

# Trust The Leaders

SGR

A Publication of Smith, Gambrell & Russell, LLP

Issue 14 / Winter 2005

## POST-CLOSING DUE DILIGENCE

*Why It's Critical to Your Deal*

## TRASH TALK

*How to Protect Your Company  
From Cybergripping*



## SUPREME COURT UPDATE

*Cases to Watch This Term*

## TURBULENCE IN THE AIRLINE INDUSTRY

*Will There Be a Smooth Landing?*





Smith, Gambrell & Russell, LLP congratulates Prentiss Yancey, Tracie Maurer, Toysha Sharpe, Jason Pettie and Gerald Wells for the recognition of their professional accomplishments in *Who's Who in Black Atlanta 2006*.

Trust  
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And a special congratulations to Prentiss Yancey. *Who's Who in Black Atlanta 2006* honored Prentiss as one of "Atlanta's Most Influential" for his career of civic and corporate leadership since joining Smith, Gambrell & Russell, LLP in 1969.



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# Season's Greetings

*With the holiday season now upon us, I hope that you'll plan to tuck this issue of Trust The Leaders into your carry-on bag to help you wile away your travel time. And there's plenty of interesting reading to be had.*

*This issue features a particularly timely piece on the state of the U.S. airline industry. As a result of the recent bankruptcy filings of industry giants Delta Air Lines and Northwest Airlines, many wonder how the airline industry got to the position it is in today and where it is headed. The article by Howard Turner and Hong Wills of SGR's Air Transport Group explores the evolution of the airline industry since deregulation, including the multiple bankruptcies that have plagued the industry recently, and whether we can expect anything different in the years to come.*

*"Cybergripping" is a term with which you may not be familiar. But it refers to the increasingly common practice of setting up a Web site to air criticism of a company and its practices. In their article on cybergripping, Robert Lockwood and Coby Nixon of SGR's Intellectual Property Practice discuss the clash between First Amendment protections available to the cybergriper and Lanham Act protections available to the target company, and offer advice on how your company can best protect itself against Internet trash talking.*

*Businesspeople frequently speak of "due diligence" to describe the steps that a party takes before a transaction occurs to ensure that it is getting exactly what it bargained for. But as Jonathan Minnen explains in his piece on ongoing due diligence, careful attention to operational details after a transaction has closed is just as important for ensuring the continued viability and success of the organization.*

*The past six months have been interesting ones for the U.S. Supreme Court, as two positions on the Court have simultaneously been available to be filled. In this issue, Hunter Jefferson looks at the unique role of the Chief Justice of the United States, a position recently filled by former appeals court judge John Roberts, and also reviews several cases to be considered this term that are likely to be of particular interest to our readership.*

*This issue's Client Profile features The St. Joe Company. This Florida developer is using the concept of New Ruralism to create beautiful rustic living spaces in the Florida panhandle for those who can't get enough of the great outdoors.*

*In The Finish Line, Billy Hearnburg highlights some of the recent pro bono activities of SGR lawyers, who have successfully represented clients, without charge, in a wide variety of matters ranging from overturning a felony conviction to protecting the rights of a "mail-order bride."*

*This is the last issue of Trust The Leaders for 2005, so I'd like to take this opportunity to wish each of you a very happy holiday season and a peaceful and prosperous New Year. As always, I welcome any input you may have on how to make this publication as useful to you as possible.*



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## Protected Expression or Trademark Infringement?

The Internet is replete with gripes, complaints, accusations and grievances directed toward corporations. Such negative opinions are usually posted by unhappy customers, disgruntled former employees or other discontented individuals who feel somehow wronged by the particular corporation. The Internet provides an open and public forum for voicing these opinions in newsgroups, blogs and other interactive Web sites. With increasing frequency, proactive critics are also creating dedicated gripe sites to attack targeted corporations. A nominal fee and simple registration procedure will confer upon the cybergriper the domain name (the unique on-line identifier of a Web site, *e.g.*, [sgrlaw.com](http://sgrlaw.com)) of his or her choice, which is generally identical to the corporation's trademark, a slight variation on the corporation's trademark or the corporation's trademark suffixed with a pejorative term such as "sucks" or "blows."

Forbes.com recently published a list of the top nine<sup>1</sup> corporate gripe sites, based on criteria such as hostility level (the angrier the better) and frequency of updates. The list included the following domain names: [KBHomeSucks.com](http://KBHomeSucks.com), [PayPalSucks.com](http://PayPalSucks.com),

[AllstateInsuranceSucks.com](http://AllstateInsuranceSucks.com), [MS-Eradication.org](http://MS-Eradication.org) (offered by The Microsoft Eradication Society), [ameXsuX.com](http://ameXsuX.com), [WalmartBlows.com](http://WalmartBlows.com), [Verizonpathetic.com](http://Verizonpathetic.com), [Untied.com](http://Untied.com) (targeting United Airlines) and [UnitedPackageSmashers.com](http://UnitedPackageSmashers.com) (targeting United Parcel Service).<sup>2</sup>

A corporation targeted by such gripe sites clearly has a cause for concern from a public relations standpoint, and may also have a cause of action for the unauthorized use of its trademark in a domain name under the Lanham Act, which contains the federal statutes on trademark law. The cybergrippers, on the other hand, may seek to invoke First Amendment protection for their choice of domain name and their negative gripe site content.

Bally Total Fitness brought one of the first gripe site lawsuits in 1998 against a disgruntled customer who created a gripe site at [compupix.com/ballysucks](http://compupix.com/ballysucks).<sup>3</sup> The domain name in this case was "compupix.com," and the post-domain path was "ballysucks." A post-domain path indicates how subdomains and Web pages are stored on the host computer and need not be unique across domains (*i.e.*, whereas there may

## A plaintiff corporation must establish that any expression embodying the use of its trademark by the cybergriper is commercial speech in order to bring the claim within the jurisdiction of the Lanham Act.

be only one registered “compupix.com” domain, any number of domains on the Web may have a “ballysucks” post-domain path). The gripe site prominently displayed Bally’s name and logo and was dedicated to criticizing Bally’s services. The court ruled that the gripe site was “a consumer commentary” whose content was a form of noncommercial expression protected by the First Amendment. That “Bally” was used as part of the post-domain path rather than in the site’s domain name factored into the court’s decision in favor of the cybergriper.

More recently, the court in *Taubman Co. v. Webfeats*<sup>4</sup> found that “the domain name is a type of public expression, no different in scope than a billboard or a pulpit, and [the defendant] has a First Amendment right to express his opinion about [the plaintiff], and as long as his speech is not commercially misleading, the Lanham Act cannot be summoned to prevent it.”

Because First Amendment law allows commercial speech to be regulated in ways that would be impermissible if applied to noncommercial expressions, a plaintiff corporation must first establish as a threshold matter that any expression embodying the use of its trademark by the cybergriper is commercial speech in order to bring the claim within the jurisdiction of the Lanham Act.

### Trademark Infringement

The basic focus of trademark protection is preventing the use of identical or similar marks in a way that confuses the public about the source of goods and services. The owner of a registered trademark may bring suit against a cybergriper for infringement of the mark under 15 U.S.C. §§ 1114 and 1125(a). The touchstone of a trademark infringement claim is



the likelihood of consumer confusion caused by the unauthorized use of the mark. As mentioned above, however, a court will analyze a defendant’s use of a trademark for likelihood of confusion only if it first finds the use to be commercial.

Under the Lanham Act, any person who “use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive” may be held liable for such use.<sup>5</sup>

**“Commercial Use” Requirement.** In *Planned Parenthood Federation of America v. Bucci*,<sup>6</sup> Planned Parenthood brought



## A corporation targeted by a gripe site may have a cause of action under the Lanham Act.

an action against an anti-abortion activist who registered and maintained an anti-choice Web site at *plannedparenthood.com*. The court found the “commercial use” requirement of the Lanham Act was satisfied in three ways: (1) the defendant’s Web site promoted the sale of his anti-abortion book; (2) the Web site communicated that abortion was morally wrong, which constituted an informational service; and (3) the defendant’s use of the mark would prevent some users from reaching Planned Parenthood’s own Web site at *ppfa.org*, thereby constituting interference “in connection with” the plaintiff’s distribution of services. The court thus entered a preliminary injunction enjoining the defendant from using the PLANNED PARENTHOOD mark, or any colorable imitation thereof, to identify his Web site.

The court in *Jews for Jesus v. Brodsky*<sup>7</sup> applied analogous reasoning to find the “commercial use” requirement satisfied by a Web site with the domain name *jewsforjesus.org*, which was nearly identical to the plaintiff organization Jews for Jesus’ Web site’s domain name, *jews-for-jesus.org*, and which promoted views antithetical to those espoused by the plaintiff organization. The court held that the defendant’s conduct

met the Lanham Act’s jurisdictional prerequisite of acting “in connection with” goods or services because the defendant’s Web site provided a single hyperlink to another Web site that sold merchandise such as audiotapes and books, and because the use of the JEWS FOR JESUS mark in the domain name was likely to prevent consumers from accessing the plaintiff’s own Web site.

Similarly, in *PETA v. Doughney*,<sup>8</sup> the court found that the defendant’s unauthorized use of the PETA mark in his registered domain name *peta.org* — a site that featured materials on eating meat, wearing fur and leather, and hunting — was “in connection with” goods and services because the use could intercept consumer attempts to access the Web site of the animal rights organization People for the Ethical Treatment of Animals, commonly referred to as “PETA.”

Some courts have declined to find commercial use under the *Planned Parenthood* reasoning, and thus have refused to find that the offending site gives rise to a cause of action under the Lanham Act. For example, in *Taubman*, the Sixth

Circuit refused to hold that an unauthorized use of a protected mark in conjunction with a cybergripping site is a commercial use and “in connection with the sale of goods,” or to hold that providing information on a Web site constituted a service under 35 U.S.C. § 1114. Similarly, in *Bosley Medical Institute, Inc. v. Kremer*,<sup>9</sup> the court found that the defendant’s gripe site, which contained links to a discussion group, which in turn contained advertising, was not commercial.

