insights

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A Newsletter from Shumaker, Loop & Kendrick, LLP | Spring 2013

4 Tax Planning for the "New Normal"
8 HIPAA: Not Just for Health Care
11 ADA Requirements for Pools
12 Impact of Dodd-Frank Swap Regulations on Loan Documents
15 FDIC Insurance: Are you Fully Covered?
18 Successor Liability
20 Employment Law Update
22 Don't Become a Client's Surrogate in Communicating with the Government
25 E-Discovery Amendments to Florida Civil Rules
27 SLK Announces the Formation of Shumaker Advisors, LLC
28 SLK News

TRANSFER TAXES AFTER THE

Taxpayer Relief Act of 2012

By David J. Rectenwald

The American Taxpayer Relief Act of 2012 (the "2012 Act") had a profound impact on the transfer tax system. I will briefly describe that system and then, by way of background, set the stage for these changes by summarizing where we were on transfer taxes prior to the 2012 Act. I will then describe the major transfer tax changes provided by the 2012 Act and briefly describe the impact of these changes.

INTRODUCTION

As you may know, our federal government imposes three types of transfer taxes: a gift tax, an estate tax and a generation skipping transfer or "GST" tax. The gift tax is a tax on gifts made during one's lifetime that are above the annual exclusion amount, which is now $14,000 per donee. The estate tax is a tax on transfers made at one's death. The government provides each taxpayer with an exemption amount from each of these two taxes. These two systems work together in that each dollar of gift tax exemption used by a taxpayer during his or her lifetime reduces that amount of estate tax exemption remaining at such taxpayer's death.

The GST tax is really a second layer of transfer tax designed to discourage taxpayers from skipping one or more levels of estate tax by passing their assets to or in trust for "skip persons," such as grandchildren or more remote issue. The government provides each taxpayer with an exemption amount from this tax too. All such transfers in excess of the GST exemption amount are subject to a GST tax, which is tax imposed at the highest marginal estate tax rate. Thus, such transfers are subject to both the gift or estate tax (depending on when they are made) and the GST tax.

BACKGROUND

Prior to the Economic Growth and Tax Relief reconciliation Act of 2001 (the "2001 Act"), each taxpayer had an exemption amount from gift and estate tax equal to $675,000. These two taxes were tied together under a unified system with a top marginal tax rate of 55%. The 2001 Act substantially increased both tax exemptions over a 10 year period, but at different amounts. While the gift tax exemption amount increased only to $1,000,000, the estate tax exemption amount increased to $3,500,000 by 2009 and became unlimited in 2010. Then, in 2011 the 2001 Act was scheduled to "sunset" and the transfer tax system was scheduled to revert back to where it was in 2001, as if the 2001 Act had never been passed.

Along came the Tax Relief Act of 2010 (the "2010 Act"), which was signed into law the end of 2010 but was made effective retroactive to the beginning of 2010. The 2010 Act delayed the sunset of the 2001 Act for two years. It provided (starting in 2011) for $5,000,000 exemptions from all transfer taxes, indexed those exemptions for inflation, and provided for a top marginal tax rate of 35%. While the change in the tax rate was a significant change, the much more dramatic change was the reunification of the gift and estate tax systems. This change meant that taxpayers received an increase in

the gift tax exemption amount from $1,000,000 to $5,000,000, which was both unprecedented and completely unexpected.

The 2010 Act was likewise scheduled to sunset on January 1, 2013. As a result, many taxpayers with substantial means focused in the last two years on making large taxable gifts to GST trusts so they could use their $5,000,000 gift and GST tax exemptions before they were set to expire in 2013.

THE 2012 ACT

Although the 2012 Act provided only a few changes in the transfer tax arena, these changes were extremely potent and very beneficial to taxpayers. These changes include the following:

1. $5,000,000 Exemptions.
The 2012 Act unified all three transfer tax systems, providing for $5,000,000 exemptions from gift, estate and GST taxes.

2. Indexing.
The $5,000,000 exemptions for these three transfer taxes are all indexed for inflation since 2011. The indexed amount for 2012 was $5,120,000. The indexed amount for 2013 increased $130,000 to $5,250,000.

3. Tax Rate.
The top marginal tax rate for all three taxes is now 40%. While this rate is above the 2012 rate of 35%, it is substantially below the 55% top rate that was otherwise scheduled to take effect in 2013 upon the sunset of the prior law.

4. Portability.
The 2010 Act introduced the concept of exemption "portability" between spouses. Portability allows the executor of the first spouse to die to transfer all of his or her unused estate tax exemption amount to the surviving spouse. The 2012 Act retained this concept and made certain technical corrections very beneficial to taxpayers.

5. Miscellaneous Changes.
The 2012 Act included several other miscellaneous provisions, all of which are favorable to taxpayers. For example, it retained the rules providing for the automatic allocation of GST exemption for gifts to certain GST trusts and the qualified severance of trusts for GST purposes. Both of these concepts were first enacted in the 2001 Act.

6. Permanence.
One thing missing from the 2012 Act is the concept of "sunsetting." All of the provisions are permanent, which means that they will not change unless Congress takes action in the future to pass different legislation. Thus, estate planners and their clients can now plan with a reasonable degree of certainty in the law, something they have not been able to do for over a decade.

7. Chart.
The chart below summarizes much of the foregoing discussion. Specifically, it illustrates what key provisions in the law would have been if the prior two tax acts had in fact sunsetted on January 1, 2013, and compares those provisions to the provisions promulgated by the 2012 Act.

TOPIC	2013 IF THE LAW SUNSET	2013 AFTER 2012 ACT
1. Gift Exemption	$1,000,000	$5,250,000*
2. Estate Exemption	$1,000,000	$5,250,000*
3. GST Exemption	$1,430,000	$5,250,000*
4. Top Tax Rate	55%	40%
5. Portability	NO	YES
6. Automatic GST Allocation	NO	YES

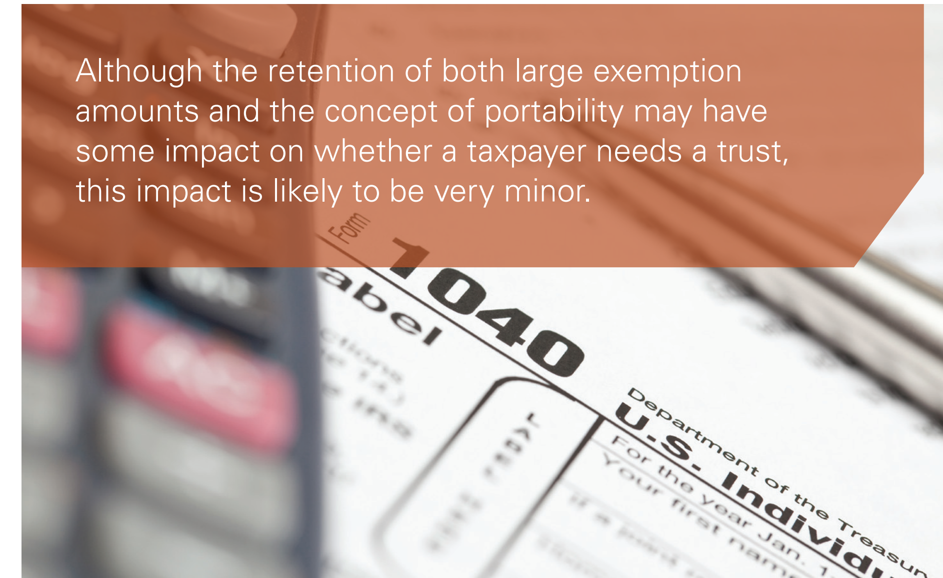
**Indexed for inflation from 2011*

IMPACT OF THE 2012 ACT

It will probably take a year or two for a consensus to build in the estate planning community on how to plan for estates of all sizes. Set forth below are some preliminary thoughts regarding the impact of the 2012 Act.

1. Large Gifts.
The fact that the 2012 Act retained large transfer tax exemption amounts, and even indexed these amounts for inflation, will certainly minimize the need for taxpayers to make large gifts during their lifetimes. The fact that donees of gifts inherit the donor's basis, rather than receiving a stepped-up date-of-death basis as they do under the estate tax regime, will further discourage large lifetime gifts. However, taxpayers with very large estates who will face estate tax may still be wise to make a large gift so that all future appreciation of the gifted assets occurs outside of the taxpayer's estate and avoids estate taxation.

2. Sophisticated Planning.
The larger exemption amounts of the 2012 Act will likewise reduce many taxpayers' need for sophisticated



estate planning techniques. Many of these techniques are labeled with catchy acronyms such as GRATs, GRUTs, CRUTs, IDITs and QPRTs. The goal of most of these techniques is to leverage the use of a taxpayer's exemption amounts. If the exemption amounts fully cover a taxpayer's estate, then no leverage is needed and these estate planning techniques will be unnecessary.

3. Trusts.
Although the retention of both large exemption amounts and the concept of portability may have some impact on whether a taxpayer needs a trust, this impact is likely to be very minor. Many couples will still want so-called "credit shelter" trusts to use the exemption amount of the first spouse to die in case the tax laws prove not to be so permanent. They may also want to take advantage of the asset protection afforded by these trusts, since the assets tucked away in a credit shelter trust at the death of the first spouse may be exempt from the creditors of the surviving spouse. No asset protection is afforded when one spouse simply leaves all of his or her assets to a surviving spouse. Trusts also provide other non-tax benefits, perhaps the most important of which is the deferral of distribution of assets to children. This deferral simply cannot be obtained without the use of a trust.

4. Portability.
Many married taxpayers will mistakenly pass all of their assets to their surviving spouse and rely on portability rather than careful trust planning. While this may be less problematic for smaller estates, say those under $1,000,000, it could certainly prove to be a large mistake for those estates between $1,000,000 and $10,000,000. While there are many problems and issues associated with portability, the main one is that it does not extend to the GST exemption. Many clients with this type of wealth should be keeping their assets in trust for several generations and using their GST exemptions, rather than passing these assets out to their children where the assets will be subject to the child's creditors during his or her lifetime and subject to estate taxation at the child's death.

5. Life Insurance.
The 2012 Act will likely not affect an individual's desire to purchase life insurance to provide financial security for a spouse or children. However, it will dramatically affect the second-to-die life insurance market. Second-to-die insurance is insurance that insures two lives, not just one. It is cheaper than single life insurance because it pays out only at the second death. Since this is usually when the estate tax is due for married couples, this insurance is usually purchased for the payment of estate taxes. Again, with the exemptions provided by the 2012 Act being so large and indexed for inflation, most couples will not need such insurance because they will not face an estate tax.

6. Other Planning.
As mentioned briefly above, the 2012 Act will have little or no impact on traditional non-tax planning. Taxpayers will still need to plan for a variety of needs or concerns, including asset disposition, asset protection, disability and incompetency, probate avoidance, business succession, premarital agreements, charitable giving, life insurance, retirement planning, and payment of education.

CONCLUSION

The 2012 Act has in fact eliminated the estate and GST tax for most Americans. It has not, however, eliminated the need for estate planning. The primary focus in most cases will simply shift from tax to non-tax goals, including those described immediately above. Since each person's particular estate planning situation is unique, all individuals would be well advised to consult with an estate planning specialist to analyze the impact of this new law on his or her estate plan.

