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Legal Update

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Intellectual Property

Six Strikes and…well…it depends… The Copyright Alert System

Richard E. Peirce

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What is the Copyright Alert System?

After years of trying to combat online copyright infringement, including using the sometimes unpopular tactic of suing students and other individuals over illegal downloading and sharing, the major content providers have now turned to a type of cooperative policing outside of the court system … enter the Copyright Alert System (CAS). It went into effect in February of 2013.[1]

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DE Supreme and Chancery Courts

"Top 10" 2013 Delaware corporate and commercial decisions

During 2013, there were many decisions made by 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 2013 are the "top 10" that we are highlighting in this short overview. In chronological order, the winners are:

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Francis G.X. Pileggi

Kevin F. Brady

Intellectual Property

(continued)

The CAS is a private initiative that is intended to promote cooperation between content providers and Internet service providers (ISPs) in order to combat online copyright infringement.

More specifically, the CAS is designed to "educate" ISP subscribers about online copyright infringement and to alert subscribers when copyright-protected content or files may have been shared illegally online through the subscribers' ISP or related Internet accounts. Here is how it works.

CAS "content partners" join and monitor peer-to-peer (P2P) networks, which are online forums where Internet users can share digital content such as movies, television shows and music.[2] The content partners can search for and review copyright-protected content that appears to have been illegally shared through the P2P sites and forums.[3]

If a content partner identifies proprietary content owned by one of the participating content providers that is being shared illegally by a particular ISP subscriber, the content owner then attempts to identify the IP address being used by the same ISP subscriber.[4] Since these IP addresses can be traced to an ISP provider, the content owner (who successfully identifies the IP address) next sends a notice to the applicable ISP about the alleged infringement.[5] The ISP then is tasked with sending a copyright alert to its ISP subscriber.[6]

The first few alerts are intended to inform the ISP subscriber about the alleged infringement taking place through the use of the subscriber's ISP account and Internet connection.[7] The initial alerts are intended to be educational, not punitive.[8]

If a subscriber fails to cease the alleged behavior, subsequent alerts may be sent. If the alleged behavior continues, the ISP may resort to instituting a "mitigation measure" against the ISP subscriber.[9] The intent of the mitigation measure is to more directly discourage the ISP subscriber from continuing the alleged behavior. A mitigation measure may include requiring the subscriber to view educational materials about copyright infringement or a reduction in the subscriber's Internet speed.[10]

It appears that participating ISPs will *not* terminate a ISP subscriber's Internet service as a mitigation measure even after receiving the maximum six alerts—hence the CAS's nickname of "Six Strikes."[11] Yet, there is nothing to stop participating ISPs from implementing other mitigation measures under their own use policies.[12, 13, 14]

The CAS is neither codified in the U.S. Copyright Act nor governed by the U.S. Copyright Office. In other words, it is a completely private undertaking that operates outside of the U.S. court system and its oversight. However, if a subscriber believes that an alert was sent in error, he/she can submit the alert for the Independent Review Process before the American Arbitration Association.[15]

Center for Copyright Information

The Center for Copyright Information (CCI) is responsible for overseeing the CAS. The CCI's purpose is to educate consumers about the importance of copyright protection and to help Internet users find legal ways to download and enjoy digital content online.[16] The CCI membership includes various content side entities such as the Recording Industry Association of America, the Motion Picture Association of America, independent filmmakers and record producers.[17] It also includes the five major ISPs (AT&T, Cablevision, Comcast, Time Warner Cable and Verizon.)[18] It is the cooperation of the ISPs that is key to making the CAS work.

AT&T

AT&T is one of the five major ISPs that have partnered with the CCI. Like the other ISPs, AT&T has its own policy relating to the type and scope of warnings and punishments it will implement under the CAS.[19]

For example, AT&T's policy states that it will send escalating alerts to a targeted subscriber who does not cease the alleged activity.[20] If the alleged activity continues after that, mitigation measures that may impact or affect the subscriber's Internet connection can be implemented.[21] Also, ISP subscribers are required to confirm receipt of each alert and assert that they will not continue to illegally share protected content or files over P2P networks.[22] Finally, ISP subscribers who receive multiple alerts from AT&T are required to complete an online educational tutorial.[23]

Conclusion

The effectiveness of this private, cooperative policing strategy is tough to measure at this point. Colleges and universities, for example, may find the CAS useful and proportionate in "educating" students about online copyright infringement without subjecting students to legal action by content providers.

