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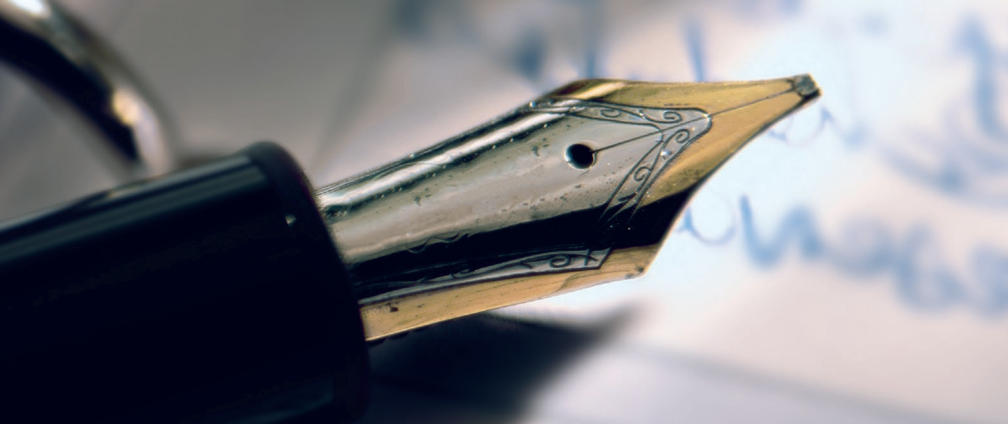
Legal Update



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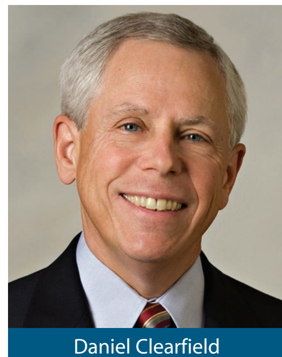
Energy

Are Demand Response programs a good fit for your business?



Daniel Clearfield

If they have not done so already, industrial and commercial electric consumers should investigate whether Demand Response (DR) programs that would pay the commercial or industrial user for committing to reduce the amount of electricity used would be a good fit. DR programs offer significant payments to end users that agree to reduce or curtail their usage during periods of system peak demand. In many cases the reduction in usage is so small as to be unnoticeable by building occupants.

DR programs are offered by electricity transmission and distribution operators (operators) to electricity consuming customers. These programs help operators control electricity system costs when high electricity demand strains the electricity system, helping to

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Litigation

Insurance counsel and the attorney-client privilege Who is the client?

Kevin P. Allen

When an insurance company selects and pays a lawyer to defend an insured policyholder, whom does the lawyer represent? Does the lawyer represent only the insured, or does the lawyer represent both the insured and the insurer? And what happens to the attorney-client privilege when the insured or the lawyer communicates otherwise privileged information to the insurance company in order to keep the insurer apprised of the status of the case?

In *Camico Mut. Ins. Co. v. Heffler Radetich & Saitta, LLP,* C.A. No. 11-4753 (E.D. Pa. Jan. 28, 2013), the Court recently concluded

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Energy

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avoid blackouts or costly investments in infrastructure upgrades and repairs. DR is often considered environmentally beneficial because reduced electricity demand from energy efficiency or conservation is cleaner and less costly than using dirtier generation sources or building new electricity generation capacity. All types of electricity customers can get paid to reduce the amount of power they draw from the grid. For example, an office building could reduce its demand by simply dimming some lighting or increasing the air-conditioning temperature by a couple degrees for a few hours; or a manufacturing facility could temporarily halt production to reduce power use, and/or run its on-site generator to reduce the amount of power needed from the grid.

Consumers participating in DR programs get paid for the amount of electricity they commit to reducing, beyond normal operations. Consumers are paid for their ability to reduce their load, whether or not the operator actually requests them to do so. Today, a business capable of supplying a 100 kW demand reduction with a 2-hour advance notification could expect its compensation to be in the range of $4,000 to $6,000 per year. These rates will vary by location and in accordance with "value" for demand reduction the electric supplier calculates annually. An entity like a large office building or warehouse should be able to achieve reductions significantly greater than 100 kW and could bundle reductions from several facilities or on-site generators to achieve greater load reductions and commensurate payments.

DR programs are offered by the regional transmission operator (PJM Interconnection LLC or PJM) and, sometimes, by the local electricity distribution company. PJM offers several DR programs, allowing consumers to tailor their participation based on their needs. Each program has specific criteria and commitments that must be met in order to qualify.

