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Hot~Po!nts

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~LITIGATION & DISPUTE RESOLUTION
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GOVERNMENT ACTS TO CURB knockoffs & counterfeits

Fake designer purses and watches at rock-bottom prices. Copycat couture dresses and gowns like the movie stars wear. Cheap versions of home furnishings that look just like the real stuff. Auto parts, brake pads—even entire luxury cars that are assembled from look-alike components.

Such a deal. ***Or is it?***

The sophisticated, well-financed manufacture of counterfeit goods is fast becoming one of the most pervasive and costly crimes of the century. And legitimate industries are quickly realizing no one is immune from this $500 billion scam.

Knockoff businesses directly impact genuine manufacturers' bottom lines. In the auto industry alone, it's estimated that phony parts cost $12 billion in lost sales; and automakers could hire an additional 210,000 employees if the counterfeit problem were solved. In addition to that huge financial impact, fake goods aren't held to any standards, and may compromise consumer safety as well.

In recent years, the fight to curb counterfeiting has become a constant battle for attorneys, business executives, legislators, and other government officials. Now, a Bill—H.R. 32, co-sponsored by U.S. Representative Joe Knollenberg from Michigan's 9th District—would put teeth into existing federal law, mandating seizure and destruction of counterfeit goods and all the machinery, tooling, and supplies used to produce them.

If enacted, the legislation would also affect bilateral and international agreements with our country's trading partners. It would provide additional leverage for the U.S. to demand that other countries enact similar changes in their laws—leading to greater protection in countries like China, where authorities find it difficult to shut down illegitimate shops when powerful state-owned enterprises are often involved.

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~REAL ESTATE
James W. Govert
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Maximize & Condo-ize

Public-private real estate partnerships get creative with condominium projects—for some very good reasons

Facing budget constraints and borrowing restrictions, many of today's public officials are looking to team up with private developers to help finance, design, construct, and operate real estate projects. But structuring a deal to satisfy both the economic objectives of private developers and the myriad requirements of civic projects can be a real challenge.

The solution? For a growing number of municipalities, school districts, hospitals, and other public authorities, a condominium project can meet those conflicting demands. And Michigan law allows plenty of flexibility in ownership and operation that makes the condo arrangement even more attractive.

Ownership: Allocate rights to suit your objectives

Condominiums allow an owner of land to subdivide the parcel into two or more units, each of which can then be separately owned, leased, transferred, or financed. Condominium units may be defined to include parcels of land, all or a portion of the buildings and improvements located on that land, or some combination of both. Many condo plans also include "common elements"—portions of the projects serving all of the units that can be owned separately by the condo association, or owned jointly by the unit owners.

Because Michigan law gives leeway to unit owners in determining property rights, public-private partnerships can allocate those rights to address their specific concerns. For example, a public entity might transfer unused or underutilized land to a private developer, but retain some rights and control related to the eventual development project.

Financing: Segregate public and private use to meet funding requirements

More good news: Individual units in a condominium project can be separately financed, allowing a public-private partnership to leverage funds from a variety of sources, over a period of time, if necessary. Those units designated for private use will be economically attractive to investors, and to commercial lenders too.

Both the legal and physical boundaries of a condo development can be crafted to segregate public and private uses, ensuring compliance with complex limitations on "private uses" for projects funded with public monies.

To illustrate: a municipality could use a parcel of public land in partnership with a private developer to build an office tower. Some space would be used by a public agency, while the balance would be rented to private firms at market rates. Separate condo units for floors or suites with private tenants might be funded from commercial sources, while the remaining units used by a public entity could be funded from proceeds from tax-exempt bonds or other forms of public financing.

Adaptability: Use land more creatively

Yet another advantage: Unlike traditional lot development, a condominium approach can help overcome design hurdles and simplify operation and management concerns once a project is complete.

Condo projects often enjoy some relief from local land-use requirements—especially with respect to zoning rules governing lot size and configuration. So long as the overall project meets with zoning and related land-use standards, individual units and common elements within the condominium may not be subject to these rules. In addition, designating a project's infrastructure as a common element allows it to be designed without regard to unit boundaries and may result in operational efficiencies.

A condominium project may allow the otherwise incompatible requirements of public and private developers to be resolved and serve everyone's interests. In addition to making public/private real estate projects "developable" using a condominium structure, our firm has extensive experience in guiding these ventures to their successful completion. For more information, call the author.

A Word of Advice

Although the condominium structure is well suited for a public-private real estate development, it does require the help of experts. In addition to competent legal counsel, secure the services of an architect, surveyor, civil engineer, general contractor, and title company to realize the full benefit of your project. We would be happy to assist in the selection of your experts.

