

Looking Ahead

2010

Corporate Insurance

Energy

Intellectual Property

Real Estate

Advertising & Marketing

Corporate M&A

Environmental

Labor & Employment

Reinsurance & Direct Insurance

Locke Lord Bissell & Liddell LLP

ATLANTA



AUSTIN



January 2010

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Dear Clients and Friends:

DALLAS



Locke Lord is dedicated to staying at the forefront of issues affecting our clients, especially during these times of unprecedented change. With numerous proposed regulatory changes, policy reform initiatives and anticipated decisions on the horizon, we want to provide insight into what our clients can expect in 2010 in a handful of areas – outlining both the challenges *and* opportunities.

HOUSTON



LONDON



Looking Ahead 2010 is designed with our clients and contacts in mind. What follows is a snapshot of some of the key issues we will monitor as the year progresses, along with the opportunities we are dedicated to pursuing for our clients.

LOS ANGELES



On behalf of all attorneys at Locke Lord, we look forward to the year ahead.

NEW ORLEANS



Sincerely,

NEW YORK



SACRAMENTO



Jerry K. Clements
Chair, Locke Lord Bissell & Liddell LLP

SAN FRANCISCO



WASHINGTON, DC



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Advertising & Marketing

Mobile Marketing

Technological advancements have created an increasingly wireless world, especially among the core consumer advertising market. Today, over 64.1 million users access the mobile web, and trends suggest consumers will soon access the Internet more often from mobile devices than from personal computers. Thus, to reach those mobile consumers, marketers and advertisers will spend substantially more for mobile marketing-focused campaigns in 2010. The increased funding on advertising and marketing tied directly to mobile marketing will inevitably sprout an assortment of new legal issues and consumer protection challenges that advertisers and marketers must meet in 2010.

Moreover, advertisers are increasingly seeking to send location-based or other behavioral advertising to consumers through the use of Radio Frequency Identification devices (RFIDs) or other tracking mechanisms connected to mobile phones. Legal challenges will come from consumer advocacy groups and increasingly stringent laws, federal and state governments and agencies concerned about mobile marketers' use, storage and protection of personally identifiable or otherwise sensitive consumer information.

Locke Lord's Advertising & Marketing Group is knowledgeable about and assists clients with mobile marketing and privacy issues. We are especially well positioned to assist mobile marketers and advertisers with identifying and resolving legal issues as they relate to the increasing expansion of mobile marketing in 2010.

Advertising with Customer Testimonials and Celebrity Endorsements

If you use customer testimonials or celebrity endorsements in your advertising, beware, the rules have changed. For the first time since 1980, the Federal Trade Commission (FTC) has updated its "Guides Concerning the Use of Endorsements and Testimonials in Advertising." The new Guides went into effect on December 1, 2009.

Locke Lord ...is knowledgeable about and assists clients with mobile marketing and privacy issues

In the past, testimonials or endorsements could feature consumers or celebrities making claims that were not typical of results generally expected in a given situation as long as it was accompanied by a properly worded and formatted "**RESULTS NOT TYPICAL**" disclosure. The new Guides remove that safe harbor. Claims in testimonials now must pass the same reasonable prior substantiation standards as a regular direct or indirect performance claim. In fact, the FTC has taken the obligation for substantiation one step further. In a claim made in a testimonial or endorsement, the company must have reasonable prior substantiation that the performance claimed matches the performance that consumers can generally expect in the depicted circumstances.

Advertising with Customer Testimonials and Celebrity Endorsements (cont'd.)

Before the Guides were adopted, when commentators pointed out that about the only way to determine what consumers can generally expect from

the performance claimed (must match) the performance that consumers generally expect in the depicted circumstances

a product is to perform expensive studies, the FTC basically agreed. Advertisers will not be able to use a standard form disclosure to sidestep the need for substantiation. Each disclaimer will probably need to be tailored to refer to the specific results a consumer generally obtains under the same conditions and circumstances referred to in the testimonial.

The new Guides also clarify a number of other key points. Unlike the previous version, the new Guides are clear that both advertisers and endorsers may be liable for false or misleading claims. An endorser should confirm that the company has in its possession evidence to substantiate the claims that the endorser is making. Also, advertisers must disclose material connections, even when making endorsements in non-traditional ads, such as in blogs, social media, and talk shows. The Guides make it clear that they are intended to apply to all advertising.

We can help clients in compliance with the new FTC Guides, and we work with advertisers to review existing advertising and collateral marketing pieces, revise advertising disclaimers, and guide research to determine what results consumers generally obtain with a product or service.

Advertising in Blogs and Social Media

Millions participate in social media like Facebook, Twitter and blogs. As users continue to join, companies find new ways to market and sell products and services, conduct public relations and provide customer service through social media. Concurrently, users, based on their experience, have begun touting—or tarnishing—a product, service or company's reputation. As social media becomes more prevalent and new forms emerge, companies must continually review policies and monitor company and third-party activities related to social media.

For example, a Facebook user's status update about a product she loved—or hated—can become viral quickly. Companies should plan potential responses to protect its image and enforce any legal rights. While taking a tough approach might seem beneficial, sometimes a softer stance is preferred since many users are unaware and surprised their actions have potential legal implications. These situations are bound to happen, and companies should design policies accounting for use of a company's product, brands, service or reputation in social media.

Companies must also consider their actions related to social media. The spark in social media use for promoting a company's products or services has lit a fire under consumer advocacy groups to ensure companies do not extinguish civil rights, like free speech and privacy, or engage in unfair/deceptive trade practices. In response, federal agencies like the Federal Trade Commission (FTC), legislatures and courts have tightened restrictions on social media marketing. For example, the FTC recently revised its Guides Concerning the Use of Endorsements and Testimonials in Advertising to provide information about using social media as advertisements. All social media marketing campaigns should be reviewed to ensure compliance with new laws and regulations.

Balancing the promotion and protection of products and services in social media while complying with regulations, laws and industry standards protecting consumers can seem daunting, but it is much easier with trusted advisors and counselors.

**...tightened restrictions
on social marketing**

Green Deceptive Marketing: More Risk in 2010

Deceptive and misleading environmental marketing claims are expected to rise in 2010. With the political climate favoring green products and alternative fuels, consumers and industry will increase their purchase of “green,” or environmentally-friendly products. The courts and government regulators will be ever more vigilant and active in 2010 in enforcing the laws against deceptive or misleading green advertising and marketing claims.



Advertisers will need to make a careful review of new packaging, Internet advertising and traditional advertising campaigns to avoid making overstated or unsubstantiated environmental benefit claims of a product, package, service or technology.

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In 2010, we expect the Federal Trade Commission to issue new Guides for Environmental Marketing. The new Guides will likely apply to all forms of marketing for products and services: advertisements, labels, package inserts, promotional materials, words, symbols, logos, product brand names, and marketing through digital or electronic media, such as the Internet or email, as well as blogs and social media such as Facebook and Twitter.

The new FTC Guides will apply to any green claims, express or implied, to environmental benefits. Examples of green claims requiring adequate prior scientific evidence of substantiation are: “Reduces Greenhouses Gases by One-Half,” “Less Pollution than Its Class,” “Uses Less Electricity,” and “90% Recycled Content.”

Industries most likely to be affected by court and governmental scrutiny for environmental claims are energy, chemical, automotive, housing, as well as power, packaging, waste management and pesticide.

Manage this heightened advertising and marketing risk by educating your advertising and marketing staffs and advertising agencies to avoid overstated or unsubstantiated claims to environmental benefit. Also, develop policies and standards for advertising or marketing pieces that involve claims to the environmental benefits of a product, packaging, service or technology. Finally, you need to develop standards for meeting the legal requirements of scientific evidence that provides adequate substantiation of environmental claims.

To learn more about our Advertising & Marketing services, please visit: www.lockelord.com/advertising

C orporate nsurance

The financial crisis and proposed regulatory reforms over the past year have created a climate for uncertainty and change in the insurance area. While the past year can be described as eventful, it may be just the beginning of more significant events to come. Below we set forth industry trends and items to watch in 2010.