How does a business or industry find out if a DR program is right for it? One place to start is a Curtailment Service Provider (CSP). A CSP is a business with technical expertise that facilitates electricity consumer participation in DR markets. The CSP identifies load reduction opportunities, installs required equipment to enable DR and provides guidance on the process. The CSP also aggregates multiple projects to create the strongest product to offer the electric system operator. A list of CSPs operating in the PJM is available at http://www.pjm.com/markets-and-operations/demand-response/csps.aspx.

DR programs can be lucrative, but care must be taken to determine what level of load reduction commitment is technically and administratively possible that will not adversely impact the productivity of the customer. However, considering the potential revenue that can be associated with a DR contract, it's worth exploring.

Eckert's Energy Practice Group can help to evaluate the feasibility of a DR arrangement for your business as well as ensure that the arrangements with the DR provider are fair to you. For more information, contact Dan Clearfield, John Hanger or Jeff Norton.

Daniel Clearfield is Co-Chair of the Utilities and Telecommunications Group and concentrates his practice in the areas of utility, energy and communications regulatory litigation, alternative energy development, Marcellus shale drilling and mid-stream issues, administrative litigation and government relations. Prior to entering private practice, he served as Executive Deputy Attorney General in the Pennsylvania Attorney General's Office and Senior Assistant Consumer Advocate in the Pennsylvania Office of Consumer Advocate. Dan can be reached at 717.237.7173 or dclearfield@eckertseamans.com

Litigation

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that, under Pennsylvania law, there is no "absolute rule" that treats the insured and the insurer as a "single client" of the lawyer appointed by the insurer to represent the insured. Instead, the facts of each case will control if the lawyer is engaged in a joint representation or only represents the insured. Under either scenario, all three entities—insured, insurer and counsel—should be cognizant of if and how the attorney-client privilege will apply to their communications.

Heffler, the insured, independently hired a law firm, the O'Brien Firm, to defend Heffler against a claim of misconduct. While reserving its rights, Camico, Heffler's insurer, assumed the responsibility for paying the O'Brien Firm's fees from the underlying action. However, Camico brought a declaratory judgment action against Heffler, claiming that Camico's coverage obligation was limited to $100,000.

In discovery in the declaratory judgment action, Camico sought production of documents from Heffler. Heffler refused to produce certain of its communications with the O'Brien Firm related to the underlying action, invoking the attorney-client privilege. Camico moved to compel, arguing that it was entitled to the otherwise privileged documents because it "shared a common interest" with Heffler regarding the underlying action.

The Court began its analysis by noting that it did not have the benefit of any guidance from the Pennsylvania Supreme Court on the issue. Consequently, the Court turned to other authorities in order to predict if the Pennsylvania Supreme Court would permit Camico access to Heffler's privileged communications with the O'Brien Firm.

The Court noted that Camico's invocation of the "common interest" doctrine was a misnomer. The common interest doctrine applies when two (or more) clients, each represented by its own separate counsel, share information related to a matter of common interest to the parties. In those circumstances, the sharing of confidential information does not amount to a waiver of the privilege.

The Court observed that the concept at issue in *Camico* was not the common interest doctrine, but was instead the co-client or joint client privilege. The co-client privilege is applicable when one lawyer represents multiple parties with regard to a particular matter. Having properly framed the issue, the Court then analyzed whether the co-client privilege applied in *Camico*. If it did, Camico likely would have been entitled to access to Heffler's communications with the O'Brien Firm.

Despite a rather robust division of authorities on the question, the Court rejected the proposition that Pennsylvania has an "absolute rule" that, in all instances, an insured and its insurer are co-clients of a lawyer retained (or paid by) the insurer to represent the insured. Relying on decisions from Third Circuit and the Pennsylvania Superior Court, and the Restatement (Third) of the Law Governing Lawyers, the Court held that whether an insured and insurer were co-clients depended on the facts of each particular case.

The Court then examined whether, in the case at hand, Heffler and Camico were co-clients of the O'Brien Firm regarding the underlying action. Heffler presented the Court with evidence that no co-client relationship existed: Heffler independently retained the O'Brien Firm; the O'Brien Firm submitted an affidavit denying any attorney-client relationship with Camico; a letter from Camico referred to the O'Brien Firm as "independent counsel."

Camico contended that a co-client relationship existed. It claimed that it "participated in the defense" of the underlying action and that the O'Brien Firm was to provide Camico with information regarding the case. However, Camico submitted no evidence to support its assertions.

