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September 2007 e-BULLETIN

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PRAC MEMBERS SET TO GATHER IN SEOUL

PRAC Member Firm KIM CHANG & LEE will host the 42nd International Conference in Seoul, Korea October 20-24, 2007. Registration is open to all PRAC member firms. Details including Conference Program and on line registration are available at www.prac.org/events.

Kim Chang & Lee is a founding PRAC member . Established in 1958, Kim Chang & Lee is Korea's oldest law firm. To find out more about them , visit www.kimchanglee.co.kr

KIM, CHANG & LEE

MEMBER DEALS MAKING NEWS

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BAKER BOTTS LLP

EMMONS NAMED PARTNER IN CHARGE OF MIDDLE EAST OFFICES

Corporate Lawyer's Move to Dubai Adds Fourth Partner to Firm's Team in Region

HOUSTON, September 4, 2007 -- David Emmons, who has extensive corporate experience representing clients in energy services, technology and outsourcing, has been named Partner in Charge of the Middle East offices in Dubai, UAE and Riyadh, Saudi Arabia for Baker Botts L.L.P. He will be based in Dubai.

Emmons is now the fourth partner in Dubai for Baker Botts. His arrival caps a six-month growth period for the firm in that region. Earlier this year, Sean Korney and Nigel Thompson joined Baker Botts as partners in the firm's office in Dubai. Steven Matthews guided the firm's Middle East efforts prior to Emmons' arrival last month. Matthews will remain in Dubai and continue his corporate and banking practice.

Emmons concentrates on mergers and acquisitions, capital raising transactions and joint ventures. He also has broad expertise in matters of corporate strategy and governance, compliance with securities laws and executive compensation issues. He has extensive experience in advising energy service companies in many areas, including strategic acquisitions and divestitures, capital raising transactions, including initial public offerings, shipyard construction projects and strategic joint ventures.

"David has a sophisticated and varied corporate practice focused on energy and finance matters," said Walt Smith, Managing Partner of Baker Botts. "This fits with the strategic plan for our Middle East offices, where our clients are experiencing increased activity in those key practice areas."

The Baker Botts Dubai office provides service to the energy industry, including ongoing work involving oil and gas exploration and production, LNG, pipeline, gas to liquids, petrochemical, refinery and electric power projects in the Gulf region. In addition to focusing on energy projects, the firm has expanded its corporate, banking, finance, telecommunications, construction and dispute resolution work for clients throughout the Middle East.

Emmons said he looks forward to the challenge of continuing to build on Baker Botts' successes in the Middle East.

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"Dubai and Saudi Arabia are focal points for businesses operating in the Middle East," Emmons said. " Dubai and Riyadh are dynamic centers of influence in both energy and financial projects. Our clients are important drivers in this growth. We expect there will continue to be strong demand for a broad range of sophisticated legal services delivered by an experienced team of lawyers on the ground in the region.

"We will continue to pursue strategic growth of our offices in the Middle East in order to meet our clients' growing demands."

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About Baker Botts in the Middle East

Through its Dubai and Riyadh offices, Baker Botts offers great depth of experience and knowledge in the Middle East and broad-based expertise in energy-related project development and finance. The firm represents clients in the region not only in the energy industry but also in the telecommunications, manufacturing, transportation, construction, and banking industries, among others. The firm's practice also encompasses transactional work, including entity formation and structuring, contract negotiation, and banking and finance, as well as litigation and arbitration matters internationally. Baker Botts' energy-related project development and finance work is enhanced by the firm's experience with the complex issues faced in financing these projects under local law, which is largely founded on the shari'a or Islamic law.

About Baker Botts L.L.P.

Baker Botts L.L.P., founded in 1840, is a leading international law firm with offices in Austin, Beijing, Dallas, Dubai, Hong Kong, Houston, London, Moscow, New York, Riyadh and Washington. With approximately 730 lawyers, Baker Botts provides a full range of legal services to regional, national and international clients. For more information, please visit www.bakerbotts.com

GOODSILL ANDERSON QUINN & STIFEL ADDS TO REAL ESTATE PRACTICE

LAURA J. CUTLER JOINS GOODSILL ANDERSON QUINN & STIFEL'S REAL ESTATE PRACTICE

Honolulu, Hawaii – Goodsill Anderson Quinn & Stifel, LLP today announced that Laura J. Cutler has joined the firm's Real Estate Group, where she will focus on transactions involving real estate and construction, and on business and commercial transactions.

Prior to joining the firm, Ms. Cutler served as in-house General Counsel for the Danco Group, a California real estate construction and development company. Cutler brings extensive experience in business dealings and transactions, and in real estate development. In addition to her experience with Danco Group, Ms. Cutler has worked as a transactional attorney in the corporate finance department of Debevoise & Plimpton, in New York, and with the Walt Disney Corporation in California, where she drafted and negotiated talent contracts and project financing agreements. Her experience includes representing entities in formation and dissolution; advising buyers and sellers in commercial and residential property acquisitions and sales; and representing owners, developers and contracts in negotiating and drafting contracts for construction, construction management and design services.

"We are very pleased to add Laura Cutler to our expanding real estate practice," said Gary Slovin, managing partner at Goodsill. "Her solid experience in this area and in the related area of business and commercial transactions will bring added value to our clients and add depth to the high level of service we provide."

Ms. Cutler received her JD, cum laude, from the Cardozo School of Law in New York, and her BA from Yale University. She is a member of the Hawaii State Bar Association and California State Bar Association.

Goodsill Anderson Quinn & Stifel LLP traces its roots to 1878 and currently has more than 70 full-time attorneys. Always keeping pace with client needs, Goodsill attorneys practice in all areas of civil law, extending personal, boutique-quality legal services with cutting-edge resources that can only be found at a large firm.

For more information on the law firm, visit its website at www.goodsill.com

LUCE FORWARD HAMILTON & SCRIPPS LLP

OPENS ORANGE COUNTY OFFICE EXPANDING ITS REACH THROUGHOUT CALIFORNIA

August 30, 2007 - Luce Forward today announced the opening of its first office in Orange County. The firm's growing real estate practice and increased clientele in the Orange County area prompted Luce Forward to open its sixth office location. The new office is located in Irvine, California. Luce Forward's other offices are located throughout California in San Diego, Los Angeles, San Francisco, Carmel Valley / Del Mar and Rancho Santa Fe.

John C. Murphy, George C. Rudolph and Joseph S. Stuart, the firm's newest partners, are opening the Orange County office. All three attorneys have led distinguished careers in California and maintain a strong presence in Orange County. It is expected that by the beginning of next year, the Luce Forward Orange County office will have between 10 to 15 attorneys focusing primarily in the firm's business, litigation and real estate practices.

"We are thrilled to begin working in Orange County and to provide the hallmark services for which Luce Forward is so well known," said Robert J. Bell, Managing Partner of Luce Forward. "This Orange County office now allows us to give our clients much more efficient service throughout Southern California's mid-section, from the ocean straight on through the Inland Empire."

Luce Forward's Orange County attorneys will be working out of the firm's temporary office space in Irvine, Calif. until the building of its permanent Orange County location in the Irvine Business Complex is completed by its client, Opus West.

Luce Forward's temporary Orange County address and contact information is:

Luce, Forward, Hamilton & Scripps LLP
2040 Main Street, Suite 590
Irvine, CA 92614
Main Phone: 949.732.3700
Main Fax: 949.732.3739

For additional information visit us at www.luce.com

HOGAN & HARTSON LLP

FORMER FDA LAWYER JOINS PHARMACEUTICAL AND BIOTECH PRACTICE IN WASHINGTON, D.C.

