyer 2017 in the category of Immigration. Maria also received the JD Supra Readers' Choice Award as a "Top Author: Immigration" for the second year in a row.

Jack Santaniello was appointed to a 3-year term on Charlotte Chamber of Commerce Board of Directors. He was also appointed to the selection committee for the Smart CEO Future 50 Awards, as well as elected Treasurer of the Business Law Section of the North Carolina Bar Association. Jack is a presenter at the Shumaker "Legal Minute" bi-monthly lunches of the Latin American Chamber of Commerce of Charlotte.

Dipa Shah has been elected to the Board of Directors of the American Lung Association for Tampa Bay.

Rebecca Shope was recognized as the Leukemia & Lymphoma Society's 2017 Toledo "Woman of the Year." The Leukemia & Lymphoma Society's Man & Woman of the Year campaign is a national ten-week campaign to raise funds to help find cures for blood cancer. Rebecca and her team raised over $62,000 and the 10 candidates collectively raised $254,000!

Christian Staples was elected to serve a 3-year term on the Mecklenburg County Bar Board of Directors. Christian is also an Advisory Board Member of the UNC-Charlotte Craft Beer Business Essentials Certificate Program.

Scott Stevenson was inducted into the International Academy of Trial Lawyers. He also serves on the Eagle Scout Board of Review in Mecklenburg County and is on the Board of Directors for Make-A-Wish Central and Western North Carolina.

Todd Timmerman has been elected Vice Chair of the Board of Directors of the Outback Bowl for the 2017-18 season.

Lou Tosi was a presenter at the AHC Group's Carbon & Innovation Workshop in April in Dallas, Texas, where he provided an update on the Clean Power Plan. Lou was re-elected to the National Italian American Foundation's Board of Directors for 2017-2021.

Juan Villaveces has been named a new board member at SunCoast Blood Bank. Juan will serve a three-year term on the board and has already joined the board's finance committee.

Mark Wagoner was appointed by U.S. Senators Rob Portman and Sherrod Brown to the Bipartisan Judiciary Advisory Commission to assist the U.S. Senators in identifying the best candidates to fill vacancies for the U.S. District Courts for the Southern and Northern Districts of Ohio. Currently, there are three federal court vacancies under consideration. Mark was recently named a Life Member of the U.S. Court of Appeals Sixth Circuit Judicial Conference.

A Newsletter from Shumaker, Loop & Kendrick, LLP

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Our practice of involvement spans the entire community.

Whether it's our commitment to clients,
or to our work in the community,
involvement lies at the core of everything we do.

Attorneys at Law

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