**Likelihood of Confusion Standard.** Each of the *Planned Parenthood*, *Jews for Jesus* and *PETA* cases involved Web sites with domain names identical to, or nearly identical to, the plaintiff organization’s trademark but with content disparaging of the viewpoint of the plaintiff organization. Relying primarily on the identical-domain-name factor, the court in each of these cases found that a likelihood of consumer confusion existed regarding the source of the defendant’s Web site. For example, the *Planned Parenthood* court analyzed the domain name independently from the Web site content and held that the defendant had employed the domain name as a confusing and misleading source identifier, rejecting the

## Relying primarily on the identical-domain-name factor, the court in each case found that a likelihood of consumer confusion existed regarding the source of the defendant's Web site.

defendant's argument that the domain name was part of a communication protected by the First Amendment.

By contrast, in *Lamparello v. Falwell*,<sup>10</sup> decided in August 2005, the United States Court of Appeals for the Fourth Circuit looked beyond the defendant's domain name, fallwell.com, which was virtually identical to the plaintiff's mark, FALWELL, and considered the content of the defendant's Web site to find no likelihood of confusion. The court reasoned, "After even a quick glance at the content of the website ... no one seeking Reverend Falwell's guidance would be misled by the domain name — www.fallwell.com — into believing Reverend Falwell authorized the content of that website."

Indeed, even an identical domain name is not dispositive on the likelihood of confusion issue. In *Nissan Motor Co. v. Nissan Computer Corp.*, the Ninth Circuit held that, while automobile advertising on defendant Nissan Computer's nissan.com Web site caused consumer confusion as a matter of law, the plaintiff carmaker was not entitled to injunctive relief as to non-automobile advertising on the Web site. Nor was the carmaker entitled to an injunction prohibiting the defendant's use of the domain name nissan.com. Today, Internet users can follow the ongoing litigation on the very Web site at issue: nissan.com.

Pejorative domain names, on the other hand, generally are not considered by courts to have a likelihood of confusing the consumer. *Lucent Technologies, Inc. v. Lucentucks.com*<sup>11</sup> and *Taubman* established a bright-line rule that domain names with "sucks" and other pejorative suffixes cannot be confusingly similar to the target trademark. The court in *Lucent* found that the defendant had argued "persuasively that the average consumer would not confuse lucentucks.com with a web site sponsored by plaintiff." Similarly, in *Taubman*, the court found that the use of the same pejorative term "removes any confusion as to source."

Thus, while a claim of trademark infringement would have a chance of success where the Web site has a commercial use and the domain name is identical to the target trademark, trademark owners are unlikely to prevail in court against noncommercial gripe sites with pejorative domain names that do not cause consumer confusion.

### Trademark Dilution

In 1996, Congress amended Section 43 of the Lanham Act to provide a remedy for the dilution of a famous mark: the Federal Trademark Dilution Act (FTDA).<sup>12</sup> The FTDA provides that "[t]he owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark. ..."

With the FTDA, the Lanham Act now protects against consumer confusion as to source as well as against trademark dilution by providing injunctive relief if a famous trademark is commercially used in commerce in such a way as to dilute the mark's distinctive quality. Two types of dilution traditionally have been recognized: blurring and tarnishment. Blurring occurs when a particular use of a mark weakens that mark's ability to serve as a unique source identifier. Tarnishment occurs when a famous mark is improperly associated with an inferior or offensive product or service. In addition to the FTDA's jurisdictional "commercial use in commerce" requirement, the statute also contains an additional express exemption for "noncommercial use of a mark."

**Commercial Use and Famousness Requirements.** In order to prevail on a claim for trademark dilution, a plaintiff must first establish "commercial use in commerce" of its trademark,

roughly analogous to the commercial use requirement for trademark infringement discussed above. This precondition, as in the case of infringement, puts most cybergripping sites out of reach of the FTDA. If a plaintiff is able to establish commercial use, then the other primary requirement for invoking liability under the FTDA is that the mark be famous. However, this requirement may be even more difficult to establish than the likelihood of confusion: “[B]ecause protection afforded a mark under the FTDA is much broader than that under a likelihood of confusion standard, the class of marks entitled to protection under the FTDA is limited to highly distinctive, famous trademarks which the public recognizes as signifying something unique, singular, or particular.”<sup>13</sup> Congress established a list of eight factors to be considered in determining whether a mark is distinctive and famous, including “the degree of inherent or acquired distinctiveness of the mark”; “the duration and extent of use of the mark in connection with the goods or services with which the mark is used”; “the duration and extent of advertising and publicity of the mark”; and “the geographical extent of the trading area in which the mark is used.” In consideration of these factors, the marks AOL for Internet services,<sup>14</sup> BARBIE for dolls,<sup>15</sup> FORD for motor vehicles,<sup>16</sup> and POLO for wearing apparel<sup>17</sup> have been held to be famous. By contrast, the marks CLUE for board games,<sup>18</sup> TREK for bicycles,<sup>19</sup> WE for magazines<sup>20</sup> and WE’LL PICK YOU UP for auto rental services<sup>21</sup> were held not to qualify as famous.

## Practical Advice

Should your corporation find itself the target of a gripe site that does not clearly infringe upon or dilute the corporation’s trademark in violation of the Lanham Act, the following strategies for combatting the offending cybergriper, and preventing future cybergripers, are nevertheless available:

- Consult your attorney about bringing an administrative action against the cybergriper under the Uniform Domain Name Dispute Resolution Policy (UDRP). The UDRP provides for an expedited administrative procedure for clear cases of abusive registrations and use of domain names (e.g., cybersquatting). All accredited registrars in the .biz, .com, .info, .name, .net and .org top-level domains must agree to abide by decisions rendered under the UDRP.
- Consult your attorney about writing a letter to the cybergriper warning that legal action may be taken should the cybergriper further infringe upon or dilute your company’s trademark.

- Create a rebuttal Web site to the gripe site (for example, in response to Walmart-Blows.com, Wal-Mart set up a rebuttal Web site at Walmartfacts.com).
- Monitor known gripe sites for commercial use, which may then give rise to a Lanham Act action.
- Use a trademark-watching service to receive notifications of new gripe sites.
- Preemptively register common pejorative domain names.

While it may be impossible to prevent the creation of all corporate gripe sites, by being mindful of the above tips, companies can limit potential damage caused by cybergripers.

## Endnotes

The authors would like to thank Weilyn Pa for her assistance in the preparation of this article.

1. There were 10 sites cited by Forbes.com, but the tenth was inactivated, for reasons unknown, before the Forbes.com article was published.
2. Charles Wolrich, *Top Corporate Hate Websites*, Forbes.com, March 8, 2005, at [http://www.forbes.com/2005/03/07/cx\\_cw\\_0308hate\\_print.html](http://www.forbes.com/2005/03/07/cx_cw_0308hate_print.html) (last visited July 28, 2005).
3. 29 F. Supp. 2d 1161 (C.D. Cal. 1998).
4. 319 F.3d 770, 778 (6th Cir. 2003).
5. 15 U.S.C. § 1114(1)(a).
6. No. 97 Civ. 0629 (KMW), 1997 WL 133313 (S.D.N.Y. March 24, 1997), *aff’d* 152 F.3d 920 (2d Cir. 1998).
7. 993 F. Supp. 282 (D.N.J. 1998).
8. 113 F. Supp. 2d 915 (E.D. Va. 2000), *aff’d* 263 F.3d 359 (4th Cir. 2001).
9. 403 F.3d 672 (9th Cir. 2005).
10. 420 F.3d 309 (4th Cir. 2005).
11. 95 F. Supp. 2d 528 (E.D. Va. 2000).
12. *See* 15 U.S.C. § 1125(c).
13. Blossom Lefcourt, *The Prosecution of Cybergripers Under the Lanham Act*, 3 CARDOZO PUB. L. POLY & ETHICS 269, 290 (2004) (quoting 2002 Federal Trademark Dilution Act: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 26 (2002) (statement of Ethan Horwitz, Partner, Darby & Darby, P.C.)).
14. *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998).
15. *Mattel Inc. v. Jcom Inc.*, 48 U.S.P.Q.2d 1467 (S.D.N.Y. 1998).
16. *Ford Motor Co. v. Lloyd Design Corp.*, 184 F. Supp. 2d 665 (E.D. Mich. 2002).
17. *Polo Ralph Lauren L.P. v. Schuman*, 46 U.S.P.Q.2d 1046 (S.D. Tex. 1998).
18. *Hasbro, Inc. v. Clue Computing, Inc.*, 232 F.3d 1 (1st Cir. 2000).
19. *Thane Int’l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894 (9th Cir. 2002).
20. *WE Media, Inc. v. General Elec. Co.*, 218 F. Supp. 2d 463 (S.D.N.Y. 2002), *aff’d*, 94 Fed. App’x 29 (2nd Cir. 2004).
21. *Advantage Rent-A-Car, Inc. v. Enterprise Rent-A-Car, Co.*, 238 F.3d 378 (5th Cir. 2001).