Based on the evidence Heffler submitted and the absence of evidence from Camico, the Court concluded that no co-client relationship existed. The Court also rejected Camico's argument that its "shared interest" in the outcome of the underlying action was sufficient to permit Camico to pierce the privilege. Accordingly, the Court denied Camico's motion and held that the privilege protected Heffler's communications with the O'Brien Firm.

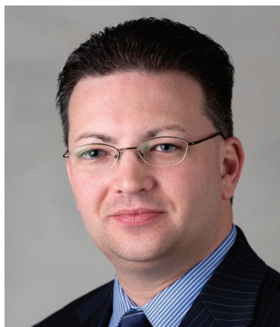
The lessons from *Camico* are:

- Pennsylvania law is unsettled on the question of whether insured and insurer will be treated as a "single client" of an attorney appointed by the insurer to defend an insured.
- If insured and insurer are joint clients of the lawyer, the insured should be aware that its communications with counsel may not be privileged vis-à-vis the insurer.
- If insured and insurer are not joint clients, then, at least initially, the insured's communications with counsel should be privileged vis-à-vis the insurer. However, if counsel or the insured voluntarily share otherwise privileged communications with the insurer, there is a significant risk that the privilege would be waived, not just to the insurer, but potentially to other parties.
- Attorney-client privilege disputes now frequently turn in favor of the party who offers competent evidence through affidavits or even live testimony to support its position. The days of merely relying on argument or representations from counsel are receding. If an attorney-client privilege issue is worth fighting about, it is worth the effort of supplying the Court with competent evidence in support of your position.

Kevin P. Allen is a Member of the Commercial Litigation group of Eckert Seamans. He is also the author of The Attorney-Client Privilege and the Work-Product Doctrine in Pennsylvania *(PBI Press 2012), now in its third edition. Kevin can be reached at 412.566.6866 or kpallen@eckertseamans.com*

Insurance

Evaluating insurance options: traditional vs. alternatives



Ryan B. Caboot

Unlike a new product development or a marketing initiative, insurance is not a topic that generates much excitement in the business world. However, all businesses, in one way or another, must navigate the maze of insurance given the litigious society within which they operate. Traditional insurance and insurance alternatives are oftentimes not considered a high priority by a business until there is, for example, a claim against the business. Every business should carefully consider its potential exposure to risks and corresponding traditional insurance or insurance alternatives to address those risks, before a claim arises, to avoid paying losses out-of-pocket.

As far as traditional insurance, a business's insurance program might include commercial general liability, property, business automobile, commercial umbrella, workers' compensation, employer's liability, loss-of-income and director and officer liability insurance, and newer products such as cyber liability coverage. Each of these insurance products offers protection against a defined risk. For example, if a business owns and operates its own manufacturing facility, the business likely maintains a commercial property insurance policy to provide coverage in the event that a fire destroys the facility. The business may experience a false sense of security, believing that its property insurance policy provides adequate coverage to rebuild the facility in the case of a fire. But does it? The sense of security may falter when the business carefully reviews its policy and realizes, for example, that the policy provides actual value (replacement value minus depreciation) rather than replacement cost value (without depreciation) coverage. In the absence of replacement cost coverage, the business may have to pay out-of-pocket a certain portion of the expense associated with rebuilding its burned facility. Further, a business may not be aware that its property insurance generally does not cover flood damage and that it should purchase separate flood insurance coverage through the National Flood Insurance Program. For these reasons, a business should carefully review its insurance policies and ask questions of its insurance agent and/or broker to better understand what is and is not covered by its policies. Otherwise, the business may be underinsuring potential losses that it may not be able to absorb financially without adequate coverage in place.

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Insurance

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Alternatives to traditional insurance products are another way for a business to protect itself from exposure to certain risks. Insurance alternatives, such as self-insurance, captive insurance and risk retention groups, may provide more cost stability to a business, greater control over underwriting and claims, and other financial incentives. If a business self-insures, this means that the business established its own risk management program as an alternative to purchasing insurance policies in the voluntary market. To limit its exposure as a self-insurer, the business may purchase from the traditional insurance market an excess or stop loss insurance policy. Excess insurance generally kicks in and covers losses after the payments made by the self-insured program reach an established dollar amount or retention.

Another insurance alternative, a captive insurer, is a variation on the self-insurance concept. A captive insurer is generally an insurance company that is formed for the purpose of, among others, insuring certain risks incurred by the business in its operations. The business may provide the capital and assets for the captive insurer and be an affiliate of the captive insurer in the same corporate family. Captive insurers come in different forms and sizes and are permitted in off-shore captive domiciles, for example, Bermuda or the Cayman Islands, or in U.S. captive domiciles, for example, Vermont or the District of Columbia. The number of U.S. captive domiciles continues to grow. Although captive insurers require start-up costs, capitalization and ongoing operational expenses, the business may experience certain tax benefits and savings when using a captive insurer as compared to purchasing insurance in the voluntary market or not insuring the particular risks.

