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Guidance in Protecting Software-Based Inventions After *Alice*

by Bill Schaal, Partner, Intellectual Property Section, Rutan & Tucker

We live in a software-centric world. Look around – software is used to control virtually all types of electronics, including Internet of Things (IoT) devices. In fact, by 2020, it is predicted that the number of IoT devices is expected to grow from 6 billion to 21 billion. Hence, it is likely that software-based inventions will continue to accelerate advancements in technology for the remainder of this decade.

Two years ago, the United States Supreme Court issued its decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2355 (2014), where the Court laid out a two-step framework ("*Alice* analysis") for determining whether or not a patent claim is directed to patent-ineligible subject matter. For claims directed to software-based inventions, the first step of the *Alice* analysis involves a determination as to whether the claim at issue is directed to an abstract idea. Current case law suggests that an "abstract idea" is based on (1) whether the software-based invention is directed to a task for which a computer is used instead of an improvement in computer functionality, and/or (2) whether the claim is broadly directed to an entire technical field. Upon finding that the claim is directed to an abstract idea, the second step of the *Alice* analysis involves determining whether elements of the claim transform its nature into a patent-eligible application. If a claim is construed as an abstract idea, a court will invalidate, or the USPTO will reject, the claim.

As a result, some companies have witnessed the loss of valuable patent assets. Furthermore, these companies often fail to formulate strategies directed toward mitigating future patent-eligible subject matter challenges, including what requisite content should be inserted into patent applications seeking to protect software-based inventions (hereinafter, "software-based applications"). Based on recent decisions by the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), slight changes in the content and organization of software-based applications may prove useful in successfully defending a patent-eligible subject matter challenge.

I. Specification: Identify Advantages

First, current case law suggests that it may be prudent to include, within the specification of a software-based application, certain advantages offered by the software-based invention over conventional technology. *Enfish, LLC. v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

In *Enfish*, the Federal Circuit concluded that the claimed invention, directed to a self-referential database, constituted patent-eligible subject matter. When considering the first step of the *Alice* analysis, the court held that the claimed invention was not directed to an abstract idea. In its reasoning, the Federal Circuit focused on advantages of a self-referential database, which includes "increased flexibility, faster search times, and smaller memory requirements." These advantages were directed to "an improvement to computer functionality versus being directed to an abstract idea," namely the advantages of the software-based invention were focused on improved capabilities of the computer.

Hence, the presence of these advantages as content within the patent application is important in avoiding or overcoming a patent-eligible subject matter challenge. However, such advantages should be presented in the application in a manner that avoids these advantages from being construed as "essential" features, which must be present in the independent claims to avoid noncompliance with the written description requirement set forth in 35 U.S.C. §112(a). *See Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473 (Fed. Cir. 1998). In other words, how these advantages are characterized to avoid software-based inventions from being categorized as an "abstract idea" is as important as their placement into the patent application itself.

II. Specification: Highlight Embodiments

Second, current case law further suggests that it may be prudent for software-based applications to identify multiple embodiments of the software-based invention including those embodiments where coverage is not currently desirable. These embodiments may be used as a reference to identify the specificity of a claim set, which may arguably transform an abstract idea into a patent-eligible invention. *Bascom Global Internet Services, Inc. v. AT&T Mobility Corp.*, 827 F.3d 1341 (Fed. Cir. 2016).

On June 27, 2016, in *Bascom*, the Federal Circuit concluded that the claimed invention, directed to a filtering system "located on a remote ISP server that associates each network account with (1) one or more filtering schemes and (2) at least one set of filtering elements from a plurality of sets of filtering elements," constituted patent-eligible subject matter. Although agreeing with the District Court that filtering content constitutes an abstract idea, the Federal Circuit focused on the second step of the *Alice* analysis and held that the patent claims contained an inventive concept as the claims "carve out a specific location for the filtering system (at a remote ISP server) and require the filtering system to give users the ability to customize filtering for their individual network accounts."

Thus, based on *Bascom*, companies may defend against a patent-eligible subject matter challenge by mapping the pending claims to certain embodiments of the software-based invention. By showing that a particular claim being challenged is directed to a particular inventive aspect found in some (but not all) of the identified embodiments, a persuasive argument may be made that the specificity provided in the particular claim set creates a technological advantage over other techniques, and hence, the claim set does not constitute an "abstract idea."