Tax Planning for the "New Normal"

Effective January 1, 2013, the American Taxpayer Relief Act of 2012 ("ATRA") was enacted into law, finally settling years of debate over the fate of the Bush era tax cuts. On the same day, the 3.8% Medicare Tax on net investment income that was part of 2010's Health Care Act went into effect. These two developments have changed some of the fundamental assumptions made over the last decade concerning how to structure ownership of business interests from a tax perspective. During that time period, the top individual and corporate federal income tax rates were equal, with both being set at 35%. Although qualified dividends were accorded a preferential 15% tax rate, a C corporation was generally the least tax-efficient form of doing business. A C corporation's net income was subject to tax at a maximum rate of 35% at the corporate level, and then after-tax net income that was distributed to shareholders was subject to tax at the 15% rate imposed on dividends. In contrast, "pass through" forms of doing business, such as S corporations, partnerships and limited liability companies ("LLCs") taxed as partnerships or disregarded entities were (and still are) subject to only one level of tax. The net income of such entities was taxed directly to their individual owners, at the same maximum rate of 35%. Distributions from such entities, however, were (and still are) not subject to tax, thus avoiding the second level of tax imposed on dividends from C corporations. Even if a business contemplated reinvesting profits back into the business rather than distributing profits to the business' owners, using a pass-through entity would leave the business in no worse shape from a tax standpoint because profits were subject to the same top 35% tax rate whether they were taxed directly to the owners or at the corporate level.

By Thomas A. Cotter

Under ATRA the planning environment has materially changed. C corporations are still subject to a maximum federal income tax rate of 35%. In contrast, individuals who are married and file jointly are subject to a maximum federal income tax rate of 39.6% on taxable income in excess of $450,000 ($400,000 for single filers). The 3.8% Medicare Tax on investment income can push the top aggregate marginal federal income tax rate up to 43.4%. At the same time, while ATRA increased the top federal income tax rate on dividends from C corporations, it made the preferential tax treatment of dividends permanent rather than allowing dividends to revert back to being taxed at regular income tax rates as was scheduled to occur at the end of 2012. Under ATRA, dividends are taxed at a top federal income tax rate of 20% for married individuals filing jointly with taxable income in excess of $450,000 ($400,000 for single filers). For taxpayers below this income threshold, dividends continue to be taxed at a rate of 15%. These changes have important planning implications.

Choice of Entity Considerations. Since, as a result of ATRA, individual taxpayers are subject to a significantly higher top marginal federal income tax rate than corporate taxpayers, in some instances it may be more tax efficient to conduct business as a C corporation than as a pass-through entity. This is particularly true of a small business. C corporations are subject to federal income tax at a rate of 15% on net income up to $50,000, 25% on net income from $50,001 to $75,000, 34% on net income from $75,001 to $10 million and 35% on amounts in excess of $10 million. Assume a married individual that is in the top federal income tax bracket of 39.6% owns a small business in which he or she does not materially participate (more on this in the next section). Assume also, that the business has taxable income of $50,000 for 2013. Finally, assume that the taxpayer and his or her spouse has other net investment income in excess of $250,000. If the taxpayer conducts the business through an LLC of which he or she is the sole owner, the LLC will be a disregarded entity (unless he or she expressly elects otherwise) that is ignored for federal income tax purposes and its $50,000 in net income will be taxed directly to the taxpayer. At a rate of 39.6% this will result in tax of $19,800. In addition, because the taxpayer does not materially participate in the bakery business, the $50,000 in net income will also be subject to the 3.8% Medicare Tax on net investment income, resulting in additional tax of $1,900 for a total of $21,700 in total tax.

In contrast, if the taxpayer instead conducted the bakery business through a C corporation, it would pay tax on the net income at a rate of 15%, resulting in corporate level tax of $7,500. If the corporation then paid an after-tax dividend of $42,500 to the taxpayer, it would be subject to tax at a rate of 20%, resulting in an additional $8,500 of tax. The 3.8% Medicare Tax would also apply to the dividend, generating $1,615 in tax. In total this amounts to $17,615 in corporate and individual income tax, over $4,000 less than the tax generated by a business conducted through a pass-through, single member LLC.

The foregoing is a highly simplistic and, perhaps, somewhat unrealistic factual scenario. Nonetheless it illustrates the point that it is no longer correct to simply assume that conducting business through a pass-through entity will produce tax results superior to doing so through a C corporation. Instead, one should consider, among other things, the tax brackets of the business owners, the extent to which the owners will be able to use deductions that may flow through to the owners from a pass-through entity, the projected profitability of the business, whether profits will be distributed to the business owners or reinvested in the business and, as discussed in the next section, whether the business owners materially participate in the business.

Planning for the 3.8% Medicare Tax on Net Investment Income. The 3.8% Medicare Tax on net investment income is imposed on the lesser of a taxpayer's (1) net investment income or (2) the excess, if any, of the taxpayer's modified adjusted gross income over $250,000, if the taxpayer is married filing jointly, or $200,000 if the taxpayer is a single filer. "Investment" income is defined as income from interest, dividends, annuities, royalties and rents, as well as other income from a trade or business that is not a "passive activity" with respect to the taxpayer, or which consists of trading in financial interests or commodities, as well as gains recognized on the disposition of property that generates such income. Expenses incurred with respect to investment income are deducted from such income to arrive at net investment income.

With respect to income derived from a trade or business, the statute incorporates the definition of "passive activity" that is used for purposes of the limitation on deduction of passive activity losses. Under these rules a trade or business activity is passive to a taxpayer if the taxpayer does not "materially participate" in the activity. By regulation the IRS has established seven alternative tests for determining whether a taxpayer materially participates in a trade or business activity. A detailed discussion of these tests is beyond the scope of this article. Generally speaking, however, a taxpayer's involvement in a trade or business must be "regular, continuous and substantial." Under one of the regulatory material participation tests, this requirement is satisfied if a taxpayer spends more than 500 hours participating in the activity during the year. Under the other tests, a taxpayer can meet the material participation standard with less than 500 hours participation if substantially

all the participation in the activity is by the taxpayer, no other individual participates more than the taxpayer in the activity or other factors indicate the taxpayer is actively engaged in the trade or business. Rental activities are subject to more stringent material participation requirements.

Significantly, trade or business income from partnerships (including LLCs taxed as partnerships) and S corporations that is taxed to an owner is not subject to the 3.8% Medicare Tax if the owner materially participates in the trade or business. This exception also applies to gain recognized on the sale of a partnership interest or S corporation stock by an owner who materially participates in the trade or business. While this creates planning opportunities for reducing the amount of Medicare Tax imposed on the income of S corporations, doing so with respect to partnerships presents certain challenges notwithstanding the fact that partnerships nominally qualify for the exception. This is because, starting with the case of a service partnership, all income allocable to partners is treated as income from self-employment. Income from self employment has always been subject to Medicare Tax. Starting in 2013, the top Medicare Tax rate imposed on self-employment income is 3.8%, just like the Medicare Tax on net investment income. Thus, although a partner materially participating in a service partnership avoids the 3.8% Medicare Tax on net investment income, the partner will be subject to the 3.8% Medicare Tax on self employment income. Even in the case of non-service partnerships, the IRS generally takes the view that if a partner materially participates in the partnership's trade or business, all of his or her income is taxed as income from self-employment. The IRS has from time to time informally blessed partnership arrangements that bifurcate a partner's share of partnership income into compensation from self-employment and investment return, but the IRS has not issued any clear, binding guidance on the subject. Moreover, it is not always possible to structure the economic relationship between partners in a manner consistent with the IRS' informal guidance concerning such structuring.

In contrast to partnerships, income allocable to S corporation shareholders is not considered income from self-employment even if the S corporation is engaged in a service business. As a result, some business owners may consider converting trades or businesses from partnerships to S corporations. By the same token, because there is no exception to the 3.8% Medicare Tax on net investment income for dividends paid by C corporations to shareholders that materially participate in a C corporation's business, it may make sense to elect S corporation status for a C corporation. Of course, the Medicare Tax savings would need to be balanced against the higher top marginal income tax rate imposed on individuals, as described in the preceding section of this article.

The material participation exception raises interesting ownership structuring issues with respect to S corporation shares held in trust. Trusts can qualify to hold S corporation stock in three ways: (1) as a "grantor trust," which by virtue of the terms of the trust results in the person who created the trust (the "grantor") being treated as if he or she owns the S corporation stock directly, (2) as a "Qualified Subchapter S Trust" ("QSST"), pursuant to which the sole beneficiary of a trust agrees to be taxed on the S corporation income allocable to the shares held by the trust and (3) as an "Electing Small Business Trust" ("ESBT") pursuant to which the trust itself is taxable on all of the income allocable to the S corporation shares it holds, even if that income is distributed to the trust's beneficiaries. Who must materially participate in the business of an S corporation to qualify for the exception to the Medicare Tax on net investment income will vary depending on how the trust qualifies to hold the S corporation stock. In the case of a grantor trust, because the grantor is treated as if he or she owns the S corporation stock held by the trust, the grantor must materially participate in the business of the S corporation to qualify for the exception. In contrast, because it is the beneficiary who is taxed on S corporation income allocable to shares held by a QSST, it is the beneficiary who must materially participate to qualify for the exception.

Satisfying the material participation standard in the context of an ESBT is a somewhat murky proposition. Neither the statute nor IRS proposed regulations regarding the Medicare Tax on net investment income directly address this issue. However, based on two private letter rulings issued by the IRS regarding the passive activity loss limitation provisions, it appears that the IRS position is that the trustee of an ESBT must materially participate in the trade or business of the S corporation in order to qualify for the Medicare Tax exception. This may present a hurdle to satisfying the material participation requirement in many instances because the trustee of a trust often does not have the time, background or ability to be involved in an S corporation's trade or business on a regular, continuous and substantial basis. In some circumstances it may be possible to replace an ESBT trustee with an individual who does materially participate in the S corporation's trade or business, but often an individual who does so may not want to take on the responsibilities (and potential liability) associated with being a trustee. Under such circumstances it may be possible to satisfy the material participation standard by appointing a "special trustee" to work in the S corporation's business. That said, in its rulings the IRS has indicated that the trustee who materially participates in the trade or business must do so in a fiduciary capacity with the full power and authority of a trustee. Therefore, if a special trustee is appointed, he or she will have to have all of the powers and responsibilities of a full trustee insofar as the S corporation's activities are concerned.

It is worth noting that the IRS position concerning material participation by the trustee conflicts with the only court decision that has considered the issue. In that case a federal district court in Texas ruled that a trust could satisfy the material participation requirement under the passive loss limitation rules through the employees and independent contractors that the trustee hired to operate a business on behalf of the trustee. This makes good common sense and provides support for the position that the trustee himself or herself does not have to participate in the trade or business directly for a trust to satisfy the material participation standard. However, most taxpayers will likely be more comfortable attempting to comply with the IRS position in order to avoid a challenge by the IRS upon audit of the trade or business.

The foregoing discussion illustrates that it is no longer "business as usual" as far as evaluating the optimal entity and ownership structure for organizing business activities from a federal income tax perspective. The combination of the passage of ATRA together with the imposition of the 3.8% Medicare Tax on net investment income has turned some traditional tax planning assumptions on their head. Moreover, what works best will vary widely from business to business depending on the particular facts and circumstances of the business and its owners. Rather than relying on general rules of thumb, putting in place the most tax-efficient structure will require consultation with tax advisors and crunching the numbers. This may prove to be a somewhat painful task, but doing so can result in substantial tax savings in the long run.

CONGRATULATIONS

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Shumaker was recognized as a 2013 "Go-To" Law Firm® for the Top 500 Companies in the areas of Labor and Employment and Litigation.