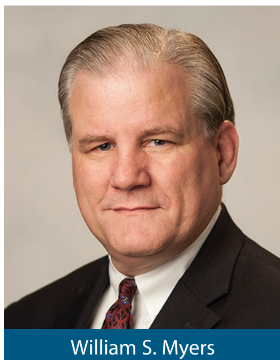
A risk retention group (RRG), another alternative to traditional insurance, is an entity that is owned by its members and whose primary purpose is to assume and spread certain liability exposures among the group's membership. RRGs generally provide coverage for, among others, general liability and directors and officers liability. RRGs are oftentimes more utilized when there is a hardening of rates for liability coverage including, among others, professional liability insurance. RRGs, which are authorized under the Federal Liability Risk Retention Act of 1986, must be domiciled in a state or the District of Columbia and are subject to its domiciliaries' surplus and capital requirements. Once domiciled, an RRG may generally insure its members in other states and the District of Columbia after registering in those jurisdictions. However, RRGs cannot insure nonmembers. It is important to note that RRGs and its members are not eligible to participate in state insurance guaranty funds and obtain payments from these funds for any outstanding claims in the event that an RRG becomes insolvent.

Businesses should evaluate, on a regular basis, their overall insurance coverages and risk management to ensure that proper protections are in place against potential losses. As part of this review, a business should consider, among others, the alternatives to traditional insurance that might fit with its particular business plan.

Ryan B. Caboot is a Member who focuses his practice in the areas of insurance regulatory compliance and general corporate matters. Prior to joining Eckert Seamans, Ryan served as Department Counsel in the Pennsylvania Insurance Department's Office of Chief Counsel. He can be reached at 717.237.6074 or rcaboot@eckertseamans.com

Labor & Employment

Are they or aren't they? *Noel Canning* and the status of the NLRB


William S. Myers

Are they, or aren't they? That question is left dangling about the legitimacy of the National Labor Relations Board (NLRB) in the aftermath of the now-infamous case of *Noel Canning v. NLRB*. The United States Court of Appeals for the DC Circuit stirred up a hornet's nest when it declared the January 4, 2012, presidential appointment of three NLRB members unconstitutional and the decisions of the Board since their appointment to be "void *ab initio*."

This case could, quite literally, change the face of labor law, and fundamentally alter the way presidents and senators work together on nominations to *all* federal agencies and courts.

Noel Canning

Noel Canning is a bottling company in Yakima, Washington. The Teamsters union filed an unfair labor practice charge against the company for refusing to sign a collective bargaining agreement that, according to the union, reflected an agreement reached over several months of bargaining. After a hearing, the administrative law judge (ALJ) sustained the charge, and the Board later adopted the ALJ's decision. Noel Canning sought review in the DC Circuit, asserting as the mainstay of its appeal that the NLRB did not have a quorum to decide the case, so its ruling was invalid and unenforceable.

President's Appointments

Section 3(b) of the National Labor Relations Act requires the Board to have at least three members to constitute a quorum. At the beginning of 2012, the Board had three members and two vacancies. Chairman Mark Pearce and Member Brian Hayes had been nominated and confirmed by the Senate in 2010, and

Member Craig Becker was a 2010 recess appointee. Becker's commission expired January 3, 2012, leaving the Board with only two members and no quorum.

On January 4, 2012, while the Senate was adjourned, President Obama appointed Sharon Block, Richard Griffin and Terrence Flynn pursuant to the Recess Appointments Clause of the Constitution. These appointments gave the Board a full complement of five members for the first time since the summer of 2010. The Board's decision in *Noel Canning* was issued February 8, 2012, by a three-member panel consisting of Members Hayes, Flynn and Block. Later that year, Member Flynn resigned and Member Hayes' term expired, returning the Board to just three members.

Meanwhile, the Senate was operating in "pro forma" sessions since its adjournment before the holidays. This was a procedural maneuver whereby the Senate adjourned from conducting regular business from December 17 to January 23 without ever being in recess for longer than three days at a time. The Senate simply convened for a few minutes every three days and then adjourned until the next scheduled pro forma.