CLIENT ALERT

Circular 230 Regulations are in effect
New rules govern tax advice

In recent years, both the IRS and Treasury Department have beefed up efforts to curtail certain tax transactions considered to be abusive. As part of those efforts, the Treasury Department has issued new regulations under Circular 230, which set forth rules and standards for attorneys and other professionals who render written tax advice. The rules took effect June 20, 2005.

As a result of these regulations, any written advice addressing federal tax issues must either meet the standards for "covered opinion" or include a legend stating that the advice may not be relied upon for purposes of avoiding federal tax penalties.

To meet "covered opinion" standards, written advice must review, investigate, and evaluate all relevant facts, assumptions, and representations; fully discuss all applicable legal authority; and completely analyze and provide a detailed conclusion for each and every federal tax issue pertaining to the transaction.

Prior to the new regulations, taxpayers generally could assert a "reasonable cause" defense when facing potential federal tax penalties if they reasonably relied on advice from an attorney or other tax professional. Now, written tax advice from a tax professional alone may not be sufficient to avoid these penalties, if the advice fails to meet Circular 230's "covered opinion" requirements.

In order to meet the requirements of Circular 230, our firm's email and certain other written communications will now bear this legend advising our clients that they may not rely on that material for the purpose of avoiding federal tax penalties:

> NOTICE TO PERSONS SUBJECT TO UNITED STATES TAXATION:
>
> DISCLOSURE UNDER TREASURY CIRCULAR 230: The United States Federal tax advice, if any, contained in this document and its attachments may not be used or referred to in the promoting, marketing, or recommending of any entity, investment plan, or arrangement, nor is such advice intended or written to be used, and may not be used, by a taxpayer for the purpose of avoiding Federal tax penalties.

Written tax advice that meets the Circular's standards and, thus, may be relied upon for preventing federal tax penalties is available by contacting the appropriate Miller Canfield attorney. If you'd like to know more, please contact our Federal Tax and Employee Benefits Group; Michael Indenbaum, 313/ 496-7979; or Carolee Cameron, 313/ 496-7627.

Issues in Labor & Employment Law
Miller Canfield's Annual Seminar

October 20, 2005
8:30 am ~ 4:30 pm

MSU Management Education Center
Troy, Michigan

A full day of information, updates, interactive workshops, and lively Q&A. All HR professionals, managers, in-house counsel, CEOs, and business owners will want to attend.

This seminar has been approved for seven credit hours toward PHR and SPHR re-certification through the Human Resource Certification Institute. For more information, visit the HRCI at www.hrci.org.

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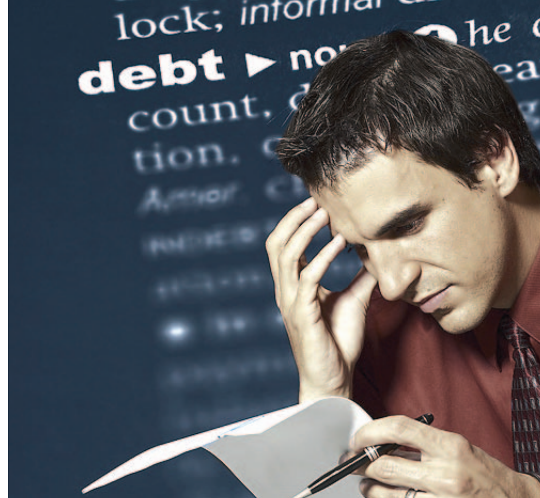

HEADS UP

The U.S. business bankruptcy law has changed. *Here's what you need to know.*

Quicker deadlines. Faster cases.
Under the old law, debtors had the right to submit a plan for reorganization during the first 120 days after filing a bankruptcy case, as well as the right to solicit acceptances of that plan for 180 days after filing. Courts typically extended deadlines to allow debtors time to investigate all possible reorganization options. No more. The new bankruptcy law limits the court's discretion to allow extensions, requiring a plan to be submitted a maximum of 18 months after a case is filed. Acceptances must be solicited and secured within 20 months of filing.

Creditor protection.
A great bane for any creditor is being sued for "preferences"—the recovery of payments made within 90 days of a debtor's bankruptcy to cover prior debt owed. The new law makes it easier for a creditor to prove that such payments were made in the ordinary course of business, providing a strong statutory defense. The law also imposes a $5,000 minimum for any such suit.

Real estate leases tightened up.
Debtors used to have 60 days from the filing of a bankruptcy case to assume or reject a debtor's lease of commercial real estate property. But, like other deadlines, this one was repeatedly extended by the courts. The new law requires a debtor to decide the disposition of commercial leases within 120 days from the case filing, and the court may extend this deadline only up to 90 days for cause. That means debtors will have, at most, seven months to determine whether to assume or reject nonresidential real estate.

