insights

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The Risks and Rewards when Implementing Electronic Medical Records Systems

By Erin Smith Aebel

By Douglas Cherry

There's No Such Thing As Free Money

In 2009, President Obama signed the American Recovery and Reinvestment Act ("ARRA") designed to stimulate the American economy. Part of this bill is the Health Information Technology for Economic and Clinical Health Act, or the HITECH Act. The HITECH Act is in part designed to stimulate the healthcare industry into switching from a paper-based medical records system to an electronic medical records ("EMR") system. $17.2 billion in Medicare and Medicaid incentives have been allocated to eligible providers who are "meaningful users" of EMR technology. For example, starting in 2011, physicians, hospitals and healthcare providers who are "meaningful users" of certified EMR technology will receive up to $44,000, which will be paid out over a five-year period in the form of medical incentive payments. The maximum payment in the first year is $18,000 (2011 and 2012) and bonus payments decline each subsequent year, to be phased out in 2016.

On July 13, 2010, the Department of Health and Human Services ("HHS") published its final rules on "meaningful use" and EMR standards. During the first year (Stage I) of adoption, physicians must comply with fifteen, and hospitals fourteen, core objectives. Eligible providers must use certified EMR software, which must include the ability to send compliant electronic prescriptions to pharmacies. Providers must be able to electronically exchange health information with labs, hospitals, providers and payees. Providers must also be able to submit clinical quality measures. Physicians must also choose five from a list of ten additional criteria to implement in 2011-2012.

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The 15 core criteria for physicians

1. Use computerized physician order entry
2. Implement drug and allergy interaction checks
3. Generate and transmit permissible prescriptions electronically
4. Record demographics
5. Maintain an up-to-date problem list of current and active diagnoses
6. Maintain an active medication list
7. Maintain an active medication allergy list
8. Record and chart changes in vital signs
9. Record smoking status for patients thirteen years old or older
10. Implement one clinical decision support rule
11. Report ambulatory clinical quality measures
12. Upon request, provide patients with an electronic copy of their health information
13. Provide clinical summaries for patients for each office visit
14. Capability to exchange key clinical information electronically
15. Protect electronic health information through the implementation of appropriate techniques

Physicians must also choose five from a list of ten additional criteria to implement in 2011-2012.

In January 2011, clinicians may begin the ninety day process of using a certified record per meaningful use requirements. Attestation begins in April 2011 and CMS payments in May 2011. If a healthcare provider is considering applying for these stimulus funds, there are other legal and practical considerations that go beyond complying with the "meaningful use" regulations.

Implementation of EMR Systems and the Unique Nature of Software Projects

The implementation of EMR systems frequently involves complex software and project management considerations. Software projects often go over budget and fail to meet deadlines, sometimes by several hundred percent. Resulting damages could easily run into the millions of dollars.

Healthcare organizations and physicians typically consider "off the shelf" software or SaaS (Software as a Service) models to handle separate business functions. Often, its physicians and administrators want to integrate, control, and track all functions -- from scheduling to billing to patient follow-up -- using one software system. This is typically accomplished by selecting a core product, adding some specialized programs, and creating enough custom software to make the parts operate together. When a core product cannot be found, it must be custom-designed or several products must be integrated. It is the authors' understanding that there is currently no "one-stop" solution that addresses all facets of the healthcare process or of the core criteria listed above.

As a general rule, the more customized the software or the more integration required, the greater the risk that creating the new EMR system will be problematic. If a system has been successfully created or implemented by the same vendor for similar healthcare providers a great many times before, chances are low that the project will spin out of control in both time and expense. As the amount of customization or the size of the system increases, the risk escalates.

Software system construction is unique because software is intangible and problems can be elusive. For example, if the first floor of a proposed office building is too small to support larger upper stories, the flaw is obvious and can be addressed quickly. But flaws in the early design of software are often not necessarily evident and may not be fixed until it is too late. Any deviation from rules and procedures for good software selection, design, configuration, and testing can harm the project substantially. Mistakes made early in the project tend to do more damage than those made later. Projects that move rapidly (and cheaply) through early phases may be most at risk. What appears to be early success may actually be a sign of poor project management.

Certain steps, or disciplines, in software system creation are designed to prevent errors, inconsistencies, and the need for later changes. These include a thorough initial analysis of the client's needs, rigorous workflow and software design, effective training, strict standards, enforced methodology, and multiple levels of testing. When any of these are neglected to focus on system "production," the resulting EMR system may be riddled with errors.

Trying to implement these disciplines later in the project may actually create more errors and inconsistencies, and the project may deteriorate into chaos as the "to do" list grows along with the budget and project staff. The project enters into a spiral of endless complications and goes out of control. For example: data entered into the system cannot be retrieved, data is retrievable but corrupt, patient payments/information are lost, or billing is inaccurate. At that point, the healthcare provider suffers losses not only from having a poor system, but also from resulting damage to its business and reputation.

It is important to consult legal counsel early in the process to discuss and strategize important safeguards and preventive measures to avoid the traps associated with the implementation of these types of projects. The attorney should have a thorough understanding of the software process, familiarity with applicable law (including the Uniform Commercial Code) and litigation experience in software performance disputes. This involves the ability to identify the reasons a software project can fail, which include bad project management techniques, inadequate gathering of requirements, poor project implementation, and a lack of testing plans or technical expertise.

Preventative Measures to Avoid Common Pitfalls

To avoid these issues and problems, project planning should be carefully strategized:

• The organization should assign or engage a project manager (PM) with a clear understanding and broad knowledge of EMR applications. This PM should work closely with the vendor PM. Both PMs should have experience with multi-department and multi-vendor implementations. If the PM skill is not available in-house, the organization should consider engaging a third-party consultant PM to plan and manage the effort. If a PM is only temporarily engaged, then he or she should mentor an internal resource so that the knowledge is retained, as post implementation struggles are common.

• Careful vendor selection, using a planned request for proposal process, is critical. There are many resources available regarding vendors, such as feedback from prior implementations.

• A good contract, which clarifies expectations in the software implementation process, is key. It will clearly define all parties' responsibilities and contain a clear and measurable list of project deliverables (tangible outcomes) and milestones. It will also detail the function and performance of deliverables, rather than using vague and immeasurable technological terms. If deliverables or milestones are not met, the penalties should be explicitly laid out in the agreement. Payment should not be upfront, but should be staggered throughout the project life-cycle based on client approval of deliverables. Be wary of one-page flat-fee proposals before requirements are gathered, or a contract that does not account for change orders or acceptance procedures.

• "I paid for it, so I own it" is a common misconception in the realm of software copyright (and intellectual property in general). Ownership of intellectual property, by default, will lie with the third party vendor, unless specific language to the contrary is included in the agreement. Do not spend hundreds of thousands of dollars on a software system to later discover that you only have a non-exclusive license to use the software with no right to modify the system without the vendor's approval (which may be contingent on further payment).

• Often counsel is consulted late in contract negotiations as an effort to get a "legal signoff" of the contract. The approach is problematic as any recommended changes to a contract late in the negotiations can raise red flags or slow the process. Counsel should be involved as early as pre-contract activities, such as vendor or third-party consultant selection.

• If multiple vendors are used, then an overall project plan or project charter should be documented and agreed upon by all. The plan will articulate scope and approach, and clearly define measures of success in order to manage expectations for the overall project.

• It is not realistic to agree to a deliverable timeline without the vendor first understanding the project requirements.

• Always allow for timeline flexibility. Most software projects go over time.

• Understand that changes in requirements are inevitable. "Scope creep" (the change in a project's scope after the project work has started) should be managed with change orders and careful processes.

• Involve all members of the healthcare team in the process.