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## From Atlanta

- **John Despriet** and **Shayne Clinton** authored an article entitled “Evolution of the Securities Litigation Uniform Standards Act” which has been accepted for publication in the *Securities Regulation Law Journal* Winter 2005 edition. The article deals with the Securities Litigation Uniform Standards Act (SLUSA), passed by Congress in 1998 in an effort to limit class action litigation filed in state courts to circumvent the requirements of the Private Securities Litigation Reform Act of 1995. SLUSA provides for pre-emption by federal law of class actions in which plaintiffs assert state law fraud claims in connection with the purchase or sale of certain securities. The article examines current judicial interpretation of SLUSA’s provisions as well as tactics used by the plaintiffs’ bar to attempt to avoid SLUSA’s preemptive effects.
- **Tom Hong** recently presided over a seminar entitled “Doing Business in China,” co-sponsored by the State Bar of Georgia International Law Section. Speakers at the seminar addressed a wide range of topics from negotiating contracts with Chinese businesses to an overview of Chinese patent law. The more than 70 seminar attendees were welcomed by **Anton Mertens**, Chair of the International Law Section. Anton also spoke recently on immigration options for foreign students at the 26th Annual Southern Region Student Conference of the National Association of Black Accountants, Inc., and on immigration challenges in hiring foreign workers at the 15th Annual Southeast Human Resource Conference.
- **Ed Burch** has been named a 2005 Georgia Super Lawyer Rising Star. Each year, *Atlanta* Magazine publishes a list of the top young lawyers in Georgia, as chosen by other Georgia Super Lawyers. All Georgia Rising Stars are 40 years of age or younger or have been in practice for 10 years or less.
- **Stefan Tiessen** has been named the recipient of the Federal Republic of Germany Friendship Award. The award is given by the German government to recognize efforts to foster and sustain good relations between Germany and the United States. Stefan was cited for his service as chairman of the Friends of Goethe, a nonprofit organization founded in 1995 to support the Goethe-Institut in Atlanta, and his involvement in obtaining and presenting a collection of

works of art from artist colonies in Europe that was featured this year at Oglethorpe University in Atlanta.

## From Jacksonville

Long-time SGR client Winn-Dixie Stores, Inc. has engaged the firm to serve as Special Real Estate Counsel in connection with the company’s February 2005 filing under Chapter 11 of the United States Bankruptcy Code.

Immediately following the Chapter 11 filing, SGR began working with Winn-Dixie and its lenders to document and secure the company’s new \$600 million debtor-in-possession credit facility. After the company adopted a post-filing business strategy in June, SGR provided counsel on various store lease matters including reduction of the company’s market presence by nearly 400 supermarket locations throughout the southeastern United States. SGR has assisted in the company’s ongoing efforts to sell a number of regional distribution centers, product manufacturing plants and raw land parcels, and the recent disposition of 150 in-store pharmacy inventories and prescription files to a variety of national and regional drugstores and retail chains. The firm is actively working with Winn-Dixie’s real estate brokers in modifying more than 100 leases and subleases to adjust to Winn-Dixie’s financial needs in its continuing market areas.

Of special note, SGR played a key role in the evaluation of Winn-Dixie’s lease obligations and interests in the Louisiana and Mississippi Gulf Coast region in the aftermath of Hurricane Katrina and continues to advise the company on store lease matters as Winn-Dixie strives to rebuild and reopen damaged or destroyed supermarkets in the storm-impacted areas.

**Doug Stanford, Keith Daw, Simone Kenyon** and **Pam Brown** make up the Jacksonville-based attorney working group assigned to Winn-Dixie real estate matters.

## From Washington, D.C.

- **Fred Calvetti** presented an intensive two-day seminar on U.S. patent litigation earlier this year in London before an audience of corporate, university and other delegates on behalf of the Chartered Institute of Patent Agents (CIPA), one of Europe’s oldest intellectual property organizations. Fred inaugurated this course for CIPA, has offered the course elsewhere for several years, and anticipates presenting it again in Paris in early 2006.



# TURBULENCE

in the Airline Industry

It is difficult these days to avoid news stories on the troubled U.S. airline industry. Three of the seven largest U.S. passenger airlines are currently in bankruptcy. Over the past four years, the U.S. passenger airline industry has lost more than \$32 billion, with an additional \$9–10 billion loss projected for 2005. Have you ever wondered why this happened, where the industry is going and what the future of flying will be like? Do these events represent an extended dislocation in the industry or are they the harbinger of a vast structural change?

In answering these questions, we must first introduce two terms commonly used in the industry: “legacy carriers” and “low-cost carriers,” or “LCCs.”

### Legacy Carriers

You may have heard the term “legacy carrier” in the news. Legacy carriers are the large airlines that existed before the economic deregulation of the U.S. aviation industry in 1978. They exhibit the characteristics of the pre-deregulation period such as large, established route networks and unionized workforces, contracts with restrictive work rules, and generous wages and benefits including defined benefit pension plans for their workers. Today the legacy carriers include the following major passenger airlines: American Airlines, United Airlines, Delta Air Lines, Continental Airlines, Northwest Airlines and US Airways.



tion, and the aircraft and crews may have longer waits between flights. The airlines are also burdened with the expenses of having to handle connecting passengers at origination, hub and destination.

### Low-Cost Carriers (LCCs)

Low-cost carriers are airlines formed post-deregulation that offer lower fares but eliminate a number of traditional

Since deregulation of the U.S. airline industry, there have been 160 airline bankruptcy filings, 20 of which have occurred in the last five years.

Legacy carriers are generally full-service airlines that operate what are referred to as “hub-and-spoke” systems through which they funnel passengers from different locations into central hubs at major airports and sort the passengers onto connecting flights to their ultimate destinations. Thus, passengers often have to change planes at the hub before flying on to their destinations. This system provides the airlines with a broad network and geographic reach and improved load factors. However, the system can result in inefficiencies because the aircraft arrive in waves, thereby creating conges-

passenger services. They are also known as “no-frills” or “discount” carriers. There are a number of low-cost carriers, but the major ones in the United States include AirTran, Frontier, JetBlue and Southwest.

The typical LCC business model includes several of the following practices: a single passenger class (some, such as AirTran, also offer business-class service); a single or limited number of aircraft types, which allows the carrier to reduce training, servicing and maintenance costs; a simple fare structure, which rewards early reservations; outsourcing of major



## Just under half of all airline flight seats available in the United States are now operated by airlines under bankruptcy protection.

aircraft maintenance to third-party repair shops, which is generally cheaper than doing the work in-house at higher wage rates; utilization of cheaper, less-congested secondary airports, which reduces air traffic delays, landing fees and airport charges; shorter flights and faster turnaround times, which maximize the utilization of the aircraft; flying primarily point to point, which reduces costs and maximizes the utilization of the planes as compared to the traditional hub-and-spoke system; emphasizing direct sales of tickets and usage of the Internet, which reduces fees and commissions paid to travel agents and other third parties; employment of fewer employees, which reduces personnel costs; and the elimination or reduction of in-flight catering and complimentary services, which further reduces costs.

### Troubles of the Legacy Carriers

As noted, airline bankruptcies have been much in the news recently. According to the Government Accounting Office (GAO), since deregulation of the U.S. airline industry, there have been 160 airline bankruptcy filings, 20 of which have occurred in the last five years. Although many of these failures were ill-planned and poorly financed start-ups, it is undeniable that in the post-deregulation world, airlines have failed at a high rate. Old, well-established brands such as Eastern Air Lines, Pan Am and TWA have disappeared entirely, ceasing operations after one or more bankruptcy filings. And currently, three of the six U.S. legacy carriers are in bankruptcy and a fourth only emerged from Chapter 11 protection in September. United Airlines filed for bankruptcy in 2002. US Airways filed in September 2004, its second filing since 2002 (US Airways emerged from bankruptcy in

September 2005 and merged on that date with an LCC, America West). Northwest Airlines, the nation's fourth largest airline, filed for bankruptcy on September 14, 2005. Delta Air Lines, the nation's number-three carrier, filed on the same day as Northwest, in what was the ninth largest bankruptcy filing in U.S. history. Continental Airlines, although not in bankruptcy now, underwent bankruptcy reorganizations twice in the '90s. American Airlines is the only legacy carrier that has not sought bankruptcy protection. According to the Air Transportation Association (ATA), just under half of all airline flight seats available in the United States are now operated by airlines under bankruptcy protection. Moreover, the revenues of the major carriers have declined drastically. According to *Air Transport World*, operating revenues for the 10 largest U.S. airlines totaled \$80.8 billion in 2003, down from \$97.7 billion in 2000, as to which it noted "there is simply no precedent for this type of contraction in the deregulated era."

There are multiple causes for the failure of the legacy carriers, both internal and external, many of which are intertwined. Some of them are examined below.

### ***High Wages, Benefits and Mounting Pension Obligations.***

Legacy carriers continue to be burdened by many of the characteristics of the pre-deregulation period: unionized work forces, high wages, comprehensive benefits, hugely expensive pension plans and restrictive work rules. Given their level of fixed costs, high ratios of debt to equity and the prevailing competitive environment, airlines cannot generally withstand a strike that would shut down flying. Not surprisingly, airline unions resist reducing wages and benefits or easing work

rules. Thus, union contracts, which have been negotiated and renegotiated over the legacy carriers' long history, contain successive accretions, tradeoffs and concessions made by management over the years to avoid strikes and maintain labor peace. But the weight of these accretions has gradually but surely resulted in such carriers being saddled with the twin burdens of high wages and benefits and restrictive work rules, thereby fostering an environment in which many employees have developed an attitude of entitlement. Management of legacy carriers has had only limited success in addressing these problems outside bankruptcy. Union leaders are, after all, political animals and few of them are ever re-elected based upon a record of agreeing to reduce pay or benefits or change favorable work rules. Nor do all of their members really yet believe that the world they knew in the '90s is gone forever. For example, Northwest's recent attempt to avoid bankruptcy by, among other things, obtaining concessions from its 4,400 mechanics, resulted in a strike in August 2005. Northwest's bankruptcy filing followed in September.

The costs and attitudes associated with these collective bargaining agreements, and similar wages and benefits granted to nonunion employees, have become embedded in the culture and cost structure of many of the legacy carriers and have made it increasingly difficult for them to compete with their LCC counterparts, which pay their workers less and have far more flexible work rules. Similarly, even when the pay scales are comparable, the legacy carriers generally have older workforces with more on-the-job seniority and thus higher effective wage costs.

Pension costs under defined benefit (as opposed to defined contribution) plans designed on the old "Rust Belt" model are also a major factor forcing legacy carriers into bankruptcy. Many such plans have become significantly underfunded. For example, at termination, United's pension plans were underfunded by \$9.8 billion and US Airways' by \$5 billion. Delta's pension plan is estimated to be underfunded by \$10.6 billion and Northwest's by \$5.7 billion. Both United and US Airways terminated their pension plans in bankruptcy. It is not clear whether Delta and Northwest will do the same. If these bankrupt airlines are allowed to terminate their pension obligations while also reducing wage and benefit costs, this development will put significant economic pressure on American and Continental, the only remaining legacy carriers not under bankruptcy protection.



