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When a key customer files bankruptcy...

WHAT SHOULD YOU DO?



As bankruptcy filings increase, more companies are faced with that very question. Here are some strategies for protecting your interests.

If you're a creditor in a bankruptcy case, you have two major areas of concern: collecting debts that were incurred prior to the bankruptcy filing; and the debtor's ability to continue to perform and pay its debts after the filing.

In the case of bankruptcy under Chapter 11, a debtor is usually not permitted to pay pre-petition claims until a plan of reorganization is confirmed or the debtor assumes the creditor's contract. Similarly, a creditor is prohibited from taking action against the debtor to obtain payment of pre-petition debt during this period. In fact, an attempt to collect payment of pre-petition debt or seek any remedy against the debtor with respect to the pre-petition debt may result in a violation of the "automatic stay," which is in place to protect a debtor during reorganization or liquidation of assets.

Still—it's important for you to preserve your claims. If you are a secured creditor, you'll have a greater likelihood of recovery if you've retained a lien at least equal to the amount of your claim, and there's no prior lien on the assets in question. Lien or no lien, you should plan to file a "proof of claim" prior to the bar date. Such claims are assessed by the debtor and—although there's no guarantee—may be re-paid at least in part.

If you've sold goods to an insolvent debtor, you may be entitled to reclaim possession. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (which took effect in October), you have 45 days after receipt in which to make a written demand for reclamation, or 20 days after the date of a bankruptcy filing, if the 45-day period expires after the filing. Reclamation depends on several factors, including whether the goods are subject to the prior rights of a holder of a secured interest.

And what of the debtor's ability to meet its contractual obligations and continue to work with you following a bankruptcy filing?

If there's a contract in place, the debtor will usually have a certain amount of time to decide whether to assume or reject the contract. During that period, both parties are expected to continue to perform. However, claims that arise following the bankruptcy filing are given priority as

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Just what the doctor ordered?

When criminal law invades the examining room, everyone can suffer



One would think a physician's decision to prescribe a controlled substance for treatment of pain would be purely a medical issue. Wrong. Lately, criminal law has begun to creep into the practice of medicine, and the prognosis for doctors, patients, and prosecutors is uncertain.

With increased media coverage of painkiller abuse, federal and state prosecutors are going after physicians who, they claim, are prescribing controlled substances for illegitimate purposes. Using every tool at their disposal in the pursuit of "dirty doctors" who write bogus prescriptions, prosecutors in Michigan are charging physicians under the state's Racketeer Influenced and Corrupt Organizations (RICO) statute—a law that can carry a 20-year prison sentence. In some cases, prosecutors are filing civil forfeiture actions in an attempt to recover a physician's assets that are traceable to the unlawful prescribing of controlled substances.

No one disagrees with stiff punishment for doctors who knowingly sell prescriptions to addicts or those who deal drugs. But determining who has a legitimate medical need for a powerful painkiller and who doesn't can be difficult—even for the trained physician.

For starters, the nature of pain is largely subjective. While doctors can run tests to diagnose the underlying cause of pain, there's no objective way to determine whether a patient's discomfort is sufficiently serious to require treatment with a controlled substance. In large measure, physicians are forced to rely on their patients' word—and drug addicts often have a special ability to fake their suffering. The risk for doctors is that they'll be charged for being fooled into writing an unnecessary prescription for a controlled substance.

To make their case, prosecutors may look at a physician's examination and treatment protocols, contrasting them with the prevailing "standard of care." Thus, if a reasonably prudent doctor would prescribe a controlled substance only after a thorough physical exam and numerous tests, a doctor who writes a prescription after only a perfunctory examination or short visit with a patient may be subject to prosecution. Physicians argue that such conduct may constitute medical malpractice—but isn't necessarily criminal.

Meanwhile, the intrusion of criminal law into the examining room seems to have had the unintended consequence of dissuading physicians from writing painkiller prescriptions for those patients who have a genuine need for the medications. Recent studies have documented substantial under-treatment of pain in this country, and significant personal and economic cost.