Reach extends across the border.
A new Chapter 15 has been added to the Bankruptcy Code, incorporating the model law on cross-border bankruptcy issued by the United Nations Commission on International Trade Law. Now, U.S. bankruptcy courts will have a mechanism to recognize and act on insolvency cases that span the globe.

While the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was enacted on April 20, 2005, most of its provisions don't take effect until October 17, 2005. Call us if you'd like more information.

New law. Old concept.

The term "bankruptcy" traces its roots back to the days of Roman law and Italian city-state statutes. Banca-rupta was the medieval trade custom of breaking (rupta) the bench (banca) of a banker or tradesman who stole the property of his creditors.

Now you know.

Important Michigan Supreme Court ruling confirms **3***-year limit on discrimination claims*

~LABOR & EMPLOYMENT
Christopher M. Trebilcock
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"Three years means three years." So said the state's Supreme Court in a recent 4-3 decision that clarifies the statute of limitations period applying to employment discrimination claims made under state law.

In *Garg v. Macomb County Community Health Services*, the Supreme Court ruled plaintiffs cannot pursue claims for alleged employment discrimination acts that occurred more than three years before the lawsuit was filed.

Prior to the *Garg* ruling, plaintiffs could pursue claims for events that occurred more than three years ago, based on the "continuing violations doctrine." That doctrine expanded the statute of limitations beyond three years to allow evidence suggesting a pattern of related discriminatory conduct, providing at least one of those discriminatory acts occurred within the three-year limitations period.

While recognizing that the continuing violations theory had some merit, the Supreme Court's majority opinion said the benefits of applying a clear three-year statute of limitations outweighed the harm from not allowing plaintiffs to pursue claims based on events more than three years prior. In enforcing the three-year limitations period in Michigan law, the Justices determined a three-year limit recognizes that memories fade and witnesses or evidence may no longer be available—thereby preventing stale claims based on long-past occurrences.

Although the *Garg* decision has set attorneys scurrying to see whether their cases now contain outdated claims or allegations, other questions remain.

- Does the ruling apply to hostile environment claims, which frequently consist of a series of events over some period of time?
- Will the ruling limit the discovery of evidence of a decision-maker's predisposition to discriminate? Or limit the scope of discovery to the three-year timeframe?

Defense counsel hoped that *Garg* would offer clarification. On reconsideration, however, the Supreme Court struck a seemingly critical footnote from its original opinion—explaining the majority's belief that evidence of events outside the three-year limitations period could not be used for any purpose to support timely claims.

Although the issue of whether such evidence is admissible as "background evidence" is still an open question, the Supreme Court majority apparently tipped its hand on how it might rule on that question in the future. Absent further clarification from the Michigan courts on this issue, the Equal Employment Opportunity Commission (EEOC) and federal district courts could see an increase of those hostile environment claims previously filed in state court based on the belief that these forums will provide clearer standards regarding evidence.

In the meantime, employees and their attorneys who pursue state law claims of employment discrimination will be held to *Garg's* three-year limitations.

Douglas W. Crim
517/ 483-4964

Employers who put profit over safety risk prosecution

MIOSHA gets tough with willful violators

A foreman neglects to have an electrical utility line relocated as advised. When a company's dump truck comes in contact with the overhead power line, the driver is electrocuted. An excavating company fails to provide proper trench cave-in protection, resulting in a worker's death. An environmental company forgets to clean a gasoline storage tank before cutting it apart with a torch, resulting in an explosion and the death of an employee. All are Michigan worksite accidents. And all resulted in criminal prosecution under Michigan Occupational Safety and Health Administration (MIOSHA) provisions.

Michigan takes worker health and safety seriously. Unlike federal OSHA criminal standards, which permit only misdemeanor charges, Michigan's MIOSHA Act allows felony charges.

When an employee dies because of an employer's willful violation, MIOSHA issues a citation—and all evidence is turned in to the state Attorney General for criminal investigation. Lately, MIOSHA and the Michigan Attorney General's Office have shown a greater willingness to bring criminal charges in workplace fatality cases when facts and circumstances indicate that an employer egregiously failed to protect employees. Not only are companies charged. When evidence exists that specific individuals are guilty of willful conduct, they face prosecution too.

And how does MIOSHA decide what constitutes willful conduct? For purposes of criminal prosecutions, "willful" means an employer intentionally disregards a requirement, rule, or standard of MIOSHA or is indifferent to the rules. In other words, "willful" doesn't require evil or criminal intent, or moral turpitude.