III. Claims: Avoid Preemption

Lastly, instead of utilizing a robust specification to counter a patent-eligible subject matter challenge as described above, current case law suggests that it may be prudent to organize each claim set within a software-based application to cover a particular embodiment of the software-based invention without any claim set preempting all processes for achieving the technological advancement. As suggested in *McRO, Inc. v. Bandai Namco Games America*, 120 USPQ2d 1091 (Fed. Cir. 2016), preemption is one of the primary factors in the first step of the *Alice* analysis.

On September 13, 2016, in *McRO*, the Federal Circuit concluded that the claimed invention, directed to an automated three-dimensional (3D) animation process, constituted patent-eligible subject matter. The 3D animation is accomplished through "rule sets aim[ed] to produce more realistic speech by tak[ing] into consideration the difference in mouth positions for similar phonemes based on context." The Federal Circuit reversed the District Court's finding of patent-ineligible subject matter by focusing on the lack of preemption, and determining "whether the claimed genus of rules preempts all techniques for automating 3-D animation that rely on rules." The Federal Circuit found that "[t]here has been no showing that any rule-based lip-synchronization process must use rules with the specifically claimed characteristics," and "[b]y incorporating the specific features of the rules as claim limitations, [the claimed invention] is limited to a specific process for automatically animating characters using particular information and techniques and does not preempt approaches that use rules of a different structure or different technique." In a general sense, the Federal Circuit appears to be outlining public policy by favoring software-based patents that are narrowed to a particular concrete solution to a problem and discouraging attempts to patent the abstract idea of a solution to the problem in general. *See Electric Power Grp., LLC v. Alstom,* 830 F.3d 1350 (Fed. Cir. 2016).

Thus, based on the decisions in *McRO* and *Electric Power*, companies may find success by seeking expansive coverage of software-based inventions by including multiple claim sets, where each claim set is directed to a specific embodiment (solution). Albeit there is a risk that this claim structure will cause the USPTO to issue a restriction, requiring an applicant to elect a particular embodiment (and require the filing of divisional patent applications to pursue other embodiments), your chances of successfully defending against any patent-eligible subject matter challenge may be greatly increased.

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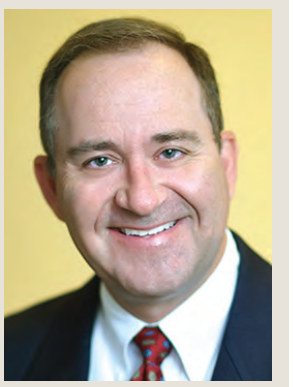

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Corporate Principles for Thriving and Avoiding Bankruptcy

by Richard H. Golubow, Founding Member and Managing Shareholder, Winthrop Couchot

The dreaded B Word. Bankruptcy. We think we know what it is but don't like to say it, and we hope we never have to go through it. Despite stagnant US macroeconomic growth, companies are still generally able to take advantage of the liquidity available in the historically low-interest rate market to refinance or renegotiate their debt. While business bankruptcies are down and the turbulent times precipitated by the "great recession" seem so long ago, many companies continue to limp along in some degree of financial distress or instability. Finance experts continue to anticipate an interest rate increase from the Federal Reserve later this year or early next year. There is also increased economic uncertainty as a result of the recent presidential election. If credit markets tighten, and companies cannot refinance their maturing debt obligations, businesses may be faced with the need to consider bankruptcy, or bankruptcy alternatives.

We're always reminded to pursue preventative healthcare for ourselves and maintenance for our prized possessions. Those same principles hold true and should be pursued by business owners, operators and executives. Many troubled companies could avoid severe losses and often the loss of the business itself by developing, implementing and aggressively following some simple and elementary business principles. However, it is surprising how many experienced and qualified business owners and operators do not implement, let alone follow, some business guiding principles. By ignoring them, ownership and management puts at risk the very survival of the business.