• Enter the implementation process with a mindset that the EMR system should not just "computerize" current business processes, workflows and procedures, but should improve them. The flow of information in most hospitals and doctors' offices is not as efficient as it could be. Before the implementation occurs, workflows should be carefully analyzed for deficiencies and improvements. Everyone from the administrators to the staff should be open to changes, as the new EMR system will surely impact nearly every business process. No software can match all of your current methods exactly. Taking the foregoing steps, which include a well-defined project plan and detailed agreement, are important to make sure that your EMR project is on time and on budget.

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New Legislation Provides Tax Breaks for Small Businesses

On September 27, 2010 President Obama signed into law the Small Business Jobs Act of 2010 (the "Act"), which contains a number of tax breaks and incentives for small businesses designed to spur job growth.

The Act seeks to encourage business investment by increasing and expanding the election to fully deduct the cost of certain depreciable business assets placed in service in 2010 and 2011 under IRC Section 179. Under prior law, a business could elect to fully deduct the cost of certain depreciable assets placed in service in 2010 up to a maximum of $250,000. The deduction was reduced dollar for dollar to the extent the total amount of qualifying property placed in service exceeded $800,000 during 2010. In 2011 the maximum amount that could be deducted under IRC Section 179 was scheduled to decrease to $25,000, with the dollar for dollar phase out beginning at $200,000.

By Tom Cotter

The Act increases the maximum amount deductible under IRC Section 179 to $500,000 in 2010 and 2011, and increases the phase out threshold to $2 million. In addition, the Act expands the definition of qualifying depreciable business property to include certain leasehold improvements, restaurant property and retail improvement property.

The Act also extends additional first year depreciation for 50% of the cost of certain property, most notably computer software, leasehold improvements and MACRS property with an applicable recovery period of 20 years or less. The special first year depreciation deduction expired at the end of 2009, but the Act extends the same to property acquired and placed in service in 2010.

In addition, the Act assists small business owners by allowing persons subject to self-employment tax to deduct the cost of health insurance for themselves and their dependents for purposes of determining net earnings from self-employment. Previously, the cost of health insurance was only deductible for purposes of computing adjusted gross income, not for purposes of computing self-employment income subject to self-employment tax.

Small business owners also benefit from the provisions of the Act that provide (1) the general business credit for certain types of expenditures under IRC Section 38 will not be subject to alternative minimum tax for the 2010 tax year and (2) the carry-back period for general business credits determined in the 2010 tax year is increased from one to five years.

Those considering converting a so-called "C corporation" that is subject to tax at the corporate level to a flow-through "S corporation" that is taxed only at the shareholder level may want to delay doing so until 2011. Normally, a C corporation that converts to an S corporation is subject to a special "built-in gains" tax on any asset that has a value in excess of its adjusted tax cost basis at the time of conversion if the corporation sells the asset during the ten year period following conversion. For conversions during 2009 and 2010, the built-in gains tax period was shortened from ten years to seven years. For conversions occurring in 2011, however, the period is shortened to five years.

Other noteworthy provisions of the Act allow for exclusion from taxable income of 100% of the gain on the sale of certain small business stock, as defined under IRC Section 1202; the removal of cell phones from the definition of "listed property" under IRC Section 280F and an increase in deductible start-up expenditures incurred in 2010 and thereafter from $5,000 to $10,000.

Of course, in this era of fiscal restraint, every tax break is accompanied by one or more provisions to offset the loss in revenue. The most significant revenue raiser in the Act is yet another increase in the reporting requirements for business. Generally speaking, any trade or business that pays more than $600 in the aggregate to one payee in the course of its trade or business during the tax year must file an information return with the IRS identifying the payee and the total amount paid. Usually this is accomplished on an appropriate Form 1099. Earlier this year, an important exception to this filing requirement was eliminated by the health care reform

legislation, which made the reporting requirement applicable to payments made to corporations. This will substantially increase the paperwork burden imposed on businesses, and has generated considerable controversy.

The Act further expands the reporting requirements for payments exceeding $600 in the aggregate during the tax year by extending it to those engaged in rental real estate activity. The new reporting requirement is applicable to payments made in 2011 and thereafter. Theoretically, the reporting requirement will improve enforcement and compliance with the tax laws and raise the additional revenue needed to offset the tax breaks afforded small businesses by the Act.

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Did you know?

- That there are millions of private businesses in the United States.
- A large number of these are owned by individuals who expect to retire or dispose of their business management responsibilities in 10 years or less; and
- Most of these individuals have no clearly defined business succession plan or exit strategy.

A business owner may have several options for business succession planning. One of these is sale of the business to some or all of the business's employees.

From the Owner's perspective, a sale to employees may be beneficial because:

- Employees are the best market for the business. They are likely to be motivated purchasers;
- There is an opportunity for continuation of corporate culture and business values – continuity of operation; sale to employees keeps the business rooted in the community; and
- Management transition can be thoughtfully conducted over a period coinciding with a gradual or installment sale.

Two forms of business succession by sale to employees are favored in public policy and under federal income tax law the employee stock ownership plan (ESOP) and the employee cooperative.

ESOP's are fairly well known. They are subject to precise regulation and require legal counsel with particular training, skills and experience in the applicable corporate and tax issues.

Employee cooperatives are less well known and understood as a vehicle for business succession, but they should always be on the "choice of entity" list for a business owner who is looking for an exit strategy. Employee cooperatives are less expensive to implement and maintain than ESOP's, and they are more flexible in design and operation. They are not regulated as are ESOP's, but they, too, require legal counsel with particular skills and experience in the corporate and tax matters that are unique to cooperatives.

Shumaker attorneys can provide creative and well-informed counsel in the design and implementation of ESOP's and employee cooperatives.

Brief Overview of the Dodd-Frank Act: Updating Financial Regulation

On July 21st of this year, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). As most commentators have noted, the Act constitutes the most significant change to the regulation of financial institutions since the 1930s. This Act mandates significant studies and the promulgation of regulations, by some measures up to 240, necessary to implement the legislation. Significant discretion has been shown to the banking regulators and the Securities and Exchange Commission, among others, to fully implement the legislation, and it will be years before we fully understand its impact.

By Tom Blank

Due to the length (over 2,300 pages) and complexity of the Act, this article will merely highlight a number of the more important provisions and will be divided into sections referencing changes impacting banks and bank holding companies, securities reform, and corporate governance and compensation reforms impacting public companies.

The Act grants to the FDIC authority to liquidate failing bank holding companies and related affiliates of banks.

1. Banks and Other Financial Institutions

The Act generally maintains the existing structure for banking regulation, unlike some of the original proposals that discussed extracting retribution from the Federal Reserve and other regulators for having "failed" to properly monitor and address the problems that existed in financial institution oversight. The Federal Reserve will continue to regulate bank holding and financial holding companies, as well as state "member banks," the FDIC will continue to insure the deposits of financial institutions and regulate and oversee "non-member" state chartered banks and the OCC will continue to be responsible for the examination and oversight of national banks. State banking regulators still will have the authority to charter financial institutions as well. The one casualty among the banking regulators is the Office of Thrift Supervision ("OTS"), the regulators of "thrifts." It will be eliminated with its principal duties transferred to the OCC for federally chartered thrifts, the FDIC for state chartered thrifts and the Federal Reserve for holding companies of these institutions. While existing thrifts will be grandfathered and allowed to continue to exist, commentators speculate that due to the increased penalties for violation of the qualified thrift lender test and other tighter restrictions, many of these institutions will convert to national banks. In addition, many commentators have suggested that the other regulators will penalize former OTS-chartered institutions due to the perceived "lax" regulation previously imposed upon them by the OTS.

The Act also creates the Financial Stability Oversight Council which was established to protect the United States financial system from systemic risks. The Council will consist of 15 members representing banking, securities and insurance regulators with the Secretary of the Treasury serving as Chairperson. The principal goal of the Council is to provide oversight for the entire financial system of the United States. In addition to the Council, the Act grants to the FDIC authority to liquidate failing bank holding companies and related affiliates of banks with significant procedural limitations.These two provisions were included in the Act in an effort to avoid the type of situation created by American International Group ("AIG"), which had many different component parts and many different regulators, with no one seemingly in charge of the entire organization.