That said, it's more important than ever for doctors to consult with their attorneys to develop a full understanding of how criminal laws are being applied against physicians, learn how best to prescribe controlled substances when they are needed, and minimize the risk for prosecution. An ounce of prevention can cure a lot of pain.

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Are you a manufacturer of motor vehicles or automotive equipment?

Here's what you should know about reporting defects and issuing recalls

Under the Motor Vehicle Safety Act, the National Highway Traffic Safety Administration (NHTSA) is authorized to establish safety standards for vehicles and vehicle equipment used in interstate commerce—as well as regulations for reporting defective products or issuing recall directives. Given the many nuances of those reporting and recall responsibilities, a careful examination of the fine points is in order.

A REPORT IS REQUIRED

- 🚗 If the motor vehicle or equipment does not comply with a safety standard
- 🚗 Or when the manufacturer determines that there's a defect related to safety

DEADLINE

- 🚗 The defect report must be filed **within five business days** after the safety defect is discovered, or noncompliance with a motor vehicle safety standard has been determined.
- 🚗 Information about a safety issue that is not available within that five-day period must be submitted as it becomes available. Late filing of a report may not be excused by a lack of complete information or documentation.

WHAT TO SUBMIT TO NHTSA

- 🚗 Notices, service, or technical bulletins
- 🚗 Product improvement bulletins
- 🚗 Warranty and policy extensions
- 🚗 Any communications sent to more than one manufacturer, distributor, dealer, lessor, lessee, or purchaser regarding a defect in a vehicle or automotive equipment (including any failure or malfunction beyond normal deterioration in use; or any failure of performance, flaw, or unintended deviation from design specifications), **whether or not the defect is related to safety.**

PENALTIES FOR FAILING TO ACT

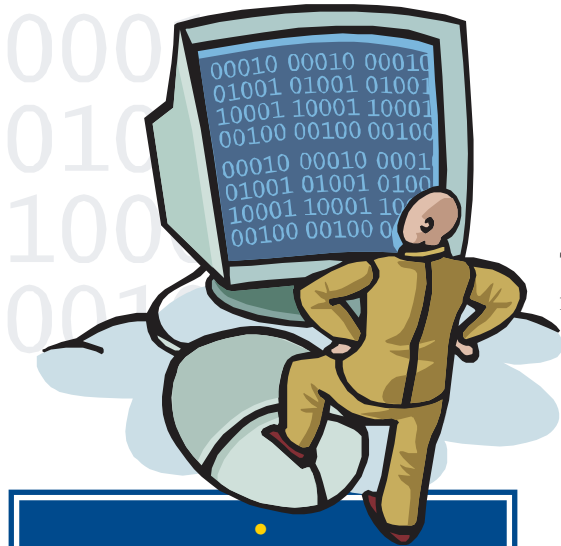
- 🚗 Failure to comply with reporting or recall requirements carries stiff penalties. While the law provides for a civil penalty of no more than \$5,000 for each violation, it's important to note that **a separate violation occurs for each motor vehicle or item of motor vehicle equipment**, and for each failure or refusal to meet the required reporting or recall mandates.
- 🚗 The maximum civil penalty related to such a series of violations is \$15 million. What's more, the law allows prosecution for criminal contempt.

Clearly, the NHTSA means business when it comes to safety standards. Automotive and motor vehicle equipment manufacturers who would like further information or advice regarding recall or reporting requirements are invited to call the author or Amy M. Johnston, 248/ 267-3374.



~ INFORMATION TECHNOLOGY
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How to steer clear of a **Software Snafu**



BEGIN WITH A COMPREHENSIVE CONTRACT

The devil is in the details. Before you begin your software project, make sure you have a carefully written contract.