**Competition from Low-Cost Carriers.** Competition from LCCs is one of the most direct and significant causes of the failure of legacy carriers. The market share of LCCs has increased significantly in the last 10 years. LCCs represent 25 to 30 percent of the U.S. domestic market and they compete on 70 percent of the routes. Three of the 10 largest passenger airlines in the U.S. are LCCs: Southwest, JetBlue and AirTran. LCCs have managed to keep their operations simpler and more efficient than legacy carriers. Because costs are lower, LCCs can charge bargain fares and still make a profit. Even if they match the LCC fares, legacy carriers may not be able to make a profit (or as much of a profit) because of their higher costs. Legacy carriers are also not at liberty to charge a much higher fare than the LCCs because consumers are generally price sensitive and will book the airline with lower fares.

The legacy carriers have made significant cost-cutting progress in the last few years by, among other things, obtaining concessions from employees and eliminating in-flight services such as meals and even snacks, pillows, blankets and headphones. Some have scaled back their hub-and-spoke operations. For example, Delta Air Lines closed its connecting hub at Dallas/Fort Worth International Airport. However, legacy carriers still have a considerable distance to go to bring their costs in line with their LCC competitors. According to the GAO, the LCCs maintained a 2.7-cent-per-available-seat-mile advantage over legacy carriers in 2004.<sup>1</sup>

**Soaring Fuel Costs.** Record high fuel costs are said to be the most direct cause of the recent airline troubles. Although cer-



**Overcapacity.** Today's airline troubles are partly due to overcapacity in the system. When capacity exceeds demand, airlines are unable to charge higher fares to offset their costs without risk of losing market share. Nonetheless, aircraft manufacturers' order books for new aircraft are full. Older aircraft are not typically scrapped but sold off to new start-ups and other second- and third-tier carriers. Thus, capacity remains in the system and continues to restrain pricing. The healthier carriers argue that allowing bankrupt carriers to continue to operate under the protection of the bankruptcy courts in Chapter 11 only adds to the industry's problems because the overcapacity is never eliminated, and that the industry will remain unstable until the government ceases allowing failed airlines to reorganize in bankruptcy over extended periods and instead forces failed carriers to liquidate. Under bankruptcy court protection, bankrupt airlines renegotiate and restructure aircraft, engine and facility financing and lease arrangements, revise labor contracts, and

## When capacity exceeds demand, airlines are unable to charge higher fares to offset their costs without risk of losing market share.

tainly not the only reason, both Delta Air Lines and Northwest Airlines cited, among other things, skyrocketing fuel costs as reasons for making their bankruptcy filings in September after the interruptions in supplies from Gulf Coast refineries due to the hurricanes. Fuel prices reached record levels after Hurricane Katrina. The ATA estimates the airline industry's jet fuel expense could increase by \$9.2 billion this year.<sup>2</sup> While all carriers are exposed to high fuel costs, certain of the LCCs have had the resources to hedge against much of the impact. For example, Southwest has hedged 85 percent of its fuel requirements in the second half of 2005 at the equivalent of \$26 per barrel while spot market prices hover in the high \$60s. Legacy carriers that are already deeply in debt, flying older, less fuel-efficient aircraft and whose fuel purchases are generally unhedged, are less capable of weathering such spikes in fuel prices.

reduce or eliminate pension obligations — all while continuing to operate. Although they may choose to cut services in certain areas or reduce the number of aircraft in their fleet, they are not forced to wind up or cease business. Therefore, even bankruptcy does not measurably reduce capacity. As the supply of available airline seats does not decrease and demand remains at approximately the same levels, the remaining players do not have the power to influence pricing.

**Low Fares and Lack of Control Over Pricing.** Airlines have limited control over the pricing of airline tickets. This is not an industry where most passengers have deep-seated brand loyalty. The Internet enables consumers to have more accurate competitive pricing information and to search for bargain fares. Because of price competition, legacy carriers have been unable to raise their fares much above the fares charged by LCCs without risk of losing customers.

Old, well-established brands such as Eastern Air Lines, Pan Am and TWA have disappeared entirely, ceasing operations after one or more bankruptcy filings.



**High Leverage.** Legacy carriers have accumulated heavy debt obligations due to their higher operating costs, wages, benefits and pension obligations and their inability to raise prices much beyond the fares charged by the LCCs. The debt they carry has a snowball effect because it becomes more difficult to finance acquisition of new, more fuel-efficient aircraft needed to modernize their fleets. And because they are not replacing their fleets with lower maintenance, more fuel-efficient aircraft, they are not able to bring their costs down as fast as needed in order to compete effectively with the LCCs. Heavy debt also means that the legacies have not had as much flexibility or resources to hedge their fuel costs which puts them at a further disadvantage to those LCCs that are able to hedge such costs effectively.

**Little Leverage Over Powerful Suppliers.** It is also sometimes said that airlines are held captive by their suppliers and have little influence on the prices they pay for the goods and services they require.<sup>3</sup> Many key suppliers enjoy oligopoly or monopoly status and some have regulatory power. For instance, major airports, air navigation service providers and security services can essentially dictate the prices they charge for use of their facilities and services.

While all airlines are subject to powerful suppliers, legacy carriers tend to be more at their mercy. For instance, legacy carriers' hub-and-spoke systems require them to use the primary airports around the country, which charge higher landing fees and other expenses. Compared to the legacy carriers,

several of the LCCs (most notably, Southwest) are able to reduce their costs by utilizing secondary airports in their point-to-point systems. Another example is the transaction fees charged by the distribution systems that airlines use to sell tickets. So long as the airlines are more or less dependent on these systems for distributing tickets, they have limited leverage bargaining against rising transaction costs. LCCs are less vulnerable to such costs because they tend to utilize the Internet for a higher proportion of their ticket sales and are less dependent on more costly distribution systems.

Additionally, aircraft and engine manufacturers have significant market leverage over the airlines, not just in prices charged for the aircraft and engines, but also in the supply of spare parts. By lobbying the airline regulatory agencies to require that airlines use the spare parts produced by them or their licensed suppliers, and demanding that such parts be used in order to preserve aircraft and engine warranties, airlines have only limited ability to avoid high prices charged for many spare parts. Though this issue affects both legacy carriers and LCCs, LCCs are better able to reduce the maintenance cost by utilizing fewer different types of aircraft.

**High Fixed Costs.** To establish and maintain their services, airlines have a high level of fixed operating costs such as labor, fuel, aircraft, engines, spare parts, IT services, airport equipment, airport handling services, sales, catering, training, insurance and other expenses. The majority of the proceeds from ticket sales are paid out to different external providers



## Operating revenues for the 10 largest U.S. airlines totaled \$80.8 billion in 2003, down from \$97.7 billion in 2000.

and internal cost centers. Most of the costs for airlines are fixed. The variable costs associated with serving another passenger on the flight are often negligible compared to the fixed costs. Airlines will sell seats at anything over their variable costs. This means that revenues may not always be sufficient to cover the fixed costs. While this is true for all airlines, this factor is exacerbated for legacy carriers due to their higher fixed costs than LCCs.

***Low Barriers to Entry and High Barriers to Exit.*** The GAO attributes the instability of the airline industry partially to the low barriers to entry.<sup>4</sup> Since the barriers were lowered after deregulation, there have been many start-ups. The lower entry barriers have produced significant competition, which drives down airfares. This may be good for consumers, but for legacy carriers, it means less revenue. Many of the new entrants charge significantly lower fares in order to gain market share. Established carriers cannot match these reduced rates without lowering their profitability.

The exit barriers for carriers tend to be higher than the entry barriers. For one thing, the government does not wish to see a carrier dropping an area of service for fear that the failure of legacy carriers would leave people traveling to less popular destinations without service. Credit card companies, lessors and manufacturers of the aircraft and engines also would typically rather keep a troubled airline alive than see it

liquidated. The fact that bankrupt airlines continue to fly, and often at reduced costs, makes it difficult for other airlines to raise fares to profitable levels.

***Cyclical Demand for Air Travel.*** The demand for air travel tends to be cyclical, depending on the economic environment, business needs, vacation time and the like. For instance, the industry suffered greatly reduced demand after the September 11, 2001 terrorist attacks frightened away travelers and deepened the recession. Air travel was undermined again by the SARS epidemic in Asia and the Iraq war. Cyclical demand applies equally to legacy carriers and LCCs, but LCCs have been in a financially better position to weather the storms.

### **Trends and Future of the Airline Industry**

No consensus has emerged regarding the future structure or composition of the U.S. airline industry. Whether what we are currently seeing is an extended dislocation from the after-shocks of 9/11 and an aberration in fuel prices, or a fundamental structural change, is still uncertain. But many pundits warn that a fundamental shakeout is already in progress and that the industry as it currently exists is not sustainable.

In any event, some trends are discernable. For example, the legacy carriers will continue to use the bankruptcy laws to

aid in reducing their debt and pension burdens and otherwise go back to the drawing board to find more effective ways to compete with the LCCs. Legacy carriers will continue to endeavor to cut their seat-mile costs and in the process tend to become more like larger versions of the LCCs. LCCs, on the other hand, will continue to grow and in the process become more like the legacy carriers but without the historical baggage such as defined benefit pension plans. This process, sometimes referred to as “convergence,” is not greatly different from what has happened to other industries in the process of consolidation and diversification.