Yet, will the "promise" by ISPs not to terminate ISP accounts result in ISPs implementing tougher mitigation measures for repeat infringers? If that happens, can the Independent Review Process adequately protect consumers against heavy-handed actions by ISPs done outside of the protection of the legal system? If the ISPs go the other direction and soften their mitigation measures, do the content providers abandon the CAS for traditional copyright litigation?

Because the CAS is relatively new, it may take nothing more than time to get these answers.

1 http://www.copyrightinformation.org/uncategorized/copyright-alert-system-set-to-begin/
2 https://www.markmonitor.com/services/antipiracy.php
3 *Id.*
4 http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/
5 *Id.*
6 *Id.*
7 http://www.onthemedia.org/story/266382-copyright-alert-system-and-six-strikes/transcript/
8 *Id.*
9 http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/
10 *Id.*
11 http://www.copyrightinformation.org/resources-faq/copyright-alert-system-faqs/
12 http://www.verizon.com/Support/Residential/internet/highspeed/general+support/top+questions/questionsone/123247.htm#
13 http://customer.comcast.com/help-and-support/internet/copyrightalerts
14 http://optimum.custhelp.com/app/answers/detail/a_id/3592/~/copyright-infringement-alerts
15 http://www.copyrightinformation.org/the-copyright-alert-system/what-do-i-do-if-i-think-the-alert-was-wrongly-sent/
16 http://www.copyrightinformation.org/about-cci/
17 *Id.*
18 *Id.*
19 https://copyright.att.net/home
20 *Id.*
21 *Id.*
22 "Acknowledge Alerts" available at https://copyright.att.net/home
23 "Copyright Infringement Tutorial" available at https://copyright.att.net/home

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DE Supreme and Chancery Courts

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Supreme Court Determines that There is No Fiduciary Duty to Structure Executive Compensation to Take Advantage of Corporate Tax Deduction. *Freedman v. Adams.* This decision is another example of how difficult it remains to challenge compensation decisions on the basis of Delaware corporate law.

Supreme Court Enforces Duty to Negotiate in Good Faith. *SIGA Technologies v. PharmAthene.* Most lawyers will be surprised to know that an obligation to negotiate can be enforced in Delaware even when a term sheet is not complete or final.

Supreme Court Upholds Presumption of Good Faith in Agreement to Bar Claims. *Norton v. K-Sea Transportation.* This is one of many recent examples where an LP agreement waived all duties except the non-waivable implied duty of good faith, but the agreement also created a presumption of good faith that made it almost impossible to challenge wrongdoing. N.B. Waivers will be enforced. Read before signing to know what duties and rights are being waived.

Chancery Clarifies Fiduciary Duty of Disclosure Owed by Directors and Majority Shareholders when Purchasing Shares or Selling Shares to Existing Shareholders. *In re. Wayport, Inc. Litigation.* This opinion provides a textbook-style explanation of the duty of disclosure in general, as well as in the context of selling and buying shares among existing shareholders.

Supreme Court Establishes New Standard for Trial Courts to Determine Appropriate Penalty when Pretrial Deadlines are Not Met. *Christian v. Counseling Resource Associates, Inc.* This is a must-read for lawyers (and their clients) to understand when court approval is needed to extend pre-trial deadlines and the consequences of missing pre-trial filing deadlines.

Chancery Emphasizes Duty of Oversight Owed by Directors Includes Corporate Operations in Foreign Countries. *Rich v. Chong and Puda Coal* and *In re. China Agritech, Inc. Shareholder Derivative Litigation*. This trio of decisions, all involving operations in China of Delaware corporations, should worry directors of companies with far-flung operations in distant countries unless they make visits to those countries or otherwise make themselves sufficiently aware of those operations.