Before issuing a willful citation, MIOSHA officials use a worksheet to gather and document evidence surrounding the fatality. Among the questions asked:

- ✔ Did the employer or employer representative know the condition existed?
- ✔ Did the employer or representative know the condition was hazardous?
- ✔ Did the employer know the condition violated a MIOSHA standard?
- ✔ What knowledge of safety and health matters related to the accident would be reasonably expected for this employer and industry?
- ✔ What precautions were undertaken by the employer to limit the hazardous condition?
- ✔ Were any similar violations or hazardous conditions brought to the employer's attention in the past?
- ✔ Do any previous MIOSHA citations, letters, or notifications exist?
- ✔ Were there any previous injuries, illnesses, or accidents related to the violation or condition?
- ✔ Was the violation or hazardous condition a recurring problem in the facility or in any other facilities under the employer's control?
- ✔ Did the nature and extent of the violations constitute indifference to safety and health? Did they constitute a purposeful disregard of responsibility under the MIOSHA criminal enforcement act?
- ✔ Was the company able to gain by not complying with the standards? Was there a motive?

Three factors weigh heavily in the decision to bring felony charges:

1. An employer's heightened awareness of a hazard and reckless decision not to take corrective measures
2. Any appearance that an employer profited from the decision not to protect employees from a known hazard
3. A pattern of health and safety violations—particularly if the pattern persists after a fatality

It's clear that citations are up and the Attorney General's Office is very deliberate in its review of evidence—often taking a year or more to make a decision about whether to bring criminal charges. The wise employer will make worker safety a priority. Call us if you'd like some help.

Andrew P. Doornaert
313/ 496-8431

U.S. extends long arm of the law

Evasion of import taxes elsewhere could lead to prosecution at home

It was no happy hour when a group of U.S. citizens were caught trying to smuggle large quantities of liquor into Canada without paying that country's alcohol import taxes.

Although the plot involved failure to pay import taxes in a foreign country, U.S. prosecutors went after the offenders using an unusual application of the U.S. wire fraud statute. That statute prohibits the use of interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses."

Prosecutors determined that the smugglers met two elements of the wire fraud statute: they engaged in a scheme to defraud, and the object of the fraud was money or property "in the victim's hands"—which, in this case, was Canada's right to the uncollected excise tax. Also of interest, the U.S. government's reliance on Canadian customs and tax laws continued at sentencing, where the amount of Canada's import duties the defendants evaded—a whopping $3.6 million—resulted in stiffer penalties in accordance with U.S. sentencing guidelines.

Recently, these decisions were upheld by the U.S. Supreme Court. In *Pasquantino v. United States*, the Court ruled that people who engage in a conspiracy to evade another country's import taxes can be prosecuted under the U.S. wire fraud statute.

In making its ruling, the Court concluded: "It may seem an odd use of the Federal Government's resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statutes authorizes us to do so."

The bigger issue to consider is this: Could the wire fraud statute be applied to any multinational corporation that does business in different customs duty and tax jurisdictions around the world and establishes a duty- or tax-avoidance plan? Could such plans be considered schemes?

It's possible U.S. prosecutors relied on the wire fraud statute because they were limited in how they could pursue an act of "organized crime" where foreign taxes were avoided. Nonetheless, the Court may have inadvertently established a new tool for prosecutors to go after multinational corporations.

In the meantime, a review of customs duty and tax law for those doing business outside the U.S. may be in order.

Note: With an office in Windsor, our firm is uniquely able to assist companies importing goods to Ontario, as well as with Canadian customs compliance issues. Call us if we can help.

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Called the "Stop Counterfeiting in Manufactured Goods Act," the Bill was passed by the House in May 2005, and is now headed for the Senate. Along the way, it has earned the support of many organizations—including the National Association of Manufacturers, the National Retail Federation, the U.S. Chamber of Commerce, and the Automotive Aftermarket Association.

How can you fight the fakes? For the time being, companies and their attorneys should stay on top of developing legislation, both here and abroad. Those businesses involved in international trade, and those with joint venture partners or subsidiaries overseas, need to be especially attuned to the problem.

Companies should adopt effective measures to detect and seize bogus goods, and be prepared to actively prosecute—both civilly and criminally—those who produce the knockoffs. It's also advisable to register trademarks and patents in other countries such as China.

Because 25% of our trade from Canada crosses the Ambassador Bridge between Detroit and Windsor, Detroit has become a hot spot for counterfeit goods. U.S. Customs agents are the first line of defense and they're prepared to assist. Companies and their legal counsel should work with agents and educate them on how to detect a fake. They should also consider setting up enforcement teams of investigators and attorneys in areas near suspected counterfeiting operations or at ports of entry to identify, seize, and halt production.

To learn more about this issue, or get an update on the status of pending legislation, call the author.

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