One of the more meaningful actions taken in the Act is the creation of the Bureau of Consumer Financial Protection, an autonomous agency within the Federal Reserve. This Bureau has been established to consolidate examinations for consumer compliance for banks with $10 billion or more in total assets and certain other entities including mortgage brokers. The rules created by this Bureau will apply generally to all banks, regardless of size, with enforcement for smaller banks left to bank regulators. While payday lenders, check cashers and certain other non-bank financial firms will be regulated by the Bureau, auto dealers and pawn brokers escaped such oversight. Commentators have noted that the impact of the Bureau could be one of the more significant aspects of the Act. The creation of the Bureau was one of the more contentious issues contained in the legislation. For a while, it appeared that the Bureau would be created as a truly independent entity, but in the end, the Bureau was housed under the Federal Reserve. Because of the fact that significant consumer protection legislation already exists and is enforced by various bank regulatory entities, there was some question whether the new entity, with its proposed initial $850 million budget, was necessary. There is some concern that the creation of the Bureau will burden consumer lenders and further contract the lending in this sector resulting in some parties leaving this service entirely.

The Federal Office of Insurance ("FOI") was created as a new entity housed within the Treasury Department to review insurance matters other than health, long-term care and crop insurance. Initially, this Office of Insurance is intended to engage in information gathering and monitoring the insurance industry in the country as a whole. The Office is required to deliver a report to Congress within 18 months. Many had pushed for the creation of a federal oversight of insurance, which is currently regulated at the state level. It is unclear whether the creation of the FOI is a precursor to the federal regulation of insurance intending to preempt state authority.

The Act also reforms mortgage underwriting and provides certain anti-predatory lending restrictions. The intent of this portion of the Act is to require lenders to ensure that a borrower is able to repay a home loan by verifying the borrower's income, credit history and job status (what a novel concept) and ban payments to brokers for steering customers to more highly priced products.

Interestingly, the Act, notwithstanding its breadth, did not deal with the resolution of Fannie Mae or Freddie Mac. Many have deemed this to be the greatest failing of the Act noting that the projected exposure for these entities now owned by the government ranges as high as $500 billion. Apparently, attempting to reign in these entities was not something that was politically possible in the effort to have the legislation passed this year.

Finally, the Act permanently increased to $250,000 per account the deposit insurance provided through the deposit insurance fund. Interestingly, the increase was made retroactive to January 1, 2008, which will mean that depositors who lost money in institutions resolved prior to the implementation of this increase by the FDIC in October 2008 (such as IndyMac) will be protected.

2. Securities Reform

One of the provisions in the Act that probably has received greatest press is the so-called "Volker Rule" named after Paul Volker, former Chairman of the Federal Reserve. The intent of this Rule is to limit the ability of banks and financial institutions to participate in proprietary trading. While this is likely to impact only the most significant financial institutions in the country, it will have a meaningful impact upon those entities. Banks will be allowed to invest only up to 3% of their "Tier 1" capital in hedge funds, and may not own more than 3% of any one fund. To some extent, this provision attempts to turn back the Gramm-Leach Bliley legislation which effectively abolished the Glass-Steagall Act in 1999. This activity has provided significant revenue to the largest financial institutions in the country and there is some belief that this limitation

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will cause those institutions to segregate proprietary trading into different entities. Derivatives regulation is another aspect of the Act that will impact larger financial institutions. First, the Act forces to an over-the-counter clearing market a significant portion of the derivatives industry in an effort to be more transparent and stable. It also requires a separation of certain derivative or swap activities from the bank itself into a non-depository affiliate.

Securitizations also have been dramatically impacted by the Act. Recognizing that securitization of various assets, some of which proved to have little or no value, was a significant contributing factor to the economic meltdown, the Act would require banks to maintain at least 5% of the credit risk for any securitizations. This provision known as "skin in the game" is intended to make certain that institutions are not able to make a quick buck by securitizing worthless assets and moving on. Finally, the Act imposes strict new standards limiting the conflict of interest of credit rating agencies. Previously, Standard & Poor's, Moody's and Fitch were paid by the varying investment bankers seeking ratings for instruments that they were in the process of selling. This conflict of interest is deemed also to have contributed to the financial meltdown due to the seemingly generous ratings provided to now seemingly worthless assets.

The Act also modifies the definition of an accredited investor for purposes of private placement offerings. Previously, the definition *included* the individual's principal residence in determining if he or she met the minimum $1 million net worth threshold to constitute an accredited investor. The Act now specifically *excludes* the person's primary residence in that measure. Additionally, the Act mandates that the SEC review the definition of accredited investor within four years from the adoption of the Act and every four years thereafter. There is significant concern that the SEC will move to drastically increase the minimum net worth and income tests provided in Regulation D, which have not been significantly modified since its original adoption in 1982.

Finally, in the securities areas, and of interest to brokers, dealers, registered investment advisors and trust companies, the SEC is obligated to undertake a study reviewing the standard of care for persons providing "personalized investment advice" to "retail customers." The SEC's task is to determine whether the "fiduciary standard" typically applied to fiduciaries and RIAs should be imposed upon brokers and dealers as opposed to the "suitability standard" which currently is imposed. Not surprisingly, this proposal has garnered significant comment to the SEC.

3. Corporate Governance and Compensation Reforms

In addition to specific actions affecting financial institutions as noted above, the Act implements a number of corporate governance and compensation reforms for all public companies. First, all public companies will now be required to have advisory (non-binding) votes taken at their annual meeting concerning pay packages. In 2010, there were approximately 80 companies who sought shareholder advisory votes regarding compensation plans, and an additional 650 companies whose "say on pay" votes were mandated due to the fact that they had participated in the Troubled Asset Relief ("TARP") Program. The Act will mandate that companies both take the vote and address in its proxy statement what action they will take if a majority of the shareholders vote against a pay package.

The standards for independence on compensation committee members has been heightened and is similar to that provided for audit committees. The committee itself, as opposed to management of the company, is required to retain any outside compensation advisors. The Act provides that any Exchange (NYSE, NASDAQ, etc.) will be required to delist a company that fails to conform to these practices within one year.

Clawbacks have been expanded. Originally a result of the Sarbanes-Oxley Act ("SOX") and reinforced under TARP, Clawbacks will now be required of all executive officers, as opposed to only the CEO and CFO as required under SOX. The Act requires that an executive repay his or her employer or former employer, on a three-year lookback standard, for any "material noncompliance" with financial statement preparation as opposed to the higher "misconduct" standard imposed under SOX. In the area of compensation disclosure, the Act mandates disclosure of median pay of all employees compared to that of the CEO and requires that the proxy statement or annual report contain a chart comparing executive compensation to stock performance over a five-year period. Some commentators have noted that this could result in a short-term, as opposed to longer-term, outlook for a company's compensation practices, which may not

be desirable. Finally, the SEC recently adopted regulations that would allow persons with a greater than 3% ownership of a public company that have maintained that ownership position for three years or more to place nominees in the company's proxy statement. This proxy access rule was to have become effective for larger companies in 2011 and for all smaller reporting companies beginning within three years. However, due to a lawsuit filed by the Business Roundtable and the Chamber of Commerce, the SEC on October 4, 2010 stayed the implementation of this new rule. It is unclear when this matter will be finally determined, but commentators feel that the rule will not be in place for the 2011 proxy season.