Notable Pending Federal Legislation Affecting the Insurance Industry

Health Care Reform. As 2010 begins, the House and the Senate have each passed a health care reform bill, with many of the same provisions but with several key differences. These key differences will need to be ironed out in order for a final bill to be passed and the recent election of Scott Brown to the Massachusetts Senate seat may stall the bill's progress. As the regulatory systems and rules change, health insurers, health maintenance organizations and self-insured employers must be cognizant of the interplay between federal and state regulation.

Insurance Antitrust Exemption Under Scrutiny. The Senate majority leader has already announced his support for legislation introduced by Senate Judiciary Chairman Patrick Leahy that would repeal the federal antitrust exemption for health and medical malpractice insurers. This comes after a prior bill introduced in 2007, which sought a broader repeal of the antitrust exemption for insurers, failed to pass Congress. Momentum for repeal of the antitrust exemption for at least health and medical malpractice insurers appears to be gaining significant traction, and its inclusion in the broader health reform legislation is a distinct possibility as negotiation on a final bill continues.

Financial Regulatory Reform-Impact on the Insurance Industry

The Treasury Department's proposal for the most significant financial regulatory overhaul since the Great Depression was released in 2009, and bills in both the House of Representatives and the Senate are pending that would significantly reshape the financial regulatory landscape. The overwhelming view is that changes to our financial regulatory system need to occur, and the insurance industry will not be immune to such action. Financial regulatory reform includes a number of notable proposals that affect the insurance industry, including the following:

Systemic Risk Regulator. A proposal to regulate systemically important institutions has the potential to affect insurance holding companies and insurance subsidiaries, as questions remain as to the extent to which large insurers or reinsurers will be subject to this new systemic risk regulator. At this point, there is no consensus as to the federal entity to be charged with regulating such firms, whether it be the Federal Reserve or some new Council of regulators. An additional concern is that insurers could be subject to potential assessments to pre-fund the resolution fund for those systemically important firms, even though insurers already pay for their own resolution fund at the state level through guaranty fund assessments.

Office of National Insurance. The proposals contemplate a new Federal office of insurance charged with coordinating international insurance and recommending ways to modernize insurance regulation. The office would also have the authority to enter into international agreements. It remains to be seen how broad the agency's authority will be to preempt state insurance laws that are inconsistent with international agreements that it negotiates. However, regardless of its powers, the creation of any type of federal office of insurance represents a significant change in a state-regulated industry and a diminution of the McCarran-Ferguson Act.

Notable Pending Federal Legislation Affecting the Insurance Industry (cont'd.)

Financial Regulatory Reform-Impact on the Insurance Industry (cont'd.)

New Consumer Financial Protection Agency (CFPA). There is a proposal to create a new consumer financial protection agency dedicated to protecting consumers in the financial products and services markets, except for investment products and services already regulated by the SEC or Commodities Futures Trading Commission. While some have urged the exclusion of all insurance products from this new agency, other proposals have included credit and mortgage insurance under the purview of this new agency. The CFPA could have supervisory, examination and enforcement authority over all entities subject to its regulations.

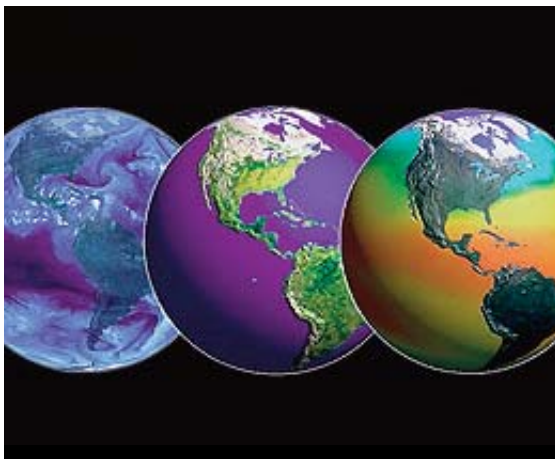
Consolidation of the OTS and OCC into a New Federal Agency and Elimination of Thrift Charters. A newly-created federal agency has been proposed to assume responsibilities of the Office of the Comptroller of the Currency and the Office of Thrift Supervision (OTS). The OTS is the chief regulator of a number of holding companies of federally-chartered thrifts with well known insurance subsidiaries. A new regulator would bring with it a host of regulatory uncertainties, including how aggressively the new regulator would push to regulate the operations of the insurance affiliates of the holding company.

Nonadmitted Insurance and Reinsurance Reform. The House bill on financial regulatory reform includes provisions found in the separately-proposed Nonadmitted and Reinsurance Reform Act. This bill does not provide for federal licensing of surplus lines brokers, but instead would prohibit states outside the insured's home state from applying their licensing requirements to a surplus lines insurance placement. With narrow exceptions, it would also prohibit states – other than the insured's home state – from regulating any other aspect of a surplus lines insurance transaction. Its provisions regarding reinsurance are designed to restrict reinsurance regulation to the domiciliary state of the cedent. If a reinsurance transaction qualifies for credit for reinsurance in the cedent's domiciliary state and that state is accredited by the National Association of Insurance Commissioners (NAIC), then no other state may deny the cedent such credit.

NARAB II. Legislation that would provide for a national system to register insurance agents and brokers by creating a National Association of Agents and Brokers (NARAB II), has been re-introduced in the House. Its goal is to permit licensed insurance producers to operate nationwide after obtaining membership in NARAB II. While the legislation has broad support, it risks being crowded out in a busy legislative agenda.

Optional Federal Charter. What may be most notable regarding the proposals stemming from the financial regulatory reform outlined above is what is not explicitly proposed: a national insurance regulator in the form of an optional federal charter. Legislation proposing an optional federal charter is pending in Congress, but is unlikely to get any significant movement in the coming year as the financial regulatory reform proposals take center stage. However, it is clear from the principles outlined for financial regulatory reform that the current administration and the Treasury are of the view that the time for significant change and action at the state level has arrived. This modernization effort could ultimately lead to optional federal charter legislation some time down the road, especially in the life industry, which believes it is at a considerable disadvantage in competing with banks and other financial institutions primarily regulated by a single federal regulator, and foreign financial services companies with insurance company subsidiaries that prefer a single regulator.

Taxation. A bill introduced in the House would disallow deductions for certain non-life reinsurance premiums paid to affiliated foreign reinsurers. This is the latest action in a long-running controversy over claims by some domestic insurance companies that federal tax laws give offshore reinsurers a competitive advantage with respect to the insurance of U.S. property and casualty risks. In a broader sense, as governments look to shore up deficits and search for new revenue streams, the tax status of insurers and reinsurers will be primary targets. Taxation in the insurance area, including in the health care reforms mentioned above, is ripe for change.



Industry Activity

Mergers & Acquisitions. Difficulty raising capital and the financial crisis has reduced overall activity in the M&A market over the past two years, but as the economy improves we expect a significant increase in mergers and acquisitions and capital raises. A desired increase in size and capital strength for insurers, along with economies of scale in already fragmented markets, will fuel an increase in mergers and acquisition activity. We expect consolidation for both insurers and brokers, and anticipate that some private equity funds that have not been able to sell in depressed conditions will be looking to liquidate their investments.

Life Settlement. We expect life settlement buying and securitizations to increase in 2010, and will keep a close watch on increased regulatory scrutiny of such products, which we expect will continue in 2010. Both the SEC and GAO have task forces studying the life settlement industry, and there have been a number of mini-Madoff-like investment scams in this industry that have become the subject of securities law enforcement actions during the last 18 months.

Industry Developments

Climate Change Heats Up the Insurance Industry. The NAIC has approved a mandatory Insurer Climate Risk Disclosure Survey for the purposes of collecting information from insurance companies concerning their exposures to and plans to address climate change risks that affect their businesses. Mandatory disclosure is due May 1, 2010, for those insurers with annual premium volume over \$500 million. The NAIC White Paper on climate change indicates that this disclosure represents “the beginning of a process rather than the end.” Testifying on behalf of the NAIC in a Senate Hearing, Commissioner Dilweg of the Wisconsin Insurance Department stressed that the NAIC has “taken some important first steps, but more can be done.” These statements foreshadow further action and regulatory scrutiny on climate change.