Will either legacy carriers or LCCs disappear in the process? It is unlikely that either industry segment will disappear entirely, although it is foreseeable that certain individual legacy carriers or LCCs may fail in the process. Though LCCs have advantages over legacy carriers in many areas, it does not necessarily follow that the business models of the legacy carriers are outdated and should be replaced by LCC business models. Legacy carriers still have advantages in several areas. For example, legacy carriers have well-developed frequent-flyer programs and far more extensive route networks, allowing them to serve more customers across greater distances as well as customers traveling to less popular destinations. They are often entrenched with most of the airport gates and landing slots in popular business destinations such as LaGuardia International Airport in New York. Their advantages are particularly pronounced in the international arena. With a few exceptions, LCCs have not tapped into the trans-Atlantic, trans-Pacific and Europe-to-Asia routes. Legacy carriers, on the other hand, have extensive international route networks enhanced by alliances and code-sharing relationships with large foreign carriers.

One way to look at the industry is by comparing it to the development path of the retail industry. In a sense, legacy carriers are similar to department stores and LCCs are like Wal-Mart, Target or specialty stores. Department stores traditionally attempt to carry a wide selection of brand names and products. They, in fact, previously eliminated many of their mom-and-pop predecessors. Then, along came discount stores such as Wal-Mart and Target, which significantly undercut department store prices. A significant number of their former customers, as well as new customers, naturally gravitated to the discount stores for many of the products offered in the department stores but at cheaper prices. Specialty boutiques also sprang up, where customers could go for greater product specialization, higher quality brands, bet-

ter service and the convenience of not having to navigate the large department stores or the discount stores. All three types of stores co-exist.

The airline industry seems to be following a similar path. While the legacy carriers, as the “department stores” of the industry, continue to cut costs in an attempt to resemble and compete with the LCCs (the “discount stores” of the industry), the legacy carriers will continue to exist because of their more extensive route networks to more destinations and broader selection of services available. At the same time, the “discount stores” of the industry, the LCCs, continue to grow and expand to resemble the “department stores,” and will continue to thrive due to their low costs, low fares and convenience. The boutiques, such as various all first- or business-class airlines and premium charter services offering special niche services to targeted consumers who are willing to pay for the premium services, will also make their presence felt from time to time.

The above is not to say that a number of legacy carriers and LCCs will not fall by the wayside. Some have already failed, as noted, and others may be in the process. Still others have consolidated or strengthened their competitiveness in the market. The stronger of the existing LCCs will undoubtedly continue to grow and new-entrant LCCs will regularly appear on the scene. However, the legacy carriers and the LCCs will likely continue to co-exist to provide their customers with a wide selection of flights and services according to the different preferences and priorities of the flying public.

## Endnotes

1. Subcommittee on Aviation, *Hearing on Current Situation and Future Outlook of U.S. Commercial Airline Industry*, available at <http://www.house.gov/transportation/aviation/09-28-05/09-28-05memo.html>.
2. *Id.*
3. Perry Flint, *Broken Business Model*, Air Transport World (August 2005).
4. See note 1, *supra*.

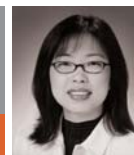
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# Due Diligence: Does It Ever Really

The closing has occurred, documents have been executed, and the consideration has been delivered. There are handshakes and congratulations all around, perhaps followed by a closing dinner and then, finally, a good night's sleep.

The due diligence team has been successful in providing comfort that there are no major problems, or as to those identified, that they have been adequately addressed in the transaction documents. Good job. Well done. But wait — is the due diligence really over?

The lack of attention to ongoing due diligence once an acquisition has closed can lead to significant unbudgeted liabilities and diversion of the time and energy of key executives. Ongoing due diligence is important in your organization, both immediately after the closing of the acquisition and as an ongoing enterprise activity.

A hand holding a magnifying glass over the word "End?". The magnifying glass is held by a hand from the bottom left, and the lens is focused on the word "End?" which is written in a large, dark purple serif font. The background is white.

End?

## Post-Closing Transactional vs. Ongoing Enterprise Due Diligence

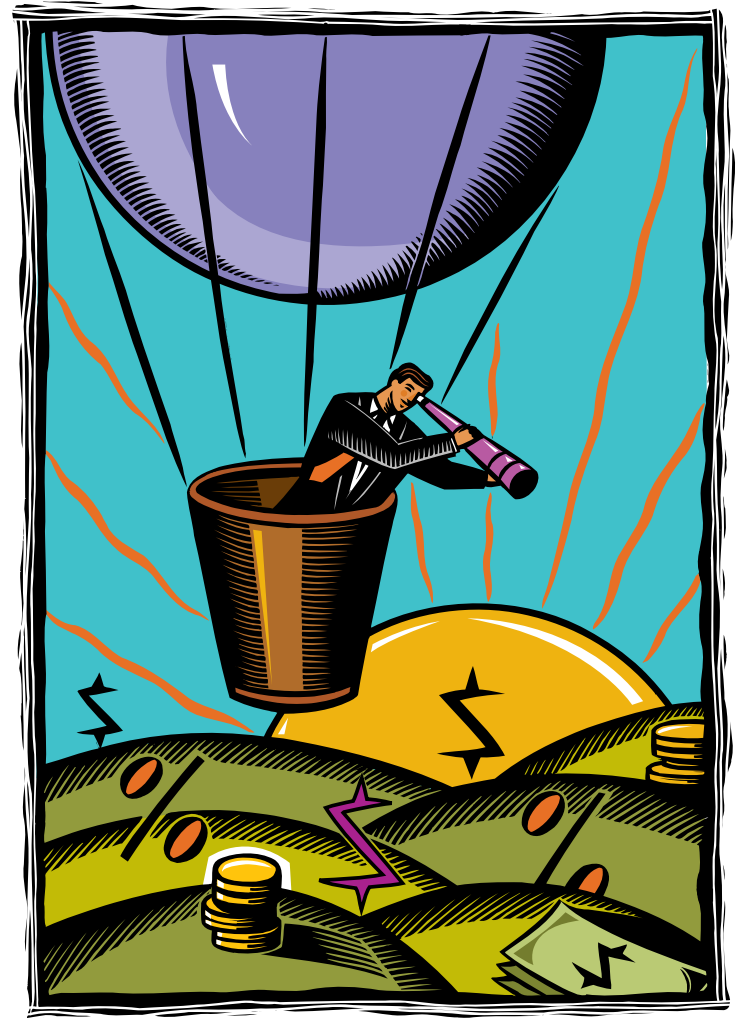
It is useful to view post-closing transactional due diligence and ongoing enterprise due diligence as different activities with certain common elements. Post-closing transactional due diligence will overlay the ongoing enterprise due diligence activity with specific issues relevant to the transaction. Ongoing enterprise due diligence, when handled efficiently, should be focused and tailored to meet the needs of the organization, and thus will vary from organization to organization. Both types of due diligence should be viewed as dynamic processes and subject to change as circumstances unfold.

The post-closing transactional due diligence plan should be designed to (i) monitor whether key assumptions used to justify the transaction are being realized, so that if they are not, management can be alerted as soon as possible so that remedial efforts can be undertaken; and (ii) help ensure that the target company is being effectively integrated into the organization. In the M&A arena, studies have shown that approximately 70 percent of all M&A transactions fail to create meaningful shareholder value. While a number of different factors can contribute to post-M&A disappointment, lack of ongoing due diligence is often one of the leading factors.

An organization's ongoing enterprise due diligence plan should be designed to help ensure that (i) the organization avoids unnecessary losses and expenses, (ii) the organization's governing body (be it a board of directors, trustees or governors) can demonstrate that it has engaged in effective oversight, and (iii) senior officers of the company avoid job- and bonus-threatening adverse events.

These are, of course, broad concepts. Set forth below are several examples where they apply. Each example could be the topic of a separate article, so only a few high spots will be addressed. Each example has implications for both post-closing transactional due diligence and ongoing enterprise due diligence. The individuals designing the due diligence plan can pick and choose which aspects of due diligence are relevant for their organization and circumstances. However, in every instance it is important to plan the organization's due diligence activities to maximize their effectiveness and minimize their cost to the organization and their burden on management and staff.

While a number of different factors can contribute to post-M&A disappointment, lack of ongoing due diligence is often one of the leading factors.





The lack of attention to ongoing due diligence can lead to significant unbudgeted liabilities and diversion of the time and energy of key executives.

## Financial and Accounting Operations

Internal malfeasance involving an organization's financial and accounting personnel has always existed. Unfortunately, we have seen a recent increase in these events, perhaps due to the transition from manual, paper-based systems to electronic ones. But whatever the cause, the problem is real, and it is growing.

Most people naturally assume the good faith and fidelity of those who work in an organization. It is difficult and unpleasant to contemplate that the person who reports to work on time, works diligently and is pleasant to co-workers may also be diverting the organization's financial assets. Since it would be counterproductive to create in an organization an atmosphere of mistrust and suspicion, how does an organization maintain a pleasant and productive environment while engaging in appropriate due diligence?

One avenue is to remember that almost all monetary activities of an organization interface with parties outside of the organization — in particular, banks and customers. With regard to banks, only those individuals who appear on the authorized-access list maintained in the files of the bank should have the ability to access the funds of the organization. With the ever-increasing ability to scan and manipulate documents, it is well within the ability of the creative yet malevolent employee to alter documents and create fictitious originals, such as the signature-authority list. Similarly, the creation of blank-check stock is as easy as ordering checks in response to the ubiquitous advertisements from discount check printers in the Sunday newspaper. Furthermore, when an employee departs the organization, notifying the bank that this person is no longer authorized to deal with the account may be a detail that is overlooked. Accordingly, the easy solution is to request periodically that the organization's bank or other financial institution send to a designated individual in the organization a copy of its authorities file. This should then be compared to what is in the internal file of the organization.

Dormant checking accounts, and those being phased out and with minimal activity, are another area of risk where continuing due diligence is important. Because it is expected that these accounts will have little or no activity, they may not receive the same review as the organization's active accounts. Such accounts provide a ready vehicle for diverting funds for

inappropriate purposes. Thus, they should receive the same level of review and scrutiny as any other account. And, once an account becomes dormant, it should be closed as soon as possible.

As most public accountants and auditors will advise, checks and balances should exist with regard to the review of the organization's financial accounts. Individuals who have the authority to sign checks or otherwise move funds (such as by wire transfer) should not be the same people who receive the bank statements or perform the reconciliation function.