Shumaker received the Sarasota Chamber's prestigious Insignia Award for the month of February, 2013. The Chamber presents the Insignia Award to a company or organization each month in recognition of its quality service and commitment to the community under The Chamber's Code of Ethics.

HIPAA

Not Just for Health Care Providers Anymore

The U.S. Department of Health and Human Services ("HHS") recently issued its long awaited updates to the Health Insurance Portability and Accountability Act ("HIPAA"). The HIPAA Omnibus Rule, which took effect March 23, 2013, significantly expands the reach of HIPAA outside the health care industry and ups the stakes for noncompliance. The article will address the main components of the Omnibus Rule and how they apply outside the health care industry.

The original HIPAA privacy rules were issued in 1999 and were effective April 14, 2003. The privacy regulations addressed protected health information ("PHI"), that is, individually identifiable health information that related to an individual's past, present, and future medical care and treatment or payment for that care and treatment. The privacy regulations established new limits on use and disclosure of information, and created new individual rights regarding PHI. The security regulations soon followed in 2004, and governed electronic PHI. These regulations imposed a number of safeguards to ensure the confidentiality and integrity of electronic PHI.

By Jenifer A. Belt

These regulations imposed a number of safeguards to ensure the confidentiality and integrity of electronic PHI.

Health care providers and plans alike scrambled to develop policies and procedures to comply with the original rules, with varying degrees of success; however, "much has changed in health care since HIPAA was enacted over fifteen years ago," according to HHS' press release announcing the Omnibus Rule. "The new rule will help protect patient privacy and safeguard patients' health information in an ever expanding digital age," the press release proclaims.

What's New?

The most far-reaching aspect of the Omnibus Rule is its expansion to directly regulate business associates. "Business associates" under HIPAA are defined as persons or organizations that create, receive, maintain or transmit PHI for the covered entity for purposes related to claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities, billing, benefit management, practice management, and repricing, or provides legal, actuarial, accounting consulting, data aggregation, management administrative, accreditation, or financial services to or for the covered entity, if such service involves use or disclosure of PHI. The definition specifically includes health information organizations, e-prescribing gateways, or other persons who provide data transmission services, persons who offer personal health records to individuals, and subcontractors who receive PHI of business associates. 42 C.F.R. 160.103.

Under the prior rule, HHS determined it did not have authority to directly regulate business associates, so it created a business associate agreement requirement pursuant to which the covered entity was obligated to enter into a business associate agreement (BAA) that imposed all of the legal requirements applicable to the covered entity on the business associate (by contract, however, and not by law). According to the HHS Office of Civil Rights ("OCR") (the agency responsible for enforcing compliance with HIPAA), some of the most significant breaches of HIPAA have involved business associates. By determining that it had the authority to directly regulate business associates, HHS has expanded compliance obligations and potential exposure for fines and penalties to business associates. (Note, however, that even though business associates are now directly regulated, business associate agreements are still necessary.)

As the definition of business associates suggests, it extends well beyond the health care industry to a range of other industries, including records storage, data analytics, software vendors, legal and accounting firms, and many others who may come into contact with PHI in the performance of services for a third party. In addition, HHS has increased the fines and penalties that can be assessed for non-compliance with the regulations, to a maximum of $1.5 million per violation. While business associates were previously required to commit <u>by contract</u> to abide with the regulations, their obligation now is to comply with <u>the law</u>, so the stakes are higher.

What are Business Associates' Compliance Responsibilities?

Business associates have similar obligations to covered entities in ensuring the privacy and security of PHI they create, receive, maintain, or transmit. Under the Omnibus Rules, business associates are required to comply with all aspects of the security rules if they create, receive, transmit or maintain electronic PHI. Thus, for example, a law firm that receives medical records via email from a hospital in connection with a medical malpractice case must develop physical, administrative, and technical safeguards to prevent, detect, contain and correct any security violations. This would include, among others:

1. Administrative Safeguards

a. Create a security management process, to include: a required risk assessment to determine risks and vulnerabilities to electronic PHI, security measures to reduce identified risks and vulnerabilities, a sanction policy for workforce members who fail to comply with security policies and procedures, and a process to regularly review system activity.

b. Identify a security official responsible for implementing required policies and procedures.

c. Create workforce security procedures, such as procedures for electronic PHI access within the organization, workforce clearance procedures to determine access to electronic PHI is appropriate, and termination procedures to eliminate access when appropriate.

d. Create information access management policies and procedures, to include access authorization and access establishment and modification as required.

e. Implement security awareness and training, including security reminders, protection from malicious software, log-in monitoring, and password management

f. Create Security Incident Procedures.

g. Establish a Contingency Plan in the event of damage to systems containing electronic PHI, to include: a data backup plan, disaster recovery plan, emergency mode operation plan, testing and revision procedures, and applications and data criticality analysis.

h. Perform periodic evaluations to determine ongoing compliance.

i. Enter into agreements with any third parties with which the business associate shares electronic PHI (copying firm, for example).

2. Physical Safeguards

a. Establish facility access controls to limit access to electronic PHI, including contingency operations, facility security plan, access control and validation procedures, and maintenance records.

b. Establish policies and procedures regarding workstation use for workstations that can access electronic PHI.

c. Establish workstation security for all workstations that can access electronic PHI.

d. Implement policies and procedures for device and media control to include disposal and re-use of electronic PHI, accountability, and backup and storage.

3. Technical Safeguards

a. Implement various technical controls (access control, emergency access procedures, audit controls, authentication, encryption).

4. Develop and maintain policies and procedures to ensure and demonstrate compliance.

While some of the requirements are "addressable" under the regulations (i.e. the business associate's level of implementation can be based on its risk assessment), others are required, meaning every business associate must implement the standard without exception. In addition, in the event any business associate contracts with a third party (copying firm, records storage facility, etc.) for services that involve the electronic PHI, the business associate is required to enter into an agreement with the third party to ensure the third party complies with these requirements. Moreover, the above rules only address security obligation compliance; business associates must also comply with the requirements of their business associate agreements which address their ability to use and disclose PHI (electronic and otherwise).

Risks of Non-Compliance

Now that business associates are directly covered by HIPAA, they are subject to enforcement activity. Any individual has the right to register a complaint regarding non-compliance. Since the inception of the regulations, the number of complaints for violations of the privacy rules has steadily increased each year.

In addition, Congress adopted a law in 2009 requiring reporting of security breaches. The Omnibus rule implements these statutes, requiring covered entities and business associates alike to report breaches of unsecured protected health information – covered entities must report to the affected individuals and to the government, and business associates must report to the covered entity (to report to the affected individuals and the government). A "breach" is an unauthorized access, use or disclosure of PHI in a manner not permitted by the rules. For example, if an employee who is uninvolved in the litigation the law firm is handling were to access the medical records of the plaintiff because she is an interested family member, such action would be presumed to be a breach unless a risk assessment revealed a low probability of compromise, based on the nature and extent of information involved, the unauthorized person who accessed the information, whether the PHI was actually viewed, and the extent to which risk has been mitigated.

In 2010, reported breaches affected over 5 million people, according to OCR's Annual Report to Congress on Breaches of Unsecured Protected Health Information. Because of this, the Omnibus Rule adds some "teeth" to HIPAA enforcement, and includes fines and penalties ranging from $100 to $50,000 per violation, and up to $1.5 million for repeated violations within the same year. HHS will apply a number of factors in determining the appropriate penalty, including the nature and extent of the violation (number of individuals affected and the time period during which the violation occurred) and the nature and extent of harm resulting from the violation (whether the violation caused physical, financial, or reputational harm, whether the violation hindered an individual's ability to obtain health care, history of prior compliance, and the financial condition of the business associate). Prior to the Omnibus Rule, business associates were not directly subject to these fines and penalties.

In Other News

The Omnibus Rule also makes various changes to the rules directly pertaining to health care providers and other covered entities and creates new individual rights regarding certain PHI. These changes include limitations on covered entity's use of PHI for marketing without an authorization; greater use of PHI for fundraising, and greater right of the individual to limit disclosure to a health plan in certain instances.

Deadline

The Omnibus Rule makes a number of changes to healthcare providers' ability to use and disclose information with or without a patient's authorization. In particular, the Rule gives healthcare providers some additional flexibility in terms of the kind of information they can gather and use to target fundraising efforts. Individuals must be given the opportunity to opt out of further receipt of such communications, however. The Rule also provides greater ability for healthcare providers to engage in certain activities previously considered to be marketing (and thus requiring authorization) by carving out specific activities from the definition of marketing (refill reminders, care coordination or case management so long as no remuneration is involved).

The Omnibus Rule also incorporates certain aspects of the Genetic Information Nondiscrimination Act (GINA), prohibiting health plans from using genetic information about an individual or family member for underwriting purposes.

All entities subject to the rule must comply with its requirements by September 23, 2013. HHS has developed a model business associate agreement for use by covered entities and their business associates. Covered entities and business associates alike must review and update their existing practices and procedures to ensure compliance and enter into new compliant business associate agreements (in most cases) on or before September 23, 2013.

SWIMMING UPSTREAM –

Americans With Disabilities Act (ADA) Requirements For Swimming Pools

By John E. Haller

As of January 31, 2013, all existing pools located at "public accommodations" must meet ADA standards. This requires the installation of a fixed lift for the pool areas. This short article attempts to answer some of the frequently asked questions with regard to whether a pool is subject to the ADA requirements and what happens if the new standards are not met.

Who has to comply, and when?
Generally, anyone with a pool made available to the public had to install a lift by January 31, 2013. This would include hotels and other organizations such as athletic clubs. Some pools are generally not covered by the ADA such as those within privately owned apartment complexes, but these might be subject to the ADA Standards if they sell passes to non-residents to use the pool or rent the pool to the public. Apartment complexes have their own standards under the Fair Housing Act that must be met.

The hotel industry had been working with the Department of Justice to extend the deadline beyond January 31, 2013, but was unsuccessful. Whether the deadline will be extended is not something one can count on at this point. You should also be aware that tax credits are available with regard to the costs incurred.

What standards do I have to meet?
The requirements are set out in the 2010 ADA Standards for Accessible Design. A government document is available online to assist in answering frequently asked questions concerning the ADA Standards (http://www.ada.gov/qa_existingpools_titleIII.htm).

What should a hotel owner do?
You should get your pool in compliance with the standards as soon as possible. We know from talking with our clients that there is a backlog on installations of these mainly due to the fact that the installation is somewhat specialized because not all pool decking is the same. This means that there are not a large number of companies that can do the installation correctly. We have seen 60-75 days from placing the order until installation.

What can happen if I do not have the lift installed yet?
You can be sued. One of our clients was sued in Indiana recently because a pool lift had not been installed (it was thereafter installed). The same plaintiff who sued our client filed 20 other lawsuits against other hotels in the same area on the same day he sued our client. The suits all seek class action status and the recovery of the plaintiff's attorney fees. If you are a Shumaker client and you are sued, you need to let us know as soon as possible. We expect that hundreds of lawsuits have been or will be filed in the very near future that are similar to the one involving our client.

What about a portable lifts?
If you purchased a complying lift before March 15, 2012, it might be acceptable. Otherwise, you need to install one if your pool falls under the definition of pools that need to be in compliance.

At Shumaker, we are familiar with these and other ADA issues. Please get in touch with your Shumaker contact and he or she will be able to get you in touch with the attorneys having expertise in this area.