Cat Bonds & Securitizations. Despite turbulent financial markets, the catastrophe bond market has continued to play a critical role for both sponsors and investors. As financial markets continue to stabilize, we expect catastrophe bond issuance conditions to continue to improve. Issuance was strong in the fourth quarter of 2009, and we expect continued strength in 2010.

Index Linked Annuities. Equity-indexed annuities earn interest that is linked to a stock index. These products are often characterized as falling between a fixed and a variable annuity. A case brought by several annuity companies challenged an SEC regulation treating these products as securities. In response, the SEC recently agreed to delay for two years a rule under which certain indexed annuities would be treated as securities rather than insurance products. The rule had been scheduled to take effect in January 2011, and is the focus of a legal battle between the SEC and certain industry participants. Despite the reprieve by the SEC, the debate over the appropriate classification of these products will continue in 2010.

Reinsurance Collateral. The NAIC approved submission to Congress of the Reinsurance Regulatory Modernization Act of 2009. The proposed legislation would create two new classes of reinsurers in the United States: National Reinsurers and Port of Entry Reinsurers. In order to transact reinsurance business, both national and port of entry reinsurers would be licensed through a single state (either the home state or port of entry state). Reinsurers could also choose to continue under the current regulatory scheme. The legislation would also, among other items, reduce the amount of collateral certain reinsurers would need to post in order for a U.S. cedant to receive credit for reinsurance. At this point, no legislation has been introduced and the prognosis for this NAIC proposal will depend on the outcome of the financial regulatory reform debate discussed above.

Industry Developments (cont'd.)

New York Insurance Exchange. Governor David Paterson recently indicated that the New York Insurance Exchange will be revived in the near future. The exchange would be a Lloyd's type marketplace through which buyers could purchase insurance and reinsurance, and those who want to take on risk could form syndicates. While a previous exchange never gained traction in the 1980s before dissolving, this new exchange could gain momentum in a different economic and regulatory climate in 2010.

Producer Compensation Transparency. The New York Insurance Department published new producer compensation disclosure rules in December of 2009 that could go into effect soon. If effective, the regulation will require all producers to disclose to the purchaser certain items, including whether the producer represents the purchaser or the carrier and information on the compensation the producer receives. The Independent Insurance Agents & Brokers of New York has already threatened legal action if the new rules are implemented.

**Governor David Paterson recently indicated
that the New York Insurance Exchange will
be revived in the near future**

State Foreign Assets Control. The California Department of Insurance has requested all insurers licensed in California (foreign and domestic) to provide specific information regarding certain Iranian investments to evaluate whether such investments are sound and in compliance with applicable law. The investigation was launched to ensure insurance industry compliance with a new California state law that prohibits California insurance companies from investing in countries designated as state sponsors of terrorism. The California Commissioner advocated a coordinated nationwide divestment effort with respect to Iran as well as the formation of an NAIC working group or task force to address the issue. Florida Insurance Commissioner Kevin McCarty, secretary-treasurer of the NAIC, also has stated that he is consulting other states' commissioners to see if it is practical to develop a national effort similar to California's. We expect these types of inquiries and divestment efforts to continue throughout 2010.

Accounting Changes

The International Accounting Standards Board (IASB) and the Financial Accounting Standards Board (FASB) have increased the pace of their efforts to develop a common set of accounting standards by the target date of 2011. One area sure to gain attention is insurance contracts, where a long awaited and delayed IASB exposure draft is scheduled to be issued in April 2010. The SEC is considering measures that could lead to adopting International Financial Reporting Standards (IFRS) in the United States (to the possible exclusion of U.S. GAAP standards) as it moves forward with its proposed "Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards by U.S. Issuers." Regardless of how the SEC moves in its proposed plan, the effects of global reporting standards on U.S. insurers will continue to increase.

Financial Regulatory Reform-Impact on the Insurance Industry (cont'd.)



Life Insurance Reserve Requirements. The NAIC risk-based capital (RBC) system was created to provide a capital adequacy standard that provides a safety net for insurers to assure they hold in reserve enough assets to pay all claims on outstanding policies. The amount of required assets that must be held are currently determined by a formula. During the midst of the financial crisis, the American Council of Life Insurers (ACLI) made a proposal asking the NAIC to lessen the current reserve and risk-based capital standards in the life industry. While the life insurance industry's proposal was rejected by the NAIC, other more limited relief has been provided. In addition, at its Fall 2009 meeting, the NAIC approved critical revisions to the Standard Valuation Law (SVL) that would permit principles-based reserving. The SVL is utilized by states when setting

the SVL will embody a new “principles-based” approach to calculating reserves as opposed to utilizing formulaic calculations, thus creating a monumental shift in life reserving that has existed for over one hundred years

What to Expect in 2010

This year promises to be every bit as eventful as the past one, and could be one of the most transformative in regulatory change. Those companies that are able to anticipate and adopt to the changing environment will prosper. We will continue to follow developments in the insurance and reinsurance areas and assist clients in adapting and complying with insurance transactional and regulatory matters.

standards for life reserve calculations. The SVL will embody a new principles-based approach to calculating reserves as opposed to utilizing formulaic calculations, thus creating a monumental shift in life reserving that has existed for over 100 years. Further details and specifics must be finalized in a valuation manual, which should be finalized by the middle of 2010, with ultimate implementation by the following year.

SWAPs Regulated as Insurance. In November 2009, the National Conference of Insurance Legislatures (NCOIL) adopted the Credit Default Insurance Model Legislation based on the assumptions that credit default swaps are insurance and sellers of such products must be licensed by state insurance departments. Federal legislation regarding credit default swaps is also pending, and given the attention and perceived role such products played in the financial crisis, this year could see a significant shift in how these products are regulated.

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C Corporate M&A

Wall Street Reform Act May Roll Back Sarbanes-Oxley Auditor Attestation Requirements

If legislation passed by the U.S. House of Representatives in December 2009 also is passed by the Senate, this will be a significant step in reforming Sarbanes-Oxley and easing the regulatory burden imposed on small public companies. On the heels of a string of corporate governance changes proposed by Congress and the Obama administration, the U.S. House of Representatives passed its version of a comprehensive regulatory reform bill, The Wall Street Reform and Consumer Protection Act (“Wall Street Reform Act”). The broad-sweeping legislation covers dozens of issues, ranging from consumer protection to federal authority to dismantle failing financial firms to registration of private fund advisors and derivatives oversight. The Wall Street Reform Act includes several reforms that we anticipate will impact corporate governance at public companies and some that will boost the Securities and Exchange Commission’s (SEC) regulatory authority.

If enacted, the legislation would mark the most significant revamp of the U.S. financial rules since the 1930s; however, it is far from a done deal. The focus now shifts to the Senate, where a similar bill introduced by Banking Committee Chairman Chris Dodd (D-Conn.) is reported to be undergoing a substantial bipartisan overhaul. When the Senate’s reform bill is complete, the two chambers will still have to reconcile any remaining differences between the two bills, so the final legislation could be substantially different from the bill approved by the House. While the content of the final legislation remains unclear, we encourage senior management and directors at public companies to follow these developments closely. Considering the current political and economic climate and the level of Congressional interest, it appears likely that we will see elements of these bills become law, with potential for additional and significant regulatory changes.

