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Philadelphia, PA
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St. Petersburg, FL
727-896-4600

LEGAL ALERT

Autumn 2008

How Safe Are Your Assets in These Turbulent Times?

With financial markets and real estate going haywire, we have received many telephone calls and emails from clients wanting to know how safe their bank accounts are. We thought it would be appropriate to review some of the myriad laws which are designed to protect your assets and which should help prevent the collapse of our financial institutions.

FDIC – All deposits at "insured" banks are insured by the Federal Deposit Insurance Corporation ("FDIC"), an independent agency backed with the full faith and credit of the United States up to the insurance limit. Until recently, the basic limit was $100,000 per depositor per insured bank and $250,000 for retirement accounts like IRA's. On October 3, 2008, the basic limit was temporarily increased in the "Bank Bailout Bill" to $250,000 per depositor per insured bank. The increase was to counter the concerns that depositors have over the state of the economy and financial institutions and will be in effect until December 31, 2009. A depositor can increase his or her limit merely by having deposits at different insured banks.

There is separate coverage for deposits held in different categories. The most common categories are single accounts, retirement accounts, joint accounts and trust accounts. There is a separate $250,000 limit for each category and for each beneficiary of an account. The limit per retirement plan at an insured bank remains unchanged at $250,000. The following chart illustrates the insurance possibilities at a single bank. There is separate insurance for each bank at which one owns deposits.

State Insurance Guarantee Funds – The government bailout of AIG caused many people to wonder whether their life insurance and annuities were protected. The answer is "maybe" depending upon the kind of insurance or annuity and the amount. Every state has a guarantee fund to protect its residents who own traditional "fixed" personal insurance and fixed annuities. Nearly every state, including Pennsylvania, New Jersey and Florida, will guarantee the first $300,000 of death benefit on each covered person. The guarantee limit for cash surrender value is $100,000 in most states and there is a separate $100,000 for annuities. These are cumulative guaranteed amounts. For example, if one has two life insurance policies with $150,000 cumulative cash surrender value, there is only a total of $100,000 guaranteed insurance. These guarantees are mean-

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Account Title	Account Balance	Insured	Uninsured
Bill	270,000	250,000	20,000
Bill and Linda	540,000	500,000	40,000
Bill POD to Linda	250,000	250,000	0
Linda POD to Bill	250,000	250,000	0
Bill and Linda POD* to their 3 Children	1,500,000	1,500,000	0
Bill's IRA	250,000	250,000	0
Totals	**3,060,000**	**3,000,000**	**60,000**

** POD is a form of trust account which is "payable on death" to the named beneficiary, in this illustration – the three children.*

IN THIS ISSUE

AT THE PODIUM

Attorneys from the Employment Law Group, **Alan Epstein**, Chair, and **Jennifer Myers Chalal**, Associate, recently presented a seminar to the City of Philadelphia at its annual CITY CLE. The seminar was an overview of the various litigation issues that arise during the representation of city clients including the initial interview of the client; the fact gathering and file organization taken by the assigned attorney; discovery; settlement, trial preparation and the trial of the case, from opening to closing.

Alan Epstein: 215-241-8832 or aepstein@lawsgr.com.

Jennifer Myers Chalal: 215-241-8817 or jmyers@lawsgr.com.

Timothy Szuhaj, Chair of the Intellectual Property Group, participated as a panelist in a recent webcast addressing the issues on how to protect the integrity and commercial reputation of online corporate clients.

Tim Szuhaj: 856-914-4910 or tszuhaj@lawsgr.com.

PUBLICATIONS

Stanley P. Jaskiewicz, a Member in the Corporate Group, was quoted in numerous national media about a subsequent decision in a case about which he had written for E-Commerce Law & Strategy newsletter, concerning Target.com's website and equal access issues; the same article was printed in the *Philadelphia Legal Intelligencer*. His article on "litigation holds" (a litigation hold is when all documents and emails must be maintained once litigation is pending or threatened) in practice was cited in a law professor's blog on procedure, and featured in the Law.com daily newsletter. The recently published book "Inside the Minds: Managing Legal Technology Issues" by Aspatore Publishing includes a chapter by Mr. Jaskiewicz. Mr. Jaskiewicz was featured on the front page of *The Reporter* in Lansdale for his work with the Horsham Challenger Little League team. His article on his son's First Communion was featured in the July newsletter of the National Catholic Partnership on Disability.