Impact of Dodd-Frank Swap Regulations on Guaranties and Loan Documentation

By W. Kent Ihrig

and Steven S. Grieco

Often in connection with commercial loans, borrowers will enter into hedging transactions ("swaps") for the purpose of mitigating interest rate, commodity or currency risk. Such swaps will frequently be entered into directly with the borrower's lender or an affiliate of the lender[1] or, in a syndicated or club loan transaction, one of the syndicate lenders (or an affiliate of such syndicate lender). In such circumstances, lenders will typically require that guarantors of the loan (including borrower subsidiaries and/or affiliates), and the collateral securing the loan, also provide support for the borrower's obligations under swaps entered into with the lender and/or an affiliate of such lender. Recent interpretative rules related to the implementation of Dodd-Frank[2] have significant implications with respect to the documents governing such loan transactions.

"Dodd-Frank [has] . . . significant implications on loan documents . . . where a related swap is (or in the future may be) involved."

Certain provisions of Dodd-Frank amended Section 2(e) of the Commodity Exchange Act (the "CEA")[3] and recent final rules interpreting these statutory reforms, published jointly by the U.S. Commodity Futures Trading Commission (the "CFTC") and the U. S. Securities and Exchange Commission (the "SEC"), have significant implications on loan documents, including guarantees and, potentially, security documents, where a related swap is (or in the future may be) involved. As a result of these new interpretations, Lenders should carefully review current loan document forms, including guaranties, pledges and other security documents to ensure that they are in compliance with Dodd-Frank and CEA restrictions and requirements for entities providing credit support for swap transactions. In particular, in light of these new interpretations, borrowers and their counsel should also be cognizant of the need to potentially modify enforceability representations and warranties contained in loan documents that they enter into, as well as qualifications and assumptions in forms of legal opinions, given in connection with commercial loan transactions.

Under current CFTC rules and regulations, swap transactions must either be executed on a registered exchange or each party thereto must qualify as an "eligible contract participant" ("ECP") under the CEA. As the result of the recently- issued No-Action Letter No. 12-17, (October 12, 2012) (the "No-Action Letter") from the Office of the General Counsel of the CFTC, effective March 31, 2013, guarantors of obligations under such swap transactions, including plain-vanilla interest rate swaps, are subject to the same requirements as the direct counter-parties to the transaction and must themselves be ECPs in order to guaranty the swap transaction.[4] Although the CFTC interpretation in the No-Action Letter is limited to guarantees of swaps and does not specifically address other forms of credit support such as pledging collateral, it appears to recognize that the logic it employs applies equally to a non-ECP providing collateral to secure obligations under a swap and suggests that the CFTC and/or the SEC may, in the future, extend its interpretation such that pledgors of collateral securing obligations under swaps may also be required to be ECPs.

Under the CEA, ECP's include:

- Corporations, partnerships, proprietorships, organizations, trusts or other entities with more than $10 million in total assets, or any entity guaranteed by such entity;
- Entities with a net worth of at least $1 million that are hedging commercial risk;
- Certain financial institutions;
- State-regulated insurance companies;
- Investment companies subject to regulation under the Investment Company Act of 1940[5];
- Regulated commodity pools with more than $5 million in assets under management;
- Employee benefit plans subject to ERISA[6] with total assets exceeding $5 million or whose investment decisions are made by a registered commodity pool advisor or commodity trading advisor subject to regulation under the Investment Advisers Act of 1940[7] or by a financial institution or insurance company;
- Governmental entities;
- Corporations, partnerships, proprietorships, organizations, trusts or other entities whose obligations are guaranteed by an entity which is an ECP satisfying one of the foregoing descriptions;
- Brokers and dealers subject to regulation under the Securities Exchange Act of 1934[8] and similarly regulated foreign entities (if the broker or dealer is an individual, must have discretionary investments of greater than $10 million);
- Futures commission merchants and similarly regulated foreign entities (if an individual, must have discretionary investments of greater than $10 million);
- Individuals with aggregate amounts of greater than $10 million invested on a discretionary basis (or $5 million if hedging);
- Any entity that:
  - is owned entirely by ECPs,
  - together with its owners have an aggregate of at least $1 million in net worth, and
  - is entering into an interest rate, foreign exchange or commodity derivative for purposes of hedging a commercial risk.

Large corporate borrowers would typically not have an issue meeting the $10 million asset threshold[9], or one of the other thresholds to be an ECP. However, subsidiaries, affiliates or principals, may very well not qualify as ECPs. Further, there are many borrowers in smaller transactions (as well as guarantors) who do not meet the minimum requirements to be considered an ECP.

The consequences of failing to comply with these provisions, as interpreted by the No-Action Letter, include the illegality and un-enforceability of a guaranty by a non-ECP guarantor in connection with swap transactions and the potential for an enforcement action by the CFTC against the guarantor, the borrower as the "Guaranteed Swap Counterparty" or the lender as the "beneficiary " of the swap guaranty.[10] This also raises further issues as to the over-all enforceability of a "universal" guaranty where the guarantor is not an ECP. The No-Action Letter does not address whether only the guarantee of the swap under such a "universal" guaranty is invalidated or whether the guarantee of the underlying loan obligations could also be tainted and rendered invalid and unenforceable as a result of the invalid guarantee as to the swap obligations. Additionally, many existing loan documents could be subject to technical default where the definition of "obligations" is broad enough to include swap obligations, since invalidity of the underlying obligations (*i.e.*, the swap obligation, if a borrower or a guarantor is not an ECP at the time the swap is entered into) very often constitutes a default. This obviously should raise a number of concerns for lenders who are also counterparties under loan-related swap transactions. This is not only a prospective issue: this issue should be addressed in loan transactions currently in negotiation, as well as in existing loan and swap documentation that may be required to be amended as of or subsequent to the March 31, 2013 effective date, since the determination of when the guarantor is required to be an ECP is the time as of when the swap is entered into[11], which may be after the guaranty is executed and delivered.

This also has implications for loan parties and their counsel in connection with representations and warranties in loan documents and with qualifications and assumptions in opinion letters given in such transactions addressing the enforceability of loan documents, including guaranties and security documents.

There are a number of potential solutions to addressing non-ECP guarantor issues including:

- adding carve-outs in the definition of "obligations" in guaranties and other loan documents so as to exclude swap obligations for which the guarantor is a non-ECP;
- providing for severability provisions in guaranties providing that if a loan party is not an ECP, such status would not affect the non-swap obligations under their guaranties;
- considering whether "waterfall" provisions should be modified so as to exclude amounts recovered from non-ECP loan parties from application to swap obligations;
- providing for representations by loan parties that they are ECPs. However, this may be of limited value, and the representations would have to be "re-upped" each time a swap is entered into, since ECP qualification must be satisfied at each such time;
- including provisions that require "keepwell" support from loan parties that are ECPs to those that are not ECPs[12]; and
- if the loan documents are not drafted in a manner to exclude non-ECP party guaranty obligations, borrowers and their counsel should make appropriate carve-outs in loan party representations and warranties and opinion assumptions and qualifications regarding validity and enforceability of loan documents[13].

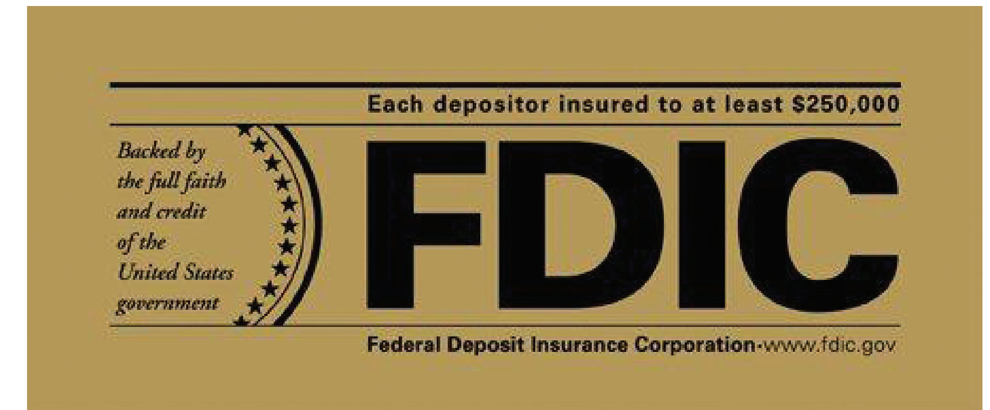
Obviously, these changes, which became effective on March 31, 2013, have serious implications for lenders and they should consult with their legal counsel to determine the best approach in addressing these issues in the context of their individual transactions. If you would like to discuss these issues further, please contact a member of the Shumaker Financial Services Team.

FDIC Insurance: Are Your Accounts Fully Covered?

When a client walks into a bank he or she is bombarded with signs indicating that the funds deposited in the bank are insured by the FDIC. Even if the client does not fully comprehend what that means, the signs offer the client peace of mind to know that his or her funds are safe while on deposit at the bank. However, the signs also give notice to the client that there is a limitation on the FDIC insurance to a specified dollar amount.

When a client comes into an attorney's office there are no such signs. A client who entrusts funds to an attorney to be placed in escrow, commonly known as an IOLTA account, believes those funds to be safe based merely on the fact that they are placed with the attorney. Like the client's personal account at the bank, the funds placed with the attorney are also insured by the FDIC; however, FDIC insurance coverage may be limited by considerations that are not apparent to the attorney or the client.

By Kristina L. M. Wildman



Until recently, the funds placed in IOLTA accounts received unlimited FDIC insurance. The law that allowed the unlimited protection was passed as part of the Dodd-Frank Wall Street Reform Act in 2010. Like many other laws passed in response to the financial crisis of 2008, the unlimited FDIC insurance for IOLTA accounts was valid for only two years and expired on December 31, 2012. Since there was no move by Congress to extend the unlimited coverage, the FDIC insurance coverage for IOLTA accounts is now calculated based on the amount that a client has on deposit with the financial institution as a whole, whether those funds are held in a client's personal account or on the client's behalf in the attorney's IOLTA account. This is known as pass-through coverage and it is provided to IOLTA accounts on a per-client basis.

FDIC insurance is essentially a safety net that is triggered when a bank fails. Upon the failure of an insured bank, the FDIC will repay the depositors the amount they had on deposit in the failed bank on the date of the closure up to the insured amount. The FDIC insurance applies to all types of deposit accounts, including checking accounts, savings accounts and certificates of deposit. Currently, the FDIC insures deposit accounts to $250,000 per individual depositor (not per account) at each separately chartered insured bank; however, the law allows for a single person to insure much more by holding accounts with different ownership types and at different banks.

Individual Accounts

The FDIC calculates the insurance limits based on the ownership categories of a depositor's accounts at each separately chartered insured bank. Therefore, depositors can obtain more than $250,000 of FDIC insurance by titling the accounts in different ownership categories and by using different financial institutions for their deposits. Under the FDIC rules, an individual depositor can have accounts at the same bank titled individually, jointly with one or more other individuals, and as certain types of retirement accounts. Each of these categories is considered separately for purposes of calculating the FDIC insurance amount limit.

Each of the ownership categories is afforded its own $250,000 FDIC insurance limit based on the owners of the account. The individual account, in the name of the depositor only, is insured up to $250,000. A joint account between the depositor and his spouse is insured up to $500,000 ($250,000 for each owner). Retirement accounts are calculated separately from a depositor's individual accounts and are also insured for up to $250,000.

For example, if a depositor at Bank A deposits $250,000 in an account held in his own name, $500,000 held in a joint account with his spouse, and $250,000 held in an IRA account, the depositor will not have exceeded the limits of the FDIC insurance offered for these accounts at Bank A. A depositor could then make deposits into accounts at Bank B and the calculation of FDIC insurance limits would start over as to the Bank B accounts.