Business Judgment Rule Announced as Standard Applicable to Controlling Shareholder Transactions with Safeguards. *In re. MFW Shareholders Litigation.* This iconic Chancery decision provides a clear standard to practitioners who formerly had less definitive guidance (and multiple conflicting standards) to advise clients on the standard that would apply in Delaware to controlling shareholder freezeouts. This decision was appealed, and on December 18, 2013, the Supreme Court heard oral argument en banc.

Chancery Addresses Whether Notice Required Before Board Ousts CEO/Controlling Shareholder. *Klaassen v. Allegro Dev. Corp. et al.* This Chancery decision is the subject of an expedited appeal to the Delaware Supreme Court. Among the issues to be addressed by Delaware's high court is whether the actions of a board to dismiss the CEO, who also had voting power over a controlling percentage of shares, are void—as compared to voidable. The trial court opinion considering a motion for a stay pending appeal provides a mini-treatise on the Delaware law applicable to notice requirements for board meetings and the consequences of ineffective notice. The opinion is also must-reading for anyone interested in the proper approach to contests for control among warring factions of dissident directors and competing shareholder groups.

Supreme Court Addresses Business Combination Not Requiring Shareholder Vote. *Activision Blizzard Inc. v. Hayes, et al.*, No. 497-2013, order issued (Del. Oct. 10, 2013). In a rare ruling from the bench, after oral argument, the Delaware Supreme Court reversed an injunction granted by the Court of Chancery in *Hayes v. Activision Blizzard Inc.*, No. 8885, 2013 WL 5293536 (Del. Ch. Sept. 18, 2013). The formal written Supreme Court opinion was issued on Nov. 15, 2013. The issue addressed was whether the structure of the deal qualified as the type of business combination that required a vote by public shareholders. In a unanimous ruling, Delaware's high court ruled that no vote was required. Notably, merely a month or so transpired between the date of the complaint being filed and the Supreme Court's oral ruling after its review of an injunction that was issued by the trial court. Especially in a major case like this, that remains remarkable celerity.

Chancery Addresses State Insider Trading Claims Twice in Two Weeks. (Two cases tied for the last spot in top 10 list.) *In re. Primedia, Inc. Shareholders Litigation*. In connection with discussing the elements of the claim, this opinion addressed whether equitable tolling of the state insider trading claim applied to extend or suspend the statute of limitations. In *Silverberg v. Gold*, for the second time in as many weeks, a state insider trading claim, called a Brophy claim in Delaware, was analyzed in a Chancery opinion. This 40-page decision denied a motion to dismiss based on an alleged failure to make pre-suit demand on the board.

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Intellectual Property

Considerations when taking an appeal from the United States Patent and Trademark Office Trademark Trial and Appeal Board


Candace Lynn Bell

An appeal from a decision of the United States Patent and Trademark Office Trademark Trial and Appeal Board (TTAB) can be taken to either the Court of Appeals for the Federal Circuit or a district court. Two recent cases, both decisions handed down in January 2014, highlight the strategic considerations to be considered when making that choice. One case is an appeal of a decision in an opposition proceeding while the other case arises from an *ex parte* appeal on the registerability of an applied-for mark.

The current statutory basis for appeals from the TTAB arises from the Lanham Act, Section 21(a) and (b) (15 U.S.C. § 1071), which states:

(a) (1). . . An applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 1058 or section 71 of this title, or an applicant for renewal, who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, may appeal to the United States Court of Appeals for the Federal Circuit. . . .

(b) (1). . .Whenever a person authorized by subsection (a) of this section to appeal to the United States Court of Appeals for the Federal Circuit is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, said person may, unless appeal has been taken to said United States Court of Appeals for the Federal Circuit, have remedy by a civil action if commenced within such time after such decision . . .

In choosing between the two options, strategic consideration should be given to (1) the standard for review; (2) the evidence to be relied upon in the appeal; (3) the law to be applied; (4) the scope of the issues to be placed in front of the Court; and (5) the nature of the case to be appealed, e.g., opposition, cancellation, *ex parte*, etc.

If an appeal is taken to the federal circuit, no new evidence may be introduced and the standard for review is that of an appellate court. If an appeal is taken to a district court, the record from the TTAB proceeding is entered as evidence, but additional evidence, as well as additional claims, can be submitted by a party to the proceeding. The required standard for review depends upon whether new evidence is propounded, as discussed in the *Kappos*[1] decision.