As noted in the introduction to this article, many of the provisions of the Dodd-Frank Act will be subject to interpretation, regulation and rule making for many years. However, as you can see from this brief review, the Act will have a significant impact upon the financial system in the United States. As is true with any legislation enacted in response to a perceived systemic failure (such as SOX), the Act may be deemed to have gone too far in some instances, while avoiding dealing with the Fannie Mae and Freddie Mac looming issue. Please note that there are a number of additional provisions of the Act not addressed in this article due to their complexity and limited applicability. Stay tuned for what the regulations and rule makings do for the implementation of the Dodd-Frank Act.

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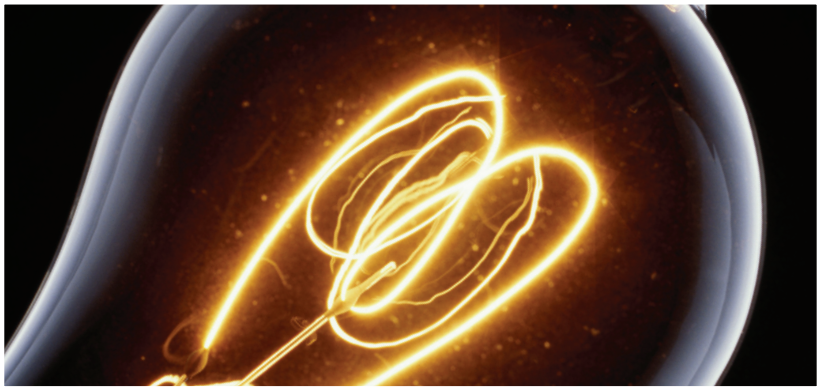
Supreme Court Decides the *Bilski* Case

By Michael Myers



Laws of nature, physical phenomena, and abstract ideas are well established as ineligible for U.S. patent protection. A *process*, however, is eligible for protection. But, what if the process is a business method, specifically a computerized method of hedging risk in the commodities market? Many had hoped that the U.S. Supreme Court would take this opportunity to throw out these types of computerized methods and conclude they are no longer eligible for patent. Instead, the Court concluded that the recognized standard for patenting software — that is, whether the process is tied to a machine or changes an article into a different state or thing, also known as the "machine-or-transformation (MOT) test," — isn't the *sole* test for deciding whether these business methods are eligible for patent consideration.

Thus, the Court appears to have broadened the standard for business method patent eligibility. Although Bilski's invention was ultimately judged a mathematical formula and hence, an unpatentable abstract idea, the *Bilski* holding should reaffirm the business of business method patents.

Single Member LLCs in Florida Lose Asset Protection Feature

A reason many have chosen to form limited liability companies over corporations to hold their assets has been the asset protection feature. Prior to the Florida Supreme Court's June 2010 decision in *Olmstead et. al. v. FTC*, 35 Fla L. Weekly S 357 (2010), under Florida law a judgment creditor of a member of an LLC who desired to satisfy the judgment from his debtor's LLC interest could obtain only a "charging order" against the debtor's LLC interest. The charging order is a lien on the interest and requires distributions from the LLC to be redirected from the member to the judgment creditor until the judgment is satisfied. The creditor could not take ownership of and sell the interest to satisfy the judgment. The charging order remedy originated in common law to protect non-debtor partners from being forced unwillingly into partnership with a creditor of a debtor-partner.

By Ed McGinty

By contrast, a judgment creditor of a shareholder of a corporation can take ownership of and sell the debtor's shares of the corporation to satisfy the judgment. This rule is codified in modern statutes that provide for the assignee of corporate shares to succeed to all of the rights of the shareholder, including voting rights, and creditor rights statutes, such as Fla. Stat. 56.061.

In *Olmstead*, the Court was faced with the issue of providing the Federal Trade Commission with access to the defendant's assets to allow for the recovery of profits from his fraudulent activities. The defendant's assets were embedded in LLCs in which the defendant was the sole member. Unlike the Florida partnership and limited partnership statutes, the relevant Florida LLC statute did not expressly state that a charging order was the exclusive remedy for a judgment creditor with respect to a LLC interest. Consequently, the Court ruled that a charging order was not the exclusive remedy. The Court ruled that an LLC was a type of corporate entity and that an ownership interest in an LLC is personal property reasonably understood to fall within the scope of "corporate stock," allowing the FTC to take ownership and control of the single-member LLC. This ruling is inconsistent with the general theory of the Florida LLC Act and with the Florida Income Tax Code and the Florida UCC. It is unlikely that the Court's intention was to expose multi-member LLCs to this type of remedy for creditors of members. But until the law is clarified and fixed by subsequent case law or, preferably, legislative correction, the holding nevertheless does expose them to that risk. Until that time, those seeking to organize closely-held businesses and real estate ventures as Florida LLCs would do well to consider alternatives such as Florida limited liability limited partnerships, which benefit from statutes making a charging order the exclusive remedy for a judgment creditor, or organizing LLCs under other states' statutes that expressly provide that a charging order is the exclusive remedy, such as Alaska, South Dakota or Nevada.

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Did you know?

Shumaker attorneys have extensive experience in representing clients in defending or pursuing claims of investment fraud.

For additional information, contact Michael Taaffe at mtaaffe@slk-law.com or Peter Silverman at psilverman@slk-law.com.

Peter's recent case was highlighted in *The New York Times* at http://www.nytimes.com/2010/10/10/business/10whistle.html?r=2&hpw=&pagewanted=all

E-Discovery Update:
Emerging Principles Regarding Document Retention and Preservation

Electronically stored information (ESI) is an important and valuable source of evidence. More than 90% of an organization's documents are created, edited, accessed, communicated, and stored electronically without ever being printed. With this trend towards the paperless office, there is more to discover in an organization's network of servers and computers than in its dusty filing cabinets. How do you retain and manage ESI? What ESI are you obligated to keep? Once you anticipate litigation, what are your obligations to preserve ESI? These are a few important questions

By Dawn Floyd

By Douglas Cherry

that should be considered in developing defensible document retention and preservation policies. You should also keep in mind the following principles:

1) "Disk space is cheap…let's save everything" is a common misconception

A defensible document retention policy is grounded in principles of good-faith preservation. Unless required by contract or statute, there is no requirement that an organization save *all* types of ESI, nor is it cost-effective or strategically wise to do so. Instead of a save-all mentality, you should take

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a proactive approach to document retention with a focus on what information should be retained, where and why it should be retained, and for how long. Consider that everything you keep may be potentially discoverable if relevant to a lawsuit. For instance, the informal, terse and blunt nature of emails or online posts can be a gift to opposing attorneys and a scourge on your organization. Also, it can be very costly to have to search through years (or even decades) of electronic documents to respond to litigation discovery requests.

2) A good document retention policy can save money and headaches down the road

With the short timetables that often come about from litigation, the urgent demands on the parties and their information technology departments may be significant. A good document retention policy can help you quickly and efficiently locate documents relevant to any litigation.

3) Parties are obligated to produce ESI

ESI is a category of information discoverable by an opposing party, regardless of how much ESI exists. If a party has *any* ESI relevant to litigation it must be produced, even if the information exists in another form such as paper. The law does recognize some exceptions to production of certain ESI, including where production would result in undue burdens and costs. However, this ESI *must still be preserved*.

4) If you think you might be sued, stop document deletion (including email) and start preserving

Courts have different standards as to when the duty to preserve ESI arises. Most commonly, the duty to preserve arises "when a party reasonably anticipates litigation." *The Pension Committee of the University of Montreal v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). At this point, you should immediately contact counsel, suspend any document retention policy and put in place a "litigation hold" to ensure the preservation of relevant documents. *Id*. Also, you should identify all key players and ensure that their electronic and paper records are preserved, cease the deletion of email, preserve the records of former employees that are in your possession, and preserve backup tapes. *Id*. at 471.

5) Failure to preserve relevant ESI can have significant consequences

Failure to preserve relevant ESI can lead to being found negligent and/or grossly negligent, may result in monetary sanctions, and may result in an adverse jury instruction regarding spoliation of evidence. *Id*. at 496-97. Sanctions may be imposed if you engage in careless and indifferent collection efforts after the duty to preserve arises, regardless of whether there was an intentional destruction of evidence. *Id*. at 463.