Stanley Jaskiewicz: 215-241-8866 or sjaskiewicz@lawsgr.com

The Need For An Email Retention Policy

- Now More Than Ever Before:

In December 2007, the Federal Courts implemented revisions to the Federal Rules of Civil Procedure. These revisions formalized the inclusion of electronically stored information in the types of records subject to discovery requests. These revisions reflected the courts' recognition of the increased role played by computers in all aspects of business, including the expanding use of email for business communications[1]. A recent survey of 2,134 adults, conducted by the Pew Research Center's Internet and American Life Project, revealed that 96 % of the group surveyed use email, the Internet or cell phones at work.

Email has become an increasingly common substitute for traditional mail. For example, following the lead of the Federal Courts, Pennsylvania's courts are implementing electronic filing requirements. The number of businesses that require their vendors to submit invoices electronically is growing, as is the use of email to transmit documents. Email provides an efficient method for decentralized businesses to communicate with employees. Despite their adoption of email for these uses, most companies have not considered or developed orderly, rational methods for preserving email, despite the care taken by the same organizations to file and retain their correspondence, memoranda and reports in the past. For example, there are organizations that routinely delete all emails to and from an employee when that employee leaves the company. Because of the transient nature of today's work force, this policy can lead to the premature loss of valuable information[2]. Some companies leave decisions about email retention to their IT departments, which are likely to implement automated processes addressing the volume of email retained on email servers, without addressing the content of the emails. An example of such an approach was Intel Corporation's (Intel's) policy to automatically delete all email over 35 days old, unless an individual email user moved the email to their hard drive or personal folders[3].

The risk of an automated delete procedure was demonstrated in Intel's antitrust litigation. In that case, despite Intel's efforts to implement an appropriate litigation hold to preserve relevant emails, Intel chose not to discontinue their auto delete email procedure. When Intel became aware that some email custodians were not complying with instructions to retain relevant emails, a follow-up program was implemented that included hiring a separate group of attorneys to interview each of the 1,023 email custodians and determine their preservation habits. A summary of the information obtained by those attorneys was provided to the court. In response to AMD's motion to compel Intel to turn over the interviewing attorneys' notes, the court found that Intel had waived attorney client privilege by producing the summary, and ordered the production of the notes with limited redactions.

1 *Overall, the number of reported cases in which the sanctions of dismissal or entry of default judgments are requested and in some instances granted against parties who failed or refused to comply with court orders to produce emails increased more than 25% for the first eight months of this year following the implementation of the revisions to the Federal Rules, when compared to the same time period on 2007.*

2 *According to the Pew Research Center, 58% of job-holding Americans have been working for their current employer for fewer than seven years.*

3 *See In re Intel Corp. Microprocessor Antitrust Litigation, 2008 WL 2310288 (D.Del. June 4, 2008).*

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Two New Laws Affect Employers

In the past few months, both Congress and the Pennsylvania Legislature have passed laws that will affect every employer in the state. On June 16, 2008, Pennsylvania Governor Rendell signed into law the Pennsylvania Clean Indoor Air Act that went into effect on September 11, 2008. On September 26, President Bush signed the American's With Disabilities Act Amendment Act (ADAAA) which will go into effect on January 1, 2009.

Pennsylvania Clean Indoor Air Act

The Pennsylvania Clean Indoor Air Act prohibits smoking in all workplaces and in all public places. Public places are defined as any enclosed area that serves as a workplace, commercial establishment, or an area where the public is invited or permitted, and also includes vehicles used for mass transportation. In turn, a "workplace" is defined as any indoor area serving as a place of employment, occupation, business, trade, craft, professional or volunteer activity. Any enclosed area of a workplace must be smoke free, including offices; meeting rooms; sales, production and storage areas; cafeterias, lunch and break rooms; restrooms; stairways; hallways; warehouses and garages.