Although most of the Wall Street Reform Act aims to further regulate Wall Street, the House bill includes a break for Main Street. Among other things, the Wall Street Reform Act would amend the Sarbanes-Oxley Act (SOX) to permanently exempt non-accelerated filers (generally defined by the SEC as public companies



Wall Street Reform Act May Roll Back Sarbanes-Oxley Auditor Attestation Requirements (cont'd.)

with less than \$75 million public float and referred to below as “Small Public Companies) from the requirement for an external audit of internal controls under Sarbanes-Oxley Section 404(b). It is important to note that the Senate has not yet acted on this provision, and may reject it, so companies should still rely on the SEC’s statement issued on October 2, 2009, in which the SEC stated that Small Public Companies must start complying with SOX Section 404(b) beginning with their annual reports for fiscal years ending on or after June 15, 2010. Note also that the proposed exemption in the House bill (H.R. 4173) applies only to Section 404(b)-the external auditor’s report on internal control; it does not change the requirements in Section 404(a)-management’s report on internal control.

The exemption relating to Sarbanes-Oxley was inserted as a bipartisan amendment to the more broad-reaching Wall Street Reform Act. The amendment, offered by Reps. Scott Garrett (R-N.J.) and John Adler (D-N.J.), mirrors legislation Rep. Garrett introduced earlier in 2009, the Small Business SOX Compliance Relief Act (H.R. 3775). The Garrett/Adler amendment would not only exempt Small Public Companies, but also would require the SEC, together with the Government Accountability Office (GAO), to conduct a study directed at evaluating the burden imposed by Sarbanes-Oxley 404(b) on companies with market capitalizations between \$75 million and \$250 million. Additionally, the amendment calls for the study to “consider whether the compliance burden or a complete exemption for these companies will encourage them to list on exchanges in the U.S. in their initial public offerings.”

although the stated intent of Sarbanes-Oxley was to provide investor confidence in the financial markets through greater accountability and disclosure, the Act has had the unintended effect of creating undue and often unbearable burdens on small businesses

Although the stated intent of Sarbanes-Oxley was to provide investor confidence in the financial markets through greater accountability and disclosure, the Act has had the unintended effect of creating undue and often unbearable burdens on small businesses. According to Rep. Garrett, there is a place for federal oversight, but the weighty cost of compliance under Section 404(b) is slowly strangling small businesses. It is diverting valuable resources away from other legitimate business needs; creating massive and tedious documentation requirements; and discouraging the public listing of both international and domestic companies on U.S. markets. University of Minnesota researcher Ivy Zhang calculated that Sarbanes-Oxley has cost the economy \$1.4 trillion in direct and indirect costs. And research from economist Kenneth Lehn of the University of Pittsburgh shows that such costs reduce firms’ business investment and research and development spending, two important precursors for job growth.

Wall Street Reform Act May Roll Back SOX Auditor Attestation Requirements (cont'd.)

The problem is particularly acute for the estimated 6,000 Small Public Companies that are each worth less than \$75 million. According to a 2006 report by the GAO, Small Public Companies paid a median of \$1.14 in audit fees per \$100 in revenues versus 13 cents for public companies with market capitalizations greater than \$1 billion. The GAO also found that smaller companies proportionally incurred far greater non-audit compliance costs than large firms.

The SEC has repeatedly extended the deadline for Small Public Companies to begin providing audited assessments of their internal controls over financial reporting – an acknowledgment of continued concern about compliance costs. In 2008, the SEC's Office of Economic Analysis conducted a survey of public companies to judge the efficacy of Sarbanes-Oxley, and in late 2009 posted the findings, after soliciting data from thousands of corporations. The results showed that Section 404 is still consuming more than \$2.3 million each year in direct compliance costs at the average company. The SEC's survey shows the long-term burden on small companies is more than seven times that imposed on large firms relative to their assets, and only 19 percent say that the benefits of Section 404 outweigh the costs. Additionally, more companies responded that (1) it has reduced the efficiency of their operations than say it has

improved them, and (2) it has negatively affected the timeliness of their financial reporting than responding that it has enhanced it. In summarizing survey responses from businesses regarding the benefits of Section 404(b) compliance, the SEC said that “a majority felt that the costs of compliance outweighed the benefits. This was especially true among smaller companies.”

Should this bill be passed by the Senate and signed by President Obama, it would be a significant step in reforming the Sarbanes-

Oxley Act. While Section 404 was originally passed with little fanfare, it is widely considered to impose the greatest Sarbanes-Oxley compliance burden and it has resulted in substantial, and sometimes debilitating, costs for U.S. public companies. The permanent exemption of Small Public Companies from the auditor attestation requirements would remove one of the most significant negative factors being evaluated by smaller companies considering an initial public offering and companies considering whether to remain publicly registered in the United States. Given the significance of the public markets to smaller companies seeking growth opportunities, the permanent elimination of this compliance burden, which provides debatable investor protection, seems a sensible reform.

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Is Broader Regional Transmission Planning Needed?

2009 ended with the FERC asking the electric industry (1) whether there is a need for broad, regional transmission planning – broader than transmission planning on a utility-by-utility or regional transmission organization (RTO)-by-RTO basis and (2) whether regional cost recovery mechanisms should be adopted for transmission facility expansion. The FERC received written comments from over 100 energy industry participants addressing, among other things:

- Whether Eastern Interconnection-wide or Western Interconnection-wide transmission planning should be mandated, and if so, whether the approach should be “bottom-up” (i.e., beginning with the utility or RTO) or “top-down” (imposed from some new overarching and independent organization);
- Whether the FERC should require construction of Extra High Voltage (EHV) backbone transmission lines that span a region, and if so, what voltage cut-off should be used for the EHV determination – 345 kV, 500 kV or 765 kV;
- Who should pay for the transmission – should a “beneficiary pays” approach be adopted (but, then, how are beneficiaries identified across a region) or should costs be socialized among all load across a region;
- Whether customer load alone should pay for transmission or whether generators be required to pay for transmission as well;
- The role of merchant transmission in planning processes;
- Whether there should be differing rate treatment for reliability transmission upgrades versus economic transmission upgrades; and
- Whether new transmission should be “right sized” to accommodate future load and generation needs, and if so, who pays for the unused transmission capacity until it is needed in the future.



Federal Energy Regulatory Commission (FERC): Electric Transmission Will Be a Key Issue in 2010

Policy of the Federal Energy Regulatory Commission (FERC) will evolve in many significant areas in 2010 with an anticipated lasting impact on the electric industry. And this is without considering any of the legislation currently pending before Congress that would vest the FERC with responsibilities with regard to key issues such as cap-and-trade and administering a national renewable portfolio standard. If these issues become law, the rulemaking proceedings undertaken by the FERC promise to be lively.

In the meantime, the FERC has an opportunity to establish policy in many significant critical areas. For example, the FERC is poised to clarify when an “affiliate” relationship exists for market power purposes under section 203 or 205 of the Federal Power Act (FPA). The FERC’s decision will impact the scope of investment in generation companies. We also expect the FERC to address “demand response” in a meaningful way this year. In October 2009, the FERC issued a draft National Action Plan on Demand Response as required by Section 529 of the Energy Independence and Security Act of 2007. The draft Plan makes recommendations in regards to identifying technical assistance for states, designing communication programs and customer education and identifying tools, contracts and support material to be used by states, utilities and providers of demand response. Numerous industry comments were submitted addressing the draft Plan. The FERC’s determination will be a key feature in providing a blueprint to establish a more effective and robust demand response system in competitive energy markets the United States.

However, the most significant area where FERC electric policy likely will evolve in 2010 is in regard to transmission grid expansion and transmission cost recovery, particularly with regard to accommodating renewable generation projects.

Federal Energy Regulatory Commission (FERC): Electric Transmission Will Be a Key Issue in 2010 (cont'd.)

The comments received by the FERC at the end of 2009 regarding regional transmission planning and cost recovery are pervasive and address issues that will reshape the electric industry if the FERC decides to pursue specific reforms through a proposed rulemaking. (*See Sidebars.*) We anticipate the outcome will have business implications for all industry players, and indeed, will not be without challenge as many participants have argued that the FERC does not have the authority under the FPA to impose such reforms. The chances are high that 2010 will see the FERC initiate reform in some respect with many of these issues.

FERC treatment of merchant transmission and transmission to support renewable generation will be addressed in other areas as well.