WASHINGTON, D.C., September 10, 2007 — Hogan & Hartson LLP announced today that Mike Druckman has joined the firm's Washington, D.C. office as a partner. Druckman will be a member of the pharmaceutical and biotechnology practice group, which is part of the firm's food, drug, medical device, and agriculture practice. At Hogan & Hartson, he will be joining nine other former lawyers from the Food and Drug Administration's Office of the Chief Counsel (OCC) who are collectively part of the broader practice.

For the past six years, Druckman has been a member of the FDA's Office of the Chief Counsel (OCC), first as an associate chief counsel for enforcement, and then as an associate chief counsel for biologics. He served as a principal advisor to the FDA's Center for Biologics Evaluation and Research (CBER) on legal and regulatory issues. Druckman also served as co-team leader for the OCC's Biologics Team and as a member of the Pandemic Flu and Disclosure Teams.

Prior to joining the OCC, Druckman was a litigation partner at Patton Boggs LLP, where he focused his practice on complex civil litigation and white collar criminal defense.

Druckman will focus his practice on all aspects of U.S. Food and Drug Administration (FDA) product approval pathways; enforcement and compliance; and advertising and promotion. In addition to broad counseling and litigation experience in those areas, he also has particular experience with vaccines, counterterrorism products and public health crisis preparedness, post-approval safety, blood components and derivatives, Prescription Drug User Fee Act (PDUFA) issues, protection of trade secrets and confidential information, and investigational product and clinical trial issues. As part of the pharmaceutical and biotechnology practice group, Druckman will be joining seven partners and 11 counsel and associates dedicated to pharmaceutical and biotechnology issues.

"We are very proud to welcome Mike to the firm," said Bob Brady, head of Hogan & Hartson's pharmaceutical and biotechnology practice group. "Mike's impressive pharmaceutical and biotechnology-related work for the FDA, combined with his years of litigation experience, make him a tremendous asset to our firm and our clients."

"I am excited to be a part of this firm that has global regulatory experience and is highly-regarded for its work in the pharmaceutical and biotechnology industries," said Druckman. "I am eager to build my practice alongside the talented lawyers at the firm."

Druckman received his law degree from the University of Pennsylvania Law School and his bachelor's degree from Harvard College. Following law school, he served as a law clerk to The Honorable John H. Pratt of the U.S. District Court for the District of Columbia.

About Hogan & Hartson

Hogan & Hartson is an international law firm founded in Washington, D.C. with more than 1,000 lawyers in 22 offices worldwide. The firm has a broad-based national and international practice that cuts across virtually all legal disciplines and industries.

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

For more information about the firm, visit www.hhlaw.com

TOZZINI FREIRE ADVOGADOS

RELOCATES RECIFE OFFICE

We are pleased to inform that our Recife office has moved to a new address. The new premises are structured to provide more comfort for our clients, in addition to easy access and a pleasant view of the Boa VIagem Beach. With 70 professionals, our Recife office conciliates customized regional assistance to the advantages of the countrywide scope of the firm. Our new Recife address is Av. Eng. Domingos Ferreira 2589—5th Floor, 51020-031 Recife PE Tel: 55 81 3316 2229 Fax: 55 81 3316 2225. Local Partner Luis Fernando Visconti [lvisconti@tozzinifreire.com.br]

Tozzini Freire Advogados is a full-service law firm ranking as one of the leading firms in Latin America with 440 lawyers, 275 trainees and a support staff of 545 people. In addition to two offices in Sao Paulo, the firm has offices in Rio de Janeiro, Brasilia, Porte Alegre, Fortaleza, Recife and Campinas and a representative office in New York. For more information visit us at www.tozzinifreire.com.br

BRIGARD & URRUTIA

ADVISES ALMACENES EXITO

Almacenes Exito's issue of USD$392 million worth Global Depositary Receipts in international markets

Brigard & Urrutia advised Almacenes Exito S.A., Colombia's largest retail company, in the issue of USD$392 million worth of Global Depositary Receipts (GDR's) in 50 million receipts, each representing one share in Exito, in international markets. JPMorgan acted as Bookrunner on the deal, with Citigroup and Merrill Lynch as Co-Managers.

This deal is extremely representative for the country, having in mind that the last transaction of this kind made by a Colombian company was in the 1990's. The transaction closed in July, 2007.

The deal was lead by Brigard & Urrutia partners Sergio Michelsen and Carlos Fradique; they were assisted by associates Juan Manuel Idrovo, Jaime Moya, Andres Crump, Alejandro Garcia, Cristina Lloreda, Mauricio Borrero, Juan David Bedoya and Camilo Bernal.

For more information visit www.bu.com.co

GIDE LOYRETTE NOUEL

ADVISES GE CAPITAL

5 September 2007

Gide Loyrette Nouel advises GE Capital in Subordinated Debenture Financing

Gide Loyrette Nouel MNP has acted as United States and English law counsel to General Electric Capital Corporation in connection with a global offering of two tranches of Subordinated Debentures issued on September 5 and listed on the London Stock Exchange’s Gilt Edged and Fixed Interest Market. The euro tranche consisted of an offering of €1,500,000,000 Fixed to Floating Rate EUR Subordinated Debentures due 2067 and the sterling tranche consisted of an offering of £600,000,000 Fixed to Floating Rate GBP Subordinated Debentures due 2067.

London based Partner Scott Cameron led the team of lawyers representing General Electric Capital Corporation and was assisted by associates Alex Muller and Phung Pham, each also from the London office.

Scott Cameron commented, “*We were very pleased to assist GE Capital in completing the subordinated debenture financing, especially under current market conditions. GE Capital continues to be one of the most active issuers of debt securities in the world and we highly value our relationship with them."*

For additional information visit www.gide.com

HOGAN & HARTSON LLP

ADVISES RENOVA ORGSYNTES ON ITS ACQUISITION OF KHIMPROM (NOVOCHEBOKSARSK)

MOSCOW, September 10, 2007 – Hogan & Hartson has been advising major Russian chemical holding company ZAO Renova Orgsyntes in a series of transactions resulting in the acquisition of a majority stake in the leading chemical producer OAO Khimprom, located in Novocheboksarsk in the republic of Chuvashia. The transaction value has not been disclosed by the parties.

According to Alexander Zarubin, head of Renova Orgsyntes, "The purchase of Khimprom is an important stage in realizing our company's strategy of consolidating prospective assets in the sector with the aim of creating a major chemicals holding company."

Hogan & Hartson has been advising Renova Orgsyntes on all legal and tax issues in connection with the deal structure and implementation. The Hogan & Hartson team on this matter is being led by Moscow partner Ilya Rybalkin and includes Moscow associates Dmitry Zheleznyakov, Alexey Tsitovich, Igor Eliseev, and Ivan Meleshenko, and tax adviser Vadim Kukushkin, as well as London partner Sean P. Harrison and London associate Vicky Hau.

Notes to Editors:

Hogan & Hartson is a global law firm founded in Washington, D.C. in 1904 with more than 1,000 lawyers in 22 offices throughout Asia, Europe, Latin America, and the United States. In Europe, the firm has eight offices: Berlin, Brussels, Geneva, London, Moscow, Munich, Paris, and Warsaw.

The Moscow office of Hogan & Hartson has built a strong market reputation for highly complex corporate and commercial work, including mergers and acquisitions, corporate finance, capital markets, banking, private equity, real estate, tax, intellectual property, international litigation, and arbitration.