Employers must have a no-smoking policy, post no-smoking signs, and take reasonable measures to prevent or stop people from smoking in regulated areas. A no-smoking policy should prohibit smoking in regulated areas, be communicated to all employees through letters, pay enclosures and/or employee meetings, and be made available upon request in writing. The policy should address:

- where, outside of the building smoking is permitted. This must be at least 20 – 25 feet from any entrance to the building (including open windows) so that second hand smoke does not enter the building;
- how employees should handle cigarette butts (e.g., use receptacles outside of the building rather than littering);
- how new employees will be notified of the policy;
- how violations will handled;
- how employees will be trained to understand the policy and handle violations
- that employees will be protected from retaliation for reporting violations of the law covering current and prospective employees, customers and volunteers.

Violations of the law include failure to post appropriate signage, allowing smoking where it is prohibited, and smoking where it is prohibited.

Fines of between $250 for a first offense to $1,000 for a third offense within a twelve month period can be levied against the owners, operators or managers of a workplace as well as against a person (patron or employee of the premises) who violates the act.

Spector Gadon & Rosen will be happy to help your business draft a no-smoking policy that complies with the Act. No-smoking notices can be downloaded from the Pennsylvania Department of Health's web site at http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=174&Q=251422.

Americans With Disabilities Act Amendments Act

This Act was passed to remedy the limitations placed on claims under the Americans with Disabilities Act ("ADA") by several recent Supreme Court decisions. The ADAAA broadens the definition of "disability" and increases the number of individuals who will qualify for protection under the ADA.

The ADA defines "disability" to mean an individual: (1) who has a physical or mental impairment that "substantially limits" one or more of the individual's major life activities; (2) who has a record of such an impairment; or (3) or who is regarded as having such an impairment. While the ADA does not define "substantially limit," that term has been interpreted by the EEOC to mean "significantly restrict." This interpretation was specifically rejected by Congress in the ADAAA as being "inconsistent with congressional intent" because it sets "too high a standard" for protection under the law. In the ADAAA, Congress directs the EEOC to revise the definition of "substantially limits" to make it less stringent and to expand the class of people who will be deemed disabled under the law. As a practical matter, this means that more employees will be protected under the law and employers can expect more requests for reasonable accommodation and more disability discrimination claims.

Perhaps even more sweeping, the ADAAA overrules relevant Supreme Court decisions and requires that the determination of whether an individual's physical or mental impairment substantially limits a major life activity be made "without regard to the ameliorative effects of mitigating measures." So, for example, as the law is now interpreted, an employee whose medical condition is controlled by medication and is asymptomatic would not be considered "disabled." Under the Amendments, that employee may be considered to be disabled if his condition would substantially limit a major life activity if he were not taking the medication. The ADAAA defines "mitigating measures" to include: medication, medical supplies, equipment or appliances, low vision devices that magnify a visual image, prosthetics, hearing aids and devices, mobility devices, oxygen therapy equipment and supplies, assistive technology, reasonable accommodation or auxiliary aids or services, and learned behavior or adaptive neurological modifications. How-

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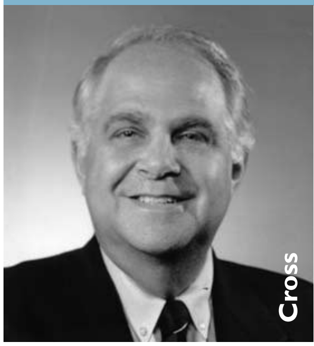
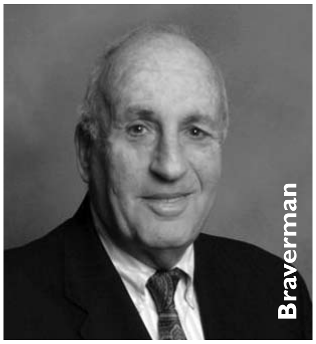
Employers must have a no-smoking policy, post no-smoking signs, and take reasonable measures to prevent or stop people from smoking in regulated areas.

Under the ADAAA, employers will find it much more difficult to defend disability discrimination suits on the basis that the individual was not "disabled" as defined in the Act.

Post-Acquisition Dispute Issues





Many acquisition agreements contain clauses that allow (or require) the parties to adjust the purchase price for certain changes in the financial condition of the selling company between the time the purchase price is negotiated and the closing date. This adjustment occurs after the closing.

Most acquisition agreements require that financial statements of the selling company are to be prepared as of the closing date for purposes of determining any purchase price adjustments. Often these financial statements are required to be prepared in accordance with generally accepted accounting principles (GAAP) consistently applied and/or refer to other specific terms of the acquisition agreement, such as the company's procedures, and practices. Even with these requirements, however, there may still be potential disagreements between buyers and sellers with respect to the proper accounting.