The financial interface of an organization with its customers or clients who remit on the organization's invoices is another area for due diligence. Unexpected voiding of invoices from the organization's accounts receivable system should be investigated, particularly if your organization is structured so that people who have the ability to void an invoice also have the ability to receive or issue checks. Intercepting and diverting a customer's payment, followed by voiding the invoice so that it is removed as an account receivable (meaning, of course, that the organization no longer anticipates receiving payment on that invoice), is a classic criminal methodology.

Collateral losses in this area can exceed the funds actually misappropriated. The costs of investigation and attempted recovery, coupled with the diversion of management time, can be significant. Furthermore, if the loss is of a sufficient size and the organization is publicly traded, an embarrassing public announcement may be required.

### Due Diligence Involving Organizational Records

Organizational actions outside of the ordinary course of business often require the approval of the organization's governing body, such as a corporation's board of directors. Periodically, a review of the minutes of board actions should be undertaken to verify that such actions, such as (i) the issuance of stock, (ii) entering into a contract or other activity outside the ordinary course of business, (iii) activities where the organization's governing documents require more than just the authorization of an officer, or (iv) interested-party transactions, have been duly considered and properly approved by the board (or similar body in the organization) and that such consideration and approval has been appropri-

A method of organizing key contracts and agreements, and summarizing and cross-referencing critical terms for future reference, is important for avoiding inadvertent conflicts.



ately documented. Among other benefits, such documentation assists the governing body of the organization in taking advantage of the business judgment rule should the owners of the organization take issue with its decisions. It also helps defend against the allegation that appropriate oversight was not effected.

Record retention policies have become a hot topic over the past several years and are the subject of many articles.

No financial officer wants to be embarrassed by having a key customer file a bankruptcy petition shortly after a large order has been shipped.

However, regardless of the type of record retention policy the organization has in place, it is vital that periodic due diligence be undertaken to ensure compliance with the policy. A policy that is ignored may expose the organization to more risk and liability than having no policy at all.

### Legal Compliance

Ongoing due diligence to assure that your organization is in compliance with applicable law has always been important. In recent years the importance has escalated to a whole new level with legislation such as the Sarbanes-Oxley Act of 2002. It is vital to the ongoing success of the organization (and, as found by an increasing number of executives, vital to their personal freedom) that the activities of the organization as a whole, and the individual activities of those within the organization for whom an executive is responsible, are in compliance with applicable law. Depending on the nature and size of an organization's business, professional advisors should be engaged to evaluate which laws and regulations are applicable, and to help management design a due diligence



plan to not only monitor compliance with existing laws and regulations, but also keep abreast of trends toward new legislation, and to be proactive in recommending actions so that compliance can be achieved in an orderly, cost-effective and timely manner.

### Interaction of Contracts

The process of an organization entering into contractual relationships does not exist in a sealed environment. Rather, many contractual relationships exist in a universe where they must co-exist with other contractual arrangements. Two examples illustrate this point. One is the executive employment agreement that offers stock option benefit terms that are inconsistent with the pre-existing stock option plan. As a matter of contract law, the executive may be able to enforce the terms of her contract, even though it could cause the employer to violate the terms of its stock option plan. Another example is the organization factoring selected accounts receivable in order to generate short-term cash, which has the consequence of violating a negative covenant in the organization's loan agreements with its lenders. A method of organizing key contracts and agreements, and summarizing and cross-referencing critical terms for future reference, is important for avoiding inadvertent conflicts. This is particularly necessary where a contract has a multiyear

duration, and where the officers of the organization who negotiated the contract have departed the organization. Their replacements will not have the same familiarity with the document, and at least early in their tenure may not even know that it exists.

## Due Diligence of Information Systems

Due to rapid advances in electronic information systems in the last 10-plus years, many organizations have dismantled their manual system infrastructure, either in whole or in significant part. The ability to operate effectively in a manual mode is gone, likely never to return. The acquisition and successful implementation of new technology or material upgrades to existing technology require significant amounts of lead time as the complexity and the requirement of interoperability of information systems increase. Furthermore, information systems and regulatory compliance have been converging for several years, as exemplified by the Health Insurance Portability and Accountability Act (HIPAA). Just being satisfied that your current information system “works” today is not an advisable method of review. Personnel should be tasked to evaluate periodically when (and it is “when,” not “whether”) new or updated technology will be required, due either to growth or to changes in the law, and to embark on appropriate modifications well in advance.

## Key Customers and Suppliers

If your organization has key customers or suppliers, ongoing monitoring of their operations and plans is important. While this may sound like snooping, it most certainly is not, nor is it a particularly difficult task. Routine review of a customer’s or supplier’s Web site (if available), searches on any of the major Internet search engines and periodic review of credit reports can reveal important information on its current financial and operational status, as well as near-term future events. Finding out after the fact that a key supplier with whom you trade on open account (as opposed to a contractual relationship) has been vertically integrated into your competitor would be a very unpleasant surprise. Likewise, no financial officer wants to be embarrassed by having a key customer file a bankruptcy petition shortly after a large order has been shipped, when a review of credit reports would have revealed a deteriorating financial condition in advance.

## The Rule of Enlightened Self-Interest

Those readers who saw the 2002 motion picture *K-19: The Widowmaker* will recall a scene early in the film depicting the failure of an important test of a Soviet submarine’s missile system. The commander of the submarine then screams that he “wants names” — he wants someone to take the responsibility and blame for the failure.

President Harry Truman kept a plaque on his desk that read, “The Buck Stops Here.” Like it or not, and whether it is fair or not, if there is a serious problem that has arisen in an organization, it is common for one or more senior executives to shoulder the blame and suffer the consequences. In the situation where effective due diligence could have ferreted out the problem in advance, boards of directors can be most unforgiving. And, in light of ever-increasing shareholder activism, coupled with an aggressive plaintiffs’ bar in the securities litigation context, material problems that trigger the restatement of a company’s financial statements can be the catalyst for a class action. Such problems can also be grounds for a for-cause termination in some instances.

For many senior executives, meeting financial goals (including earnings) is the litmus test of whether or not year-end bonuses are paid. It would be extremely frustrating to motivate the sales and marketing team to achieve high top-line performance, only to see the bottom line suffer due to unexpected liabilities that could have been avoided by due diligence.

Thus, an effective ongoing due diligence program is not only in the best interest of the organization as a whole, it is also in the enlightened self-interest of senior management. Both post-closing due diligence and ongoing enterprise due diligence require effort and operational discipline to plan and implement. However, when properly accomplished, such due diligence can yield benefits to both the overall organization and senior management that more than justify its use.





A look at the unique position  
of Chief Justice, and a preview of key cases  
to be decided in the October Term 2005

## The Role of the Chief Justice

This summer marked an unusual time in American legal history. With the resignation of Associate Justice Sandra Day O'Connor and the death of Chief Justice William Rehnquist, two positions on the United States Supreme Court were simultaneously available to be filled.

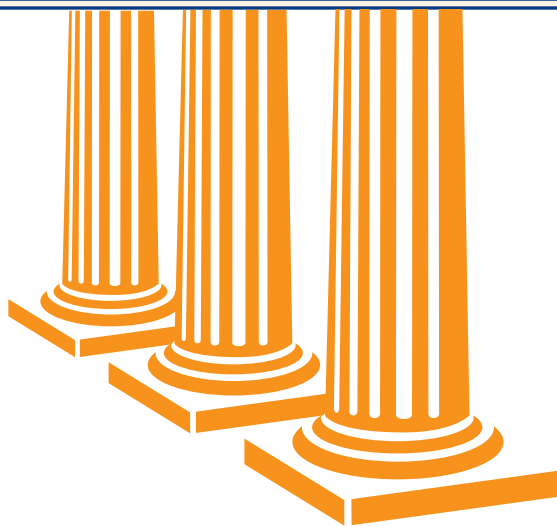
Technically, however, there were not two positions unfilled, since Justice O'Connor made her resignation effective upon the confirmation of her replacement. President Bush nominated Judge John Roberts of the United States Court of Appeals for the District of Columbia Circuit for Justice O'Connor's seat. However, upon Justice Rehnquist's death, President Bush nominated Roberts for the position of Chief Justice instead, thereby ensuring that Justice O'Connor would remain an active member of the Court for longer than she probably had anticipated.

Chief Justice Rehnquist's death marked the first time since 1986 that the position of Chief Justice has been vacant. Exactly what is the role of the Chief Justice? The only federal judicial position created by the United States Constitution is the office of the Chief Justice — all other judicial offices have been created by act of Congress. Because of the uniqueness of the office of the Chief Justice, Congress has charged that office with oversight and administration of the judicial branch of the U.S. government. Accordingly, the Chief Justice oversees the preparation of proposed budgets for the federal courts, directs the collection and dissemination of statistics regarding the federal courts and plays a major role in allocating the limited resources of the judicial branch to various courts throughout the country. The Chief Justice selects the members of the Court who present the judicial branch's budget request to Congress and who will testify regarding the same. The Chief Justice is required to provide an annual statement on the state of the federal courts to Congress. In essence, this task has provided the Chief Justice with an opportunity to express the concerns of the federal judiciary, such as low wages and insufficient staffing and other resources. In addition, the Chief Justice has often used this opportunity to influence political discussions regarding the role of the federal judiciary and its independence from the other branches of government.

The Chief Justice also plays an important role in the workings of the Court itself. According to Supreme Court



If the Chief Justice  
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community.

tradition, after the Court has heard oral argument and has initially voted on the outcome, the Chief Justice decides which Justice will write the opinion of the Court if the Chief Justice has voted with the majority. If the Chief Justice has voted with the dissenters, then he has the right to determine which Justice will write the principal dissenting opinion. In essence, this permits the Chief Justice to exert influence via the assignment of certain opinions to specific Justices, with the hope of garnering more votes for his position.