Revocable Trust Accounts

Unlike individual accounts, the FDIC insurance limits for revocable trust accounts are calculated based on the number of beneficiaries of the trust and not on the current owner of the account. Under the FDIC rules, revocable trust accounts include both formal revocable trusts created by a written agreement and what the FDIC considers an informal revocable trust, such as an account that names a payable on death (POD) beneficiary.

For FDIC insurance purposes there are two categories of revocable trust accounts: those with five or fewer unique beneficiaries and those with more than five unique beneficiaries. For the revocable trusts with fewer than five beneficiaries the account receives FDIC insurance in the amount of $250,000 per beneficiary. If the revocable trust has more than five beneficiaries the FDIC insurance coverage is dependent upon each beneficiary's beneficial interest in the trust. Further, if the trust has two owners, such as a joint trust, these amounts are doubled.

For example, if a depositor establishes a revocable trust for the benefit of her three children, the account would be insured for up to $750,000, based on $250,000 of FDIC insurance for each beneficiary. If a husband and wife establish a joint revocable trust for the benefit of their three children, the account would be insured for up to $1,500,000. To calculate the FDIC insurance on the joint trust the husband can calculate $750,000 of coverage, $250,000 for each child, and so can the wife.

If there are six beneficiaries of the revocable trust and they each have an equal interest in the trust, the FDIC insurance will remain at $250,000 per beneficiary. If the six beneficiaries have unequal beneficial interests in the revocable trust, then the FDIC insurance is either the sum of each beneficiary's actual interest up to $250,000 per beneficiary or $1,250,000 for the entire trust, whichever is greater.

For example, if a depositor establishes a revocable trust for her six nieces and nephews in equal shares, the account will be insured for up to $1,500,000. If the depositor instead establishes a revocable trust that leaves $1,000,000 to her three children equally and $600,000 to her three nieces equally, the FDIC insurance is calculated based on the beneficiaries' actual interest. Here, each of the children would be entitled to $250,000 of FDIC insurance coverage and the nieces would each be entitled to $200,000 of FDIC insurance coverage based on their respective interests in the trust. Therefore, $250,000 of the children's interest would remain uninsured by the FDIC and the total coverage of the account would be $1,350,000.

Irrevocable Trust Accounts

Irrevocable trusts are either created by the death of a revocable trust owner, or they are irrevocable at their inception. Under the FDIC insurance rules, an irrevocable trust that was previously revocable will continue to calculate FDIC insurance coverage pursuant to the revocable trust rules outlined above. The FDIC insurance coverage for an irrevocable trust that was irrevocable from inception will vary greatly depending on the interests of the beneficiaries and the power of the trustee(s) to invade the trust. Similar to the revocable trust rules, each beneficiary may be insured for up to $250,000, so long as their interest in the trust is not contingent. If the trustee has the power to invade the trust to distribute funds to any or all beneficiaries, then the FDIC insurance will likely be limited to $250,000 total, because the beneficial interest of the beneficiaries cannot be determined until the distributions are made.

For example, if depositor creates an irrevocable trust for the benefit of his three children, the FDIC insurance coverage will depend on the distribution language of the trust agreement. If the trust agreement provides that each child is to receive a one-third equal share of the trust assets, then the trust account will be insured for up to $750,000, or $250,000 per beneficiary. However, if the trust provides equal income payments to the three beneficiaries and then allows the trustee to invade the principal for the benefit of one or all of the beneficiaries, the beneficial interests of each child are contingent and the trust account will receive only $250,000 of FDIC insurance coverage.

IOLTA Accounts

With the recent change to pass-through coverage for IOLTA accounts, any client that deposits funds with an attorney for escrow purposes must include those funds when calculating the FDIC insurance coverage if the IOLTA account is held at the same bank the client uses.

For example, if a client has a checking account at Bank A with a balance of $500,000, the account is insured for only $250,000. If the client writes a check for $200,000 to the attorney to hold in the IOLTA account at Bank A, the client is still insured for only $250,000 on the balance of his checking account and the funds held for his benefit in the IOLTA account. If the client has a checking account at Bank B with a balance of $500,000 and writes a check for $200,000 to the attorney, the client's checking account is insured for up to $250,000 and the balance in the IOLTA account at Bank A is insured for up to $250,000 because the balances are held at separate financial institutions.

Summary

In the ten years preceding the 2008 financial collapse, only 43 banks failed. Over 470 banks have failed since January 2008. These developments have made the possibility of utilizing the FDIC insurance a very real possibility. The calculation of a client's insured balances can be completed by the client's bank and will provide the client with peace of mind. While IOLTA accounts potentially offer clients the same FDIC insurance coverage as their personal accounts, the amount that a client has on deposit in a bank and the identity of the bank(s) holding such deposits can limit the FDIC insurance coverage on both the client's personal accounts and his deposit in the IOLTA accounts. Therefore, it is important for clients to be aware of the FDIC insurance limits and the balances they have on deposit that are subject to those limits, both in personal accounts and in IOLTA accounts.

welcome

Katherine S. Decker
Toledo, Litigation

Sarah M. Glaser
Tampa, Bankruptcy, Insolvency and Creditors' Rights

Developing Federal Common Law of Successor Liability

When a purchaser acquires substantially all the assets of a seller, the purchase agreement typically provides that the purchaser does not assume seller's liabilities except to the limited extent specifically set forth therein. Nevertheless, a disclaimer of liability is not effective in all situations. State statutes typically impose liability on successors for sales taxes and certain similar obligations, and for that reason purchasers usually protect themselves, such as by escrowing a portion of the sale proceeds until full payment of such taxes and obligations is verified. Additionally, federal courts have judicially imposed successor liability based on violations of the Labor Management Relations Act (*John Wiley & Sons, Inc. v. Livingston*, 376 543 (1964)), the National Labor Relations Act (*Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)), Title VII of the Civil Rights Act of 1964 (*Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1985)), the Employee Retirement Income Security Act of 1974 (*Upholsterers' International Union Pension Fund v. Artistic Furniture*, 920 F.2d (7th Cir. 1990), the Age Discrimination in Employment Act (*EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1986)), and the Family and Medical Leave Act (*Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 7707 (9th Cir. 2010)).

By Regina M. Joseph

In a recent decision, the Seventh Circuit Court of Appeals expanded what it characterized as the "federal common law" imposing successor liability to the Fair Labor Standards Act ("FLSA"), which governs minimum wage and overtime paid to workers. In *Teed et al v. Thomas & Betts Power Solutions, L.L.C.*, Nos. 12-2440, 12-3029 (7th Cir. March 26, 2013), the seller's assets had been sold by a secured lender through an auction conducted under a state court receivership. The purchaser's bid imposed the condition that the sale had to be free and clear of all liabilities, including FLSA liabilities. An FLSA case had been filed approximately two years prior to the sale and was apparently known to the purchaser. Writing for the Seventh Circuit, Judge Posner noted that, under Wisconsin law, this disclaimer of liability would have been sufficient to dispose of the matter; however, state law was not controlling, nor was it even relevant, when a federal standard applies.

Although Judge Posner noted that the Court must, as a threshold matter, determine whether the FLSA should be included within the group of employment and labor statutes to which the federal standard had previously been found to apply, his analysis was perfunctory. He reasoned that federal labor and employment statutes are intended either to foster labor peace or to protect the rights of workers who are unable to prevent a corporate sale aimed at extinguishing employment law liabilities. The FLSA promotes this goal; ergo the federal standard is applicable.

In imposing successor liability, the district court had applied the following multi-factor test, which it derived from the cases mentioned above:

- Did the purchaser have notice of the pending lawsuit?
- Would the seller have been able to provide the relief sought in the lawsuit prior to the sale? The court noted that if an insolvent seller would have been unable to pay, it would be a windfall to the litigating plaintiffs to impose successor liability, and this weighs against imposing successor liability.
- Would the seller have provided relief after the sale? In *Tweed*, the sale proceeds went to the secured lender – the Seventh Circuit found this to be a factor in favor of successor liability.
- Is the purchaser able to provide the relief sought in the litigation?
- Is there a continuity of operations and work force? If so, successor liability is favored because "nothing really has changed."

Although reaching the same conclusion, the Seventh Circuit disavowed the multi-part test in favor of a simple federal standard – successor liability should be imposed unless "there are good reasons to withhold such liability." The Court stated that the purchaser's disclaimer of liability as an express condition of its purchase was not a good reason. Although it hinted that lack of notice might serve as a good reason, such dictum provides little comfort for structuring future transactions, since factors constituting notice are always elusive. In essence, the Seventh Circuit ruled that liabilities under federal employment and labor statutes must be assumed by a successor purchaser that buys the complete business, no matter what. Only when the business is broken up and sold piecemeal would purchasers not face successor liability.

However, the Court toyed with a "theoretical" good reason if the relative rights of competing creditors would be disrupted. In *Tweed*, the business was sold by a secured lender through a state court receivership. If the purchaser had known that it could not avoid the FLSA liability, the purchase price in its bid would have been discounted by its valuation of the liability it must assume. Viewed from the creditors' perspective, the unsecured employees' claims would be paid in full prior to the secured creditor's claims, disrupting the laws governing priority of competing claims. Since the purchaser in *Tweed* did not make this argument, instead informing the court that it did not discount its purchase bid, we do not know if the court would truly have been persuaded by this line of thought.

Tweed is a reminder of the limitations to a purchaser's reliance on a disclaimer of liability in an asset purchase agreement. There is no substitute for a thorough due diligence investigation to arrive at the appropriate purchase price.

Employment Law Update

Ohio Intentional Tort Update. In a decision that will minimize employer exposure to workplace injury intentional tort suits, the Supreme Court of Ohio recently narrowly interpreted what constitutes the deliberate removal of an equipment safety guard for purposes of *Ohio Revised Code* 2745.01(C). That statute, which is intended to limit employer liability for intentional torts, provides that an employer is only liable for an intentional tort if it deliberately intended the employee's injury. However, the statute also provides that an employer's deliberate removal of an equipment safety guard creates a rebuttable presumption that the employer deliberately intended to cause injury. Some Ohio courts of appeal interpreted "equipment safety guard" and "deliberate removal" very broadly, with some courts holding that any safety device, including personal protective equipment, constitutes an equipment safety guard, and extended "deliberate removal" to include an employer's instructions not to use a safety device.

By Serena L. Lipski

In *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, the Supreme Court of Ohio rejected such a broad interpretation. The Court limited the definition of an equipment safety guard to "a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment," and held that "free-standing items…, such as rubber gloves and sleeves, are not an 'equipment safety guard.'" *Id.* at ¶ 18. The Court further held that a deliberate removal is "a careful and thorough decision to get rid of or eliminate a safety guard." *Id.* at ¶29. Such a decision does not include an employer's failure to properly instruct an employee on its use or the employer's failure to provide a guard where one did not previously exist. *Id.* The Court did, however, leave open the possibility that bypassing or disabling a guard could be deliberate removal of a guard for purposes of R.C. 2745.01(C). *Id.*

While the Court's decision represents a victory for employers, it is important to remember that employers still may face significant liability if an employee is injured where a guard has been removed or disabled.

The statute also provides that an employer's deliberate removal of an equipment safety guard creates a rebuttable presumption that the employer deliberately intended to cause injury.