Merchant transmission is burgeoning. New projects are being proposed all around the nation. Many of the projects are receiving FERC backing in regard to future rate recovery (whether the rates are cost-based or market-based) or proposed use and availability of transmission capacity. This year will likely see a continued flow of proposed new transmission projects being presented to the FERC, with the FERC and industry participants continuing to address how merchant transmission should be coordinated with existing RTO transmission plans and how the cost of merchant transmission should be recovered particularly if the new transmission will span multiple RTOs and states.

The FERC also will address significant jurisdictional questions in regard to merchant transmission. For example, Tres Amigas LLC is proposing to construct a three-way Alternating Current (AC)/Direct Current (DC) transmission interconnection in New Mexico that would eliminate the current market separation among the Electric Reliability Council of Texas (ERCOT), Eastern Interconnection and Western Electric Coordinating Council (WECC) regions of the United States. Tres Amigas contends that the new facility will make it possible for entities in any one of these regions to sell electric power in the other two regions. The filings pending before the FERC raise significant jurisdictional issues including (1) whether a

Is Broader Regional Transmission Planning Needed? (cont'd.)

Many transmission questions stem from the need to accommodate the growing movement to maximize the use of renewable generation, with industry participants addressing:

- Whether there should be a separate transmission planning process for renewable generation;
- Whether specific revisions are needed in current RTO processes to accommodate the interconnection of, and transmission of energy from, renewable generation;
- Whether renewable generation should be required to pay for ancillary services in certain RTO markets;
- Whether RTO planning and dispatch processes should be revised to accommodate the effect of renewable generation on base-load generation;
- Who should pay for transmission needed to deliver renewable generation from remote locations (where the wind is blowing, for example) to customer load centers, and whether it is just and reasonable for customer load in the northeast, for example, to pay for transmission installed in the midwest to accommodate renewable generation sited there;
- Whether the FERC should be acting at all to revise transmission policies solely to accommodate renewable energy; and
- Whether the focus on cost allocation and the beneficiary pays approach is misplaced because the issue is not deliverability of renewable energy but availability of Renewable Energy Credits.



Federal Energy Regulatory Commission (FERC): Electric Transmission Will Be a Key Issue in 2010 (cont'd.)

transmission owner that constructs transmission facilities that will interconnect the ERCOT grid to the Tres Amigas facility in New Mexico will be subject to FERC jurisdiction as a public utility under the FPA; (2) whether transmission service over AC facilities from ERCOT to the Tres Amigas facility will be subject to FERC jurisdiction; and (3) whether a new AC to DC interconnection between Tres Amigas and ERCOT will change the jurisdictional status of any ERCOT utilities or ERCOT transactions. Successful resolution of these jurisdictional issues could open up new energy markets in that section of the United States.

The past two years saw the FERC accept varying cost recovery policies for transmission supporting renewable generation. The FERC's policies have differed depending on whether the region has significant potential for renewable

the FERC is poised to clarify when an “affiliate” relationship exists for market power purposes under section 203 or 205 of the Federal Power Act

generation. For example, different policies have been authorized for the east and northeast regions of the United States compared to the midwest and southwest regions. Moreover, although the FERC adopted a renewable-favorable transmission policy for the southwest (in the Southwest Power Pool Inc. region), in the midwest, specifically the Midwest Independent Transmission System Operator, Inc., (Midwest ISO) region, the FERC accepted an interim measure that requires new renewable generators (and, in fact, all types of generators) to bear 90 percent to 100 percent of the cost of integrated transmission system network upgrades. The cost recovery policy is intended to be temporary, with the FERC requiring the Midwest ISO to submit a revamped transmission cost recovery proposal in July 2010. We expect that proceeding to be contentious. FERC resolution of the transmission issues in the Midwest ISO proceeding could signal how the FERC plans to institute transmission cost recovery in many contexts throughout the United States, including with regard to renewable generation.

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E nvironmental

Enforcement Focus: Commercial Power Washing – Cleaning can be Criminal

Recently local law enforcement agencies have cracked down on wastewater discharges from power washing, bringing both civil and criminal charges. We expect that trend to continue in 2010 because the issue is widespread, relatively easy to identify and enforce, and can have real impacts on the environment.

Power washing has been a target because the wash water discharge is often allowed to enter the storm drains, which typically flow unfiltered into nearby water bodies. Under federal law and the law of many states, it is a crime to cause or allow the discharge of pollutants to waters of the United States or waters of the state without a permit, and the term “pollutant” is usually broadly defined so that it includes power washing wastewater discharged to storm sewers.

In Houston, criminal indictments were not limited to power washing service companies, but included large, publicly traded property management firms, an international engineering services firm, local building and garage operators, and both blue collar and white collar employees of these entities. Many other cities in Texas and across the country have begun to focus on power washing discharges as a criminal enforcement priority.

Any company that owns, operates or manages parking facilities should implement a detailed compliance plan, which includes minimum standards for power washing contractors, as well as procurement procedures, to ensure that contractors comply with environmental laws. The compliance plan should ensure that all wastewater generated during power washing is collected and transported off-site for disposal at a permitted facility, or discharged into on-site sanitary sewers equipped with interceptors (and comply with any conditions or limitations imposed by the local municipality or wastewater treatment plant operator for such discharges).

Cloudy Forecast for Climate Change Legislation

While we expected 2009 to bring sweeping actions on climate change including a cap and trade system, legislation stalled out for a variety of reasons, including the recession, political opposition and lingering skepticism regarding the underlying scientific consensus. Those factors, combined with the looming midterm elections, are likely to stymie any broad-based climate change legislation in 2010 as well. Rather than a cap and trade bill, we are likely to see a comprehensive energy bill that further incentivizes clean and renewable energy research and development through additional tax credits and grants. The task of imposing actual greenhouse gas (GHG) emissions limitations will likely be left to EPA. Expect EPA to issue a proposed rule for control of GHGs from mobile sources such as cars as early as March, and a subsequent proposed rule for stationary sources later in the spring or summer. EPA may not finalize these rules, because it will likely face numerous legal challenges, and Administrator Lisa Jackson has gone on record as stating that EPA's preference is for a legislative solution. Thus, while there is likely to be a great deal of sound and fury about climate change regulation in 2010, it may signify nothing until 2011, when a new and possibly realigned Congress can take up the issue with renewed purpose and priorities.

Greenhouse Gas (GHG) Emissions: The Time for Data Collection is Here

The data collection requirement in EPA's GHG reporting rule came into effect on January 1, 2010 for covered facilities. Covered facilities include those that supply certain products such as fuels, industrial GHGs, or CO₂, as well as facilities that are in certain listed source categories and that emit 25,000 metric tons of CO₂ equivalent (MTCO₂e) per year. The required reports will include both total GHG emissions and a breakdown of each source category and supply category by type of GHG and by individual unit or process line. The first emissions reports are due to EPA on March 31, 2011.

What You Need to Know

Federal

Air Permitting. In response to criticism by EPA on certain aspects of the State of Texas' new source review air permitting program, the Texas Commission on Environmental Quality (TCEQ) will undertake several new rule makings in 2010. Significant changes could result, including the discontinuance of flexible permits.

Toxic Substances Control Act (TSCA). Congress is expected to introduce new legislation to update TSCA, including requiring chemical manufacturers to submit additional information to EPA, faster reviews by EPA, and additional authority for the EPA to take risk management actions.

RoHS in the United States? As various states enact laws similar to the European Union's Restriction on the use of Hazardous Substances in Electric and Electronic Equipment (RoHS), Congress has initiated some efforts to pass a federal law to pre-empt varying state laws. However, amendments to TSCA may divert attention from the proposed legislation.



New EPA Requirements for Storm Water Discharges Associated with Construction Activity

On December 1, 2009, EPA published a new rule for storm water discharges associated with construction activity. For the first time, construction sites that disturb 10 or more acres at one time will be subject to numeric effluent limits for turbidity. EPA chose turbidity as the pollutant for monitoring because turbidity can indicate how much sediment and other pollutants are being discharged during the construction activity. Turbidity can also be measured directly in the field without laboratory analysis.