1. Prepare, Maintain and Update a Business Plan.
A business plan is critical to the governance and success of a well-managed company. A proper plan includes plans for sales, marketing, operations, capital-expense budget, and a cash-flow projection. It is the roadmap that should guide every aspect of the business. It is the primary tool that aids in executive decisions to increase revenues and profitability while minimizing expenses. As markets change for better or worse, it is critical to adjust the business plan accordingly.

2. Achieve Cash-Flow Stability.
Planning and executing balanced inflow and outflow of cash is critical to the success of a well-run company. When financial conditions deteriorate or fluctuate, as they are prone to do in very poor and unpredictable economic times, owners and operators must anticipate significant monthly income swings and actively manage and adjust cash flow accordingly.

3. Constantly Evaluate Your Business Revenues and Expenses.
Maximizing corporate efficiencies such as managing expenses, inventory levels, and capital expenditures, while making the hard day-to-day decisions, often determine the difference between success and failure. You must resolve to constantly assess, challenge, and reconsider historical, business-as-usual allegiances to people, products and processes.

4. Prepare Timely, Accurate, and Meaningful Financial Reports.
There are few business owners and operators who haven't experienced that uneasy feeling when presenting the company's financials only to have officers, board members, investors or senior or secured creditors discover material errors. Inaccurate financial reporting is considered by many to be a symptom of a much larger problem, such as mismanagement of the business. All financial reports should be as close to error free as possible and meaningful to reflect the information necessary to profitably operate the business.

5. Be Transparent, Timely, and Precise in Reporting to Creditors.
Financial reporting is not an exact science and is often subject to differing opinions and interpretation. The presentation of reports to senior or secured creditors should be treated with extreme care. Management must emphasize timeliness and transparency. All too often, reports are delayed or redacted of negative information to avoid advising of the current or impending "bad news." This approach is counterproductive. Once the actual results become known, the trust of creditors may be permanently impaired and the debtor company irreparably harmed.

6. Be Honest with Yourself and Others.
The sooner management faces the reality of a challenging situation, the better prepared it will be to develop and implement a quick solution. If you try to fool yourself and those around you, you'll ultimately experience failure. While painful, recognizing and dealing directly with the problems at hand lead to a better result.

7. Be Open to the Assistance of Independent Professionals When Faced With Challenging Times.
Even when times are good, it is near impossible for businesses to track and understand the increasingly complex factors affecting corporate finances, marketing, personnel, and virtually every other aspect of corporate management. Financial distress creates new challenges, concerns and problems for the unwary. For example, when a corporation is solvent, directors owe fiduciary duties to the corporation and its shareholders. When a financially distressed corporation is insolvent, the number of parties to whom the directors owe their fiduciary duties may increase to include the corporation's creditors. As a result, the directors of an insolvent corporation must balance the sometimes conflicting interests of the shareholders and creditors, elevating the directors' risk of personal liability. Seeking the advice and counsel of knowledgeable, experienced outside "specialists" such as counsel that specializes in financial restructuring can be crucial to identifying and mitigating personal liability and risks to directors and, indeed, to a company's survival.

These principles form the foundation of a sound business leadership and help maintain a state of preparedness, so you can adapt more quickly to the unexpected. Business owners and operators should view these fundamentals as a set of guidelines to follow at all times, irrespective of whether or not the company is experiencing or anticipates financial distress.

Indeed, at Winthrop Couchot because we understand insolvency and its causes we are best positioned to assist clients in navigating around such turbulent times. We listen to our clients and take the time to learn about and understand our clients' business as well as their needs to effectively provide customized, innovative, responsive and cost-effective legal solutions. Simply, we view the law as a means to accomplish our clients' business and personal objectives, not an end in itself. While our diverse client base includes representation of debtors and other parties in business bankruptcy proceedings, we also provide extensive counsel and strategic planning in support of bankruptcy avoidance and alternatives. For example, we place great emphasis on proactively counseling clients to identify and manage cash flow and insolvency risks posed by customers, vendors, landlords, and other counterparties to all types of contracts including purchase and sales agreements, real and personal property leases, franchise and intellectual property licenses, loan agreements, guaranties and employment contracts.