DC Circuit's Bombshell

At the court of appeals, the company argued that recess appointments may not be made unless the Senate adjourns for more than three business days, and that no president in history had ever attempted a recess appointment during such a short break. The government countered that there is no minimum period for a recess appointment. Neither side, however, addressed the question of "intra-session" breaks, meaning breaks that occur *during*, as opposed to *between,* sessions of Congress.

The court of appeals bypassed the arguments of both parties to reach three very significant points. First, the court held the Recess Appointments Clause refers only to *inter-session* recesses. Second, the only vacancies that may be filled with recess appointments are those that initially occur during an inter-session recess. Third, recess appointments must be made during the same inter-session recess in which the vacancy occurs.

The practical impact of this decision, if it stands, will be to dramatically reduce the number of recess appointments. It correspondingly strengthens the hand of the Senate to influence nominations. Its greatest impact would be on agencies, like the NLRB, that cannot lawfully function without a quorum of presidential appointees, and that have no statutory provision for "acting" officers to serve until proper nominations and confirmations can be accomplished.

Conflicting Circuits

Noel Canning conflicts with the previous decisions of three other federal circuits. In *United States v. Allocco* (2d Cir. 1962), the defendant challenged the recess appointment of the district judge because the vacancy occurred while the Senate was in session, but the appointment was made during a recess. The Second Circuit upheld the appointment, but did not address the question of inter-session versus intra-session recesses (although the recess in that case was intra-session), and it did not address the length of the recess. The only question was whether the President may make a recess appointment for a vacancy that occurred while the Senate was in session, and on that point, *Noel Canning* directly conflicts with *Allocco*.

In *United States v. Woodley* (9th Cir. 1985), the defendant again challenged the district judge's recess appointment. The court of appeals, sitting *en banc*, held squarely that the Recess Appointments Clause applies to judicial appointments, and held further that recess appointments may be used to fill vacancies that "exist" during a recess, not just those that first occur during a recess. The court did not address the intra-session question, but the appointment at issue was made during an inter-session recess.

Finally, in *Evans v. Stephens* (11th Cir. 2004), the court of appeals had to decide if one its own members was a valid recess appointee. Here, the *en banc* court explicitly held that recess appointments may be made during intra-session breaks.

Both *Woodley* and *Evans* included lengthy dissents that fully support the later decision and rationale in *Noel Canning*. Moreover, while the Supreme Court denied certiorari in *Evans*, Justice Stevens filed a concurring opinion suggesting that he, and perhaps other justices who are still on the Court today, had concerns about the Eleventh Circuit's decision in *Evans*, and therefore might look favorably on the *Noel Canning* decision.

Judge Sentelle vs. Other Circuits

Much has been made about the DC Circuit's rejection of *three* other circuits, especially because the result invalidates almost 300 Board decisions. However, Judge David Sentelle, who penned the *Noel Canning* opinion, is no stranger to conflicts involving the validity of NLRB decisions issued without a quorum.

In *Laurel Baye Healthcare v. NLRB* (2009), Judge Sentelle also wrote for a unanimous panel that held the NLRB had been acting without a quorum for two years. This opinion went against decisions of *five* other circuits, which had expressly upheld the Board's authority. On certiorari in one of those cases (*New Process Steel v. NLRB*), the Supreme Court rejected all five of the other circuits and came down on the side of Judge Sentelle (albeit for slightly different reasons), invalidating almost 600 NLRB decisions.

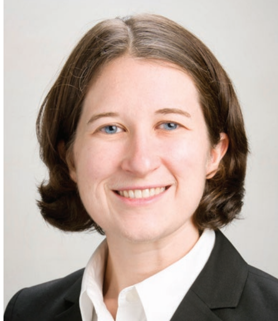
Board's Response

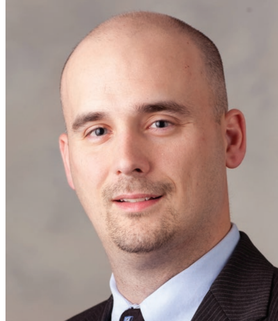
The Board has announced it will seek Supreme Court review of the *Noel Canning* decision. In the meantime, it will continue "business as usual," with both challenged members continuing to decide cases. On subsequent quorum challenges, the Board has simply rejected the argument, noting the conflict among the circuits and stating "[t]his question remains in litigation, and until such time as it is ultimately resolved, the Board is charged to fulfill its responsibilities under the Act."