For additional information about Hogan & Hartson, visit www.hhlaw.com.

FRASER MILNER CASGRAIN
ACTS FOR HARMONY ASSET LIMITED

Fraser Milner Casgrain assisted Harmony Asset Limited of Hong Kong to become the first Hong Kong Stock Exchange Listed company to become dual-listed on the Toronto Stock Exchange (TSX). The listing became effective June 29,2007 (TSX Stock Symbol HAR).

The core business of Harmony Asset Limited is investing in private companies which have high potential for earnings growth and capital appreciation in China. Its three investment focuses are resources, technology-enabled manufacturing and food and retail. As of December 31, 2006 Harmony Asset Limited had total revenue of HK$331 million and turnover of HK$51 million. Its current market capitalization is approximately HK$150 million.

Fraser Milner Casgrain's Toronto team representing Harmony Assest Limited included Michael Melanson and Charlie Kuo. Harmony Asset Limited is a mutual client of PRAC member firm Lovells, whose Hong Kong office acted as local counsel..

For additional information visit www.fmc-law.com

WILMERHALE
VICTORY FOR LOAN SYNDICATIONS AND TRADING ASSOCIATION

August 27, 2007

WILMERHALE VICTORY FOR SECURITIES TRADE ASSOCIATIONS HELPS PROTECT VIBRANT SECONDARY MARKET IN DISTRESSED DEBT

A team of WilmerHale bankruptcy and appellate lawyers won an important victory for the Loan Syndications and Trading Association (LSTA), the Securities Industry and Financial Markets Association (SIFMA) and the International Swaps and Derivatives Association (ISDA), when District Judge Shira A. Scheindlin of the US District Court for the Southern District of New York reversed a bankruptcy court decision that threatened to cause massive disruption in the secondary markets for trading bank debt, bond debt and other claims against a debtor in bankruptcy.

Recognizing that its decision would have "serious ramifications well beyond the parties involved," the district court held that equitable subordination and disallowance are "personal disabilities" that do not transfer with claims when they are sold to good faith purchasers on the open market. The district court noted that the bankruptcy court's contrary conclusion "threatened to wreak havoc on the markets for distressed debt. That result has now been avoided."

The decision was a victory for the trade associations that WilmerHale represented, as *amici curiae*, in this appeal. In their *amici* brief, the associations apprised the court of the substantial market disruption caused by the bankruptcy court's decision.

The WilmerHale team representing the *amici curiae* trade associations included Seth Waxman, Louis Cohen, Craig Goldblatt (who argued on behalf of the trade associations before the district court), James Millar, and Amy Oberdorfer Nyberg.

For additional information visit www.wilmerhale.com

NAUTADUTILH
MITTAL STEEL WINS SUMMARY PROCEEDINGS

NautaDutilh represents Mittal Steel Company N.V. in its dispute with Trafalgar Catalyst Fund et al. In its judgment of 27 August 2007, the Rotterdam District Court has denied all claims brought by Trafalgar Catalyst Fund et al in summary proceedings against Mittal Steel.

Trafalgar et al sought to enjoin a legal merger between Mittal Steel and ArcelorMittal S.A.

The Court dismissed Trafalgar et al's stance that they were prejudiced by the merger. It furthermore held that since a consecutive merger between ArcelorMittal S.A. and Arcelor will be subject to Luxembourg law, the plaintiffs will have the opportunity to raise their objections, if any, before the proper Luxembourg forum. There is no ground for the Dutch Court to interfere in a Luxembourg law matter.

Last week, the AFM, in reaction to allegations from Trafalgar et al, already ruled that Mittal had not issued misleading statements in respect of the merger.

Mittal Steel was represented in court by Harmen de Mol van Otterloo and Gosse Oosterhoff, assisted by Flip Wijers and Wikke Nijland, while the team working on the transaction and/or litigation consists of Gerard Carrière, Petra Zijp, Marc Anker, Bart Jong, Mintsje Baars, Matthieu van Straaten and Anne Hakvoort.

For more information visit www.nautadutilh.com

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PACIFIC RIM ADVISORY COUNCIL

PRAC CONFERENCE 2007 Bogotá - Cartagena, Colombia

BRIGARD & URRUTIA

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MUNIZ RAMIREZ PEREZ-TAIMAN & LUNA VICTORIA ADVISES BBVA BANCO CONTINENTAL

EDELNOR COMPLETES FILING OF US$ 150 MILLION CORPORATE BOND PROGRAMME THROUGH PERUVIAN SEC's FAST TRACK PROCEDURE

Lima, Peru, August 2007.- Edelnor S.A.A., Spanish Endesa's power distributing company in the Peru, has automatically registered its US$ 150 million third corporate bond programme in the Stock Market Public Registry of the Peruvian Securities and Exchange Commission (CONASEV) resorting to the new fast track procedure established by the regulations governing primary public offerings exclusively directed to accredited investors (known for its Spanish acronym as "ROPPIA").

The ROPPIA includes the automatic registration of programs (the ordinary registration procedure contemplates a previous evaluation by CONASEV), subject to the condition that the public offers to take place be directed exclusively to "Accredited Investors" (institutional investors, securitization companies and other entities expressly identified in the ROPPIA).

Negotiation of the bonds is restricted for the first 12 months only among Accredited Investors. Upon that term, in the case of Edelnor's programme, the bonds may be automatically traded among the general public.

Fernando Vega of Muñíz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados, who advised BBVA Banco Continental, says: "*One of the benefits of this new procedure is that the issuers are able to place their bonds according to their financial planning, as they can control the timing of the registry and placement of the instruments.*"

BBVA Banco Continental acted as arranger and Continental Bolsa SAB S.A. acted as placement agent.

The filing was made on August, 22, 2007.

Muñíz, Ramírez, Pérez-Taiman & Luna-Victoria Abogados Partner Sergio Oquendo and senior associate Fernando Vega acted for BBVA Banco Continental.

For additional information visit www.munizlaw.com

ARGENTINA

New Requirements to Access Foreign Exchange Market by Non-Residents

On May 11, 2007, the Central Bank of the Argentine Republic issued Communication "A" 4662, modified on July 31st, 2007, by Communication "A" 4692, through which new regulations applicable to the sales of foreign currency to non residents performed by authorized entities were made. These communications incorporate the concepts of "reduction of capital decided by a local entity", "restitution of irrevocable contributions made by a local entity" and indemnifications decided by local courts in favor of non residents".

On July 4, 2007, the Central Bank of the Argentine Republic issued Communication "A" 4687 through which the minimum requirements that should verify the involved entities where specified, so that residents can have access to the Foreign Exchange Markets and be able to proceed and negotiate the foreign currencies.

For additional information visit www.allendebrea.com

Swaps: Takeovers Panel releases (draft) policy

print

The Takeovers Panel wants more disclosure of cash-settled equity swaps.

In a draft Guidance Note issued yesterday, the Panel also took the opportunity to clarify its position on short positions and the progressive building of swaps.

The release of the draft Guidance Note also warns existing swap holders to think seriously about disclosing or unwinding swaps that do not accord with the proposed policy.

Level of disclosure

Following the Austral Coal cases, there has been a growing market practice of disclosing cash-settled equity swaps where the "combined holding" of swaps and shares has equated to 5 percent of a company. This commonly takes the form of a note on a substantial shareholder disclosure notice, disclosing only that the person has economic interests in X per cent of the company, through cash-settled equity swaps.