GAAP is not an exact science that delivers only one correct answer. GAAP involves estimates and judgments that are made by management and reviewed by the independent auditors. Two different management teams (the buyer and seller) or two different accounting firms involved in a transaction can, legitimately, have different views as to how those estimates or judgments are made and reflected in the financial statements. In the case of a post-closing purchase price adjustment, these differences in judgment can result in buyer and seller having different views of the change in the financial condition of the company, even though both parties have calculated their adjustments within the technical requirements of GAAP.

GAAP is not an exact science... GAAP involves estimates and judgments that are made by management and reviewed by the independent auditors.

The post-closing purchase price adjustment can alter the price of the deal for both the buyer and the seller, which can lead to a post-acquisition dispute.

To resolve post-closing disputes, acquisition agreements often include arbitration clauses (generally binding arbitration) providing a procedure for dispute resolution. Arbitration is presumably quicker and less expensive than litigation although this is not always the case.

Typically, the disputes are decided by an accounting firm as arbitrator because the disputes generally relate to the proper accounting treatment of various items on the financial statements of the selling company.

Typical areas of dispute that are the subject of an arbitrator's review include whether financial statement items, such as the allowance for doubtful accounts (i.e., the estimated amount of accounts receivable that will not be collected), the "reserve" for excess and obsolete inventory (i.e., the estimated amount of inventory that is unsalable) or the overall working capital calculation, reflect the correct amounts as contemplated by the acquisition agreement. For example, the seller's management might have estimated the allowance for doubtful accounts and reserve for excess and obsolete inventory based on its company policies and believed that its determination is reasonable. The buyer's management, however, might look to its actual experience after the sale as evidence of whether the allowance/reserve was adequate under GAAP as of the closing. Each management could have a different view of what the accounting estimates as of the closing should be and both could well be in accordance with GAAP.

Attorneys assisting with the deal negotiation can help to minimize post-acquisition disputes related to the estimates by trying to eliminate the subjective nature of the estimates. This can sometimes be accomplished (albeit with potential unintended consequences) by the parties agreeing in the acquisition agreement to mathematical formulas for calculating estimates that are based on objective data. For example, a formula for determining the allowance for doubtful accounts can be based on how long accounts receivable have been outstanding.

If the arbitration is intended to be conclusive, merger and acquisition agreements should clearly specify that the arbitrator's decision is final and binding. Otherwise, the non-prevailing party may argue that the arbitrator's decision is not enforceable and then file an action in court.

For more information, please contact Milton Cross at 215-241-8811, mcross@lawsgr.com or Elliott Braverman at 215-241-8853, ebraverman@lawsgr.com

HONORS & APPOINTMENTS

Jonathan Greystone, Of Counsel in the International Law, Banking & Financial Services, and Commercial Litigation Groups, has been appointed by the State of New York on the Special Committee for Procedures on Judicial Discipline of New York State Judges.

Jonathan Greystone: 215-241-8927 or jgreystone@lawsgr.com.

Craig Turet, a Member in the Commercial Litigation Group, was selected to serve on the March of Dimes Executive Leadership Council, a strategic planning panel. He joined the Board of Directors of the Southeastern Pennsylvania Division of the MoD in 2007.

Craig Turet: 215-241-8821 or cturet@lawsgr.com

Community Involvement

Stroll & Roll: Stanley Jaskiewicz, a Member of the Corporate Group, reports that "thanks to the contributions of 14 staff members, paralegals and attorneys, I was once again the leading individual fundraiser (as well as a sponsor) at the 17th Annual Stroll & Roll benefitting **The Legal Clinic for the Disabled.**" He is shown here with **wife Judy and son Peter**. "Despite a steady rain, a dedicated group of joggers, walkers and swimmers honored outgoing Executive Director Tom Prettyman by raising funds to help provide free legal services to low-income people with physical disabilities in Philadelphia and its suburbs," Mr. Jaskiewicz said.

As a board member, Mr. Jaskiewicz also attended the YMCA of Philadelphia & Vicinity's annual Not So Black Tie Affair at the Water Works Café. Also attending as guests were firm clients Eve Sturtevant and Angelo Gonzalez, who continued their tradition of supporting the YMCA by successfully bidding on several items at the Silent Auction that helps fund the YMCA's work in the community.