- **Spell out what you expect your software to do in as much detail as possible.** Consult a specialist in the ways of software functioning if you're not sophisticated in IT. Your contract specifications should guide your vendor or—in the worst case—convince a court that you didn't get what you paid for.
- **Get a fixed price and a firm schedule,** backed up by penalties for missed deadlines. Unless you're knowledgeable about software projects, a time-and-materials contract is a bad idea.
- **Make sure your vendor agrees to perform up to industry standards.** Carnegie Mellon's Software Engineering Institute (SEI) and the Institute of Electrical and Electronics Engineers (IEEE) have published widely accepted standards for software projects. If your vendor balks at contract language that incorporates these or similar standards, it's wise to keep shopping.

In the September issue of Spectrum magazine, Robert Charette, author of numerous books on risk management, concludes that up to 15% of all software projects are cancelled before or shortly after delivery because the new system fails to do what it was expected to do. Even if the project isn't abandoned outright, many software programs come in over budget and behind schedule because they require massive retooling before they can function.

According to Charette, "Few IT projects... truly succeed." Here's what you can do to make sure your software project is productive.

NO CONTRACT? WHAT TO DO IF YOU HAVE PROBLEMS

If your software project is already in progress and your contract is vague or non-existent, legal solutions are available—but they may be more complicated. That's because laws in most states aren't yet geared to remedy computer and software failures. Although a national committee of scholars recently drafted a new section of the Uniform Commercial Code to specifically address the sale (and failure) of software, only two states have adopted it—and Michigan isn't one of them.

What to do? It might be best to cut and run. If your installation is facing mounting problems, take a good hard look at its chance for success. Don't minimize the snafus and hope they'll go away. Sit down with your vendor and work out new arrangements. If that's not possible, you could be doing yourself a favor by getting out of the deal.

Is your company **lie-censing** software?



POP QUIZ: How many software licenses are in use at your company? Who's using them? On what systems are they used? If you don't know the answers to these questions, it's time for an assessment of your company's software licenses. Here are some tips to get you started.

1. BE COPYRIGHT SMART

"You mean I wasn't supposed to download that undocumented software to my work computer?" Yep, that's right. Sometimes employees need a friendly reminder that software programs are protected under the U.S. Copyright Act. Illegal copying of software—intentional or not—can result in fines or imprisonment, and cases involving company software piracy often draw large fines. Be sure your employees are aware of copyright restrictions.

2. DO YOUR DUE DILIGENCE

"Wow! I can get this software for \$5.99 when other vendors are selling it for \$59.99!" If the price seems too good to be true, beware. Check your sources. Are you buying from an authorized dealer or a software pirate? Is the software authentic? When in doubt, talk directly to the software publisher. If your company has designated an IT agent, make certain you've established some checks and balances to oversee that person's decisions.

3. BE PROACTIVE

"Oops... we're overusing our software licenses." Don't wait until non-compliance is brought to your attention by an employee or—worse yet—your software vendor. Conduct regular self-audits of the programs licensed by your company at least once a year. If your audit reveals an under-usage, try to reallocate those unused licenses to make the most of your agreements. If you're over-using some licenses, check your licensing agreement for notification requirements and follow through on your obligations. Always respond to an appropriate audit request from your software vendor. Need some help? Several software programs can make it easy to conduct efficient self-audits and keep track of your licenses.

**Take these
steps to save
time, money,
and your
company's
reputation.**

New Roth option begins January 1

401 (k) and 403 (b) plans affected



Starting January 1, 2006, all taxpayers—including those in higher brackets—will be allowed to make Roth contributions to their 401(k) plans. The new rules likely will apply to 403(b) plans as well. Contributions to a Roth are taxable at the time they're made, but the account grows tax-free, and accumulated earnings escape taxation when they're distributed. And that can be good news for retirement savers.