The Panel apparently thinks that more disclosure is required. Although it does not want disclosure of written agreements establishing swap arrangements, it does think that the following details should be disclosed:

- price
- entry date
- derivative period
- number of securities to which the derivative relates
- termination rights
- unwind terms
- the identity of the counterparty; and
- any material changes to the information disclosed to the market.

It does not propose to require disclosure of whether the counterparty has hedged the swaps by acquiring shares. This is for two reasons:

- the swap holder will not necessarily know if the counterparty has hedged; and
- in any event, disclosure of hedging shares could be frustrated by the counterparty's using other means to hedge (such as back to back derivatives).

Who has to disclose?

Basically, it's proposed that everyone would have to disclose once they had a combined holding of 5 percent, regardless of whether they're a would-be bidder or merely taking an economic position.

The Panel's rationale is that, even where the swap holder has no takeover intentions, the fact that someone has an economic foot on 5 percent of a company will impact on the market for that company's shares.

Progressive building of swap positions

Swap positions are often built progressively, and formally binding documentation may not be executed until very late in the process. The Panel takes the view that the 5 percent disclosure threshold should be calculated on the basis of the size of share exposure that the counterparty has agreed to offer on a firm basis. Where that exposure increases, the Panel would expect those increases to be disclosed.

The Panel will not require disclosure of the total exposure sought by the swap holder but, on the other hand, will be watchful for arrangements that have been structured to avoid progressive disclosure.

Long vs short positions

The size of a combined holding would be calculated by reference to the swap holder's long positions (ie. where the counterparty has an incentive to hedge its position).

The swap holder will not be allowed to net short positions against long positions when calculating the size of its combined holding. However, once the combined holding threshold has been reached and disclosure is required, the swap holder's short positions (of 1 percent or more) should also be disclosed.

Beneficial ownership tracing

There were whispers that counterparties who received a beneficial interest tracing notice in relation to hedging shares might be required to disclose the swap holders.

In its current form, the draft Guidance Note doesn't go this far. However, in an accompanying discussion paper, the Panel asks whether it should become part of the final policy.

Physically settled equity derivatives

The Panel also comments on the amendment made to section 609(6)(b) of the *Corporations Act* by the *Financial Services Reform Act* 2001.

This replaced the word "futures contract" with "derivative" where it appeared in that section. As a result of that amendment, section 609(6)(b) currently appears to provide that a person that is party to any "derivative" (including privately negotiated derivatives) does not acquire a relevant interest in securities (which it might otherwise hold by reason of section 608(8)) except for the purposes of Chapter 6C. The Panel's view is that the amendment "may have results which were not intended by the legislature" and that it would regard it as unacceptable if this broader exception in 609(6)(b) was used to undermine the purposes of Chapter 6 or avoid its provisions.

The Panel also states that it would be likely to treat as unacceptable circumstances any attempt to avoid the intent of the Guidance note by persons entering into deliverable equity securities in a manner which, it was argued, did not give rise to an obligation to make disclosure under Chapter 6C where an equivalent cash settled equity derivative would need to be disclosed under the Guidance Note.

How does this affect current swap arrangements?

The Panel is allowing 12 weeks for comments about the draft Guidance Note, after which it will be finalised. It takes the view that that is also the effective transition period for the implementation of the policy.

In other words, it's proposed that there will be no "grandfathering" of existing swaps. On the day the Guidance Note is finalised, it will apply to all swaps, even if they were written before that date. The Panel advises current swap holders to take this opportunity, over the next 12 weeks, to disclose or unwind any swaps that would be affected by the Guidance Note.

Swap holders who have already disclosed combined holdings may need to revisit their disclosure: the amount of disclosure proposed by the draft Guidance Note is greater than much current market practice.

For Additional information visit www.claytonutz.com

Mark Paganin, a Partner of Clayton Utz, is a member of the Takeovers Panel. He did not participate in the drafting of this Alert.

September 2007

China's Internet Search Engines and the Struggle for Copyright Enforcement

By Zhang Haitao*

With copyright infringement running rampant among the world's second largest Internet population, China has become as much a source of frustration as a source of opportunity for multi-national music labels. They are now often looking to China's courts for protection. The country's changing legal attitude towards copyright protection can be clearly seen in its treatment of two recent cases involving two of China's largest e-commerce enterprises.

On November 17, 2006, Beijing's No. 1 Intermediate People's Court rendered its first trial ruling on the legal action jointly initiated by seven internationally renowned record companies including SonyBMG, Warner, EMI and Universal, against Baidu.com, Inc. ("Baidu"), China's most popular search engine provider, for copyright infringement on Baidu's music search engine service. The court held that Baidu's services did not constitute copyright infringement and dismissed the plaintiffs' actions ("Baidu Case").

A few months later, on April 24, 2007, Beijing's No.2 Intermediate People's Court rendered its first trial ruling for the joint allegation by eleven globally well-known record companies including EMI Music Taiwan, EMI Group Hong Kong Ltd., and Universal, against Alibaba Group ("Alibaba") for copyright infringement by providing music search engine services on www.yahoo.com.cn, a website run by Alibaba. This time, the court supported the plaintiff's claim and ordered that the defendant indemnify the plaintiffs for economic losses and reasonable court fees ("Alibaba Case").

In both cases, the premise was the same: record companies were claiming that search engine providers infringed their music copyright by providing links to download copyrighted music. Nevertheless, the two rulings were completely different. Did the courts' view of copyright change? Were there significant differences between the defendants in each case? What criteria will sway the courts' opinion in copyright infringement cases and which ones were at play in these two cases?

In general, PRC courts will look for the following elements when deciding whether an action constitutes copyright infringement:

1) Whether the plaintiff is the legal holder of the rights under dispute;
2) Whether the plaintiff's rights have been infringed upon;
3) Whether the actions of the defendant were illegal;
4) Whether causation exists between the plaintiff's losses and the defendant's actions; and
5) Whether the defendant had the intention of infringing upon the plaintiff's rights.

All five elements must be present to establish a valid claim of infringement.

I. Is the plaintiff the legal holder of the rights under dispute?

Article 41 Paragraph 1[1] of The PRC Copyright Law (the "Copyright Law") grants the producer of audio products the right to disseminate such products to the public via the Internet or "the right of dissemination"; and except for fair use[2] or statutorily authorized use[3] expressly provided in the Copyright Law, no party shall disseminate

[1] Article 41, Paragraph 1 provides that "the producer of audio and video products are entitled to the right to authorize a third party to replicate, distribute, and lease their products or disseminate such to the public via information networks and receive consideration; the term of protection is fifty years and expires on December 31 of the fiftieth year upon the completion of initial production of the products."

[2] Article 22 of the Copyright Law provides 12 types of fair use. In the case of fair use, the user may use the copyrighted work without the authorization of the copyright owner and does not need to pay the copyright owner, provided that the user indicates the name of the copyright owner and the copyright work and does not infringe upon other legitimate rights that the copyright owner is entitled to under this law.

copyrighted audio products via the Internet without authorization. Any party that engages in unauthorized dissemination shall bear civil liabilities such as ceasing the infringing action, eliminating any remaining negative impact, and compensating for damages.

In the Baidu Case and the Alibaba Case, the plaintiffs provided solid evidence to prove they were the producers of the disputed musical work, including affidavits from the related parties, certificate reports issued by record industry associations and sample CDs of the works in question. The courts recognized the validity of the evidence and upheld that the plaintiffs, as the producers of the music, shall be entitled to the right to disseminate such works via the Internet and that such rights are entitled to protection.