Stanley Jaskiewicz: 215-241-8866 or sjaskiewicz@lawsgr.com

Attorney by Day, Actress by Night: Nancy Abrams, an Associate in the Employment Law Group, performed in Torch Song Trilogy at the Walnut Street Theatre's Studio 5. Presented by Fever Dream Repertory, the show was the 30th anniversary presentation of Harvey Fierstein's award-winning play.

Nancy Abrams: 215-241-8894 or nabrams@lawsgr.com

The Need for an Email Retention Policy *continued from page 2*

Perhaps the most noteworthy decision addressing the sanctions imposed on a party was announced early this year, by the United States District Court of the Southern District of California in Qualcomm Inc., v. Broadcom Corp., 2008 U.S. Dist. LEXIS 911 (January 7, 2008). In that case, the court issued an order awarding defendant Broadcom Corporation (Broadcom) $8.5 million dollars in sanctions after Broadcom prevailed in the patent infringement action filed by Qualcomm. Those sanctions were ordered after Qualcomm's counsel produced, during trial, a series of 21 emails that had been found on the hard drive of a Qualcomm employee's laptop (stored in a "PST" file) while the employee was being prepared to testify during trial. The content of those emails, which had been repeatedly requested by Broadcom during discovery, disproved the allegations made in support of Qualcomm's claim[4 5]. The jury returned a verdict in favor of Broadcom based on the evidence contained in those emails and its determination that one of the claimed patents was unenforceable due to Qualcomm's inequitable conduct.

Qualcomm subsequently searched the hard drives of other key employees' laptops and found more than 46,000 documents that had not been produced during discovery. The court found that Qualcomm's failure to search those hard drives was an intentional part of a scheme to deny Broadcom access to critical information.

Historically, businesses developed formal document retention programs to provide a framework for managing the paper files they generated. Organizations possessing and complying with those programs have successfully relied on them to avoid sanctions for failing to retain documents that were subsequently requested in discovery. Similar principles apply with respect to electronically stored information, including

4 A PST file is a compressed file of archived emails created by Microsoft Outlook.

5 The trial team initially withheld those emails after their discovery, and when they called the witness, by carefully wording their questions on direct, avoided the need to have that witness testify about having received the emails. The information about the emails was not disclosed until the witness was cross examined by opposing counsel.

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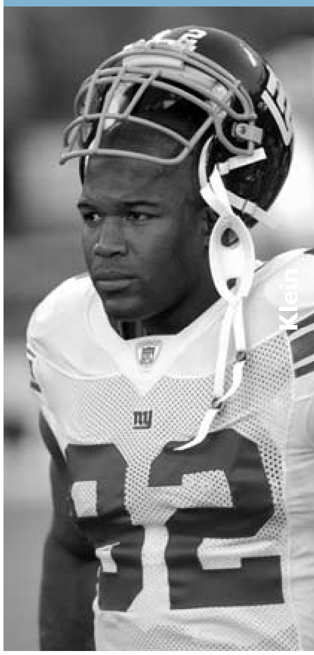
When Child Support is Excessive



Michael Strahan

Throughout both New Jersey and Pennsylvania, high income earning families are not controlled by child support guidelines. Rather, an individual analysis is required to determine the reasonable needs of children. It has always been presumed, and the courts have always ruled, that the good fortune of a high income earning parent should "trickle down" to the children. Children of high income earners generally have more options available to them, are involved in more activities and vacations, and tend to enjoy the accoutrements of a more lavish lifestyle, including education.

However, are there limits? Is it prudent that the budget of a family of extremely high earners should never be questioned? The Appellate Division in New Jersey has recently decided a matter which will have implications on both sides of the river.

For years, Michael Strahan was a star linebacker for the New York Giants in the National Football League. He was married in July 1999, and his wife had twin girls, born October 2004. A divorce was filed in March 2005 with joint legal custody granted.

There is no question that the marital standard of living was well in excess of $1,000,000 per year for the family. Therefore, the question became one of the "reasonable need" of the children. The Trial Court awarded $630,000 per year solely on behalf of the children! Further, the Court ordered the father to be responsible for 91% of the entire award. Strahan appealed.