Developing and maintaining defensible document retention and preservation policies can be accomplished through a team approach involving outside counsel, inside counsel, management, and information technology personnel. Legal counsel can be particularly useful in strategizing and assisting with the development of a document retention policy, determining when the duty arises to preserve documents (either by statute, contract or for litigation), drafting a party's written litigation hold notice, and ensuring that the party is meeting its preservation obligations under the law of the relevant jurisdiction.

For additional information, contact Doug Cherry at dcherry@slk-law.com or Dawn Floyd at dfloyd@slk-law.com.

FASB Proposes Expanded Disclosures Regarding Loss Contingencies

Companies with audited financial statements will want to stay alert this autumn for an anticipated final revision of the standards governing disclosure of "loss contingencies." Seeking to improve corporate financial statement disclosure regarding potential losses that could arise from pending lawsuits, regulatory actions and other situations deemed to constitute "loss contingencies," the Federal Accounting Standards Board ("FASB") has spent several years exploring revisions to what was originally known as Standard No. 5, and is now codified at Accounting Standards Codification Topic 450. A discussion draft issued in June 2008 caused considerable consternation in the legal and business communities about the expanded scope of disclosure. In the ensuing time, it appeared from internal FASB discussions that the final FASB proposals would be lessened. The latest exposure draft issued on July 20, 2010, however, revived the debate. For example, the FASB proposal calls for disclosure of accrual amounts in the aggregate through tabular reconciliation, remote contingencies that are potentially severe, and certain insurance coverage. By the August 20, 2010 comment deadline, the U.S. Chamber of Commerce and the Association of Corporate Counsel, among other notable commentators, severely criticized the proposal, which was originally scheduled to take effect for issuers with fiscal years ending after December 15, 2010. Commentators have recommended, among other things, that the FASB delay the effective date; however, if a final Standard revision is adopted and effective according to the FASB's proposal, companies will have considerable work to review internal practices in light of the new disclosure requirements, which will potentially affect the audit response procedures between a company's lawyers and its auditors.

For additional information, contact Regina Joseph at rjoseph@slk-law.com.

legalupdate

A new Federal Circuit decision may make patent infringement of certain products easier to prove when the product implements a standard covered by a patent. In *Fujitsu v. Netgear* (decided September 20, 2010), three patents covered different aspects of wireless communications technologies. Netgear was accused of contributory and induced infringement—that is, basically, knowingly providing a component to an infringing product when the component has no other noninfringing use. It was asserted that Netgear infringed by implementing certain wireless networking functions, like sending and receiving messages between a router and a laptop, by not obtaining a license from the patent holders who claimed exclusivity to the communications standards. The standards were adopted to ensure interoperability of these types of devices.

Netgear dodged a holding of infringement on most of its products because notice letters sent to Netgear prior to the lawsuit were not sufficient to establish the knowledge and intent elements of contributory and induced infringement, respectively.

In what may be the most significant portion of its opinion, however, the court held that a district court may rely on an industry standard in analyzing infringement. The court stated that it still agreed that patent claims should be compared to the accused product to determine infringement, but if an accused product operates in accordance with a standard, then comparing the claims to that standard is the same as comparing the claims to the accused product.

The impact of this case may be especially felt in lawsuits involving contributory and induced infringement involving IT. It would seem that infringement in the presence of an applicable standard may be easier to prove. A litigant may not need to analyze complicated code, for example, to determine and convincingly argue infringement. If a district court construes the patent claims and finds that the reach of the claims includes any device that practices a standard, then this can be sufficient for a finding of infringement.

For additional information, contact Michael Myers at mmyers@slk-law.com.

welcome

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Did you know?

Shumaker attorneys regularly file patent applications for clients with respect to newly developed plant varieties.

For additional information, contact Robert Pippenger at rpippenger@slk-law.com.

Know thyself and it will work out:

Workout of Commercial Real Estate Loans in Today's Economy

I. THE PROBLEM

Lack of Liquidity in the Banking System Results in a Tightening of Credit and Creates a Severe Recession

The unprecedented recession that befell the American economy commencing in the Fall of 2007 and from which we are just beginning to emerge has created extraordinary problems for all commercial enterprises that rely on the use of credit to conduct business operations. The present calamity manifested itself in a bank liquidity freeze which reduced lending to a trickle. The lack of credit in turn affected general economic activity, reducing the revenue streams which businesses rely upon to pay existing indebtedness, including indebtedness secured by commercial real estate. This destabilizing feedback loop has put both prudent and recklessly managed businesses under extreme economic pressure which in most cases could not have been anticipated. The discussion which follows deals with the workout of loans secured by commercial real estate.

By Moses Luski

II. HOW THE PROBLEM IS ADDRESSED

Self-Knowledge and Succinct Analysis Establishes a Game Plan for the Favorable Workout of Existing Commercial Indebtedness

The severe recession obviously presents the business owner with challenging issues relating to both complying with obligations under existing financing documents and obtaining extensions of credit. The advice on how to deal with these issues is simple and direct: Self Knowledge combined with Realistic and Succinct Analysis.

The best thing a pressured business owner can do at this juncture is to put into practice the ancient maxim: "Know Thyself." Do not engage in denial of economic realities. Do not panic and delay the tough economic analysis that will eventually need to be made. If it is determined that financial covenants of loan documents are being violated or that problems making loan payments are being experienced or will soon be inevitable, it is essential that preparations are made to proactively and productively reach out to one's banker. Time is of the essence in this process. An analogous case study which illustrates the need to take swift action when there is a sudden downturn in economic activity is the demise of Wachovia, N.A. It has been widely commented that had TARP (Troubled Asset Relief Program) been enacted a number of days earlier, Wachovia might have survived as an independent bank. The short delay in enactment of this legislation rendered Wachovia unable to defend itself against a run on its deposits. The takeaway from the Wachovia case is that even obtaining forbearance of short duration from one's lender can mean all the difference in preserving the value of one's enterprise.

III. You May Have More Influence on Your Banker than You Think

While it would be imprudent to imply that there are magic bullets which will make one's banker go away (he/she will not), the banking industry is also under pressure and for many reasons is incentivized to work with a borrower who is prudently managing its economic difficulties. Among the reasons are:

1. Collateral values are in decline. If a bank can "kick the can" down the road, wait for collateral values to improve and avoid negative impacts to its balance sheets, it may do so.

2. The Federal Banking Regulators, in a recent policy statement issued October 30, 2009 (see Moses Luski, *Mercy for the Vanquished: Federal Regulators Announce New Policy Statement on "Prudent Commercial Real Estate Loan Workouts"* (February, 2010), available at http://www.slk-law.com/articles/default.aspx?id=327, have encouraged banking institutions, in the case where loans are secured by commercial real estate, to engage in loan workouts, even though collateral values have decreased or compliance with financial covenants

have deteriorated. Where reasonably prudent repayment terms can be arranged, banks are encouraged to work out existing loans secured by commercial real estate.

3. Commercial bankers may be under deadline pressures at the end of each quarter to evaluate their loan portfolios. If they are surprised by last minute disclosures or reporting at the very end of a quarter, they may be less likely to be predisposed to work with a borrower to restructure a loan. On the other hand, if a borrower proactively reaches out to his banker earlier in the quarter to give a "heads up" of potential restructuring issues, a banker is more likely to work harder to obtain a mutually favorable restructuring.

IV. Practical Advice

Armed with the general knowledge gained from the discussion above, a borrower seeking to work out a loan with its banker should heed the following practical advice:

• Faithfully comply with all reporting requirements such as the provision of tax returns and financial statements. Failure to comply with these requirements immediately raises a red flag with the bank officer who is responsible for the loan who may in turn flag the loan as potentially troubled.