### And Then There Were Eight

Subsequent to Justice O'Connor's announcement of her retirement but prior to the death of Chief Justice Rehnquist, the Court continued to operate with all of its positions filled: the constitutionally mandated position of Chief Justice and the eight statutorily created positions of Associate Justice. After Rehnquist's death, because it was during the summer months and the Court was not in session, the Court continued to deal with requests by litigants to have their cases heard by the Court, known as petitions for a writ of certiorari, and with emergency matters such as requests to stay certain lower court orders. Any emergency matters that came before the Court were reviewed by the Justice responsible for overseeing such matters from the particular region of the country from which the emergency petition arose. As for petitions for a writ of certiorari, those matters were still reviewed by the Court as a whole, and no petition could be granted without the vote of at least four members of the Court. Thus, prior to the death of the Chief Justice, a petitioner to the Supreme Court needed the votes of four Justices out of nine to have his case heard by the Court. However, when the Court's membership dropped to eight Justices with the death of Chief Justice Rehnquist, petitioners were required to receive the votes of four Justices out of only eight, a slight change in the odds that one's case would be heard by the Court.

By statute, Associate Justice John Paul Stevens, by virtue of his being the most senior Associate Justice, immediately assumed the duties of Chief Justice until a new Chief Justice could be confirmed. Although not readily discernable to outsiders, this enabled Justice Stevens to exert slightly more influence over the Court during this interim period. By tradition, it could be expected that Justice Stevens led the discussions regarding pending petitions for a writ of certiorari and

was the first to express his opinion regarding whether certain cases should be heard. Justice Stevens also was able to play a role in determining the Court's oral argument schedule.

## October Term 2005

Although recent events regarding the recomposition of the Supreme Court have proven to many to be very interesting from both a political and historical perspective, the Court's substantive docket also deserves attention. Before the death of Chief Justice Rehnquist, the Court had agreed to review a number of issues important to the business community, some of which are summarized below.

### *Arbitration*

*Buckeye Check Cashing, Inc. v. Cardegna (Case No. 04-1264)*

The Federal Arbitration Act generally requires federal and state courts to enforce arbitration provisions in contracts that affect interstate commerce. The Supreme Court has long held that arbitration provisions should be enforced but also has recognized that a claim that the plaintiff's assent to an arbitration clause was fraudulently induced is not itself subject to the strictures of the Federal Arbitration Act and should not be referred to arbitration. This case presents the related issue of whether questions regarding the legality of a contract containing an arbitration clause are themselves subject to arbitration. In the case below, the Supreme Court of Florida held that the Federal Arbitration Act did not apply to the question of whether the underlying contract violated the usury laws of the State of Florida (if the contract were usurious, no provision of the contract could be enforced because the entire contract would be illegal). Specifically, the court concluded that any claim that a contract is illegal must be decided by a court before any dispute arising out of that contract may be referred to arbitration. The issue before the Supreme Court has the potential to create an added defense to the enforcement of an arbitration provision governed by the Federal Arbitration Act.

### *Section 1981*

*Domino's Pizza, LLC v. McDonald (Case No. 04-593)*

After the Civil War, Congress enacted 42 U.S.C. § 1981, which guarantees each citizen the right to make and enforce

contracts free from racial discrimination. Most courts have determined that someone who is not a party to a contract cannot claim that the terms or enforcement of the contract violates Section 1981 as a result of any alleged racially discriminatory effect. This case involves the sole shareholder of a company that had a contract with Domino's Pizza. After Domino's Pizza terminated its contract with the company, the shareholder filed an action against Domino's Pizza alleging that the contract had been terminated because the shareholder was African-American. The shareholder alleged that he had suffered financial loss, emotional distress, mental anguish and humiliation as a result of the termination of the contract. The Court of Appeals for the Ninth Circuit held that even though the shareholder was not a party to the contract between his company and Domino's Pizza, he had standing to assert a claim that the termination violated Section 1981 and that he had suffered damages for the violation. In essence, the Ninth Circuit concluded that the shareholder could assert a claim for his injuries separate and apart from any contract damages suffered by his company. This ruling will be the subject of the Supreme Court's review.

### *Federal Diversity Jurisdiction*

*Lincoln Property Company v. Roche (Case No. 04-712)*

The diversity jurisdiction of the federal courts is established statutorily in 28 U.S.C. § 1332(a). In order for plaintiffs to rely on diversity jurisdiction to file an action in federal court, all of the plaintiffs must be citizens of states different from all of the defendants and the amount in controversy must exceed \$75,000. Recurring questions focus on how to determine the citizenship of a defendant. A partnership is traditionally considered a citizen of every state in which one of its members is a citizen. In this case, the Fourth Circuit held that diversity of citizenship did not exist even though all of the defendants were citizens of states different from all of the plaintiffs. To reach its conclusion, the Fourth Circuit held that an entity not a party to the lawsuit was the real party in interest, *i.e.*, the entity should have been a defendant in the action, even though no party had sought to name it as a defendant in the lawsuit. In order to determine that the unnamed entity, a limited partnership, destroyed diversity, the Fourth Circuit held that although the partnership did not have any partners who were citizens of Virginia — the state of citizenship of the



It has generally  
been accepted  
that an institution  
can be defrauded  
even if its  
employees allowed  
or participated  
in the fraudulent  
practices.

plaintiff — the partnership would nonetheless be considered a citizen of Virginia because the partnership had a close nexus to the state. Although a somewhat similar test is often employed to determine the citizenship of corporations, it has never been applied to partnerships. If the decision of this case is affirmed, partnerships will be considered citizens not only of the states in which their partners are citizens, but also of any state in which the principal place of business for the partnership is located as well as potentially other states with which the partnership has a close nexus. Such a ruling could greatly reduce a partnership's ability to avail itself of a federal forum.

#### ***Federal Diversity Jurisdiction***

*Wachovia Bank, N.A. v. Schmidt (Case No. 04-1186)*

As discussed above, pursuant to 28 U.S.C. § 1332(a), the federal courts can exercise jurisdiction over cases not based upon violations of federal law only if the parties are citizens of different states and the amount in controversy exceeds \$75,000. Another federal statute, 28 U.S.C. § 1348, specifically states that national banking associations are to be deemed citizens of the states in which they are located. In this case, Wachovia sought to bring an action in the United States District Court for the District of South Carolina against certain citizens of South Carolina. Because Wachovia has its principal place of business and main office in Charlotte, North Carolina, Wachovia believed that it had citizenship different from the defendants and could avail itself of federal court jurisdiction. However, the Fourth Circuit held that, pursuant to 28 U.S.C. § 1348, a national bank is a citizen of every state in which it has a branch, effectively guaranteeing that neither Wachovia nor any other national banking association could ever bring a claim in federal court based on diversity jurisdiction against a defendant who is a citizen of any state in which the national banking association does business. This case has the potential to curtail drastically the availability of a federal forum for federally chartered banks.

#### ***Antitrust***

*Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (Case No. 04-905)*

As part of the antitrust laws of the United States, the Robinson-Patman Act, 15 U.S.C. § 13(a), prohibits price

discrimination between different purchasers of commodities when the effect of such price discrimination may be to lessen competition substantially. In this case, a distributor of Volvo trucks brought a claim against Volvo Trucks North America (“Volvo Trucks”) claiming that because Volvo Trucks had made an offer to sell certain trucks to it at a price higher than that quoted to another purchaser, Volvo Trucks violated the Act even though the distributor did not actually purchase any trucks at the higher quoted price. The distributor also claimed that Volvo Trucks had violated the Act by offering its products to other distributors at lower prices than those offered to it even though the other distributors were selling their trucks to different end purchasers and were not competing with the distributor in suit. The Eighth Circuit held that in order to make out a violation of the Act, the distributor did not have to show that it had actually purchased trucks at the higher price, but merely that it had previously purchased trucks. Further, the Eighth Circuit held that the distributor was required to demonstrate only that other distributors received a lower price, not that it actually competed with the other distributors who enjoyed the lower price. The issues in this case have significant implications for manufacturers and distributors in the pricing and distribution of their products.

#### ***Antitrust***

*Illinois Tool Works, Inc. v. Independent Ink, Inc. (Case No. 04-1329)*

Section 1 of the federal Sherman Act prohibits a seller from offering to sell a certain product on the condition that the purchaser also purchase a tied product. In order to prevail on a Sherman Act claim, the purchaser generally must demonstrate that the seller exercised appreciable economic power in the tying product market such that the purchaser essentially had no option but to purchase both products. The Supreme Court previously has held that such appreciable economic power is presumed when the tying product is patented or copyrighted. In this case, on appeal from the Federal Circuit, the Supreme Court has been asked to reconsider this presumption. If the presumption is overturned, a purchaser would then be required to show actual appreciable economic power independent of the existence of a patent or copyright. A favorable outcome in this case could greatly alle-

viate concerns of Sherman Act liability for patent or copyright holders who do not necessarily possess market power.

#### ***RICO***

*Bank of China v. NBM, LLC (Case No. 03-1559)*

The federal Racketeer Influenced and Corrupt Organizations Act (RICO) has long been a statute whose remedies have been sought by litigants — in particular, because a successful plaintiff can recoup treble damages. RICO requires, among other elements, that the plaintiff demonstrate that the defendant has engaged in certain predicate acts in violation of certain criminal laws of the United States. Often, a RICO plaintiff will seek to base his recovery on acts of wire or mail fraud. In most cases, the plaintiff alleges that acts of mail and wire fraud were used to carry out the criminal enterprise in violation of RICO even though the plaintiff may never have received, reviewed or relied on the materials transmitted in violation of the mail- and wire-fraud statutes. In addition, for purposes of RICO, it generally has been accepted that an institution can be defrauded even if its employees allowed or participated in the fraudulent practices. In other words, the entity is not presumed to know that its agents and employees are engaging in illegal acts and or to have ratified those acts. In this case, the Second Circuit held that a bank could not assert RICO claims premised on mail and wire fraud unless the bank could establish that it had reasonably relied on the information contained in the mail and wire transmissions. In addition, the court held that a bank could not be defrauded in violation of RICO if any of the bank’s employees were aware of the fraud or participated in it. The issues in this case have the potential to restrict greatly the ability of a RICO plaintiff to assert claims unless the plaintiff can demonstrate reliance on the communications comprising the underlying predicate act of mail or wire fraud, and the ability of a RICO plaintiff to assert claims if any of its employees participated in the fraud.