II. Have the plaintiff's rights been infringed upon?

According to Paragraph 1 Article 41 of the Copyright Law, the plaintiff has the right to authorize a third party to disseminate the disputed audio product via information networks and is entitled to receive consideration for such authorization. In both the Baidu and Alibaba cases, the audio products in dispute were disseminated via the Internet without the consent of the copyright holders and no royalties were paid to the copyright holders for this dissemination. The two cases shared this fact and the parties also agreed on this. Therefore, the courts held the rights of the plaintiff in both cases were infringed upon.

III. Were the defendant's actions illegal?

The Copyright Law and Rules on Protecting Rights of Dissemination via Information Networks both define "actions of disseminating via information network" as "providing copyrighted works (and performance and audio and video products) to the pubic via a wired or wireless network at the time and location decided by the Internet users". In neither case did the defendant actually upload the disputed songs onto their own servers. Instead, the defendant provided links to the songs located on other websites. Strictly speaking, search engines are websites that create links through which the Internet community may access the linked content. Many websites only provide these links and do not provide the content itself; much like a telephone book provides the street address of a business or resident within a city. In the case of search engines such as Google, Yahoo!, and Baidu, virtually all of the content provided in each search is located on other websites. By merely providing links and not hosting the content itself, the actions of the defendants under both cases did not constitute "[acts] of disseminating via information networks" and therefore did not breach the law.

Article 4 of the Supreme People's Court's Judicial Interpretation on Issues Regarding the Trial of Copyright Disputes on Computer Networks ("Judicial Interpretation") sets forth that "the People's Court shall find joint liability between the content provider and its users according to Article 130 of the General Rules of Civil Procedures, where the content service provider does not take measures to eliminate the negative impact of infringement including removing the infringing content from the a website after becoming aware of any infringement upon a third party's copyright or having received notice from the copyright holder." In accordance with this provision, the links provided by the plaintiffs in both cases would be illegal, and if such parties continued to provide these links while being aware that their existence caused the unauthorized dissemination of copyrighted music, the plaintiffs would be subject to "contributory infringement" and jointly liable for infringement along with the website that the search engine linked to.

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[3] Paragraph 2 Article 23 of the Copyright Law provides the situations subject to statutory authorization. The provision set forth that "textbooks compiled for the nine-year compulsory education and national education planning does not need to receive the authorization of the copyright owner unless the copyright owner had made prior announcements that such unauthorized use is not allowed. Royalties shall be paid for the use of published excerpts of copyrighted works, or short articles, music work or a single-piece of artwork or photograph in compiled textbooks. The textbook publisher shall also indicate the name of the author and copyright work and shall not infringe upon other legitimate rights that the copyright owner is entitled to under this law.

IV. Whether causation exists between the plaintiff's losses and the defendant's action?

On one hand, as stated above, the disputed music would not be as widely accessible if the operator of these search engine websites removed these links from their servers or shut off their servers entirely. However, the Internet community would still be able to access the disputed content by going directly to the content-hosting website. This would be possible even if all links to the site were removed. Obviously, causation between the plaintiff's losses and the defendant's actions is hard to establish. On the other hand, undoubtedly, the websites that set up the links aid the Internet community in discovering and downloading the disputed music and expands the scope of music that becomes easily accessible through a single portal. This further aggravates the losses and damages incurred to the plaintiff.

V. Whether the defendant has the intention of infringing upon the plaintiff's rights?

In general, the principle of "non-misfeasance" is the major criterion in establishing intellectual property infringement. In other words, regardless of whether the defendant possessed the intention to cause copyright infringement, the court may establish infringement and impose liability on such a defendant to cease the infringing actions. However, this does not mean that the state of mind of the infringing party is not taken into account in the court's judgment. In fact, the intent of the infringing party is of vital importance to the court in rendering remedies other than ceasing the infringing action. For example, when assessing the extent of indemnification, the court may increase the amount if the infringing party possessed the intention to infringe or knowledge of infringement. In determining whether intent existed, the court will often look to the actions of the defendant when making their assessment.

In both cases, the characteristics of the linking services provided by the defendant were examined to determine whether the defendant's actions constituted misfeasance. In the Baidu Case, the court ruled that the "search engine service is an Internet technology emerged in the last a few years to assist Internet users to promptly locate and access the information they need in the tremendous amount of information in cyberspace…the MP3 service provided by the defendant is used to search for audio files on all websites that can be linked to on the Internet." In addition, the court ruled that whether the search engine service is affiliated with the website that uploads music depends on whether the website has uploaded the disputed music work and whether such website rejects links. First, the searched content originates from the website that uploads audio files and is controlled by such website. The search engine is unable to anticipate, identify or control the searched content. Second, if the website that is linked to the search engine is not subject to any agreement that rejects links, the website is accessible and the information located on the website can be shared by Internet users. Therefore, the defendant did not have the intent of infringing a third party's right of dissemination via the Internet.[4]

However, the scope of what constitutes intent goes beyond the actual state of mind of the search engine provider. According to Article 4 of the Judicial Interpretation, a defendant shall be deemed to have anticipated any negative consequences of its actions or failed to take efforts to prevent such consequences if the defendant continues to provide access to the links after becoming aware of the illegality of the content provided through the links.

Aside from state of mind, reaction to the plaintiff's warning is also an essential factor for the court to consider when determining the defendant's intent. In the Baidu Case, the plaintiff did not send a notice or warning to the defendant; therefore, the defendant did not know that their search engine was resulting in infringement and shall be released from civil liabilities. In the Alibaba Case, the plaintiff sent a warning to the defendant, which resulted in the removal of some of the links to the disputed music but not all of these links were removed. Obviously, the defendant shall be liable for its failure to remove all of the links that the plaintiff required.

[4] See Civil Ruling No. 10170 of 2005 of Beijing No.1 Intermediate People's Court.

Google's worldwide success shows the massive potential market for search engine services. The rapid growth of Baidu again proves the value of search engine technology. While the potential commercial profit makes search engine services as sweet as candy, excessive candy consumption can cause toothaches. The inherent risk of infringement in cyberspace is the candy that might cause a cavity. Search engine service providers need to be very careful about the websites to which they link and remove the links of disputed content as quickly as possible when they receive warnings from legal copyright holders. It is always good to eliminate problems early, to save court fees or a trip to the dentist.

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

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TAIWAN

FTC WARNS BANKS OVER GUARANTEE AGREEMENTS

◎James C. C. Huang

In a June 2007 letter to the Bankers Association of the ROC, the Fair Trade Commission (FTC) noted that in judgments to date the courts have refused to apply the Consumer Protection Act to guarantee agreements, and that when examining the validity of contractual terms that define the maximum amount payable by a guarantor, they have largely based their determination on the face of the agreement, rather than substantively investigating the true intent of the guarantor when accepting joint and several liability.

The FTC stated that in view of this situation, if a financial institution, in order to protect its creditor rights, attempts to transfer the whole of the risk associated with its lending to a guarantor who is in a relatively weak bargaining position, and unilaterally imposes terms that extend the scope of the guarantee to all obligations arising out of the principal debtor's all dealings with the institution, there is a real risk that an imbalance of rights and obligations will be created between the financial institution and the guarantor. The FTC further stated that such practices are wide-spread in the loans market, and are likely to ad-versely affect the overall orderly conduct of trade in that market.