• Approach your banker with any potential loan issues well before the point of missing payments. Once payments are missed, the bank is less capable of flexibility with respect to a potential loan workout. This is where the term "Know Thyself" has its highest applicability. If business conditions are rapidly deteriorating, prior to reaching the point of no return, the economics of a business should be realistically and dispassionately analyzed.

• Have a management plan ready. Indicate to the banker, as part of a fully documented plan, the changes being made in current business operations to weather the storm and how in the interim the business can support the existing payment schedule or a reduced payment schedule. Alternatively, outline an exit strategy showing what preparations are being made for a sale of the business. The latter alternative may be less realistic in today's economic climate, but may be a viable approach depending on the line of business. This is where the savvy and expertise of the business owner can "buy" some time for the enterprise and possibly be its salvation. In essence, sell the banker with reasonable projections and realistic planned actions, showing the business stands a reasonable chance of weathering the storm.

• Consider consulting with a workout specialist. There are former bankers who consult with businesses and assist them with developing a plan that can be sold to the bank. A capable consultant can inject a very useful level of legitimacy to the workout process in that it establishes a banker-to-banker dialogue which can help your bank more easily justify the proposed workout plan. Also, when dealing with less experienced bank personnel, an experienced consultant can in effect educate the bank on how to structure a solution. An attorney or CPA can also assist with this process. At the minimum, the attorney should be consulted prior to execution of any legal documents to insure the documents properly capture the business terms of the deal and do not overreach to one's detriment. A CPA must be consulted to determine that there are no adverse tax consequences to the proposed workout transaction and to suggest whether there are more tax-efficient means of structuring the transaction.

• Personal expenses should be carefully monitored. If personal expenses and/or withdrawals from the business are out of control, it will not be looked upon favorably.

continued on next page >

V. WORKOUT TERMS:

What to Expect

There are numerous ways to restructure a loan: (a) Interest Only Period; (b) Modified Amortization; (c) Reduced Interest Payment with accrual of shortfall and excess cash flow recapture; (d) Restructure into a "good" A Note and a "bad" B Note; and (e) Negotiated Equity Participation where the bank is permitted to recoup deferred interest and principal payments upon a sale or refinance event. The complexity of some of these structures suggests the need to have a capable consultant or other professional provide advice on which structure is more advantageous.

VI. What Terms to Expect on a Refinance

• Since most real property collateral is under water, a loan extension will more than likely be offered rather than a long term refinance. The term of the extension will typically not exceed one year. The interest rate will most likely be increased with a base floor set and a wider spread from the variable base rate. The bank may ask for a fee ranging from 25 basis points to 200 basis points. Obviously, in any given case, the actual terms of the extension will be the result of negotiations based on a unique set of facts so there are no typical terms other than to state it is unlikely that the term will be extended for more than one year.

• For a Real Estate Investment Property, the chances for a longer term refinance increase greatly if the borrower can inject equity to bring down the loan to value and there is sufficient rental income to service the debt.

• For owner occupied real estate, the bank might rely on the cash flow of the business to provide a long term refinance without requiring a reduction in principal.

VII. A Word on Loans that are Part of a Commercial Mortgage Backed Security (CMBS)

• If your loan is part of a CMBS, in order to trigger workout negotiations it may be necessary to stop loan payments to trigger what is known as a "special servicing transfer event." Once such a special servicing event is triggered, one is put in contact with a servicer that has authority to make decisions on behalf of the owner of the CMBS. **Caution:** *"Please don't try this at home."* Cessation of loan payments should only be made with the advice of legal counsel.

• The typical term for a CMBS loan extension are maintenance of the same interest rate, one year term extension, 5 percent principal reduction and an origination fee of one to two percent. Again, there is no guaranty that these terms may be achieved in a particular case.

VIII. Final Takeaways

• In order to successfully negotiate a loan workout, a borrower must be able to frankly communicate to the bank what the problems in the business are and what efforts the borrower is taking to mitigate the problems. If the bank sees that the borrower is making significant efforts to help itself, there is a much greater likelihood of bank cooperation.

• Sometimes the pressures facing a particular banking institution are so great that it will have little flexibility in negotiating a workout. Similarly, if a banking institution sells a portfolio loan to a third party, such party may have less interest in negotiations.

• If a business analysis indicates a borrower's business cannot be saved, then it is probably better to know this sooner rather than later and bankruptcy counsel should be consulted.

• If things appear bleak or out of control, remember the mantra: "Know Thyself and It Will Work Out." Facing the storm with a calm focused demeanor will yield a better result than disorganized panic.

For additional information, contact Moses Luski at mluski@slk-law.com.

Recent Developments in Health Care Reform

With new regulations issued on a regular basis and conflicting and unclear descriptions of health care reform in the news media, employers are at a disadvantage in determining and understanding their obligations under the new health care laws, as well as identifying the available opportunities.

The President signed the Patient Protection and Affordable Care Act on March 23, 2010, and subsequently signed the Health Care and Education Reconciliation Act seven days later (collectively the "Act"). Initially, the application and effect of some provisions of the Act remained unclear pending mandated descriptive and implementing regulations. Anticipated regulations and guidance have begun to emerge, including interim final regulations governing "grandfathered" health plans, and interim regulations and additional formal guidance expanding required internal claims and appeal procedures applicable to health insurance claims to include an external review process. These recent developments are among the first publication of regulations interpreting and implementing the Act's provisions, and require immediate consideration and analysis by sponsors of group health plans.

Grandfathered Plans

The Act imposed numerous new requirements on the design and operation of group health plans; however, group health plans maintained in existence prior to the adoption of the Act may be exempt from certain requirements as "grandfathered" health plans. The new interim regulations illustrate the requirements for a group health plan to meet and maintain "grandfathered" status.

By Scott Newsom

In general, a group health plan may be a "grandfathered" health plan if it provided health insurance coverage to any individual on March 23, 2010 and has continually covered any (not necessarily the same) individual since that date. Grandfathered health plans are not required to comply with some design and operational requirements mandated by the Act, including:

1. Coverage of Preventative Health Services. Effective for plan years beginning on or after September 23, 2010 (i.e. January 1, 2011 for calendar year plans), a group health plan may not impose cost-sharing requirements (i.e. co-payments or deductibles) for certain identified preventive care services.

2. New Claims and Appeal Procedures. Effective for plan years beginning on or after September 23, 2010, the required claims and appeal procedures applicable to group health plans has been expanded to include new rights for participants, including an external review or disputed claims by a third-party independent review organization.

3. Prohibition on Discrimination in Favor of Highly Compensated Individuals. Effective for plan years beginning on or after September 23, 2010, the prohibition against a group health plan discriminating in favor of highly compensated individuals (either in the form of eligibility or benefits) is extended to apply to all group health plans. Previously, the prohibition only applied to self-insured group health plans.

However, despite the exemption from complying with some requirements of the Act, including those listed above, a "grandfathered" health plan must comply with some of the more known provisions of the Act, including:

1. Required Coverage for Adult Dependents. Effective for plan years beginning on or after September 23, 2010, any group health plan that offers coverage to dependent children must make the coverage available to dependent adult children until they reach the age of 26 years. To accommodate this change, the exclusion from

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income for employer provided health insurance coverage has also been amended. However, for plan years beginning prior to January 1, 2014, coverage may be restricted to adult children who are not eligible for other employer sponsored group health plan coverage.

2. Prohibition Against Pre-Existing Condition Exclusions. Effective for plan years beginning on or after September 23, 2010, a group health plan may not impose a pre-existing condition exclusion on any individual under the age of 19. Effective for plan years beginning on or after January 1, 2014, the prohibition against pre-existing exclusions is extended to include all individuals.