In an enlightened decision, the Appellate Court reversed much of the monthly child support award and determined that the obligation was "beyond their reasonable needs," referring to the twins. The reasonableness of the children's needs included such items as $30,000 in landscaping, audio visual expenses of $3,000 per year, and $36,000 per year for equipment and furnishings on behalf of the children.

The Appellate Division concluded that these needs were completely unreasonable and were not given scrutiny by the Trial Court, likely because of the high income level of Mr. Strahan. The Court's attitude is made clear from the rhetorical question, "How many ponies does one child need?" The Appellate Court reversed the Trial Court decision.

The importance of this decision demonstrates that in all cases where the overall income exceeds the maximum encompassed by child support guidelines, the Court must do an exhaustive analysis of the actual and reasonable needs of the children. While not disputing that the needs of the children of high income earners may be greater, there should not be a "carte blanche" approach to awarding child support. Excesses should be obvious and discouraged.

Therefore, when analyzing what a child support obligation is, it is important for parties and their attorneys to analyze the reasonableness of expenses being claimed, the actual details of the expenses, and to be able to justify those expenses to a Court. While the child support award may still be substantial, it is in no way limitless.

For more information, please contact Richard Klein, Chair, Family Law Group at 856-778-8100 or rklein@lawsgr.com

Summer Sidebar Session

A summer reception was held for attorneys from the Firm's Philadelphia and New Jersey offices.

Far left: **George Vinci, Leslie Beth Baskin, Richard Gallucci**

Near left: **Randi Rabinowitz, Kim Packman, Craig Turet, Drew Molotsky**

SGR WELCOMES **NEW ATTORNEY**

Peter N. Kessler joined the firm's Commercial Litigation group after several years as an associate with the New York based law firm Kaye Scholer LLP, where he worked on all aspects of litigation, complex commercial disputes, securities class actions, Section 16 issues, insider trading issues, and enforcement matters – including broker-dealer issues – brought by the SEC, FINRA, and the DOJ.

Mr. Kessler majored in English at Yale and graduated with distinction in 1994. He received a Master of Fine Arts degree in fiction writing from the University of Arkansas and his J.D. from Stanford Law School in 2003.

Peter Kessler: pkessler@lawsgr.com or 215-241-8857

Moorestown Office Celebrates Sweet Sixteen

A recent reception was held to mark the 16th anniversary of the Firm's Moorestown office.

Shown here, left to right: **Joe Minitti** and **Danielle Bonamassa** from the Cancer Foundation for Personal Appearance, and **Richard Klein,** Chair of Family Law Group.

How Safe are Your Assets?

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ingful since the investments associated with these "fixed" policies are held in the insurance company's "general account." They are regular balance sheet items and are subject to claims by the insurance company's creditors. If the insurance company fails, the cash surrender value in excess of the guarantee amounts can be lost. Most insurance companies do not appear, yet, to have the kinds of problems of AIG, and people who own "fixed" life insurance or annuities have not seen their investments lose value as the stock markets have suffered, because state insurance laws limit the amount of stocks that can be held in the "general account."

Variable life insurance and variable annuities, products in which the investment is in stocks and bonds held in "separate accounts," are not covered by the state guarantee funds. However, separate accounts are not subject to the claims of the insurance company's creditors, as are funds held in the "general account" of the insurance company. Therefore, except for the investment risks which one faces by investing in equities and bonds, variable life insurance and variable annuities are immune to the financial problems of insurance companies. Unfortunately, in these turbulent times, insurance and annuity separate accounts, invested in equities, probably have suffered.

SIPC – The Securities Investor Protection Corporation protects investors whose securities and money are missing when a brokerage firm fails. Many clients maintain so-called "street accounts" with brokerage firms. The firm holds the stock, bonds and cash of their account owners and the client gets a monthly statement listing the investments the client owns. The client does not get physical possession of the stocks or bonds. If a brokerage firm fails, the stocks, bonds and cash should be available to the account owners, but sometimes are not. If they are lost or have disappeared for any reason, people covered by SIPC insurance are protected up to $500,000 at each brokerage firm at which they have an account (but only up to $100,000 of cash).