WHAT YOU SHOULD KNOW

- ✓ 401(k) Roth contributions may be made by all plan participants, regardless of their income level
- ✓ After-tax contributions to a Roth 401(k) are allowed to grow 100% tax-free, providing distribution occurs at least five years later
- ✓ The annual 401(k) contribution limit is higher than for a traditional Roth IRA: \$15,000 versus \$4,000. Higher limits of \$20,000 apply if a participant is 50 or older
- ✓ A Roth 401(k) account may be rolled into a Roth IRA, where it's not subject to minimum distribution requirements

- ✓ A separate, designated account for a Roth 401(k) must be established, and Roth 401(k) contributions must be treated separately until the entire account has been distributed
- ✓ A participant's choice to designate a contribution to a Roth 401(k) is an irrevocable election and must be made prior to the date of an actual contribution
- ✓ Contributions to a Roth 401(k) are included in taxable wages, subject to applicable income and employment tax withholding
- ✓ Certain documentation requirements apply. For example, an existing 401(k) plan must be amended and designated as a Roth 401(k). Direct rollover provisions must also be amended to rollovers to either a Roth 401(k) or Roth IRA

Should you make pre-tax contributions to a traditional 401(k) or convert to an after-tax Roth 401(k) plan? Before taking action, be sure to consult with plan participants, employer/plan sponsors, third-party administrators and retirement and financial planning professionals.

Learn more
with a
click



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CLIENT ALERT

IRS relaxes "USE IT OR LOSE IT"

The IRS recently announced a modification in a rule governing use of flexible spending accounts (FSA). Cafeteria plan sponsors now may amend FSAs to give participants a 2 1/2-month grace period to use up remaining account balances. Prior to this change, participants in a health or dependent-care FSA were required to forfeit any unused account balance at the end of the plan year. If plan sponsors wish to offer the extension, they must amend plans before the end of the year.

COMPLIANCE DEADLINE EXTENDED FOR TAX CODE SECTION 409A

The IRS has also issued proposed rules on the application of Section 409A to nonqualified deferred compensation plans. The rules would extend the deadline for documentary compliance until December 31, 2006. Good faith compliance remains effective January 1, 2005, and the opportunity to amend plans to permit participants to cancel their election to defer—or to terminate their participation altogether—continues to expire on December 31, 2005. Plan administrators should understand how their programs will be affected by these new rules before deciding whether and how to offer plans in 2006.

For details on these tax and employee benefits issues, please visit our Web site; go to Newsroom; and click on "Client Alerts."

In the **e**-world, everything is everlasting

Recent case affirms importance of having an electronic data discovery plan

Preserve and prepare to produce electronic evidence! That's the lesson to be learned from *Zubulake v UBS Warburg LLC*, an employment discrimination case litigated in federal court in the state of New York.

In a series of four decisions, Judge Shira A. Scheindlin established new benchmarks for resolving several important discovery issues involving electronic evidence. Among them: the scope of a party's requirement to produce electronic documents; the ability to shift the sometimes significant costs of retrieving those documents; the duties of both counsel and corporate employees to preserve electronic evidence in the event of a lawsuit; and appropriate sanctions to impose when violations occur.

It's clear that company representatives now must become proactive participants in the discovery process. Proficiency in the well established—yet constantly changing—world of electronic data storage and retrieval will be an essential tool in the company's defense.

Who pays for e-discovery? While the responding party is generally responsible for discovery expenses, cost shifting may be considered when electronic discovery imposes an "undue burden or expense"—that is, the expense outweighs its likely benefit given the parties' resources, or the importance of issues at stake.

In making her ruling, Judge Scheindlin differentiated between accessible and inaccessible electronic information. Accessible information (hard drive data, or optical disks that are relatively easy to retrieve and review, for example) is the responsibility of the responding party. But inaccessible information (backup tapes and erased or damaged data, for instance) could be subject to cost shifting.