3. Prohibition Against Lifetime or Annual Limits on Essential Health Benefits. Effective for plan years beginning on or after September 23, 2010, a group health plan may not establish lifetime limits or annual limits on the dollar value of essential health benefits for any participant or beneficiary. However, effective for plan years beginning before January 1, 2014, a group health plan may impose "restricted" annual limits on essential health benefits as determined by regulations to be issued.

4. Waiting Periods Cannot Exceed 90 Days. Effective for plan years beginning on or after January 1, 2014, a group health plan may not impose a waiting period of more than 90 days for an individual to become eligible for coverage.

5. Prohibition Against Rescission. Effective for plan years beginning on or after September 23, 2010, a group health plan is prohibited from rescinding coverage (termination of coverage retroactively) unless an individual engages in an act, practice or omission constituting fraud or an intentional misrepresentation of material fact as prohibited under the plan's terms. A permissible rescission will require a 30 day advance written notice. Retro-active termination of coverage is permitted for failure to pay premiums.

To maintain grandfathered status, a group health plan must include a notice in all participant communications describing benefits that alerts the participant that the plan is considered a grandfathered plan. The regulations provide sample language that may be used to satisfy this requirement.

In addition, substantive restrictions and limitations exist on the changes that a grandfathered plan may make and still maintain its exempt status from the Act. As health insurance renewal season commences for many employers, the most notable restriction is that any new policy, certificate or contract of insurance entered into after March 23, 2010 results in a loss of grandfathered health plan status. For example, many employers often change health insurance providers after a comparative shopping process as a means of controlling premium costs. This process will now result in a loss of grandfathered status. Notably the Department of Labor has issued Frequently Asked Questions, in which it states that further guidance will be forthcoming on this issue.

Other changes that cause a group health plan to lose its grandfathered status include:

1. Any elimination of all or substantially all benefits to diagnose or treat a particular condition.

2. Any percentage increase in any cost-sharing requirement (such as coinsurance).

3. Any increase in a fixed-amount cost-sharing requirement other than a copayment (such as a deductible or out-of-pocket limit) in excess of the "maximum percentage increase" (medical inflation + 15%) measured from March 23, 2010 through the effective date of the increase.

4. Any increase in a fixed-amount copayment, determined as of the effective date of the increase, if the total amount of the increase measured from March 23, 2010 exceeds the greater of:

(a) An amount equal to $5 increased by "medical inflation."

(b) The "maximum percentage increase" determined by expressing the total increase in the copayment as a percentage.

5. Any decrease in the contribution rate by employers and employee organizations as follows:

(a) For a contribution rate based on "cost of coverage" – a decrease of any tier of coverage for any class of similarly situated individuals by more than 5% below the coverage period that includes March 23, 2010.

(b) For a contribution rate based on a formula – a decrease of any tier of coverage for any class of similarly situated individuals by more than 5% below the coverage period that includes March 23, 2010.

6. Any addition of an overall annual limit on the dollar value of benefits (or for plans with a lifetime limit, the addition of an annual limit that is less than the lifetime limit amount).

7. Any decrease in the dollar value of an annual limit on the dollar value of all benefits.

For those employers who may have adopted a disqualifying change, the new regulations provide an opportunity for employers to rescind certain changes adopted after the effective date of the Act, but before the issuance of the regulations, and preserve the grandfathered status of the Plan.
If the terms of a group health plan or health insurance coverage are modified after March 23, 2010 but prior to June 14, 2010, the changes will not cause a loss of grandfathered status provided they are revoked or modified effective as of the first day of the first plan year on or after September 23, 2010, and the terms and conditions of the plan or coverage as modified are compliant with the grandfathered plan rules.

The President signed the Patient Protection and Affordable Care Act on March 23, 2010, and subsequently signed the Health Care and Education Reconciliation Act seven days later.

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Although some of the new regulations appear straightforward, the practical application of the grandfathered plan rules has raised numerous unanticipated legal and administrative issues for employers. In some cases, unintentional errors or inadvertent actions have already resulted in the loss of the opportunity for some employers to maintain grandfathered plan status. Employers considering whether to attempt to maintain grandfathered plan status must be diligent and examine the potential impact of any changes to their group health plans.

If you desire to investigate or understand the availability and effect of grandfathered status for your group health plan, please do not hesitate to contact one of our Tax and Benefits attorneys, or your regular contact at Shumaker who can arrange for one of our attorneys familiar with the Act to contact you.

Expansion of Claims and Appeals Procedures.

On July 23, 2010, the Department of Labor issued interim final regulations implementing requirements under the Act for the addition of an external review to the current mandated procedures for claims and appeals of benefit determinations for group health plans, as well as an expansion and clarification of the current provisions related to the review and adjudication of claims. The consequence of failure to strictly adhere to all the requirements of the claims and review process as articulated under the new regulations is that the claimant is deemed to have exhausted the plan's internal claims and appeals procedures, and allowed to immediately proceed to a binding external review of the dispute or potential federal court claim under ERISA. As a result, valuable presumptions and defenses may be lost and additional costs and expenses will likely be incurred.

The U.S. Department of Labor issued a technical release on August 23, 2010 that created a "safe harbor" for group health plans that must implement a Federal external review process for the plan years beginning on or after September 23, 2010 (January 1, 2011 for calendar year plans). To comply with the external review requirement and satisfy the "safe harbor," a plan may choose either:

(1) Compliance with procedures set forth in the technical release that are consistent with the Uniform Health Carrier External Review Model Act, which generally consists of the following standards:

a. A claimant may file a request for an external review within 4 months of receipt of an adverse benefit determination.

b. The group health plan must conduct a preliminary review to determine the completeness of the request and eligibility for an external review.

c. Referral of the appeal to an accredited independent review organization.

d. Provisions for an expedited external review in certain circumstances.

(2) Voluntary compliance with a State external review processes (which already currently exists for governmental and other health and welfare plans exempt from ERISA).

A second technical release was issued on September 20, 2010, that delays the enforcement of some of the claimant notice and timing for claims adjudication provisions of the new regulations until July 1, 2011.

Many self-insured and larger group health plans adjudicate their own benefits claims through plan committees. These processes should be reviewed immediately and revised in accordance with the new regulations. Further, plan committees responsible for claim adjudication should be educated on the changes to claims and appeal procedures. Employers who utilize third parties to adjudicate their health plan claims, such as a third-party administrator or health insurance provider, may wish to investigate and familiarize themselves with the procedures utilized by their contracted party to protect against an expensive lawsuit or unnecessary binding external review process.

Shumaker attorneys are actively advising clients on these issues and giving presentations on the more technical aspects of these regulations and the Act. If you have any questions or would like to discuss the Act's specific application to your organization and group health plan, please do not hesitate to contact one of our Tax and Benefits attorneys.

For additional information, contact Scott Newsom at snewsom@slk-law.com

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Gregory C. Yadley was also named a Top 100 Lawyer by Florida Super Lawyers® for the fifth straight year.

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Bankruptcy & Creditor Debtor Rights

Peter R. Silverman
Franchise Dealership

J. Todd Timmerman
Intellectual Property

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Erin Aebel hosted and spoke at a Lorman Seminar on Medical Records in Sarasota in September. Erin also spoke to physicians, students and instructors at Ultimate Medical Academy in Tampa in June and to the University Community Hospital Office Manager's Council on Health Care Reform and Provider Regulation in May.

Chad Baker was appointed to serve on the Ohio State Bar Association Estate Planning, Trust and Probate Law Council.

Neema Bell was elected as the Board Secretary of WGTE Public Media.

Jeni Belt was a presenter at the Franciscan Living Communities Leadership Team meeting in August.

Steve Berman was a panelist at the 22nd Annual Insolvency Conference presented by the California Bankruptcy Forum in May in Monterey, California. Steve was also a panelist at the 26th Annual Bankruptcy & Restructuring Conference presented by the Association of Insolvency & Restructuring Advisors in June in San Diego, California. Additionally, he was a panelist at a workshop presented by the San Diego Bankruptcy Forum in June.