Money Market Funds – Many people own money market funds ("MMF"). These type of investment accounts are really more akin to mutual funds than they are to bank deposits held in a bank money market account. Besides investing directly in MMF's, many investors retain the cash in their brokerage accounts in an MMF. The earnings on these accounts are classified as dividends, not interest, for income tax purposes. MMF's generally invest in short term financial instruments and pay dividends that often are slightly higher than the interest paid on insured bank deposits. Investments in MMF's historically are not insured, although this lack of insurance has not been viewed as a substantial risk until recently. The redemption price of MMF's is supposed to be $1.00. All income of the funds is distributed to the shareholders so that the redemption price remains $1.00. If the price of the MMF falls below $1.00, then the fund

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When Selling the Company, Directors Must Focus on Process Not Just Price

Another recent decision by the Delaware Chancery Court serves as a reminder to boards of directors of M&A target companies that passive target boards that do not take an active role in the M&A process may be setting themselves up for lengthy (and potentially personally costly) litigation. In *Ryan v. Lyondell Chemical Company*, the Chancery Court denied the defendant directors' summary judgment motion to dismiss plaintiff's claims that the directors should be personally liable to shareholders for a breach of fiduciary duty – even though the company was *sold at a significant premium to market* to the only known buyer interested in Lyondell.

In April 2006, Basell AF approached Lyondell and informally proposed a merger transaction at a price between $26.50 and $28.50 per share. The Lyondell board rejected the initial proposal as inadequate. In May 2007, Basell acquired a toe-hold position of 8.3% of Lyondell's outstanding shares (as reflected in Basell's Schedule 13D filing with the SEC). Lyondell's CEO had a series of meetings with representatives of Basell during the ensuing weeks, largely without involving the Lyondell board. During a face to face meeting between the CEOs of the two companies, Basell proposed a price of $40 per share, then raised it to a range of $44-45 per share. Lyondell's CEO expressed his view that he thought it was "doubtful" that the Lyondell board would accept such an offer. Basell then raised its offer to $48 per share. These price negotiations occurred during a meeting on July 9. 2007. The Court took note that the Lyondell board was not actively involved in the process and that the board had not engaged a financial advisor or obtained any professional valuation opinions or advice in contemplation of a possible transaction after Basell's May 2007 13D filing that suggested that Basell might make a play for Lyondell.

...passive target boards...may be setting themselves up for lengthy (and potentially costly) litigation.

After Basell made its $48 per share offer, Lyondell's board held a series of short meetings to consider the offer. The board also quickly engaged a financial advisor to deliver a fairness opinion. The Lyondell board tried to negotiate down the "break-up" fee (with very modest success) and to negotiate for a "go-shop" provision that would allow Lyondell the time to conduct a post-signing market check and consider any higher bids that might materialize. Basell dug in its heels and refused to agree to Lyondell's requests. Fearful of losing what the Lyondell board thought was a fully priced premium offer, the Lyondell board quickly agreed to accept the Basell deal.

The court was clearly troubled by the fact that the Lyondell board delegated most of the negotiating to its CEO and never bothered to engage in any serious process to examine whether better offers might be forthcoming from third parties. The court also noted that the entire deal was essentially negotiated, evaluated by the Lyondell board and signed within the space of a week, and Lyondell agreed to Basell's demands for deal protection provisions in the merger agreement that effectively precluded Lyondell from seeking a better offer from other potential bidders. On these facts, the Court refused to grant a summary judgment motion dismissing plaintiff's claims that the process was too hurried and that the Lyondell directors failed to fulfill their duty (as provided in the Revlon line of cases) to seek the best transaction reasonably available to Lyondell shareholders. The court emphasized a number of perceived procedural flaws, including (i) the passivity of the Lyondell board and its delegation of most merger-related decision making to the CEO, (ii) the relatively short length of time spent on the merger during the week leading up to the execution of the merger agreement (approximately 6 or 7 hours of deliberations during the week); (iii) the board's failure to proactively take any action to inform itself of the value of Lyondell after Basell filed its Schedule 13D (putting Lyondell on notice that Basell was still interested in pursuing a transaction) and (iv) the absence of any pre-signing market check, auction or other process to solicit offers from other potential suitors. The court held that, if proven at trial, the conduct at issue might rise to the level of a breach of the disinterested, independent directors' duty of loyalty as a result of their failure to act in good faith. By characterizing the conduct as a potential breach of the duty of loyalty (rather than the duty of care), the directors would not have the benefit of the exculpatory provision in Lyondell's certificate of incorporation providing, pursuant to Section 102(b)(7) of the Delaware General Corporation Law that directors are not personally liable for mere breaches of the duty of care.