The recent 4th Circuit *Swatch* decision applied the requirements of review set forth in the *Kappos* decision and highlighted the interplay between the standard of review and the submission of new evidence. [*Swatch AG v. Beehive Wholesale, L.L.C.* Appeal No. 12 – 2126 (4th Cir. January 7, 2014).] In the underlying Board action, Swatch opposed registration of the mark "SWAP" for "watch faces, ribbon watch bands, slide pendants, and beaded watch bands" on the grounds the mark was merely descriptive, and likely to cause confusion with and dilution of the registered SWATCH marks for "watches, clocks and parts" and other goods. The Board dismissed the opposition. Swatch appealed the decision to the District Court for the Eastern District of Virginia which affirmed the Board's decision, and held against Swatch on the additional claims of federal and state trademark infringement, unfair competition and federal dilution, which were added to the district court case. The 4th Circuit affirmed the decision, but held the district court did not apply the correct standard of review, as required by the *Kappos* decision.

The district court applied the standard of review of an appellate court for the record at the Board level while also applying the standard of a trial court, *de novo* review, with respect to the new evidence submitted and the additional claims. The 4th Circuit held that this blended standard of review was not appropriate and that

> . . .where new evidence is submitted, *de novo* review of the entire record is required because the district court "cannot meaningfully defer to the PTO's factual findings if the PTO considered a different set of facts. *Swatch AG v. Beehive Wholesale, L.L.C.* Appeal No. 12 – 2126 (4th Cir. January 7, 2014) *citing Kappos v. Hyatt, 132 S.Ct. 1690 (2012)*

For practitioners, the 4th Circuit decision demonstrates the trade-offs implicit in choosing a district court for appeal. A party is able to offer new evidence and/or add claims not previously at issue in the TTAB proceeding, such as infringement claims, but the district court will sit as a trial court and review the entire record *de novo*, limiting the deference paid to the TTAB decision. A *de novo* review also means the district court will apply the law of that court's particular circuit, which can vary somewhat among the circuits, but in any event, is not the law of the federal circuit. If an appeal is taken to the federal circuit, the court will review the decision as an appellate court and no new evidence or claims will be permitted and the law will be the law of the federal circuit, the law that governs the TTAB.

The second recent case highlighted a specific statutory provision applicable to *ex parte* appeals, where there is no adverse party. The case involved a refusal to register the mark PROBIOTIC for fertilizers. [*Shammas v. Focarino*, 109 USPQ2d 1320 (E. D. Va. 2014).] The Applicant took the appeal to the District Court for the Eastern District of Virginia. The case was decided on motion for summary judgment and the Applicant lost. The district court then assessed legal fees and expenses incurred by the USPTO in the case against the Applicant/Appellant, as per Section 1071(b)(3).

The choice of appeal to the district court opened the door for the Applicant/Appellant to be assessed legal fees and expenses of the USPTO. For practitioners, consideration needs to be given to these additional costs of an appeal in an *ex parte* case taken to a district court because, as the statute makes clear, the fees and costs are imposed regardless of the outcome of the case for the Applicant/Appellant. Such fees and costs would not have been imposed if the appeal was taken to the federal circuit.

Both these new cases make clear the need for careful consideration of the differences between an appeal taken to the federal circuit and appeal taken to a district court and that the ultimate decisions rests upon the balancing of such factors in a manner most favorable to the Appellant.

[1] The decision in the *Kappos* case arose from an appeal to a district court, under 35 U.S.C. Section 35, the patent equivalent of Section 1071, regarding a patent application. *Kappos v. Hyatt*, 132 S.Ct. 1690 (2012).

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Aviation Law

Hot Topics in Business Aviation Law

Evelyn D. Sahr

Beth A. FitzPatrick

Proposed consumer protection rules could mean changes for charter and air taxi operators and consumers

On September 29, 2013, the Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) aimed at enhancing consumer protections for charter air transportation. Comments were due on November 29, 2013, and the DOT is currently reviewing the NPRM in light of the comments it received. If the rule is made final, this could mean significant changes for those providing and using charter transportation.

The NPRM addresses air charter brokers, air taxi operators and commuter carriers, air ambulance services, and air charter broker services involving government contracts.