Although the new rule “takes effect” on February 1, 2010, each state’s general construction permit is still effective as written until its expiration date. As a consequence, the date when the new rule becomes applicable will vary from state to state. Details regarding sampling and other requirements will also be determined by each state.

The Latest on Regulating Vapor Intrusion into Indoor Air

In the last few years, the United States Environmental Protection Agency (USEPA) and state agencies have become increasingly focused on vapor intrusion, where vapors emitted from contaminated soil and/or groundwater migrate through the subsurface and collect in occupied indoor spaces. In addition to technical guidance from ASTM and ITRC, several states, including California, New Jersey and North Carolina, have recently issued new or updated regulations, guidance or policy. In April 2009, the California Department of Toxic Substance Control issued the “Vapor Intrusion Mitigation Advisory.” In August 2009, the New Jersey Department of Environmental Protection issued a policy change, requiring indoor air and sub-slab sampling at all sensitive sites, such as child care and residential properties.

What You Need to Know

States and District of Columbia

District of Columbia. The District of Columbia Department of the Environment released a policy memo regarding Environmental Impact Statement Forms, indicating that it will not use the process to require collection of groundwater samples. When evaluating impacts to groundwater, the District's policy is that dewatering will generally not be considered a groundwater impact, but activities that could result in groundwater pollution may have an impact.

Maryland. Regulations proposed by the MDE require reporting of any contamination that exceeds screening levels or when free product is present, within 48 hours of the discovery. This law applies to all "responsible persons" as defined by the rule, which includes current owners and operators, and owners and operators at the time of a release. If a person is a responsible person, the reporting regulation would apply to any data in that person's possession, regardless of the date of sample collection, or if the person no longer owns the property. MDE is reviewing comments to the regulations, and expects to issue a final version quickly.

New Jersey. In November 2009, New Jersey adopted a system allowing parties to use a licensed site professional for site remediation without direct oversight or pre-approval from the DEP, following the Massachusetts model. The change in law should allow cleanups to proceed faster, but comes with an affirmative obligation to remediate releases, eliminating the voluntary cleanup program Memorandum of Agreement process.

Texas. The TCEQ announced that it issued a record number of administrative orders in 2009, and assessed penalties amounting to a 30 percent increase over the previous year. With the increased focus on enforcement, conducting an audit under the Audit Privilege Act may be one method for facilities to correct violations and avoid hefty penalties.

The Latest on Regulating Vapor Intrusion into Indoor Air (cont'd.)

In December 2009, the Government Accountability Office (GAO) recommended that the USEPA update and finalize its 2002 draft guidance, saying that Superfund site cleanups had been delayed pending the final policy. The USEPA committed to identifying which sections needed updates by summer 2010, and to finalizing a revised document by Fall 2012. USEPA indicated that it will seek comments on the updates throughout its development of the new document.

Changes on the horizon in 2010 for state policies include revised guidance from the Massachusetts Department of Environmental Protection (MADEP). In the past two years, MADEP's audits of sites closed by Licensed Site Professionals (LSPs) have focused on sites where vapor intrusion could be a concern, and MADEP has required more work at some of the previously closed sites. In July 2009, MADEP released a draft indoor air guidance for public discussion on its blog.

The Illinois Environmental Protection Agency (IEPA) is expected to continue its efforts to establish vapor regulations. In September 2008, the IEPA issued draft regulations, which would set up a regulatory approach that is consistent with Illinois' "Tiered Approach to Corrective Action" (TACO) regulation for soils and groundwater. The draft established Remediation Objectives for soil gas, soil and groundwater to be protective of indoor air. In November 2009, the Illinois Pollution Control Board, at IEPA's request, put the vapor intrusion portions of the proposed regulation on hold to allow IEPA to address concerns raised by the USEPA.

Other states with documents currently in draft include Washington (public comment ended November 30, 2009) and Oregon (public comment ended October 30, 2009). In Texas, the TCEQ is considering vapor intrusion, but does not have a schedule for publishing draft guidance.

Vapor intrusion approaches will vary widely, including differences in whether the states will reopen closed sites, sampling techniques, and regulatory standards. However, once the USEPA finalizes its guidance, state policies may begin to converge following USEPA standards.

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Intellectual Property



Patent Marking

A patentee who makes or sells its products will mark those products to put infringers on constructive notice of the marked patent(s). In doing so, marking patentees can accumulate damages from infringement of marked patents from the date of such marking. The downside to marking is the result of doing so improperly. Falsely marking a product makes a patentee susceptible to penalties.

Until recently, the key issue involving the false marking penalty was whether the up-to-\$500 per offense applied to each article or to the overall offense or an offense for each day, week or month. On December 28, 2009 the Federal Circuit held that Sec. 292 "clearly requires a per article fine," but that the fine should be adjusted to balance deterrence and disproportionate penalties for large numbers of small, inexpensive items. *Forest Group v. Bon Tool*, 93 USPQ2d 1097. Expect more of these suits to be filed in 2010.

Given this decision, prudent businessmen should consider steps that could go a long way to rebutting the intent requirement in the statute: (1) putting the expiration date of each patent next to the patent number or instituting a regular review to remove expired patents (leaving an expired patent in the label may be challenged as false marking); and (2) doing a reasonable investigation before putting a patent number on the label (saying "one or more of the following patents may cover" may also be challenged).

Predicting trends for the New Year is a perennial favorite. Intellectual Property law is no exception. Summarized below are some predictions, based largely on projecting from 2009.

The U.S. Supreme Court Will Speak on Business Methods

A patent case that is awaiting decision in 2010 by the Supreme Court is *In re Bilski* where the Court will decide if business methods are patentable subject matter. It could be a *per se* no (given the Supreme Court's questions at oral argument) or more likely a shade of gray that might involve the Federal Circuit's machine-or-transformation test or a variant. Depending on the scope, the decision might also affect software patents more broadly, given some of the questions at oral argument. However it comes out, this will likely be as important a decision on what is patentable as *Diamond v. Chakrabarty* was, which held that a "superbacteria" was protectable by patenting the new DNA that made it.

The Federal Circuit Will Speak on Written Description

In *Ariad Pham. v. Eli Lilly & Co.*, the Federal Circuit will resolve an internal split by deciding *en banc* whether 35 U.S.C. § 112 has a written description requirement separate from enablement. Briefly, enablement requires the specification to disclose enough to enable one skilled in the art to practice the invention. Written description requires the specification to demonstrate the inventor possessed the claimed invention at the time the application was filed. While this may sound like a hyper-technical patent issue, it is of importance to patent practitioners in general and to the biotechnology industry in particular.

Patent Damages

2010 should see some clarification of patent damages for an infringing component or feature of a larger combination. Congress continues to grapple with formulating a statutory change that will satisfy the disparate views of different industries. Pending before U.S. Congress are three patent reform bills, all of which address patent damages.

H.R. 1260 has a two-step process to reasonable royalty damages. Royalties based on the entire market value of the infringing product require either (1) showing the patented contribution over the prior art is the “predominate basis for market demand,” or (2) an established royalty. Absent (1) and (2), the royalty must be based on the portion of the economic value attributable to the invention’s contribution over the prior art. There is a catchall to consider “other factors” as well, presumably a nod to the *Georgia Pacific* 15 Factors. S. 610 in general posits a *Georgia Pacific* type of hypothetical negotiation for a reasonable royalty, but places limits on what is a comparable license. It also imposes a gatekeeping function on the court to keep unsupported contentions from the jury deliberations. S. 515 places the gatekeeper functions before introduction of evidence.

These competing bills illustrate both the common concern with reasonable royalty patent damages and the lack of a consensus on a specific test or approach. The inside word is that the Federal Circuit is also looking for the right case to opine on the Entire Market Value Rule to clarify this issue. The result might be reaffirmation of existing law that the patentee must prove that the patented component is the basis for customer demand. Depending on the wording, such a decision might also lead to increased Daubert motions to exclude non-compliant opinions of damages experts.