While the *Lyondell* case still needs to go to trial, it should serve as a cautionary tale to boards of companies considering a sale (including private companies with various constituent shareholders who are not all represented on the board of directors), and is a reminder that boards of directors need to be involved in the sale process, need to seek out the necessary expert advice from outsiders and, at least with respect to Delaware companies where Revlon duties apply, need to take the time to either conduct a pre-signing market check or negotiate the ability to conduct a post-signing market check.

For more information about the responsibilities of boards of directors when selling companies, contact Peter Cripps at 215-241-8884 or pcripps@lawsgr.com.

Practicing the Art of Law℠

SPECTOR GADON & ROSEN, P.C.

Seven Penn Center Plaza
1635 Market Street, 7th Floor
Philadelphia, PA 19103

215.241.8888
fax 215.241.8844

New Laws *continued from page 3*

ever, that definition does not include ordinary eyeglasses or contact lenses.

Under the ADAAA, an impairment that is episodic or in remission may be a "disability" if it would substantially limit an employee's major life activities when it is active. The definition of when an employee is "perceived" to have a disability is also expanded so that an employee need only perceive that the employee has a physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. This new provision is limited somewhat in that it does not apply to "transitory" (lasting 6 months or less) or "minor" impairments.

Under the ADAAA, employers will find it much more difficult to defend disability discrimination suits on the basis that the individual was not "disabled" as defined in the Act. Employers will also be faced with a greater number of situations in which they must at least engage in an interactive process to determine if and/or how an employee should be given a reasonable accommodation. As such, in most situations employers should ask employees who present issues regarding physical or mental impairments how the employer can help the employee perform the essential functions of his/her job.

For more information, please contact Nancy Abrams at 215-241-8894 or nabrams@lawsgr.com.

How Safe are Your Assets? *continued from page 7*

is losing money. Until the latest financial crisis, only one MMF ever had a redemption price which fell below $1.00. Whenever any losses threatened this target price, the MMF company injected money into its MMF to protect the shareholders. However, recently the redemption price of the oldest and one of the most well-known MMF's fell to $0.97 due to investments in Lehman Bros. derivatives. Needless to say, this sparked a panic in the MMF industry and many MMF's experienced large redemptions. Because of the great importance of MMF's for the financing of industry and the economy, the U.S. Treasury has announced it will use its emergency powers under the Exchange Stabilization Fund to provide up to $50 Billion of insurance for the MMF industry. If an MMF's redemption value falls below the $1.00 mark, the shareholders of that fund will be notified that the fund will be covered by the insurance program. Sometime during the next year, Treasury has promised to provide additional insurance for publicly traded retail and institutional MMF's. This is a great relief for investors in MMF's but somewhat distressing for owners of bank certificates of deposit who have been willing to forego some interest income for FDIC insurance, and now, assuming adoption of the proposed changes to the FDIC law described above, only will get an increase up to $250,000 of insurance.

There are many other forms of asset protection that may be beneficial for you and your family. If you would like to discuss these and other forms of asset protection, please contact Alan Mittelman at 215-241-8912 or amitt@lawsgr.com.

The Need for an Email Retention Policy *continued from page 5*

email. As with so many things, prevention is the best approach. As applied to email, the best way to avoid the risk of sanctions is to take action before the litigation arises. As a general rule, emails containing information would have been saved to a file before the use of computers should be treated with the same respect as the documents of the past. As a practical matter there is no such thing as a "one size fits all" email retention procedure. Accordingly, each organization needs to develop a program that serves its own unique needs.

It is frequently recommended that an interdisciplinary group, including a member of the company's IT department and an individual with knowledge of the regulatory and legal needs of the organization, be formed to develop an email retention program[6]. Once a program is developed it should be provided to each email user and made readily available for reference. A copy of the written program should be retained as a permanent document, with any revisions similarly retained.

For more information, contact Renee Berger at 215-825-8941 or rberger@lawsgr.com.

6 *See The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy, The Sedona Conference Journal, Vol. 8, 239-280; Fall 2007.*