Air Charter Brokers

The NPRM seeks to create a new class of indirect air carriers that will be referred to as "air charter brokers." These entities are persons or companies that arrange air transportation services for customers by purchasing the use of any aircraft operated by another company. Currently, brokers act as either an agent of the customer or an agent of the company operating the aircraft. Under the NPRM, the air charter brokers would be independent entities. As such, they would have to disclose in all types of advertisements that they are air charter brokers, not direct air carriers, and that the air service will be provided by a licensed direct air carrier.

The air charter brokers would also be subject to consumer disclosure rules similar to airlines. Namely, they would have to disclose the following to any charterer:

- The corporate name of the direct air carrier operating the flight
- The capacity in which the broker is acting in the transaction (i.e., as an indirect air carrier)
- The existence of any business relationship between the operating carrier and the broker
- The make and model of the aircraft
- The total cost of the transportation, including any carrier-imposed fees and any government-imposed taxes, fees and charges
- The existence and amount of any third-party fees for which the charterer may be responsible (such as landing fees, fuel, aircraft parking or hangar fees, etc.)
- The existence or absence of liability insurance held by the air charter broker that covers the charterer and the passengers

The broker would also have to provide reasonable notice of any changes that occur after the charterer signs the contract. If the broker does not provide reasonable notice, the charterer can cancel the flight and receive a full refund. The NPRM states that a broker cannot engage in unfair and deceptive trade practices such as misrepresenting itself in terms of the types of services it offers.

Air taxi operators and commuter carriers (those who operate aircraft with 60 or fewer seats) would also be subject to these rules when offering transportation that will be performed by other air carriers.

Air Ambulance Services

Under the NPRM, entities (i.e., indirect air carriers) that arrange air ambulance services would also be prohibited from engaging in unfair and deceptive practices and would have to disclose to the public that they do not provide the actual air transportation. The NPRM lists the following as constituting unfair and deceptive practices:

- Misrepresentations that may cause the public to believe that the air charter broker is a direct air carrier

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Aviation Law

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- Displaying the trade name of the air charter broker in advertisements or on the aircraft or in the place of business in such a manner as to confuse the public as to the status of the air charter broker
- Misrepresentations as to the quality of kind of service/type/size of aircraft, time of departure or arrival, points served, route to be flown or total trip time
- Misrepresentations as to qualifications of pilots or safety record or certification of pilots, aircraft or air carriers
- Misrepresentations that passengers are directly insured when they are not so insured
- Misrepresentations as to fares, charges or special priorities for air transportation or services in connection therewith
- Misrepresentations as to membership or involvement with a particular organization that audits air charter brokers or direct air carriers or that the air charter broker or direct air carrier has met a particular standard set by an auditing organization
- Representing that a contract for a specific direct air carrier, aircraft, flight has been arranged, without a binding commitment with a direct air carrier
- Selling or contracting for air transportation while knowing that the transportation cannot be legally performed by the entity that is to operate the transportation
- Misrepresentations as to the requirements that must be met by charterers in order to qualify for charter flights

Air Charter Broker Services Involving Government Contracts

Finally, the NPRM addresses air charter broker issues relating to contracts with the federal government for air transportation. The proposed rule would subject brokers to DOT regulation; namely, the above consumer protection disclosure requirements would apply and carriers who provide the transportation would have to obtain permit authority from the DOT. In addition, federal government contracts involving air transportation would have to use the services of U.S. air carriers.

Industry Response

Those in the air charter community have responded with comments regarding the proposed rule; a sample of some of those comments is listed below:

- A registry program should be available which would serve as a vehicle through which customers and the rest of the private air industry could vet potential air charter brokers. Information in the registry should include: information on the air charter broker, class of aircraft that is entitled to a broker, level of liability insurance, whether it acts as an indirect air carrier, agent for the customer or agent for the direct air carrier, and accident history. (Flight Optics LLC)
- Indirect air carriers involved in air medical transport services should not be required to make all of the disclosures that air charter brokers have to make since it would not benefit the patients who are being transported. However, these indirect air carriers should not be entirely exempt from making certain disclosures. Namely, they should be required to disclose the air medical transport services medical/hospital affiliation as well as the aircraft operator. (Air Medical Operators Association)
- The rule would unduly burden air taxis and commuter carriers and are unnecessary since charterers are sophisticated entities that are capable of protecting their own interests and do not need consumer protections. (Corporate Flight Management/Public Charters/ Ultimate Jetcharters)
- Air charter brokers operating under a GSA Schedule contract should not have to obtain a certificate of authority since no member of the public can purchase a ticket under a GSA contract flight. (CSI Aviation)