Criminal Background Checks and Federal Contractors. On January 29, 2013, the U.S. Department of Labor, Office of Contract Compliance Programs (OFCCP) issued a directive instructing federal contractors and subcontractors on the use of criminal background checks in hiring, among other things. The directive generally discourages contractors and subcontractors from inquiring about an applicant's criminal history. If an employer does, however, request criminal background information, the OFCCP states that the request should be "limited to convictions for which exclusion would be job-related for the position in question and consistent with business necessity," and refers to the Equal Employment Opportunity Commission's guidance on criminal background checks in employment. That guidance, which is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm, suggests that an employer make an individualized assessment of a candidate's criminal background by considering several factors, such as the type of conviction, the job duties, and the age of the conviction.

New Family and Medical Leave Act Regulations. The U.S. Department of Labor's (DOL) new regulations on the Family and Medical Leave Act (FMLA) took effect on March 8, 2013. Among other things, the new regulations require covered employers, generally meaning those with 50 or more employees, to use a new FMLA poster, new FMLA certification forms, and a new Rights and Responsibilities Notice. These forms and poster are available at the DOL's website at http://www.dol.gov/WHD/fmla/2013rule.

The regulations also expand the protections of the FMLA to family members of members of the regular armed forces who are on active duty. Eligible employees may take leave for a "qualifying exigency," which includes leave taken to address issues arising from a short-notice deployment, spend time with the military member who is on Rest and Recuperation Leave, or attend military events, among other things. Additionally, eligible employees may take up to 26 weeks of leave to care for current service members or qualifying recent veterans with a serious injury or illness.

Finally, the regulations clarify the method by which employers must calculate intermittent leave. The regulations provide that an employee must not be required to take more leave than necessary. Accordingly, employers must use the smallest increment of time used for other forms of leave, but must not use greater than one-hour increments.

I-9 Form Changes. The U.S. Citizenship & Immigration Services has released a new Form I-9, along with more detailed instructions to the form. The new I-9 Form can be used immediately. Older versions of the form can no longer be used by the public effective May 7, 2013.

The newly revised Form I-9 makes several improvements designed to minimize errors in form completion. The key revisions to Form I-9 include:

- Adding data fields, including the employee's foreign passport information (if applicable) and telephone and email addresses.
- Improving the form's instructions.
- Revising the layout of the form, expanding the form from one to two pages (not including the form instructions and the List of Acceptable Documents).

The new I-9 form and detailed instructions are available at: http://www.uscis.gov/files/form/i-9.pdf

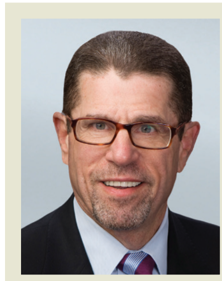
Diversity at Shumaker

Congratulations to Sharon Fulop on her selection by the National Diversity Council for the "2013 Ohio Glass Ceiling Award." Sharon will be recognized at the 2013 Ohio Women's Conference Award Luncheon on May 30, 2013 at the University of Cincinnati, Tangeman Center.

A ROCK AND A HARD PLACE:

Don't Become a Client's Surrogate in Communicating with the Government[1]

Sometimes, even seemingly innocuous acts can cause intractable problems. In one recent tax case, *United States v. Matsa*, No. 09-297, 2010 WL 4117548 (S.D. Ohio Oct. 19, 2010), a simple letter from an attorney to the government concerning a records custodian's document production caused the lawyer's disqualification and exposed him to criminal prosecution.



By David F. Axelrod

and Adam M. Galat

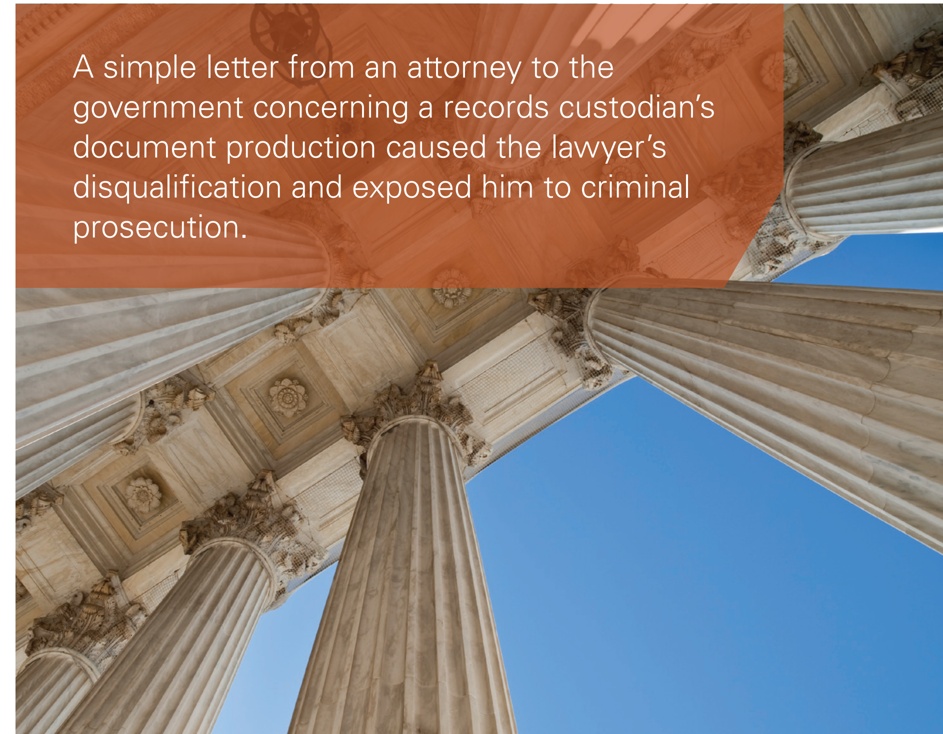
It is well known that a corporate custodian cannot resist a subpoena for corporate records on Fifth Amendment grounds, even if they incriminate the custodian personally, no matter how small the corporation. See *Braswell v. United States*, 487 U.S. 99, 102 & 117, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) (subpoena to the president, sole shareholder and only individual with authority over the corporation's affairs). Corporations are artificially created entities that have no Fifth Amendment privilege. *Id*. at 102, citing *Bellis v. United States*, 417 U.S. 85, 88, 94 S.Ct. 2179, 2182, 40 L.Ed.2d 678 (1974). When a custodian responds to a subpoena for corporate records, he acts in a representative rather than a personal capacity. *Braswell* at 110.

Issues surrounding document production by a corporate custodian may be fraught with peril. No attorney wants to have a client – especially one with any criminal exposure at all – actually appear before a grand jury, even if just to authenticate corporate records. An attorney may therefore be tempted to intercede in the hope of avoiding such an appearance. This may lead an attorney to deliver subpoenaed records to the prosecutor or, as in the case discussed below, provide information about a client's inability to produce certain records. A lawyer must provide this sort of assistance with great caution, lest it cost the client his or her choice of counsel and expose the attorney to a risk of prosecution.

Matsa illustrates some of the risks. The case resulted from a subpoena duces tecum issued to attorney Aristotle Matsa as custodian of records for specified business entities and individuals. *Matsa*, 2010 WL 4117548 at *1. In response, Matsa's attorney sent a letter to the government explaining that Matsa was not a custodian for the majority of the entities listed in the subpoena, and neither possessed nor controlled their records. *Id*.

Matsa was later indicted for a smorgasbord of offenses, including obstructing the administration of the Internal Revenue Laws (18 U.S.C. §7212(a)), aiding and assisting in the preparation of false tax returns (26 U.S.C. §7206(2)), failing to file a report of a foreign bank account (31 U.S.C. §§5314 and 5322(b)), conspiring to commit offenses against the United States (18 U.S.C. §371), witness tampering (18 U.S.C. §1512(b)), making a false statement to the government (18 U.S.C. §1001) and obstructing justice (18 U.S.C. §1503(a)). The attorney's letter formed the basis of the conspiracy and obstruction counts of the indictment, which alleged that Matsa conspired to obstruct and obstructed justice by virtue of the letter. *Id*. at *2.

Subsequently, the government moved to disqualify Matsa's attorney based upon that attorney's involvement in drafting the letter. The district court granted the motion, citing multiple grounds.



The court was first concerned about the obvious potential for Matsa's lawyer to have to testify in support of an advice of counsel defense. Additionally, the government reserved the right to call the lawyer, even if Matsa elected not to do so.[2] *Id*. at *3. The court was also concerned about the potential for Matsa's lawyer's trial examinations of witnesses and argument to become, in effect, unsworn testimony that was not subject to cross-examination. *Id*. at *4-5, citing *United States v. Locascio*, 6 F.3d 924, 933 (2d Cir.1993). Because of his involvement in crafting the letter, a jury might also have connected Matsa's lawyer to conduct charged in the indictment. *Id*. at *5.

Another factor in the district court's decision was the potential for the lawyer's personal involvement to impair his performance as an advocate. For instance, he might have been constrained from making certain arguments for Matsa because of his own involvement. He might also have been tempted to minimize his own conduct at Matsa's expense. 2010 WL 4117548 at *5. See also *United States v. Wilson*, No. 10-20581, 2011 WL 740200 at *10-11 (E.D. MI Feb. 24, 2011) (attorney disqualified in a criminal case because of his lengthy representation of businesses involved in the case), citing *Matsa* and *Locascio* (which it described as the "preeminent case on the unsworn witness issue").

The court found that any of these scenarios would have risked undermining the public's perception of the integrity of the proceedings, and might have impaired the fairness of Matsa's trial. Additionally, allowing the lawyer to serve a dual role would have violated Ohio R. Prof. Conduct 3.7, which prohibits attorneys from serving in that dual capacity. *Id*. at *2-3.[3] Matsa, however, argued that disqualification would cause substantial hardship, which is a recognized exception to disqualification under Ohio R. Prof. Conduct 3.7(a)(3).[4] But, despite the lawyer's lengthy representation of Matsa, and the historical knowledge acquired during that representation, the court found that disqualification, while inconvenient, would not cause Matsa substantial hardship. *Id*. at *3-4. See also *Wilson*, 2011 WL 740200 at *10-11. But cf. *United States v. Cardin*, No. 1:11-CR-93, 2012 WL 2906693 at *5 (E.D. Tenn. July 16, 2012) (motion to disqualify denied despite "serious potential for conflict at every stage of the trial" because "maintaining current counsel [was] likely both easier and more fair to Cardin than compelling him … to obtain new representation").

Although Matsa apparently did not offer a conflict waiver, it is doubtful whether, had he done so, it would have been accepted. Courts are not required to accept such waivers because the question of disqualification implicates the integrity of the process, as well as the Sixth Amendment. *Id*. In rejecting them, courts often cite the "whipsaw" nature of such waivers: "If a trial court disqualifies counsel, [the] defendant will argue … a violation of his Sixth Amendment right to counsel of his choice.

If a trial court refuses to disqualify an attorney, a defendant may later attempt to raise an ineffective assistance of counsel claim based on conflict of interest, asserting that his waiver was not knowingly or voluntarily made." *Wilson*, 2011 WL 740200 at *2, citing *Serra v. Michigan Dep't of Corrections*, 4 F.3d 1348, 1353-54 (6th Cir. 1993) and *Wheat v. United States*, 486 U.S. 153, 161-62, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). But cf. *Cardin*, 2012 WL 2906693 at *5 (waiver accepted despite "serious potential for conflict at every stage of the trial"). Concerns include a client's inability, while represented by the subject attorney, to knowingly and intelligently waive the right to present an advice of counsel defense. This is especially true at the pretrial stage, when the facts are typically unclear and the government's trial strategy unknown. *Wilson*, 2011 WL 7401200 at *6.