In view of this, the FTC requires that when ne-gotiating with a guarantor for the scope of its guarantee liability, a financial institution should not request the guarantor to agree to terms that do not define a maximum guarantee amount or a specific guarantee period. In addition, the scope of the guarantee should be based on debts arising out of a specific legal relationship between the principal debtor and the financial institution, and the relevant terms may not stipulate that the scope of a guarantee extends to "all past, present, and future debts of the debtor". Otherwise, the guarantee agreement is likely to violate Article 24 of the Fair Trade Act (FTA).

The FTC also requires that when a financial in-stitution draws up standardized guarantee terms as part of a lending agreement or guarantee agreement, it should print important information concerning the transaction (such as the scope of the debts guaranteed, the duration of the guar-antee, and the methods of performing rights and obligations) prominently in bold type, and should ensure that a guarantor has read and agreed to each of such clauses individually by having the guarantor tick each clause and sign against it.

Therefore, in future, when requesting loan guarantors, financial institutions should be sure to comply with the above requirements of the FTC, or they may be held to have violated the FTA.

FLASH BULLETIN **Bangkok, Thailand**
August 10, 2007
Tilleke & Gibbins INTERNATIONAL LTD.

UPDATE ON THE FOREIGN BUSINESS ACT AMENDMENT

Bangkok newspapers headlined the announcement that the draft FBA amendment did not pass its second reading by the National Legislative Assembly (NLA) on August 8. Instead, the NLA called for a more restrictive definition of "alien" by a vote of 76 to 64. The draft, which had been approved by an ad hoc parliamentary committee, contained almost exactly the same provisions as the version earlier proposed by the Ministry of Commerce ("MOC"). Several NLA members justified their decision by pointing out that although the definition of "alien" in the draft had been amended to incorporate the voting right element, it still was not sufficient to close the existing loopholes in the law. The NLA wishes to solve the nominee issue once and for all by instructing the committee to add management control as another criterion in the definition of "alien". The committee is now tasked to go back and make necessary revisions to the draft, for resubmission to the NLA.

In an interview after the NLA's surprise move, the MOC Minister, chairman of the ad-committee who is a staunch supporter of the draft and strongly opposed to the addition of management control as a criterion, said that he now feels the amended FBA may not pass within the term of this temporary government or before the NLA retires as he anticipated. He remained insistent that the draft definition was appropriate and expressed concern that adding management control to the definition will lead to great damage to Thailand in terms of lost foreign investment. He does not yet have any plan as to when to reconvene the next meeting of the committee and also cannot predict how long the reconsideration process will take.

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Tilleke & Gibbins, a multi-service law firm with offices in Bangkok, Phuket, Hanoi and Ho Chi Minh City, is Thailand's oldest law firm with an extensive, distinguished and illuminating history spanning three different centuries, having represented thousands of clients from in excess of 100 countries. It has grown from a few lawyers and staff post WW II, to a family of approaching 300 persons with expertise in many areas of legal practice focusing on the needs of business and private clients. Through membership in several of the world's largest and most prestigious associations of independent law firms, the firm has direct personal access to about 20,000 professionals in almost 100 countries in order to serve the needs of its clients in Thailand, Vietnam and abroad.

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Davis Wright Tremaine LLP

PRIVACY and SECURITY ADVISOR

Federal Court Dismisses Suit by Alleged Malware Vendor

By Bruce E.H. Johnson, John D. Seiver, Ronald G. London and Sarah K. Duran
[September 2007]

In *Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807-JCC (Aug. 28, 2007), the United States District Court for the Western District of Washington dismissed a lawsuit filed by Zango, Inc., against Kaspersky Lab, Inc., a company that distributes computer anti-virus/anti-malware software that had targeted Zango's products as objectionable. Zango alleged that Kaspersky Lab's anti-virus software improperly identified Zango's websites and ads as malware and alleged tortious interference with contract and business expectancy, trade libel, violation of Washington state's Consumer Protection Act and unjust enrichment. The court rejected Zango's claims and held that Kapersky was entitled to the safe harbor provided in Section 230(c)(2) of the Communications Decency Act (CDA), 47 U.S.C. § 230(c)(2).

The CDA's safe harbor protects providers and users of interactive computer services for "action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers … objectionable" and for "action taken to enable or make available to information content providers or others the technical means to restrict access to [such] material."

The court interpreted the CDA's safe harbor to be quite broad and cited other courts' labeling of immunity (in other Section 230 contexts) as "quite robust." The court also read broadly the requirement that immunity is afforded to a "provider" of "interactive computer service," finding Kaspersky to be an "access software provider" that "provides or enables computer access by multiple users to a computer server." Indeed, the court found that Kaspersky's "anti-malware software is exactly the type" contemplated by the CDA as enabling users to filter, screen, allow and/or disallow content that the safe harbor was designed to facilitate blocking.

The court rejected Zango's argument that it does not provide "objectionable material" within the meaning of the safe harbor. It held that the statute does not require that the material actually be objectionable, but rather only that the *provider* or *user* of the software or service deems such material objectionable. In this regard, it was noted there was no question that Kaspersky considered Zango's software objectionable.

Finally, the court rejected Zango's argument that Kaspersky lost immunity by allegedly acting in bad faith, blocking Zango as part of a "scare campaign intended to generate additional interest in [Kaspersky's] software." The court distinguished between the safe harbor afforded for actions "to restrict access to or availability of material that the provider or user considers to be … objectionable," which has an explicitly stated good-faith requirement, and actions "to enable or make available … the technical means to restrict access" to such material, which does not include any good-faith condition. Because Kaspersky's efforts fell within the latter, the court found, it held it was under no duty to act in good faith. However, the court held that "even if there was a good faith requirement," Zango's "mere conclusory assertion of bad faith, without more, would be insufficient to withstand summary judgment."

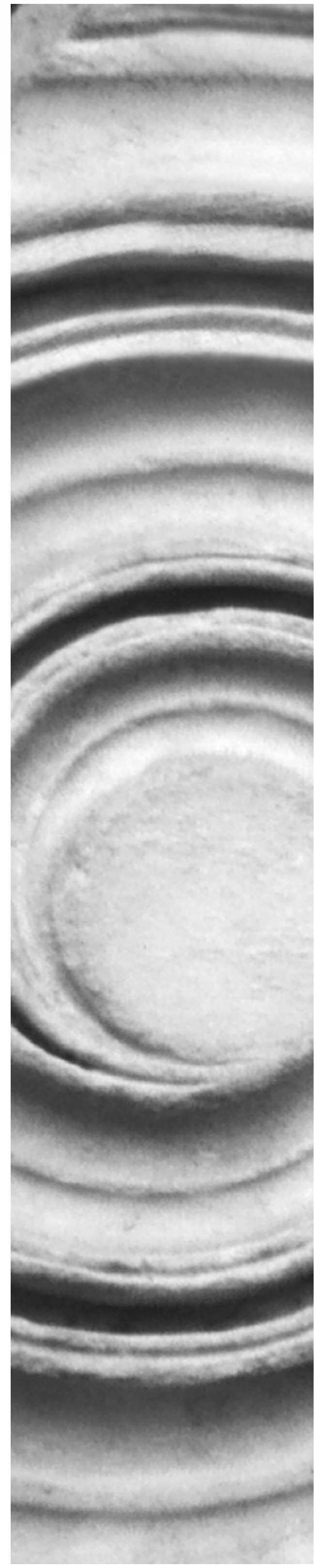
This decision is significant in several regards. The court dismissed all of Zango's claims as a matter of law and refused Zango the opportunity to conduct discovery. This dismissal suggests that vendors and distributors of anti-malware products and services can claim an absolute immunity, even against allegations of bad faith, to communicate with their customers about potential adware and spyware risks and even to facilitate consumer decisions about software installed by third parties on their computers, without incurring liability to the producers and distributors of the software. This "safe harbor" extends, by its terms, to Internet service providers (ISPs).