Richard H. Golubow

Richard H. Golubow is a founding member and the managing shareholder of Winthrop Couchot. Devoting his practice to the areas of financial restructuring, insolvency law, complex bankruptcy and business reorganizations, litigation, liquidations and acquisitions of distressed assets, his clients include debtors, creditors, creditor committees, bankruptcy trustees, assignees for the benefit of creditors, asset purchasers and receivers. He has been honored as the recipient of bankruptcy or financial restructuring attorney of the year awards by several leading international financial publications. The awards collectively recognize success and excellence, expertise, service, achievement and innovation as chosen by industry peers. He holds an 'AV' Preeminent Peer Rating, Martindale-Hubbell's highest peer recognition, generated from evaluations by other members of the bar and the judiciary for legal ability and ethical standards. He is also rated "superb" (10 out of 10) by the leading independent attorney rating service, AVVO, and has been selected by his peers as a Super Lawyer, representing the top 5% of practicing attorneys in Southern California based on peer recognition and professional achievement. Contact him at 949.720.4135 or rgolubow@winthropcouchot.com.

Knobbe Martens
INTELLECTUAL PROPERTY LAW

Another Patent Law Win for Orange County-Based Masimo Corporation

Global medical technology company based in Irvine wraps up another big patent fight

by Tom Cowan, Associate and Gerard von Hoffmann, Partner, Knobbe Martens Olson & Bear, LLP

Joe Kiani was a twenty-four year old engineer with an idea. He took out a $40,000 loan on his condo, worked day and night with colleague Mohammed Diab, and pioneered a life-saving, industry-changing technology. They solved a problem most thought impossible: to develop a pulse oximeter, which measures a patient's blood oxygen level through a finger sensor that works during patient motion and low perfusion. In 1989, Kiani founded Masimo as a garage start-up to develop noninvasive patient monitoring technologies. Since then, Masimo's advances in signal processing have virtually eliminated false alarms and increased detection of life-threatening events.

Masimo went public in 2007 and has over 3,000 employees worldwide. Technological innovation has spurred the company's success. But just as crucial was the patent system. According to Kiani, "strong patent protection was the foundation of our start-up." Masimo today holds nearly 600 patents – and they needed the ones protecting its revolutionary technology.

Assisting Masimo with its patent efforts was Irvine-based intellectual property law firm Knobbe Martens Olson & Bear. Knobbe began obtaining patents for Masimo in 1991, and has successfully represented Masimo in numerous patent litigations. The first ended with a $134 million jury verdict against Nellcor (now owned by Medtronic), enabling Masimo to enter an agreement under which it still receives royalties. In the latest case, Masimo won a $467 million verdict against Phillips, the largest IP verdict in the U.S. in 2014.

The parties announced the latest patent success in November 2016. Masimo entered into a multi-year business partnership with Philips. Under that agreement, Masimo received $300 million, and Philips would make Masimo's technology more widely available in Philips's products.

Spearheading Masimo's litigation effort were Knobbe Partners Joseph Re and Stephen Jensen. "This is a great day for Masimo," Re said. "Our firm has been honored to represent Masimo from its earliest days, helping Masimo protect and expand the use of its revolutionary pulse oximetry technology to the benefit of patients worldwide."

Masimo's patent and litigation successes have led to rapid adoption of Masimo's life-saving technologies, which are now used each year on well over 100 million patients.

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An Ounce of Prevention – Strategic Outside General Counsel Solutions

by Mark Foster, Counsel

All businesses (big and small) face legal issues every day ranging from the urgent (a lawsuit was just filed against the company), to the routine (a customer marked-up our form contract), to the mundane (where do we put our minimum wage poster?). For most businesses, the urgent issues are easy: select and engage a law firm or attorney with expertise in the subject matter. The routine and mundane legal issues are not.

The Corporate Dilemma
Most executives and managers realize that engaging outside attorneys for every routine legal matter can get expensive quickly; outside counsel fees are often unpredictable (and therefore difficult to budget) and frequently outweigh the value of the business matter (i.e., unanticipated legal fees can quickly erode profits). With that said, most prudent business executives also realize that the failure to consult an attorney with respect to many legal issues can (and frequently does) expose their businesses to undue risk and potential liability if not handled correctly.