Capitol Hill putting pressure on CBP regarding aircraft searches

The Aircraft Owners and Pilots Association (AOPA) has reported an upsurge in the inspection of general aviation aircraft by law enforcement. AOPA has received complaints from aircraft owners regarding searches by U.S. Customs and Border Protection (CBP) agents and local police. Although CBP often searches aircraft in connection with cross-border drug interdiction efforts, many pilots have complained that they were searched even though they had not conducted cross-border operations. In addition, CBP has recently proposed making certain public records unavailable for review, including those involving the referenced aircraft stops.

In response to this, eight Senators have sent a letter to the acting secretary of Department of Homeland Security (DHS) regarding the legality of CBP searches. The Senators have requested a report from DHS detailing every stop and search since 2009, voicing concerns that the searches are being conducted on aircraft that do not conduct cross-border operations and are done without reasonable suspicion or probable cause.

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Construction Law

Good faith and fair dealing in federal procurement contracts: Which way will it go?

Scott D. Cessar

Since the Civil War, courts have held that in administering construction contracts, the federal government may be held accountable for its actions in the same way that private parties are held accountable. This includes the application of the implied covenant of good faith and fair dealing to construction contracts. This duty includes the duty to cooperate and the duty not to hinder the performance of the contractor. Breaches of this duty include the failure by the government to timely deliver models necessary for performance, to unreasonably delay acceptance of the contractor's deliverables, to fail to timely make the work site available for work to proceed, to fail to provide required plans and drawings, to engage in overzealous inspection, to damage the work site and to conduct inadequate surveying of the site causing delays.

The historical standard in order to succeed on a claim of breach of the implied duty of good faith and fair dealing has been that the contractor must show by a preponderance of the evidence (51 percent) that the government acted unreasonably.

In *Metcalf v. United States*, Metcalf was the low bidder for a design/build project for the Navy to construct in Hawaii a 158-unit residential complex with an option for an additional 24 units. Metcalf's bid was approximately $43 million. Metcalf was paid, with change orders, over $49 million. Metcalf's claimed costs exceeded $76 million.

Metcalf filed claims for delay and direct costs arising from disputes over which scheduling software was to be used, whether the government failed to timely investigate differing site conditions and wrongly rejected its expert's reports, two major differing site conditions, interference with Metcalf's design/build decisions and means and methods, arbitrary rejection of submittals of proposed personnel, inconsistent administration of the payment process and active interference with its efforts to turn over housing units in order to achieve substantial completion.

Metcalf's claims were based on breach of contract and breach of the duty of good faith and fair dealing.

Following extensive hearings, the trial court denied most of Metcalf's claims, notwithstanding **its own findings** that the government had engaged in "overzealous" and "retaliatory" inspections, overbearing contract administration by an unqualified contracting officer and "hardnosed" withholding of payments. This included an instance in which the contract inspector had rejected a countertop that was 1/64 inch out of tolerance, but told a Metcalf employee that "on any other job in the universe, he would accept [the] countertop" and that "it actually looked good…."

In reaching its decision on Metcalf's claim as to breach of the implied duty of good faith, the trial court, relying on a previous decision by the federal circuit in a different factual context, held that, notwithstanding these findings, Metcalf had failed to establish that the government's actions were "specifically designed to reappropriate the benefits [that] the other party expected to obtain from the transaction, thereby abrogating the government's obligations under the contract." This standard effectively meant that Metcalf had to show that the government acted intentionally and in bad faith, subjectively targeting Metcalf with its conduct.

This decision, which Metcalf has appealed to the federal circuit, has set off a firestorm in the contracting industry. Numerous contractor groups have filed friend of the court briefs with the federal circuit arguing that the trial court's holding must be reversed. A decision from the federal circuit is expected sometime in mid-2014.