Sending the letter presented greater risks to the lawyer than disqualification, however. Had the Government believed the lawyer knew the letter contained false information, he could have himself faced criminal prosecution under, among other statutes, 18 U.S.C. §1001(a)(3), which bars the use of false writings and documents in matters within the jurisdiction of the federal government.[5]

The court in *Matsa* emphasized its reluctance to disqualify the lawyer, who had, "in his usual custom, acted in a wholly professional manner,… made all necessary efforts to disclose all pertinent information, and… sought to advance the best interests of his client." 2010 WL 4117548 at *5. This reluctance may have been reflected in the court's taking a full eight months to decide the disqualification motion. Emphasizing that its decision was "in no part based on any improper conduct" by the lawyer, the court described its opinion as simply "follow[ing] a disagreement between the parties involving the limits of representation by an attorney who has knowledge of disputed facts." *Id.*

What should Matsa's lawyer have done instead of writing the letter? There are several possibilities. For instance, the lawyer could have sought the government's agreement to have an alternate custodian produce the documents and attest to the completeness of the production, if such a custodian existed. See generally *Braswell*, 487 U.S. at 116-17. The government might also have accepted a document production outside the grand jury, with an affidavit or cover letter from Matsa – not the lawyer – attesting to the completeness of the production. At worst, Matsa could have appeared before the grand jury, produced the records of which he was custodian, attested to the completeness of the production, and refused on Fifth Amendment grounds to answer further questions about his relationship to the subject entities or possession of other records. Under *Braswell*, the government could have made no evidentiary use of Matsa's individual act of production against him. 487 U.S. at 118.

Matsa demonstrates that even well intentioned conduct by highly reputable counsel may result in disqualification, despite a court's reluctance to take such drastic action. Counsel would therefore be well advised to exercise caution in making factual representations of any kind to the government that may appear to be on firsthand knowledge concerning a client or the facts of a case.

E-Discovery Amendments To Florida Civil Rules
Now In Effect

Effective September 1st, 2012, the Florida Rules of Civil Procedure were significantly amended to address the discovery of electronically stored information (ESI). The amendments affect seven rules of civil procedure as discussed in more detail below. The Florida Supreme Court's order is available at: http://www.floridasupremecourt.org/decisions/2012/sc11-1542.pdf. The order provides a discussion and text of the amendments, including committee notes which, although not adopted as an official part of the rules, do provide valuable insight.

By Douglas A. Cherry
Chair of The Florida Bar Business Law Section E-Discovery Committee

A key goal of the amendments is to parallel similar provisions in the Federal Rules. This allows state courts to refer to Federal case law (which has been ever expanding since the 2006 e-discovery amendments to the Federal Civil Rules) as guidance. Despite this goal, the new Florida Rules contain subtle variances from their federal counterparts. These variances have the potential to allow the Florida rules to give more guidance, yet allow more flexibility.

The Florida Rules of Civil Procedure were significantly amended to address the discovery of electronically stored information (ESI).

- **Rule 1.200 (Pretrial Procedure).** The most significant deviation from the Federal Rules is that the 26(f) "meet and confer" provisions were not adopted. However, Rule 1.200 was amended to allow the trial court to consider various issues related to electronic discovery during a pretrial conference, including the possibility of obtaining admissions of fact, the voluntary exchange of documents and ESI, and stipulations regarding the authenticity of documents and ESI; the need for advance rulings on the admissibility of some documents or ESI; and finally, the possibility of an agreement between the parties regarding the extent to which ESI should be preserved and the form in which it should be produced. Such conference may be convened by order of the court or by a party merely serving a notice setting the conference.

Practice pointer: Strongly consider setting an early case management conference to discuss e-discovery, especially if you foresee related issues in the case. This is a prudent first step in avoiding costly discovery disputes and can help set the stage for achieving discovery objectives. Judges and magistrates will be annoyed if the parties waste valuable court resources in addressing matters that should be resolved amicably between the parties. Be prepared to get into specifics with opposing counsel as to what you are seeking and any burden issues related to your production of ESI.

- **Rule 1.201 (Complex Litigation)** is amended to require parties involved in complex litigation to address the possibility of reaching an agreement addressing whether ESI should be preserved, the form in which it

should be produced, and whether discovery of such information should be conducted in phases or limited to particular individuals, time periods, or sources. **Practice pointer:** Strive to reach an agreement. Don't engage in needless e-discovery expeditions without your goals in mind. Since the duty to preserve in Florida currently follows an unconventional standard in this author's opinion, it's critical to discuss preservation with opposing counsel as early as possible.

- **Rule 1.280 (General Provisions Governing Discovery)** is amended to expressly authorize discovery of ESI. On a motion to compel discovery, or a motion for a protective order, the person from whom the discovery is sought must show that the ESI sought or the format requested is not reasonably accessible because of undue burden or cost. If this showing is made, the court may nonetheless order the discovery if the requesting party shows good cause. However, the court may specify certain conditions of discovery, including cost-shifting. The court, in addressing a motion pertaining to discovery of ESI, must limit the frequency or extent of discovery if it determines that the information sought is: (i) unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or (ii) the burden or expense of the discovery outweighs its likely benefit. **Practice pointer:** The key to supporting an objection to production of ESI is to competently understand your client's technology systems. Only then will you understand the costs and burden of the requested discovery, including search and retrieval costs and the potential for disruption of operations, against the relevance of the information and the requesting party's need for that information. For instance, if you can show that tens of thousands of files will need to be reviewed merely to find information that is duplicative of readily accessible information, then this could help your position. To determine this may require early involvement of an expert.
- **Rule 1.340 (Interrogatories to Parties) and Rule 1.350 (Production of Documents...)** are both amended to allow for the production of ESI, either as an answer to an interrogatory or in response to a specific request. 1.350 allows a request for ESI to specify the form in which the ESI is to be produced. If the responding party objects to the requested form, or if no form is specified in the request, the responding party must state in what form the ESI is being produced. If no form is specified in the request, the amended rule states that ESI shall be produced in the form in which the ESI is ordinarily maintained or in a reasonably usable form. **Practice pointer:** Strongly consider specifying production format in your requests, as you may need metadata. This may require an early understanding of the responding party's ESI, which counsel may voluntarily share or which may necessitate a records custodian deposition. Leaving format selection to the responding party's discretion may be problematic. ESI produced in the form as ordinarily maintained may require specialized software to review. ESI produced in a reasonably usable format may not be native format (if that is what you are after). Keep in mind you may have only one bite at the apple.
- **Rule 1.380 (Failure to Make Discovery; Sanctions)** is amended to provide that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information that was lost as a result of the routine, good-faith operation of an electronic information system. **Practice pointer:** This "safe harbor" has seldom been followed by Federal courts. Current Florida law appears to hold that a duty to preserve arises only by statute, contract, or a request for production, rather than the stricter Federal standard of "reasonable apprehension of litigation." Florida courts will likely adopt the stricter Federal standard. Regardless, intentional destruction of evidence (pre- or post-litigation) can result in a spoliation claim. Don't take that risk. Issue a litigation hold to your client as soon as you sense litigation may arise.
- **Rule 1.410 (Subpoena)** is amended to authorize a subpoena requesting ESI. A person receiving a subpoena may object to the discovery of the ESI. The person from whom discovery is sought must show that the information or the form requested is not reasonably accessible because of undue costs or burden. If that showing is made, the court may nonetheless order the discovery if the requesting party shows good cause, consistent with the limitations provided in rule 1.280(d)(2) discussed above. The court may also specify conditions of the discovery, including ordering that some or all the expenses be paid by the party seeking the discovery.

These rules should provide excellent direction in addressing ESI issues in Florida. However, there is still a long road ahead in Florida in creating certainty on this topic.

Shumaker, Loop & Kendrick, LLP Announces the Formation of Shumaker Advisors, LLC and the Addition of Andrew W. Herf

SHUMAKER ADVISORS

Shumaker, Loop & Kendrick, LLP is pleased to announce the formation of Shumaker Advisors, LLC and the addition of Andrew W. Herf as Senior Government Relations Professional effective March 11, 2013. Shumaker Advisors and Mr. Herf will be based in Shumaker's Columbus, Ohio office.

Andrew W. Herf

Shumaker Advisors, LLC will not engage in the practice of law or rendering of legal advice, but will provide government relations consulting and lobbying, focused on the Ohio General Assembly and executive agencies.

As Senior Government Relations Professional, Mr. Herf will work closely with clients in the food and beverage, health care, retirement planning and related industries and provide strategic guidance to businesses in these highly regulated markets.

Prior to joining Shumaker Advisors, Mr. Herf worked for the Wholesale Beer and Wine Association of Ohio for over 12 years as Vice President of Legislative Affairs. Mr. Herf built one of the largest Political Action Committees in Ohio and successfully fought for the issues important to beer and wine wholesalers across the state, building overwhelming bi-partisan support for the entire alcohol beverage industry

"We are very excited to begin our professional relationship with Andy and to launch Shumaker Advisors, LLC," said Mark Wagoner, a Shumaker partner. "Andy is a known and respected voice around Capitol Square, and he will provide a new dimension to our ability to problem solve for our clients."

Previously, Mr. Herf began working in the Ohio statehouse in 1994 as the Legislative Aide to State Senator Robert Cupp, and in 1996, Mr. Herf joined the lobbying team at the Ohio Council of Retail Merchants, a nationally renowned trade association representing the interest of large and small retailers in Ohio. During his time at the Council, Mr. Herf also managed two affiliated trade associations – the Ohio Association of Convenience Stores and the Ohio Bakers Association, while also serving as the Vice President of Merchant Services, Inc., a corporation focused on providing member services to retailers in Ohio. In 1999, Mr. Herf joined the Craig Group, a Columbus based public relations firm, as Vice President.

Additionally, Mr. Herf operated AW Herf & Co., LLC, a multi-client firm representing a variety of interests ranging from pension and retirement issues, financial services, travel and tourism issues, both statewide and regional, and contract procurement.

"I am looking forward to working with Shumaker Advisors, LLC and its close relationship with Shumaker, Loop & Kendrick, LLP," stated Mr. Herf. "Shumaker is a trusted and respected law firm, and this partnership enables us to provide new government relation services to their clients along with continuing my longstanding relationship with the Wholesale Beer and Wine Association of Ohio."

Mr. Herf is a graduate of The Ohio State University.

* * *

Shumaker's Columbus office is located in the Huntington Center at 41 South High Street, Suite 2400, Columbus, Ohio 43215-6104. For more information, visit www.slk-advisors.com.

slknews

Erin Aebel participated in a panel discussion on "Heath Care Reform: What Does the Future Hold?" held in Tampa on November 15, 2012. Erin presented "The Future of Healthcare Reform in Florida" to women executives at the University of South Florida CAMLS facility on January 8, 2013 and also presented to the Hillsborough County Bar Association's Health Law Section CLE luncheon on February 7, 2013. She also co-presented a webinar for The Florida Bar Health Law Section on March 12, 2013.

Erin Aebel and Malinda Lugo were invited to speak to the University of South Florida College of Medicine residents and fellows on December 18, 2012 regarding preventing malpractice lawsuits, contract negotiations and Health Law 101.

David Axelrod was a faculty member at the 29th Annual National Institute on Criminal Fraud and the Second Annual National Institute on Tax Controversy held on December 5-7, 2012 in Las Vegas, Nevada.

Jeni Belt was a presenter at the Healthcare Roundtable's Employed Physician Networks Retreat in Bonita Springs, Florida held March 20-22, 2013. The Roundtable's Employed Physician Network is a limited membership group of hospital/health systems executives who run networks of employed physicians and who work in non-competing, not-for-profit, geographically dispersed hospitals and health systems throughout the country.