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# A Return to the Woods



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How Florida's largest private landowner is rethinking life far from the big city

For decades, Florida's coast is where nearly everyone wanted to live. An estimated 80 percent of the Sunshine State's 16 million residents now live within 30 miles of the Atlantic Ocean or the Gulf of Mexico.

But the clamor for crowded coastal cities and seaside communities now has some competition, as a growing number of Baby Boomers, entering retirement and pre-retirement, seek a special quality of life best found in rural settings. (Interestingly, when asked where they would live if money and circumstances were not an issue, more than half of those surveyed chose a 100-year-old farmhouse on 10 acres with a pond, according to a 2002 *USA Today* poll.)

After 50 years of steady migration from the country to cities, mostly for economic reasons, demographers began taking note in the 1990s of what has been dubbed the "rural rebound" — a growing number of people returning to rural communities for a simpler way of life.

Technology has helped pave the way for this trend. Rural doesn't mean remote anymore, thanks to satellite TV and radio, DSL and cable, Amazon and eBay, FedEx and UPS. In his new book, *The World is Flat*, *New York Times* columnist Thomas L. Freidman notes that technology is making it possible for people to participate in the global economy on their own terms, whether they live in Bangalore, India, or Bonifay, Florida. Today, people who want a traditional urban job can live — or spend significant time — in the country, if they choose.

**The St. Joe Company**, Florida's largest private landowner with more than 850,000 acres of land concentrated primarily in the sparsely populated northwest part of the state, is among the leaders in the emerging trend of a return to the rural life.

St. Joe is a recognized expert at "place making," the art and science of creating true places where people are drawn to

## Thirteen million of Florida's 16 million residents live within 30 miles of the coast.

live, work and escape. Since its transformation from an industrial conglomerate to a real-estate operating company in 1997 with the arrival of Chairman and CEO Peter Rummell, the Jacksonville-based company has developed a number of acclaimed communities in north Florida, including WaterColor on the Gulf of Mexico and Southwood in Tallahassee, that adhere to the New Urbanism concept of creating towns and resorts designed to recapture the sense of community that was once the defining characteristic of life in America's small towns.

Using these same proven principles, St. Joe is producing a new set of concepts it calls New Ruralism, which is intended to help people rediscover an intimate connection with the land. "We believe St. Joe is uniquely positioned to implement both New Ruralism and New Urbanism strategies on a large scale," Rummell said. "Our New Ruralism products are for people seeking a simpler life from a simpler time and wanting to reconnect with the land without the need to make a living from it."

From its vast storehouse of Florida land, St. Joe has created three new real-estate products — RiverCamps, WhiteFence Farms and Florida Ranches — aimed at those buyers who want to retreat to a rural setting without having to give up their connection to the larger world.

RiverCamps are planned settlements in rustic settings of low-density home sites surrounded by a large common area preserved for conservation. The company's first, RiverCamps on Crooked Creek, is located near one of north-west Florida's most beautiful and pristine bay systems. The site provides boating and fishing with water access to St. Andrew Bay and its creeks, the Intracoastal Waterway and the Gulf of Mexico. Recent sales of home sites averaged \$342,900 and ranged from \$174,500 for an interior site to \$1 million for a bay front site.

St. Joe's WhiteFence Farms will be developed in a number of locations in northwest Florida. Designed to feel "old

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Above: The Preble-Rish Ranch was built on former St. Joe land in northwest Florida and is designed to allow people to reconnect with the land.

Facing: WaterColor in northwest Florida recaptures the defining characteristics of America's small towns.

farm and equestrian," these communities include large home sites with areas for a variety of outdoor activities. Each farm site will include a main farmhouse along with sites for barns, guest houses and stables.

The first WhiteFence Farms, located near Tallahassee, began predevelopment planning earlier this year. Farm sites range in size from five to 20 acres and are priced from \$20,000 to \$75,000 an acre.

The Florida Ranches product also began predevelopment planning earlier this year. Expected to consist of 50- to 150-acre sites located within a 1,000- to 3,000-acre community, Florida Ranches are being designed primarily as second homes for outdoor enthusiasts.

St. Joe utilizes SGR's Intellectual Property Practice to handle its large volume of trademark-related matters, and often calls upon the firm's Real Estate Practice for representation in commercial real estate transactions. SGR also provides its litigation services to the Company on a variety of commercial matters.

Just as New Urbanism has changed the way we view community development, St. Joe and its New Ruralism concept just might change the way we view rural living.

Billy Hearnburg

# SGR Lawyers Tackle Pro Bono Representation

Service to the community is a priority for Smith, Gambrell & Russell attorneys. And an important part of SGR's commitment to community service is the pro bono representation that SGR attorneys provide to persons who need legal assistance but who do not have the money to retain an attorney. SGR attorneys devote countless hours to pro bono representation each year in a wide variety of matters.

For example, SGR attorneys have long worked with the Atlanta Legal Aid Society and the Atlanta Volunteer Lawyers Foundation to provide legal services to low-income persons in the metro Atlanta area. The Atlanta Legal Aid Society was founded in 1924 by E. Smythe Gambrell, one of the founders of Smith, Gambrell & Russell, with a budget of \$600, courtesy of a grant from the Community Chest. Today, the Atlanta Legal Aid Society serves low-income persons from Clayton, DeKalb, Fulton and Gwinnett counties. The Atlanta Volunteer Lawyers Foundation was created in 1979 through the joint effort of the Atlanta Council of Younger Lawyers, the Gate City Bar Association and the Atlanta Legal Aid Society to provide civil legal representation to low-income citizens of Fulton County — in particular, through its “Saturday Lawyers” program, in which volunteer lawyers from SGR and elsewhere meet with their new clients on Saturday morning.

SGR also participates in the Atlanta Legal Aid Society's Fellowship Program for Atlanta Associates. Under this pro-



Parker Sanders is SGR's newest Atlanta Legal Aid fellow.

gram, SGR loans an associate attorney of the firm to Atlanta Legal Aid to work at one of its five Atlanta area offices for three to six months. SGR “fellows,” as they are known, work full time at Atlanta Legal Aid to provide legal representation and counseling for low-income clients while continuing to receive their regular salaries and benefits from the firm. The cases handled by SGR fellows involve housing, domestic violence, health care, employment and other issues. SGR associate Henry Balkcom, who served as an SGR fellow this past summer, found the experience to be both professionally and personally rewarding. “For these clients in particular, their legal needs represent the difference between having a place to live or not having one; between being able to live free of fear and hurt or not; and being able to provide for your family while looking for work or not,” says Balkcom.

In the area of juvenile law, a number of SGR attorneys work with the Truancy Intervention Project, which was

## *Pro bono is short for the Latin *pro bono publico*, which means *for the good of the public*.*

founded in 1991. Through this project, SGR attorneys serve as both mentors and advocates for troubled young people who attend Fulton County schools.

Another specific area of substantive law in which SGR attorneys have provided pro bono representation is domestic violence. SGR attorneys have helped low-income battered women navigate the legal system to secure protective orders against their abusers and to obtain temporary support and shelter.

### **Other recent pro bono cases handled by SGR attorneys**

- In a landlord-tenant dispute, a public housing authority attempted to evict SGR's client, an elderly resident, on the ground that her adult son, who did not live with the client, had been arrested for drug possession in the parking lot of the apartment complex. After a team of SGR attorneys challenged on constitutional grounds in federal court the housing authority's attempted eviction, the housing authority agreed to allow SGR's client to remain in her home.
- In another landlord-tenant dispute, a client's landlord attempted to evict the client illegally by turning off the client's utilities during the winter. Despite receiving two warning letters from the Atlanta Legal Aid Society that described the proper statutory eviction process, the landlord, without notice to the client, changed the locks to the residence and placed all of the client's property on the street. SGR attorney Parker Sanders filed a lawsuit against the landlord in magistrate court. After a trial, the judge awarded SGR's client more than \$5,000 in damages.
- In a consumer fraud matter, SGR attorney Colin Delaney filed suit against a used car dealer on behalf of a client who had discovered that the dealer had forged the client's signature on new loan documents prepared by the dealer weeks after the client had purchased a car and signed the original loan documents. The new loan documents set forth a purchase price and interest rate that were higher than what appeared in the original loan

documents. As a result of the lawsuit, the dealer agreed to take the car back and paid additional compensation to SGR's client.

- Another case handled by SGR involved the post-conviction representation of an individual who had been convicted of multiple felonies and sentenced to life imprisonment without the possibility of parole. After the trial, the defendant's trial attorneys failed to pursue an appeal and refused to communicate with their client. SGR attorney Billy Hearnburg assumed the representation and filed a motion for new trial on the ground that serious errors had occurred during the original trial. The judge who had presided over the original trial agreed that he had committed reversible error and granted the motion for new trial. As a result, the State agreed to a plea bargain that resulted in SGR's client being released on probation.
- SGR attorney John Autry represented a Russian woman who moved to the United States following her marriage to a significantly older American man in an apparent mail-order-bride scheme. Upon her arrival in the United States, the client discovered that her husband had been married six times before, and that almost all of the former wives were foreign born and had come to the United States under similar circumstances. The client also began to experience verbal abuse and threats of physical harm from her husband. John was able to obtain for the client an extended family violence protective order, in which the husband was restrained from contacting the client and was ordered to provide the client with a lump-sum cash payment, a vehicle and continuation of health, life and automobile insurance coverage pending dissolution of the marriage.

SGR's pro bono program provides opportunities for junior associates to work closely with clients and make court appearances, as well as opportunities for attorneys from different sections and practice areas who may not normally work together to join forces to help people in need. Most importantly, SGR's pro bono program allows the firm to serve the community and to make real differences in people's lives.

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