If there is no good faith requirement for providing anti-malware software to consumers or enabling them to block what they deem unacceptable, future Zango-type lawsuits will become less attractive. As a general proposition, other courts following the broad reading that this court affords the CDA safe harbor will make the prospect of similar litigation less likely, and at a minimum reduce the cost of defending any such cases.

Davis Wright Tremaine LLP was co-counsel for Kaspersky in the case.

For additional information visit www.dwt.com

PUBLIC FINANCE UPDATE



IRS Announces Voluntary Closing Agreement Program for Forward Float Investments in Advance Refunding Escrows

The IRS recently announced on its website a new closing agreement program under the arbitrage rules applicable to tax-exempt bonds for so-called "forward float" agreements utilized in advance refunding escrows. Under the program, issuers will be considered to have acquired such an investment at fair market value if the up-front payment received by the issuer under the forward float agreement is not less than 80 percent of the amount determined using a pricing model provided by the IRS based upon implied forward interest rates derived from the yield curve for U.S. Treasury obligations. The closing agreement program also confirms that such forward float investments purchased in compliance with the existing bidding safe harbor under the Treasury Regulations will be considered purchased at fair market value.

Background. When bonds are issued to refinance a prior issue, and principal or interest on the prior issue will be paid more than 90 days after issuance of the new refunding bonds, the new bonds will be considered an "advance refunding" of the prior bonds. Proceeds of such an issue are generally invested in an advance refunding escrow to be used to pay principal and interest on, and redemption price of, the prior bonds. Under the arbitrage provisions of Section 148 of the Internal Revenue Code, proceeds of the refunding issue invested in the advance refunding escrow generally may not be invested at yield that is higher than the yield on the refunding issue.

Advance refunding escrows are sometimes invested in a portfolio of United States Treasury obligations. It is not always possible to have the investments in the escrow maturing on precisely the same dates that amounts will be needed to pay principal or interest on the prior bonds, so amounts potentially will sit un-invested in the escrow for such periods of time. In order to avoid this inefficiency, the issuer may enter into a forward float agreement with an investment provider, under which the issuer typically will receive an up-front payment in exchange for giving the investment provider the right to invest the proceeds during the float periods. The up-front payment received by the issuer must be taken into account in computing the yield on the advance refunding escrow for purposes of the arbitrage rules.

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A long-standing concern of the IRS is that impermissible arbitrage earnings on an advance refunding escrow may be deflected to the investment provider if the issuer purchases investments in the escrow at greater than fair market value. This has been commonly referred to as "yield burning." In the context of a forward float agreement, such yield burning would occur if the up-front payment to the issuer were less than fair market value. For many years the Treasury Regulations have provided a "safe harbor" under which issuers that purchase certain investments in compliance with specified bidding procedures will be considered to have purchased such investments at fair market value.

New Voluntary Closing Agreement Program. In announcing the new voluntary closing agreement program, the IRS confirmed that forward float agreements acquired in accordance with the bidding procedures set forth in the Treasury Regulations are treated as acquired at fair market value.[1]

In the case of forward float agreements that were not acquired through such a bidding process, the new program provides that an issuer will be treated as acquiring the forward float agreement at fair market value if the up-front payment to the issuer is at least 80 percent of the amount determined under a pricing model developed by the IRS that is based upon implied forward interest rates derived from the yield curve for U.S. Treasury obligations. Under the program, if the amount received by an issuer for a forward float agreement for an advance refunding escrow is less than 80 percent of the amount determined under the model, the issuer may enter into a voluntary closing agreement with the IRS under which the issuer must make a payment to the IRS in an amount necessary to bring the recomputed yield on the advance refunding escrow into compliance with the yield restriction requirements under Section 148 utilizing the IRS's valuation methodology.

It is important to note that this program is only available until March 1, 2008. Thus, issuers who have acquired forward float agreements for advance refunding escrows without utilizing the applicable bidding procedures have only a limited time to enter into a voluntary closing agreement with the IRS under the terms of the program. The IRS may demand higher settlement amounts after March 1, 2008.

Conclusion. Issuers of tax-exempt bonds that have entered into forward float agreements for advance refunding escrows should carefully review whether such investments were acquired in compliance with the bidding safe harbor provided in the Treasury Regulations. If the agreement was not acquired through such a procedure, issuers should consult with their tax counsel over whether the agreement meets the 80-percent test based on the valuation methodology provided by the IRS under the new program. If the 80-percent test is not met, issuers should consider contacting the IRS prior to March 1, 2008, to discuss entering into a voluntary closing agreement.

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[1] One issue that is left unanswered by the new program is whether forward float agreements that were acquired under a bidding procedure as part of a single package with the U.S. Treasury obligations for the advance refunding escrow will be treated as purchased at fair market value.

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California Supreme Court Limits Class Action Waivers in Wage and Hour Cases

September 10, 2007

On August 30, the California Supreme Court issued its opinion in *Gentry v. Circuit City Stores, Inc.* (*Gentry*). In this important decision, the court held that a class action waiver contained in an employment arbitration agreement may undermine employees' unwaivable statutory rights to overtime. The court concluded that such a waiver should not be enforced if a class action arbitration would be a significantly more effective way of vindicating the rights of employees than individual arbitrations. Although the court opined that not all class action arbitration waivers are unenforceable, the dissent suggested that the practical effect of the court's opinion is that no class action waivers will be enforced in wage and hour cases.

Background: *Discover Bank*, Facts and Claims

Nearly two years ago, the court in *Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005), addressed the enforceability of a class action waiver contained in a credit cardholder arbitration agreement mailed in a bill stuffer. The court found that the agreement was procedurally unconscionable, and the class action waiver was substantively unconscionable. Because each individual would have only a very small amount of damages, the court held that the class action waiver would have the effect of insulating the bank from responsibility for its legal fraud. The court did not rule on the possible validity of class action waivers in cases where damages are typically much higher, such as employment cases. In other states, a number of courts have upheld class action waivers in employee arbitration agreements.

The plaintiff in *Gentry* was a customer service manager at a Circuit City store. Prior to the *Discover Bank* decision, he filed a class action lawsuit claiming that he and others were misclassified as exempt employees and were due overtime under California law. When he was hired, Gentry received a packet that contained an agreement to arbitrate employment disputes. The agreement contained a class action waiver that prohibited the arbitrator from consolidating claims of different employees or conducting an arbitration as a class action. The agreement also gave employees the option to opt out of the arbitration agreement, an option Gentry did not exercise.

When Gentry filed suit in court, Circuit City moved to compel arbitration. The trial court upheld the class action waiver and ordered Gentry to arbitrate his claims on an individual basis. After *Discover Bank* was decided, the Court of Appeal upheld the arbitration agreement and class action waiver, finding that because Gentry had the option to opt out, the agreement was not procedurally unconscionable, and that, unlike *Discover Bank*, the damages involved were not predictably small.