William S. Myers is Special Counsel in the Labor and Employment Group. Bill has been a labor and employment lawyer for more than 20 years. He can be reached at 412.566.1938 or wmyers@eckertseamans.com

Intellectual Property

Generic top level domains and rights protection mechanisms


Catherine Malia Ting


Richard E. Peirce

The Internet Corporation for Assigned Names and Numbers (ICANN) has developed a system where parties can create new generic Top Level Domains (gTLDs), which are Internet domain name extensions such as .com, .net and .gov. The first set of applications for new gTLDs has already been filed with ICANN, including applications for .web, .app, .academy, .beauty and .insurance, to name just a few. A full list of the pending applications can be found at https://gtldresult.icann.org/application-result/applicationstatus.

Similar to previously released gTLDs such as .biz and .info, trademark owners will once again be faced with the risk of having their brands improperly registered in any number of the hundreds of new gTLDs that may be set for open registration to the public. In other words, the amount of domain name "real estate" to police for cybersquatting is about to significantly increase.

After years of negotiation with brand owners, ICANN has just started rolling out the first of its rights protection mechanisms that are theoretically designed to assist brand owners with protecting their marks in the new gTLD spaces. Two of the most notable mechanisms are the Trademark Clearinghouse (TMCH) and the Uniform Rapid Suspension System (URS).

1. Trademark Clearinghouse

The TMCH is a centralized repository for information on trademarks and service marks. Brand owners will be able to apply to have their marks included in the TMCH. There are two main benefits to having a mark registered in the TMCH.

First, inclusion of a mark in the TMCH enables brand owners to register their marks in domain names during "Sunrise Periods" for each new gTLD. Sunrise Periods allow mark owners to "pre-purchase" domain names corresponding to their marks in a new gTLD space before general registration is available to the public. If a brand owner intends to register its mark as a domain name during a Sunrise Period, it must submit proof of use to the TMCH.

Second, the TMCH acts a notification tool. If an applicant other than the brand owner seeks to register a domain name in a new gTLD space that is identical to a mark registered with the TMCH during the claims period, the applicant will receive notification of the TMCH mark. If the applicant registers the domain name, the mark owner will be notified. The TMCH will not prevent an applicant from completing the registration even after the applicant is notified of a matching mark in the TMCH.

One major disadvantage to brand owners is that the TMCH is generally only equipped to handle exact matches of marks. A mark owner will be permitted to attach to a TMCH record up to 50 confusingly similar variations of the mark if the owner establishes a Uniform Domain Name Dispute Resolution (UDRP) proceeding or court proceeding found the variation to be subject to abusive registration.

2. Uniform Rapid Suspension System

The URS will be similar to the current UDRP, but is intended to be a lower-cost and more efficient system for instances of clear-cut cybersquatting or infringement.

The URS filing fee will be less expensive than the current UDRP filing fee, with an anticipated cost around $300. A complaint will be reviewed within two days of filing, and the URS provider will notify the applicable registrar to have the domain name locked in order to prevent the transfer of the domain name. This lock will not alter the availability of the web content.

Within 24 hours of locking the domain name, the URS provider will notify the alleged cybersquatter, informing it that it may lose the registration. The alleged cybersquatter then has 14 days to respond to the complaint.

For a brand owner to be successful under the URS, it must establish by clear and convincing evidence that: (1) the registered domain name is identical or confusingly similar to the mark; (2) the registrant has no legitimate right to the domain name; and (3) the registrant registered the domain name in bad faith. If the mark owner meets the clear and convincing standard, the domain name will be suspended for the remainder of the current registration period, which can be extended by the successful complainant for an additional year. This "remedy" differs from the UDRP system in which the domain name can be transferred to a successful trademark owner.

A URS complaint listing more than 15 domain names registered to the same registrant will be subject to a response fee refundable to the prevailing party, i.e., a "loser pays" system.

If the mark owner does not prevail in the URS, it can still pursue its case through the UDRP or the applicable court system.

Conclusion

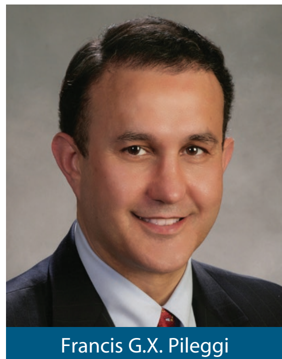
The new gTLD system creates many unknowns for brand owners. Although ICANN is attempting to settle the fears of brand owners with the TMCH and the URS, it is unclear whether such mechanisms will be effective in preventing cybersquatting.