Expect Clarification of Competitors’ Use of Trademarks in Search Engines

In 2009, the Second Circuit revived a dismissed trademark suit attacking Google’s AdWords program. *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009). The complaint alleged that this program impermissibly allows subscribers to sign up to display “sponsored” ads on a search result page when the search terms include a competitor’s trademark as a “keyword.” Within weeks of the Second Circuit’s decision, several more aggrieved trademark owners filed suit—including two class action complaints in Texas—complaining about Google’s AdWords program. Decisions concerning the legal viability of these claims against Google (as opposed to Google’s individual subscribers, who actually pick the trademark as the “keyword”) are expected over the course of 2010. Key issues expected to be addressed include:

- Whether through passively allowing others to select competitors’ trademarks, Google actually “uses” the trademark owner’s mark, a prerequisite to trademark liability.
- Whether Google’s AdWords subscribers “use” the mark “in commerce” by selecting it as a “key word”—an act which the public never sees.
- Whether class actions will be certified by the courts as an appropriate vehicle to challenge Google’s program, or whether trademark owners will instead be required to file individual suits.
- Whether Google can be required to disgorge its profits—and to whom—from the AdWords program or whether injunctions against the program will suffice as a remedy.

Class Action Patent Antitrust Actions

The antitrust pendulum appears to be swinging back again to more cases and enforcement. Patents, being a “legal monopoly,” are not exempt from this trend.

For example, antitrust claims that patents and patent settlements have wrongly kept generic drugs out of the market have been increasing and will likely increase more in 2010, given the political focus on containing health care costs. Such cases have often involved multi-district litigation as health insurers and states join to assert harm from higher-priced branded drugs. But what is new is a class action by the patients taking the drugs.

In *In re DDAVP Direct Purchasers Antitrust Litigation*, a class of patients who purchased a patented drug was granted standing to assert (1) a Walker Process claim against a patent holder on the basis that the patent had already been found unenforceable for inequitable conduct; (2) false listing of the patent in the FDA’s Orange Book; and (3) sham litigation against the FDA to delay generic approval. The defendant especially challenged the standing of the class to challenge the patent, since none of them were competitors to the patent holder or subject to a claim of infringement. The 2nd Circuit declined a *per se* rule, instead limiting the holding to the facts of the case, namely a prior Federal Circuit decision of patent unenforceability.

2010 may well see an increase in this type of action as class action plaintiffs’ lawyers learn of this, as of now, uncluttered field. We may also see an effort to expand the 2nd Circuit limits to standing.

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Labor & Employment

From new proposed employment-related legislation, to changes in leadership and policies in federal agencies, employers can expect to encounter a myriad of changes and challenges in 2010.

Credit Checks

Companies are increasingly conducting credit checks as part of their pre-employment background screening. Many employers believe that an applicant with a poor credit history may be more inclined to steal or misappropriate sensitive customer information (e.g., credit card information). Employers are generally aware that they must comply with the Fair Credit Reporting Act and similar state laws in conducting credit checks, but many are unaware of the potential for liability under Title VII whenever an applicant is denied employment because of poor credit history. Under Title VII, applicants can challenge facially neutral employment practices (such as credit checks) if those practices have a “disparate impact” on members of certain groups (e.g., racial or ethnic minorities). If an applicant proves that a screening practice disproportionately eliminates employment opportunities for members of his or her group, the employer can avoid Title VII liability only if it can demonstrate that the screening practice is “job related for the position in question and consistent with business necessity.”

The EEOC is beginning to scrutinize employer credit check practices and their potential for disparate impact on certain groups. We expect to see increasing litigation over this issue, particularly in light of the fact that many more people in this economy have poor credit histories due to mortgage-related issues or job losses.

The Department of Labor’s New Enforcement Policies

U.S. Secretary of Labor Hilda Solis recently announced that “the Department of Labor is back in the enforcement business.” These changes are a departure from the compliance assistance policies of Solis’ predecessor, Elaine Chao. Of particular significance, the Secretary announced that the DOL has hired 250 new wage and hour investigators, a staff increase of more than one third, to handle complaints of alleged wage and hour violations. In early 2010, the DOL will launch a new national public awareness campaign titled “We Can Help” to inform workers about their rights. As a result of these changes, employers should expect more wage and hour complaints and investigations by the DOL in 2010.

Similarly, the Occupational Safety and Health Administration (OSHA) under Solis’ leadership initiated a national emphasis program on recordkeeping to address the accuracy of injury and illness data recorded by employers. A November 2009 report from the Government Accountability Office suggests there is widespread underreporting of employee injuries and illnesses. This new program scrutinizes business records such as employee medical records, workers’ compensation records, payroll/absence records, incident reports, company first aid logs, and the like, to determine if the employer’s injury and illness records are accurate or reflect underreporting of injuries and illnesses. Secretary Solis also announced plans to hire 100 new OSHA inspectors in 2010. Employers should expect an aggressive, “enforcement first” approach from the DOL in 2010.

Employee Free Choice Act (EFCA)

In 2009, many predicted Congressional passage of the Employee Free Choice Act (EFCA), a bill that would supplant union elections with “card check” recognition, require that an arbitrator set the terms of the first collective bargaining agreement if the company and the union could not reach agreement soon after union recognition, and enhance the penalties for employer unfair labor practices. EFCA encountered significant resistance in the Senate, however, with several Southern Democratic senators opposing passage of the bill in its current form. Because EFCA lacked the 60 votes necessary to overcome a Republican filibuster and because of the time and resources committed by the Senate toward passage of the health care bill, EFCA did not reach the Senate floor in 2009.

In 2010, we expect that labor leaders will exert significant pressure on Congress to pass at least a modified version of EFCA. Based on the current political landscape, with Democrats expected to lose seats in Congress in the 2010 mid-term elections, union leaders likely believe that 2010 is a “now or never” moment for passage of EFCA. Business groups, however, have lobbied strongly against EFCA, and the argument that the bill is a “job killer” resonates strongly with the electorate in today’s economy. Given the political landscape, we do not expect EFCA to pass in its current form, but there is a significant possibility that Democrats could muster a 60-vote majority to support a modified version of EFCA, one that perhaps substitutes expedited union elections for card-check recognition but retains the enhanced penalties for employer unfair labor practices during an election campaign. It remains to be seen how a “modified EFCA” addresses the issue of first-contract arbitration, an idea bitterly opposed by business.

Worksite Enforcement Actions By Immigration and Customs Enforcement

Immigration and Customs Enforcement (ICE) recently announced a shift in focus from worksite raids to employer I-9 audits and began investigations of thousands of businesses as part of its strategy to focus on employers rather than the individuals who are working in this country illegally. As recently as November 2009, ICE announced 1,000 new I-9 audits against employers. As a result of this new initiative, employers can expect ICE to conduct more I-9 audits in 2010, which may result in fines or criminal actions against the employer for violations.

Paid Sick Leave

Employers may be required to provide seven days of paid sick time per year under a bill introduced in Congress, titled the Pandemic Protection for Workers, Families, and Businesses Act (H.R. 4092/S. 2790). Under the proposal, most employers with 15 or more employees would be required to provide full-time employees with paid sick time off due to a contagious illness, or to care for a child with a contagious illness. Part-time employees would be entitled to a pro-rata share of paid sick days. The proposal makes clear that state and local paid sick leave laws providing a greater amount of paid leave remain in force.

If the Act becomes law, employers’ existing paid time off (PTO) policies may need to be modified. According to the bill, employers who already provide seven days of paid sick leave that “may be used for the same purposes and under the same conditions as the purposes and conditions [covered in the legislation] shall not be required to provide additional paid sick time. . . .” It is unclear what effect the legislation would have on PTO plans that allot a certain amount of time off without specifying the permitted purposes of use.