The policy arguments for reversal of the trial court decision in *Metcalf* are straightforward and compelling. Contractors, when bidding work, must consider the risk of government-caused delays, impacts and changes. If the incredibly high burden of proof for the breach of the implied duty of good faith and fair dealing applied in *Metcalf* stands, then contractors will either be forced to dramatically increase their price or forego bidding government work. In either case, the market, the procurement process and the public will suffer.

The choice for the federal circuit on appeal is stark: (1) endorse the high burden of proof applied in *Metcalf* and require the contractor to show intentional bad faith by the government or (2) follow the historical standard requiring the contractor to show only that the government objectively acted unreasonably and, in doing so, breached its reciprocal duty to cooperate and not hinder contractor performance of the contract.

Stay tuned.

Scott D. Cessar chairs the Construction Law Group and the Pittsburgh office. His practice covers a broad range of civil litigation with a primary focus on construction law. He has extensive trial and alternative dispute resolution experience representing clients before state and federal courts, arbitration panels and mediators across the country. Scott has been selected for inclusion in Pennsylvania Super Lawyers® and The Best Lawyers in America® in the area of construction law. He can be reached at scessar@eckertseamans.com or at 412.566.2581.

Firm News

Since January 1, 2014, Eckert Seamans has made some significant lateral additions to the Firm.

A prominent public finance group has joined the firm in Philadelphia. The group, which joins Eckert Seamans from Blank Rome, LLP, includes Members (partners) **Joan N. Stern, Marc S. Stein, Robert I. Tuteur, Dacia A. Haddad** and **William T. Benzing III**.

We are delighted to welcome one of the country's leading public finance practices to the firm," said Eckert Seamans CEO **Timothy P. Ryan**. "Joan Stern is a legend in the public finance arena. The experience, background and existing client base that Joan, Marc, Bob, Dacia and Bill bring to Eckert Seamans enhances our already premier Public Finance practice, giving us the added size and scope to handle transactions of all types throughout the country."

Eckert Seamans is home to one of the preeminent public finance practices in the country. Notably, in 2012, Thomson Reuters ranked Eckert Seamans number one among bond counsel firms in Pennsylvania with deal volume in excess of $2 billion. The firm has been listed as a nationally recognized bond counsel firm in *The Bond Buyer's Municipal Marketplace* every year since 1985.

Gary D. McConnell, former Vice President and Associate General Counsel of Bayer Corporation, also joined the firm as a Member (partner) in Pittsburgh. McConnell will focus his practice in product liability, mass tort and commercial litigation matters.

For more than 15 years as a senior-level attorney in a publicly traded international corporation, McConnell led many important strategic initiatives for Bayer, where he played a major role in the management of mass tort litigation cases against the company. He had direct responsibility for the development and implementation of defense and settlement programs for mass tort and product liability litigation involving a large number of lawsuits, government investigations and insurance issues. McConnell also participated in the mediation of numerous cases and supervised the handling of U.S. employment litigation.

Our Richmond office secured two former Virginia government officials, **J. Neal Insley**, former Chairman of the Virginia Alcoholic Beverage Control Board (Va. ABC) and the National Alcohol Beverage Control Association (NABCA), has joined as a Member (partner) in the Hospitality and Government Affairs practice groups and **Julia Ciarlo Hammond** has joined as a Senior Manager in the Government Affairs Group.

Neal will focus his practice on hospitality, government affairs, administrative law and regulatory/policy issues. As Chairman of Va. ABC, he served as Chief Executive/Agency Head and provided oversight and direction for agency operations. In this role, he also served as an Administrative Law Judge for the agency and presided over all appeal hearings to the Board. As Chairman of NABCA, Neal served as Chief Governing Officer and represented the organization and provided presentations of NABCA issues, priorities and operations at meetings of national and international trade, governmental and non-governmental organizations.

Julia has extensive experience in the government affairs arena having most recently served as the Director of Legislative Affairs and Policy Advisor for Virginia Governor Robert F. McDonnell. She led the McDonnell Administration's legislative strategy, developed the Governor's policy agenda and worked with members of the Virginia General Assembly to advance the Governor's priorities.

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