Steve Berman spoke to the National Water Products Manufacturers Credit Group on October 10, 2012 at their annual meeting in Las Vegas, Nevada. Steve discussed bankruptcy and Chapter 9 municipal bankruptcy issues and trends. Steve also participated in a bankruptcy training session with JAG Corps officers at Naval Base San Diego on October 22, 2012. He was also a guest lecturer at the University of Florida College of Law Advanced Bankruptcy Seminar on January 11, 2013. Steve was a panelist for the American Bankruptcy Institute's Bankruptcy Battleground West Conference on March 22, 2013 in Los Angeles, California.

Tom Blank was a presenter to bank regulators from four states on trust company issues at the Trust Forum sponsored by the Indiana Department of Financial Institutions held on March 5, 2013 in Indianapolis, Indiana.

Mike Briley has been appointed by The Supreme Court of Ohio to the Board of Bar Examiners for a five-year term beginning April 1, 2013 and ending March 31, 2018.

Cheri Budzynski was appointed Social Media Vice Chair for the American Bar Association (ABA) Section of Environment, Energy, and Resources Air Quality Committee for the 2012-2013 term year. Cheri was a panelist at the Twelfth Annual Great Lakes Water Conference 2012 where she provided industries' perspective on mercury deposition of air emissions in the Great Lakes. She also published an article in the *Air & Waste Management Association's National Journal* entitled "The Legal Basis for the Historical and Current Role of SO2 Modeling in Attainment Status Designations."

Doug Cherry presented at the Florida Institute of CPAs (FICPA) 2013 Valuation, Forensic Accounting & Litigation Services Conference on January 10, 2013 in Ft. Lauderdale, Florida. He also presented at the April 11, 2013 Copyrights Workshop with SCORE at the University of South Florida.

Jason Collier, Jennifer Compton and Dan Strader were speakers at a "Best Practices in Employment Law 2013" seminar on April 25, 2013 in Sarasota, Florida.

Jamie Colner, who is a Board member of the Ohio Chapter of the American Board of Trial Advocates ("ABOTA"), presented a proposal to the Columbus Bar Association's Common Pleas Court Committee and Expedited Jury Trial on behalf of ABOTA, on January 3, 2013.

Jennifer Compton was a panelist at the Business Women's Initiative Women of Influence & Rising Stars conference on March 20, 2013 at the Sarasota Yacht Club.

David Conaway presented a webcast for The Association of International Credit and Trade Finance Professionals (ICTF). The topic of discussion was "The Use of Corporate Guarantees in U.S. and Canada - what credit managers should know."

Mark Connolly coordinated and moderated a Florida Coalition for Children (FCC) seminar held December 10, 2012 at Eckerd Youth Alternatives Tampa facilities.

David Coyle received the "Distinguished Service Award" at the 14th Annual Access to Justice Awards Ceremony on April 30, 2013. Dave was honored for his commitment to the mission and work of legal aid in northwest Ohio. Dave also was a guest lecturer at the University of Toledo College of Law on the subject of Chapter 11 Bankruptcy.

Mary Li Creasy has been appointed Chair of the Labor and Employment Law Board Certification Committee for The Florida Bar for 2013-2014.

Duane Daiker received recertification as an Appellate Practice Specialist from the Florida Board of Legal Specialization and Education. He has been certified since 2007 and is one of only 172 lawyers in Florida with this certification.

Julio Esquivel was elected to the Board of Trustees of the Tampa Museum of Art.

Tim Garding has been appointed to the Board of Directors of TEMPUS PROJECTS.

Vanessa Goodwin has been appointed to the Hillsborough County Bar Association Trial & Litigation Section Board of Directors.

Bonnie Keith Green obtained a significant victory for a service-disabled Veteran-owned construction company based in Florida. After being denied certification by the U.S. Department of Veteran's Affairs (VA), the client sought representation from Shumaker in filing a Request for Reconsideration. On February 26, 2013, the VA informed the client that, upon review of the Request for Reconsideration, the VA had determined that any problems with the company's corporate structure had been corrected. The VA verified the service-disabled Veteran-owned small business and stated that the company was immediately eligible to participate in contracting opportunities with the VA. This victory for the client is despite widespread issues and problems veterans are having across the country obtaining verification from the VA and doing business with the VA, as cited in testimony before a U.S. House of Representatives subcommittee hearing on the issue held on March 19, 2013.

Bonnie Keith Green and Andy Culicerto gave a presentation on "2013 Amendments to North Carolina Lien & Bond Law." The presentation highlighted important changes affecting contractors in North Carolina with the passage of Senate Bill 42 and House Bill 1052.

Mark Hildreth was the moderator for a panel discussion about receivers and the value they can add to the loan enforcement process at the 3rd Annual Bank & Financial Institutions Special Asset Executive Conference on Real Estate Workouts sponsored by Information Management Network.

Michele Leo Hintson presented "Unemployment Compensation" and "Managing Employee Usage of Smartphones" at the October 23, 2012 meeting of the West Pasco Dental Association.

Richard Lewis published an article in the *Florida Bar Journal* titled "Are Tax Expenditures Reaching Their Goals? A View From the Fiscal Cliff."

Malinda Lugo spoke at the annual meeting of the Gulf Coast Health Information Management System on January 16, 2013.

Moses Luski presented the "Shumaker Legal Minute" at the January, 2013 meeting of the Latin American Chamber of Commerce of Charlotte. Moses also presented a lecture on February 26, 2013, at the Foundation For The Carolinas. Moses was selected to jury The Juried Student Exhibition & Foundations Show at the University of North Carolina at Charlotte.

Brian McMahon was a featured speaker at an Ohio State Bar Association CLE seminar on May 3, 2013 in Columbus, Ohio titled "Franchising in Ohio: What Every Lawyer Needs to Know."

Scott Newsom co-hosted multiple seminars on "Health Care Reform: What You Need to Do Now – Action Steps to Manage Your Responsibilities and Potential Liabilities."

Maria Ramos spoke at Sterling Seminar's Fundamentals of Employment Law Seminar on January 16, 2013.

Peter Silverman was a presenter at the October 2012 American Bar Association Forum on Franchising.

Joe Simpson authored "Insights on Defending an Environmental Class Action Suit," published in the book *Inside the Minds - Litigating Environmental Class Actions.*

Bennett Speyer was a panelist at the 16th Annual University of Miami Law ESLS Entertainment & Sports Law Symposium held on April 6, 2013 at the Adrienne Arsht Center for the Performing Arts in Miami, Florida

Christopher Staine presented at the National Business Institute's seminar "How to Obtain Good Title in Real Estate Transactions," on October 15, 2012 in Tampa, Florida.

Christian Staples was named the "Connectivity Chair" by the Mecklenburg County Bar's Young Lawyers Division.

Lou Tosi was appointed to the Board of The National Italian American Foundation (NIAF) for the 2013-2017 term.

Lou Tosi co-presented an "Interactive Shale Development Conference: Changing Requirements and Policy Perspective – Developing Ohio's Shale Resources." The conference was held on November 15, 2012 in Columbus, Ohio. **Mark Wagoner** was the moderator, and **Cheri Budznyski** and **Joe Simpson** were speakers. Lou was also a presenter at the 42nd Spring Conference of the ABA Section of Environment, Energy and Resources Law held on March 21-23, 2013 in Salt Lake City, Utah. **Cheri Budzynski** assisted with the material.

Mark Wagoner was appointed to the Board of the Ohio Legal Assistance Foundation. The Ohio Legal Assistance Foundation is the statewide foundation that oversees all the funding to local legal aid groups.

Brian Willis has been elected to the Board of Directors of the Florida Museum of Photographic Arts and also serves on the museum's Development Committee. Brian founded and has been elected President of Connect Tampa Bay; a grassroots group dedicated to providing citizens across Tampa Bay with a voice in support of more transportation options. Brian spoke at the 17th Annual Downtown Development Forum on March 8, 2013 and he was also involved in a presentation by Connect Tampa Bay at the NAIOP Tampa Bay Watch meeting on April 16, 2013.

Footnotes: Impact of Dodd-Frank Swap Regulations on Guaranties and Loan Documentation

[1]Note that a US commercial bank cannot require that the counterparty to a swap be the lender or its affiliate, in that such a requirement would normally violate the anti-tying rules of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. § 1972).

[2]Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1736 (2010) ('Dodd-Frank")

[3]7 U.S.C. § 1, *et seq*. (2012).

[4]*See*, CFTC No-Action Letter No. 12-17, (October 12, 2012).

[5]15 U.S.C.§§ 80a-1—80a-64.

[6]29 U.S.C. § 1002, et seq.

[7]15 U.S.C. §§ 80b-1—80b-21.

[8]15 U.S.C. § 78a, et seq.

[9]It should be noted that the No Action Letter provides that receipt by a borrower of proceeds of a loan will count toward the $10 million or more in assets requirement, since the requirement is not a "net asset" requirement. Thus, a borrower receiving a loan in excess of $10 million would be an ECP.

[10]7 U.S.C. §§ 6b-1. 9(1).

[11]Note that no violation of the law occurs when an entity which at the time of entry into the swap transaction is an ECP later ceases to be an ECP.

[12]Borrowers or affiliates that are ECPs can under certain circumstances confer ECP status by agreeing to provide sufficient assets to, or guaranty the obligations of, a non-ECP party so that it qualifies as an ECP at the time of entry into the swap.

[13]If loan documents contain appropriate exclusionary language, there should be no need for carve-outs in representations and warranties and opinions.

Footnotes: A Rock and a Hardplace: Don't Become a Client's Surrogate in Communicating with the Government

[1]A version of this article was previously distributed at the 2012 American Bar Association National Institute on Criminal Tax Fraud and Tax Controvery.

[2]The government might have argued that Matsa gave false information to the lawyer, intending that it be repeated to the government. If so, otherwise privileged attorney-client communications about the letter might have become fair game under the "crime-fraud" exception to the attorney-client privilege. *See, e.g., United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1977); *United States v. Kerik*, 531 F. Supp.2d 610, 617 (S.D.N.Y. 2008); *United States v. Lopez*, S.D.N.Y. No. 97-1191, 1998 WL 142338 (Mar. 27, 1998). Generally, the exception permits testimony about otherwise privileged communications that were intended "to facilitate or conceal ongoing or contemplated criminal or fraudulent activity." *Kerik at 617, citing In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). It may apply even where the attorney is an unwitting participant in the criminal activity. *Id., citing In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984).

[3]Most states that have adopted the ABA Model Rules of Professional Conduct have rules the same as or similar to Ohio's. For instance, states that have adopted Rule 3.7 ("Lawyer as Witness") include without limitation Florida, New York, Massachusetts, Illinois and Colorado.

[4]Each of the states listed in note 3 also has a "substantial hardship" exception. Among them, New York's rule is slightly different because it provides, "A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact" (emphasis added). Conversely, the other states' rules provide, "A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a *necessary witness*" (emphasis added). California has not adopted the model rules. While it has a "member as witness" rule, codified as Rule 5-210, it does not have a "substantial hardship" exception, but generally allows attorney testimony with the "informed, written consent of the client."

[5]Had this occurred, the lawyer should have been permitted to disclose otherwise privileged communications to defend himself. See United States v. Amrep Corp., 418 F.Supp. 473, 474 (1976), *citing Meyerhofer v. Empire Fire and Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.1974) (attorney facing criminal charges may reveal necessary exculpatory information acquired through privileged communications with a client).

A Newsletter from Shumaker, Loop & Kendrick, LLP

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