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Real Estate

Foreign & U.S. Lenders

Among foreign- and U.S.-based lenders, very attractive returns and loan to value ratios on newly originated debt are possible given the volume of needed refinancing. Opportunities for financing new construction will be generally limited and consist mostly of isolated trophy sites. Many lenders will be focused on preserving value in their current loan portfolios through careful adjustment of existing loan terms and by working out or recouping their investments through creditor action. We expect to leverage our group's experience representing borrowers and lenders with respect to all types of financing products, including mezzanine and conduit debt and in all possible stages of a loan relationship, be it origination, workout or foreclosure and recovery. For our lender clients, including master and special servicers, we have been assessing loans to identify and fix any weaknesses in loan structure or security as well as undertaking restructuring and recovery efforts with assistance, as needed, from our litigators and bankruptcy attorneys. We are experienced at handling syndicated and participated debt, and have recently been engaged in extremely large transactions, multi-state deals and representations involving agent/servicer obligations and exposures and inter-creditor agreement enforcement and avoidance issues.



Anticipated Opportunities in 2010

While we expect the U.S. real estate industry to face continued challenges in 2010, we do anticipate opportunities. There is no doubt that the coming year looks difficult for the U.S. real estate sector. Three out of four respondents in a recent national survey conducted by the Turnaround Management Association thought the commercial real estate industry will have more difficulty in 2010 than it did in 2009. That result was matched in a similar survey conducted by the Urban Land Institute which also predicted declines of 40 percent - 50 percent off 2007 market value peaks for commercial real estate. There is limited liquidity in the system to refinance the \$1.5 trillion - \$2.0 trillion in real estate secured loans that will be maturing by 2013. Even if such funds were present, tightened underwriting standards would make the majority of those loans ineligible for funding at current loan to value ratios, requiring equity infusions at a time when cash is tight. The bleak predictions notwithstanding, opportunities are present to protect existing investments, to bargain hunt and to position for a recovered market.

Investors

For investors, we expect that cash buyers interested in high quality projects in strong urban markets will find excellent long-term ownership opportunities. U.S.-based real estate investments will prove attractive to foreign buyers, especially those who do not rely on financing at the acquisition stage. In the current market, government anchored projects appear to be dependable, long term purchases, as are high quality multifamily projects in gateway cities like Washington, D.C., Boston and San Francisco.

**opportunities are present
to protect existing
investments, to bargain
hunt and to position for a
recovered market**

We anticipate that we will be assisting our U.S.-based and international clients this year in identifying and evaluating prospective investment targets, bringing targeted properties under contract and, in concert with our corporate, tax and other practice groups, structuring and closing transactions in a manner that best suit the clients' needs. Existing owners may need to focus their efforts on debt restructuring or possibly, workout negotiations. Our real estate finance attorneys have had extensive experience in those areas and have had good results in reducing or eliminating remaining liabilities for guarantors and structuring transactions to minimize adverse tax consequences arising from, among other matters, debt forgiveness.

COMMERCIAL SPACE For Lease

Landlords & Tenants

Opportunities also exist for landlords and tenants as they seek to maximize delivery of building services while minimizing overall costs and expenses. Issues being faced in the current economy include rent renegotiation, evaluation of lease pass-through and rent escalation charges, enforcement of expansion provisions and lease enforcement and work out actions following default. Subleasing, assignment and contraction of rental space have all become very relevant matters as clients seek to balance the cost of maintaining unused space against the prospect that surrendered space or forgone expansion opportunities will hinder growth in a rebounded economy. The reduced security provided by the current economic climate has also made lease guaranty issues an increasingly relevant topic for both our landlord and tenant clients and, increasingly our landlord, tenant and lender clients have asked us to evaluate protections available in their non-disturbance agreements in the event a loan default results in foreclosure. We are currently handling these matters for their clients, often with respect to nationwide portfolios of rental space, using attorneys in our various offices to provide local counsel and in-depth market experience.

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Reinsurance & Direct Insurance

Supremes' Decision Expected Regarding Authority of Arbitrators to Decide Procedural Issues Not Addressed in Arbitration Agreement

Tort Reform

Illinois Supreme Court to Rule on Medical Malpractice Damages Cap

The Illinois Supreme Court is expected to rule soon on whether the State's medical malpractice law, which caps non-economic damages, is unconstitutional. *LeBron v. Gottlieb Memorial Hospital*, Nos. 105741 & 105745 (consolidated). The case was argued before the Court in November 2008 and was included on the Court's anticipated opinions list for December 17, 2009. For unexplained reasons, however, the Court did not issue its ruling on that date.

The challenged law, which was enacted in 2005, limits non-economic damages to \$500,000 for claims against doctors and \$1 million for claims against hospitals. In 2007, the Cook County Circuit Court ruled that the caps violated the Separation of Powers Clause of the Illinois Constitution. That decision was appealed directly to the Illinois Supreme Court.

The Court has twice overturned damages caps enacted by the legislature on constitutional grounds. If the Court again finds the caps on damages to be unconstitutional, the amount of malpractice verdicts almost certainly will increase. Whichever way it comes out, however, the decision will impact the future of tort reform in Illinois.

The United States Supreme Court will address an important question of arbitration law in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, No. 08-1198. The case was argued on December 9, 2009. A decision is likely before the end of the Court's current term in June 2010.

The specific issue before the Court is whether an arbitration panel has the authority to hear an arbitrable dispute as a class action where the arbitration clause is silent as to the parties' intent to arbitrate class claims. The arbitration panel had ruled that the case, involving antitrust issues, could proceed as a class action. The United States District Court for the Southern District of New York vacated that ruling, holding that it was in "manifest disregard of the law."

The United States Court of Appeals for the Second Circuit reversed, finding no manifest disregard of the law. The Second Circuit also rejected the argument that the arbitrators had exceeded their authority by finding an intent to submit class claims to arbitration where the arbitration agreement was silent on that issue. Only the latter ruling was the subject of the appeal to the Supreme Court.

Given the deference that courts generally accord arbitration awards, the Supreme Court's decision to hear this case, involving an issue of contract interpretation by an arbitration panel, is somewhat surprising. If the Court reverses the Second Circuit, its decision may expand judicial review of arbitral awards on certain procedural issues, such as hearing class claims or consolidation, that are not normally addressed in arbitration clauses. And although the Court has previously ruled, in a plurality opinion, that the issue of whether an arbitration clause permits class actions should be decided by the arbitrators rather than the courts, the Court could revisit that issue.

The *Stolt-Nielsen* case also is being watched closely to see if the Court makes any further pronouncement on the "manifest disregard of the law" standard for vacating arbitral awards. The Court appeared to abrogate that standard in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). Several Circuit Courts of Appeal are now split on whether the "manifest disregard" standard remains viable.

Trade Sanctions Regulation: Insurance Companies to be Told to Divest Investments in Iran

Spearheaded by the efforts of California Insurance Commissioner and 2010 gubernatorial candidate Steve Poizner, insurance companies can expect increased pressure from state insurance commissioners to divest their investments in countries subject to U.S. trade sanctions regulations.

On July 2, 2009, the California Commissioner issued a request pursuant to his office's general examination authority to 1,327 California licensed insurance companies for data concerning investments they may have in the Government of Iran, in securities denominated in the Government of Iran, and in entities that conduct business in the defense, nuclear, petroleum, natural gas and banking sectors of Iran. Initially, 1,111 companies responded to the request and disclosed billions of dollars in indirect investments in companies that do business with the Iranian energy, nuclear, banking and defense industries. After calling upon executives from 10 of the 216 non-responding companies to appear at a hearing on January 12, 2010, and testify under oath to "to explain why they ignored this critical data call," the California Commissioner announced that 100 percent of the 1,327 companies ultimately complied with his request for data.

The California Commissioner is expected to now issue a list of prohibited companies that do business with the Iranian energy, nuclear, banking and defense industries. Insurers will be given 30 days to notify the California Department of Insurance of the value of their investments in these prohibited companies and 90 days to divest their investments in these prohibited companies. Other states' commissioners are considering similar divestment initiatives, as well as a coordinated nationwide divestment effort.



insurance companies can expect increased pressure from states' insurance commissioners to divest their investments in countries subject to U.S. trade sanctions regulations

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