Phil Campbell participated in the HCBA YLD 2010 State Court Trial Seminar and spoke on the closing argument.

Graham Carothers has been selected for the 2011 Leadership Tampa Class.

Doug Cherry presented an Intellectual Property overview at the Sarasota-Manatee Association of Legal Support Specialists ("SMALSS") meeting in September. Doug spoke at the Florida Public Relations Association's Annual Conference in August in Naples, Florida and he also spoke at the Sarasota Chamber's TechFest Breakfast Summer Series.

Ron Christaldi was named Interim Secretary of the Board of Directors of The Spring of Tampa Bay, Inc.

Jason Collier was certified in Labor and Employment Law by The Florida Board of Legal Specialization and Education.

Jamie Colner was elected to the Executive Board of the American Board of Trial Advocates Ohio Chapter, effective January 1, 2011.

Jennifer Compton was a panelist for the Business Ethics Alliance inaugural education workshop in April. She discussed the importance of ethics in the workplace and its impact on effective leadership and productivity. Jennifer was also selected for Leadership Sarasota County.

David Conaway will be speaking at the NACM Fall Credit Seminar on Chapter 11 Recent Trends and Strategies for Creditors, which will take place on October 20, 2010 in Charlotte, North Carolina. David also spoke before the National Paper Packaging Credit Group in Chicago in September and was a presenter for the Furniture Manufacturers Credit Association in May in Concord, North Carolina. David also participated in the presentation of Antonio Sainz de Vicuña, General Counsel of the European Central Bank, at the Euroadvocaten Meeting in Frankfurt, Germany in May.

Tom Cotter delivered a presentation on the Hiring Incentives to Restore Employment Act of 2010 to the Toledo Chapter of the American Payroll Association in May.

Tom Cotter, Ed Emerson, Scott Newsom and Dennis Witherell spoke at the Ohio State Bar Association Corporate Counsel Institute in October on "Health Care Primer - New Directions, Decisions, Taxes and Credits for Business." **Karen Hockstad** was the Course Planner.

Mary Li Creasy was the featured guest speaker in April for the Tampa Bay Business & Professional Women "Unhappy Hour" event commemorating National Equal Pay Day. Mary Li was appointed to the Florida Bar Labor and Employment Law Certification Committee for a three–year term.

Duane Daiker was appointed to the editorial board of the Fidelity & Surety Digest which is published quarterly by the American Bar Association's Fidelity & Surety Law Committee.

Dan De Leo has been certified in Business Litigation by The Florida Board of Legal Specialization and Education.

Saralyn Dorrill has been elected to the Advisory Board of the Make-A-Wish Foundation of Central and Northern Florida, Sarasota Region.

Tim Garding was named to the Spring of Tampa Bay's Development Council.

Jack Gillespie was appointed to the Board of the Homeless Families Foundation.

Tammy Giroux, Michele Leo Hintson, Brian Lambert and Bob Warchola spoke at the 21st Annual Northeast Surety & Fidelity Claims Conference in September in Atlantic City, New Jersey.

Bruce Gordon was elected to the Board of Directors of the Tampa Museum of Art Foundation. Bruce was a speaker at the Florida Society of Enrolled Agents, Suncoast Chapter meeting, in August.

Cheryl Gordon was named to the Board of Directors of the Education Foundation of Sarasota County.

David Grogan spoke on "Bankruptcy in North Carolina" at a Lorman Education Services Seminar in Charlotte, North Carolina in May.

Gregory Haney joined the Landlord Tenant Committee of the Florida Bar Real Property, Probate and Trust Law Section.

Dan Hansen and Bill Sturges were presenters at the Southeast Surety Conference, in April in Charleston, South Carolina.

Bill Heywood was appointed to serve as a Board member of WGTE Public Media.

Michele Leo Hintson has been selected to the 2010-2011 Junior League of Tampa Board of Directors, again serving as its Legal Chair and has also been selected to serve as the Chair of the Unlicensed Practice of Law Committee "A" of the Thirteenth Judicial Circuit.

Michele Leo Hintson and Brian Lambert spoke at the 21st Annual Southern Surety & Fidelity Claims Conference in Charleston, South Carolina in April.

Karen Hockstad was elected to the Board of Directors of the Juvenile Diabetes Research Foundation, Mid-Ohio Chapter, for 2010-2012.

Adria Jensen and Deirdre Aretini presented at this year's Branch Banking & Trust Company's 2nd Annual REO Agent Meeting.

Brian Lambert has been certified in Construction Law by The Florida Board of Legal Specialization and Education.

Malinda Lugo was a presenter at the USF College of Nursing's Law Day 2010 held in March and discussed legal issues facing Nurse Practitioners from a transactional and licensure standpoint. She also was a co-presenter on how to avoid medical malpractice claims.

Moses Luski was the featured speaker at a loan workout seminar and, with **Andy Culicerto** at a construction law seminar, jointly sponsored by Shumaker and the CPA firm of Cherry, Bekaert & Holland, L.L.P.

Ed McGinty co-presented a Business Succession/Sale Case Study Panel Discussion to the Suncoast Estate Planning Council at the All Children's Education & Conference Center in St. Petersburg, Florida in April.

Scott Newsom was elected Treasurer and will serve on the Board of Directors of Leadership Toledo.

Cate O'Dowd was elected Treasurer and will serve on the Board of Directors of the Raymond James Gasparilla Festival of the Arts for a three-year term.

Mike Pitchford was certified as a Residential Mortgage Foreclosure Mediator by the American Arbitration Association, in affiliation with the Collins Center for Public Policy. In addition, Mike has been appointed to the Florida Bar Real Estate Certification Committee for a three year term. Mike also joined the Board of the Risk Management Association (RMA), Sarasota/Bradenton Chapter.

Maria del Carmen Ramos is a recent graduate of Tampa Connection.

Melissa Register was a presenter at the Estate Planning and Probate Law Update at the Florida Bar's Annual Meeting in Boca Raton, Florida in June.

Michael Robbins will serve on the Israel Affairs Committee for the Congregation Rodeph Sholom.

Steve Rothschild was selected for the 2010 Fellows Class of the Ohio State Bar Foundation.

Rebecca Shope has been appointed a Trustee on the Toledo Opera Board of Trustees.

Shumaker, in collaboration with the Central Ohio Chapter of the Association of Corporate Council, hosted a CLE seminar for in-house council in October. The seminar was held at the Jeffers Auditorium, Nationwide Plaza in Columbus. **Tom Blank, Scott Newsom, and Mechelle Zarou** were speakers at the seminar.

Peter Silverman was a speaker in May at the American Bar Association Forum on Franchising Teleseminar and for the International Association of Franchisees and Dealers.

Darrell Smith is a recipient of Finance Monthly Magazine's Law Awards for Achievement in 2010.

Lyman Spitzer was elected to the Alumni Council of Maumee Valley Country Day School for a three year term.

Christopher Staine joined the Construction Law Committee and the Legislative Issues Subcommittee of the Construction Law Committee of the Florida Bar Real Estate Property, Probate and Trust Law Section.

Juan Villaveces has been certified in Real Estate Law by The Florida Board of Legal Specialization and Education. Juan was elected Treasurer and will serve on the Board of Trustees of the Forty Carrots Family Center.

Greg Yadley was a speaker at the Second Annual Professional Day presented by the Society of Financial Service Professionals at the Tampa Bay History Museum. Greg also presented a program at the M&A Source Conference for Professional Development in Orlando, Florida in June.

Mechelle Zarou has been awarded with the Ohio State Bar Foundation's Community Service Award for Attorneys 40 & Under.

Kelly Zarzycki was elected to the Board of Directors of the Young Lawyers Division of the Hillsborough County Bar Association.

insights

A Newsletter from Shumaker, Loop & Kendrick, LLP

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