Catherine Malia Ting focuses her practice in the areas of intellectual property and professional liability matters. Catherine can be reach at 215.851.6626 or cting@eckertseamans.com

Richard E. Peirce is a Member of the firm in the Intellectual Property area. He can be reached at 215.851.8398 or rpeirce@eckertseamans.com

Delaware

Top 5 corporate and commercial decisions from Delaware in 2012, and proposed corporate statute amendments for 2013


Francis G.X. Pileggi

During 2012, Eckert Seamans' attorneys reviewed and summarized over 200 decisions from Delaware's Supreme Court and Court of Chancery on corporate and commercial issues. Among the decisions with the most far-reaching application and importance during 2012 include those that we are highlighting in this short overview. Fuller summaries with links to the actual court opinions are available at www.delawarelitigation.com.

Top 5 Decisions of 2012

In no particular order, we chose the following "top five" decisions as especially noteworthy:

Gatz Properties LLC v. Auriga Capital Corp., No. 148, 2012 (Del. Supr. Nov. 7, 2012) (Per Curiam). Issue Addressed: Delaware's High Court held that the manager of an LLC violated a contracted-for fiduciary duty that adopted the equitable standard of entire fairness in a conflict of interest transaction between the LLC and its manager. The Supreme Court also designated as *dicta* any statements by the trial court that Delaware law imposed default fiduciary duties in the LLC context. However, note that the Delaware LLC statute may be changing in 2013 to incorporate that default fiduciary duty standard by statute unless an LLC agreement expressly waives it.

In *Americas Mining Corp. v. Theriault*, No. 29, 2012 (Del. Aug. 27, 2012), in a 110-page opinion, the Delaware Supreme Court upheld the Court of Chancery's 100-plus page decision awarding over $2 billion in damages based on a breach of fiduciary duty claim in connection with the overpayment for the purchase of an affiliated company. Delaware's High Court also upheld an award of attorneys' fees in the amount of $300 million. The trial court decision was styled as *In re Southern Peru Copper Corporation Shareholder Derivative Litigation*, C.A. No. 961-CS (Del. Ch. Oct. 14, 2011).

South v. Baker, C.A. No. 7294-VCL (Del. Ch. Sept. 25, 2012). Issues Addressed: This decision is a candidate for inclusion in the pantheon of iconic Delaware Court of Chancery opinions addressing the following issues: (1) When derivative plaintiffs and their counsel will be presumptively found to provide inadequate representation resulting in the complaint's dismissal with prejudice; (2) When dismissal of one derivative suit will not bar another derivative suit involving the same corporation; (3) When a *Caremark* claim will be dismissed with prejudice if Section 220 is not used beforehand; and (4) How to successfully allege pre-suit demand futility in connection with making a *Caremark* claim.

In Re: Encore Energy Partners LP Unitholder Litigation, Cons., C.A. No. 6347-VCP (Del. Ch. Aug. 31, 2012). Issue Presented: Whether the terms of an LP Agreement protected the general partner from claims regarding what would otherwise be a self-interested transaction, without breaching any duty owed to its limited partners? Short Answer: Yes.

Soterion Corp. v. Soteria Mezzanine Corp., C.A. No. 6158-VCN (Del. Ch. Oct. 31, 2012). Why This Case is Noteworthy: This decision addresses for the first time in Delaware the applicable standard to determine when the threat of a lawsuit can be tortious interference with prospective business relationships. This opinion also features the rare instance when attorneys' fees are assessed based on an exception to the American Rule (as compared with Rule 37 for motions to compel).

Honorable Mention This distinction goes to the new Chancery Practice Guidelines which the Court of Chancery adopted several months ago and which provide comprehensive tips and instructions for both procedural matters and substantive discovery obligations that practitioners must follow if they hope to avoid the wrath of the bench.

Proposed Amendments Expected to Become Part of the Delaware General Corporation Law in the Summer of 2013

Each year the Delaware General Corporation Law (DGCL) is updated to further refine and modernize its various sections. This year brings several substantive new additions to the DGCL that are expected to be passed into law before the Delaware General Assembly adjourns its session for the year on June 30, 2013.

The most momentous new change to the corporate statute is the allowance of a new form of entity called the "Public Benefit Corporation," which is expected to be part of the new amendments adopted this summer. This new type of entity has been adopted in about 12 other states so far, but Delaware's version will not be following the "model act" that other states have chosen. The purpose of this new for-profit entity is to allow flexibility for companies that want to consider other public interests besides the primary duty to maximize shareholder value. There are restrictions on the eligibility for this new form of entity, which is already available in the alternative entity context by means of customizing, for example, an LLC agreement to achieve a purpose other than maximizing the value of the members of an LLC. A separate article will be devoted to this new form of doing business but one way to recognize it is that the name of the company must include the letters "PBC" or the words "public benefit corporation." Unlike other jurisdictions, Delaware never adopted an "other constituencies" statute. The new PBC statute will allow directors to consider specified public beneficiaries identified in the certificate of incorporation, as well as the best interests of those impacted by corporate actions—in addition to the best interests of shareholders. However, only shareholders will have the right to sue.