The Supreme Court's Reasoning

The California Supreme Court reversed the Court of Appeal in a four-to-three decision. The court noted that, unlike the plaintiff in *Discover Bank*, Gentry brought suit claiming violation of a statute conferring unwaivable rights to overtime. In prior cases, the court had held that where an employee is bound by a predispute arbitration agreement to adjudicate unwaivable statutory rights, arbitration is subject to certain minimal requirements to ensure that it does not result in a waiver of these rights. Thus, the court in *Gentry* considered whether the class action waiver would lead to a *de facto* waiver of those statutory rights or if the right to maintain a class action was necessary to enable a plaintiff to vindicate his or her rights in arbitration.

The court concluded that in wage and hour cases, a class action waiver "would have, at least frequently if not invariably," an exculpatory effect and would lead to a *de facto* waiver of an employee's statutory right to overtime. Several considerations motivated the court's holding. First, the court stated that awards in wage and hour cases tend to be modest and often involve low wage workers. The court noted the risk that such employees, if forced to sue individually, would be faced with high costs of litigating, even in arbitration, and that class actions play an important role by providing employees an inexpensive way to resolve their disputes collectively. While the court conceded that "in theory" arbitration can be quick and inexpensive, it expressed concern that the prospect of multiple employees filing individual claims could drive up costs and diminish the prospects that the overtime laws would be enforced. Second, the court found that current employees who file claims are at risk of retaliation, which further supports the use of class actions. Third, the court stated that some employees may not file claims because they are unaware that their rights have been violated, noting that employees (particularly those with limited English speaking skills) may not understand the nuances of overtime laws. Finally, the court declared that a class action may be justified to ensure enforcement of an employer's obligations to pay overtime.

The court in *Gentry* held that when it is alleged that an employer has systematically denied overtime pay to a class of employees and a class action is requested, a court must consider the following factors in determining the validity of the class action waiver:

- The size of the potential individual recovery
- The potential for retaliation against members of the class
- The fact that absent members of the class may be ill-informed about their rights
- Other real-world obstacles to the vindication of class members' right to overtime pay through individual arbitration

If, based on these factors, a court concludes that a class arbitration is likely to be a significantly more effective means of vindicating the rights of the affected employees than individual arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of overtime laws for the employees allegedly affected by the employer's violations, a class action waiver must be stricken.

In reaching its decision, the court rejected the argument that administrative proceedings before the California Labor Commissioner provided an adequate substitute for class arbitration. The court also rejected the argument that its test for the validity of class action waivers discriminated against arbitration clauses in violation of the Federal Arbitration Act, claiming that it was applying a principle that applied to class waivers "in arbitration and nonarbitration provisions alike."

The court stated that it was not foreclosing the possibility that there may be circumstances in which individual arbitrations may satisfactorily address the overtime claims of a class of employees "or that an employer may devise a system of individual arbitration that does not disadvantage employees in vindicating" their overtime rights. The dissent disagreed, noting that "the practical effect of the majority's holding" was to invalidate class action waivers in arbitration agreements in overtime lawsuits.

The court also rejected the argument that because Gentry's arbitration agreement contained an opt-out clause, it was not procedurally unconscionable. The court held that procedural unconscionability may exist even if there is a right to opt out of an arbitration program. Unconscionability may exist if the employer does not provide employees with "material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that employees felt at least some pressure not to opt out." The court also ruled that it was not necessary to show unconscionability to invalidate a class action waiver in an overtime case because the statutory rights to overtime are not waivable.

Implications of *Gentry* for Class Action Waivers

Although the court's opinion addresses only statutory claims to overtime and does not foreclose the possibility that class action waivers may be enforced in other employment-related cases, employers are likely to face an uphill battle enforcing class action waivers. Also, the benefits of an opt-out provision in an arbitration agreement have been called into doubt because *Gentry* found that even with an ability to opt out, an agreement may still be procedurally unconscionable.

Finally, the court stated that if a class action waiver is invalidated, the employer may possibly be required to proceed to class action arbitration. If that is an unsatisfactory outcome, employers with class action waivers in their arbitration agreements may consider a provision that terminates the arbitration agreement for class claims and the underlying individual claims if the class action waiver is invalidated.

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Email Alerts

UNITED STATES PATENT OFFICE PUBLISHES NEW RULES ON CONTINUING APPLICATIONS AND CLAIMS

August 22, 2007

By Mary Rose Scozzafava, Ph.D., Henry N. Wixon

On August 21, 2007, the US Patent and Trademark Office (PTO) published new rules that make a number of controversial revisions relating to patent prosecution. Two aspects of the new rules seem to be the most important. One limits the number of continuations applications that an applicant may file; the second requires the applicant to provide an extensive "examination support document" if an application contains more than five independent or 25 total claims.

Before issuing the new rules, the PTO received over 500 comments from the public in response to an earlier notice of proposed rulemaking, and the final rules are accompanied by more than 300 comments with responses from the PTO. Many of these address the effect of the rule changes on the pharmaceutical and biotechnology industries.

The new final rules amend many different sections of 37 CFR (the Patent and Trademark Office Rules of Practice), with varying effective dates. Most of the final rules go into effect as to nonprovisional applications filed (or entering the US national stage) on or after November 1, 2007. However, they will also apply to a nonprovisional application filed prior to November 1, 2007, where a first office action on the merits is not mailed before that date.

It is important to note that the limits on the number of continuations apparently apply to continuing applications filed on or after August 21, the day the new rules were published.

Continuations

Under the previous rules, there was effectively no limit on the number of continuation applications--or requests for continued examination--that could be filed. The extensive new revisions limit an applicant to two continuation applications (or continuation-in-part applications), plus one request for continued examination. Any additional continuation applications, continuation-in-part applications or requests for continued examination are permitted only if the applicant files a petition showing why the amendment, argument or evidence sought to be entered could not have been previously submitted. In addition to the permitted number of continuations and requests for continued examination, the new rules also allow an applicant to file a divisional application during the pendency of the application that was subject to the pertinent restriction requirement or the pendency of any continuing application of such an application. Each divisional application will be entitled to file two continuing applications and one request for continued examination.

The PTO's own summary of its new "continuations" rule is somewhat complex. The new rules seem to limit the number of continuations and requests for continued examination that may be filed after the August 21, 2007, effective date. However, according to the PTO, the new rule procedure provides applicants with "one more" continuation application (filed prior to the publication date of the final rule), such that the office is not engaging in retroactive rulemaking.

A somewhat related provision, relevant to applications filed before November 1, 2007, requires applicants to identify co-pending, commonly assigned applications having at least one inventor in common and filed within two months of one another, within the time periods specified in the rules (the later of four months from the filing date or two months from the official filing receipt mail date) or by February 1, 2008, whichever is later.

Number of Claims

Under the previous rules, there was no real limit on the number of claims that an applicant could present, although the claim fees could be substantial.

The revised rules seek to limit an application to no more than five independent claims and no more than 25 total claims. An applicant may file more claims, but if it wishes to do so, it must also prepare and file an extensive "examination support document" that covers all of the claims in the application. According to the revised rules, such an examination support document must include a preexamination search statement; a listing of references deemed most closely related to the subject matter of each of the claims; an identification of all of the claim limitations that are disclosed in the references; a detailed explanation particularly pointing out how each of the independent claims is patentable over the cited references; and a showing of where each claim limitation finds support under 35 U.S.C. 112 in the application and in any prior-filed application.

The "five and 25" claims limitation will be applied independently to each of an applicant's initial applications and two continuation or continuation-in-part applications. Thus, under some circumstances, an applicant may present up to 15 independent claims and 75 total claims to a single patentably distinct invention--via an initial application and two continuation or continuation-in-part applications that are filed and prosecuted serially--without having to provide an examination support document.

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