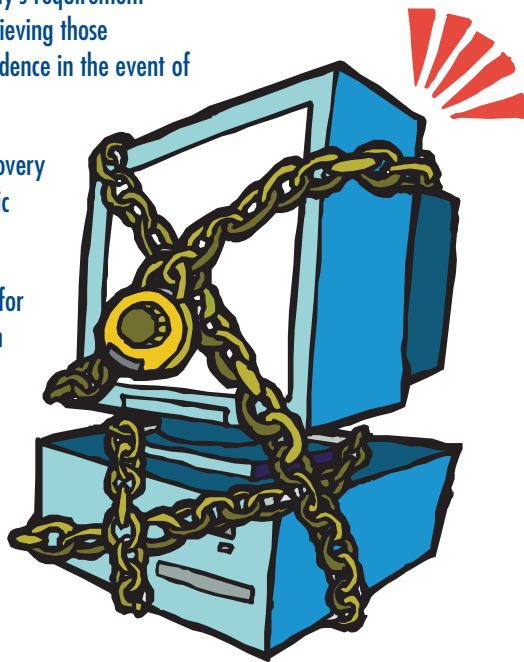
Several additional factors were found to be key to allocating costs, including the availability of the requested information from other sources, and the extent to which a request is specifically tailored to discover relevant information. By applying these factors to a discovery request, an objective cost-shifting analysis is possible, leading to appropriate assignment of expense.

What electronic information should be retained? Judge Scheindlin ruled that a party must preserve data when it knows or should know it might be pertinent to future litigation. Once litigation is anticipated, the routine document retention/destruction policy should be suspended and a "hold" put in place to ensure the preservation and categorization of all relevant documents.

The court also set forth an attorney's obligation to make certain relevant evidence is preserved by giving clients proper instructions, becoming familiar with the client's retention policies, communicating clearly with IT personnel, and proactively monitoring compliance.

While the exact parameters of electronic discovery rules will be the subject of dispute and debate in years to come, *Zubulake* serves as a warning to attorneys and clients alike. Thanks to information technology, the world is a different place. And discovery will never be the same.

If you would like more information about this case or other matters related to employment law, please contact the author or Charles T. Oxender, 313/496-7520.



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CONGRATS, TOM!

Miller Canfield attorney elected state bar president

Thomas W. Cranmer, a principal in our law firm, has been elected president of the State Bar of Michigan for the 2005-2006 Bar year. He was sworn in at the organization's 70th annual meeting in September. We're pleased and proud of our colleague, and honored to have him serve Michigan's legal community.

MICHIGAN EMPLOYMENT LAW HANDBOOK GETS AN UPDATE

Attorneys in our Labor and Employment Group recently updated the *2005 Employment Law Handbook: Guide for Michigan Employers*. Published by the Michigan Chamber of Commerce, the handbook covers a range of topics—from HIPAA and MIOSHA, to workers comp, military discrimination, and harassment issues. Also included are a sample affirmative action plan and forms to help run a compliant HR program. To order the book, call the Michigan Chamber at 1-888-763-0514, ext. 204, or visit www.michamber.com.

TOPS IN BONDS

For the 25th straight year, Miller Canfield has earned a first-place ranking among Michigan bond counsel firms in the rankings compiled by Thomson Financial. We've been #1 for as long as there have been rankings—an achievement we're all proud of. MCP&S is also top bond counsel by dollar volume for deals closed in the Midwest for the first half of 2005. Total financing exceeded \$3 billion, according to Thomson Financial. At 25 members, our firm's Public Law Group includes the largest number of municipal finance specialists in the state of Michigan.



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“administrative expenses,” meaning they generally will be paid prior to pre-petition unsecured claims. An administrative expense claim may also be made for goods received by the debtor within 20 days before the bankruptcy filing.

So, if you're a supplier who delivered goods to the debtor following the bankruptcy filing, you should be paid according to the terms in place under your contract. If the debtor fails to meet the terms of that contract, you'll retain the contractual rights—although you may have to seek court intervention to enforce them.

Bankruptcy filings often leave creditors with unanswered questions and concerns. If one of your key customers has entered into bankruptcy, don't take chances. Retain the assistance of legal counsel. Your ability to perform your work and meet your financial commitments may depend on it.

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