In addition, new DGCL sections 204 and 205 will give explicit jurisdiction to the Court of Chancery to remedy "defective corporate acts" such as the overissuance

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of shares due to an oversight, for example, when comparing the number of authorized shares in light of the number of stock options granted.

Also, new amendments to DGCL section 382(a) will allow for service of legal process on the Delaware Secretary of State on behalf of non-Delaware corporations who agree to the jurisdiction of state or federal courts in Delaware but when such an agreement does not specify how service of process will be effected. This will address the many non-Delaware companies who are parties to agreements in which they consent to the jurisdiction of Delaware courts for disputes that arise in connection with the agreement or related matters.

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Firm News

Eckert Seamans Adds Three New Offices: Expands Footprint Into Newark and Trenton, New Jersey and Providence, Rhode Island

Over the past few months, Eckert Seamans has taken great strides in its strategic plan to expand the firm's reach throughout the Mid-Atlantic corridor with the opening of three new offices, including Newark and Trenton, New Jersey and Providence, Rhode Island.

In January, the firm added nine litigators with extensive experience in product liability and complex mass tort matters from McGivney & Kluger, P.C., contributing to the continued expansion of Eckert Seamans' Boston and White Plains offices and signaling the creation of two new Eckert Seamans offices in Newark, New Jersey and Providence, Rhode Island. The group includes Members (partners) **David Katzenstein** (Newark), **Kevin E. Young** (Boston), **Craig Waksler** (Boston & Providence), **Jennifer Whelan** (Boston & Providence), **Nathaniel J. Dudley** (Boston) and **Michelle Grady** (White Plains); and as associates, **Stephanie Batchelder** (Boston & Providence), **Brad W. Graham** (Boston) and **Kerry L. Seagle** (Boston). Five para-professionals and administrative staff members also joined the firm in important litigation support roles.

The expansion continued in March, when Eckert Seamans announced the combination of its practice with the 24-attorney firm of Sterns & Weinroth, effective April 1, 2013. The merged firm results in the addition of a new Eckert Seamans office in Trenton, New Jersey and brings the firm's total attorney count to more than 385.

The combined firm provides Eckert Seamans' clients with a greatly enhanced presence in New Jersey, and the firm now has over 130 lawyers in the New York, New Jersey, Delaware and Philadelphia metropolitan markets. With the addition of the attorneys of Sterns & Weinroth, Eckert Seamans further strengthens its existing capabilities in the core areas of litigation, real estate, land use, administrative, environmental and governmental affairs.

The Trenton office includes Members **William J. Bigham, Marshall D. Bilder, Anthony E. Bush, Jennifer L. Cordes, Bernadette Fallows Davidson, Jason S. Feinstein, Erica S. Helms, Michelle Lebovitz Lamar, Robert J. McGuire, Vincent J. Paluzzi, Frank J. Petrino, David M. Roskos, Michael A. Spero, Christopher E. Torkelson, Richard J. Van Wagner, Richard K. Weinroth** and **Robert P. Zoller**; and associates **Michael R. Butler, Jill R. Cohen, Edgar Alden Dunham, IV, Christopher P. Midura, Grace Strom Power, David P. Skand** and **Gina M. Zippilli**.

Other New Additions

Eckert Seamans is committed to seeking out and retaining high-caliber professionals who have a passion for their work, as exemplified by the fine attorneys who recently joined the firm:

Members

Philadelphia: **Francis J. Greek**
Pittsburgh: **Kevin P. Allen, David P. Franklin**
Richmond, VA: **Anthony "Tony" F. Troy**
White Plains: **Michael J. Burke**

Special Counsel

Pittsburgh: **William S. Myers**

Associates

Harrisburg: **Laura B. Kurtz**
Philadelphia: **Shaune E. Ferrara**
Pittsburgh: **Katherine L. Pomerleau, John P. Powers**
Richmond: **Jerrell E. Williams**
Washington, DC: **Kimberly S. LeBlanc**

The information in this publication is for the purpose of informing and educating our clients about various aspects of the law and is not intended to be used as legal advice. If you have questions concerning any of the topics, please contact your Eckert Seamans attorney.
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