In order to solve this corporate dilemma, businesses traditionally take one of *two* paths:

1. Hire an in-house attorney to handle day-to-day legal matters. This path offers predictability for budgeting purposes, potential costs savings (assuming there is enough work to keep the in-house attorney busy) and peace of mind for executives. Nonetheless, it is difficult to quantify the added value of an in-house attorney and even more difficult to reduce the overhead burden as work flow fluctuates; OR
2. Address day-to-day legal issues among the business team and hope that the routine legal issues do not develop into urgent legal issues (also known as the "hope and pray" approach). This path is less expensive in the short term, but risky in an increasingly complex and litigious business environment. *This approach also seems to be the preferred choice for most small to mid-size businesses.*

Having recently joined Snell & Wilmer after 13 years as an in-house attorney for three very different companies, I set out to find an alternative solution to this corporate dilemma that offers predictability for clients, real cost savings and the intangible benefits offered by traditional in-house counsel. Although not new, outside general counsel (Outside General Counsel) services can offer an elegant solution to a traditionally challenging corporate issue.

What are Outside General Counsel Services?
Outside General Counsel services offer clients access to an experienced attorney under a retainer (or reduced fee) arrangement in order to allow the client and the attorney to develop a working relationship based upon trust, consistency and sound legal advice. Clients benefit from this arrangement by having a "go to" attorney who over time gets to know the client's business operations, management team and legal/business sensitivities coupled with expense predictability under a retainer fee structure. This significantly improves the delivery of legal services to clients because it reduces and even eliminates the ramp up time when a new legal issue arises and encourages clients to pick up the phone or forward an email when legal issues arise by offering a predictable cost structure. Law firms benefit from this model because routine issues sometimes turn into urgent issues and being that first legal point of contact allows a full service law firm to capture a larger share of a client's litigation, corporate and transactional work when these significant issues inevitably arise.

What types of legal issues are best suited for the Outside General Counsel arrangement?
Although every business is different, the types of routine legal issues facing companies are seemingly universal. The most typical routine legal issues are related to contracts, corporate governance and employment-related matters.
▶ **Contracts**: Every business enters into contracts every month. These include contracts with customers, vendors, suppliers, landlords, lenders, investors, franchisors, franchisees, consultants and the like, and include things like non-disclosure agreements, leases and countless other agreements. Reviewing contracts for legal pitfalls before they are signed will help facilitate contract administration and prevent future disputes.
▶ **Corporate Governance and Best Practices**: Most businesses are structured as legal entities (corporation, limited liability company, limited partnership or trust). Each legal entity is subject to certain contractual and statutory requirements that frequently require corporate resolutions, appointment of officers, corporate minutes, written consents, risk management and reporting. Without periodic legal review and housekeeping, business entities fall out of compliance with their governing documents and expose businesses to undue risk relative to investors, lenders and other stakeholders.
▶ **Employment Matters**: Every business with employees in the State of California is faced with a complex and frequently changing set of rules related to employment matters. Companies reduce the size of their workforce, terminate underperforming employees, respond to wrongful termination claims, and deal with a variety of other issues ranging from medical leave to sexual harassment. Without regular legal advice and guidance (including updating policies and procedures), businesses address these issues at their own peril.

The one universal reality for businesses today is that unexpected legal issues will arise and a company that is prepared with a legal team at the ready will be able to respond and mitigate risk better than its competitors.

Who makes a good Outside General Counsel?
The best Outside General Counsel are attorneys who understand the goals and objectives of their clients' businesses and executive teams *and* who are prepared to offer practical solutions based upon this institutional knowledge and sound legal analysis. Too many attorneys merely issue spot and offer the client a menu of potential risks. The most effective Outside General Counsel will offer these alternatives and then make a clear recommendation for action. This attribute alone saves the client time and money by avoiding a painstaking review of potential legal issues, not all of which are created equal.

In order to be truly effective, Outside General Counsel also need to have the resources of a *full-service law firm* with a diverse range of specialties. Without these resources, Outside General Counsel will not be able to truly fulfill the goal of providing timely and targeted legal solutions through prevention and, if necessary, zealous advocacy.

In an increasingly complex legal and regulatory environment, businesses should consider engaging Outside General Counsel on a monthly retainer basis who can navigate the intersection of business and the law seamlessly. This acumen is developed only through a true appreciation of a client's business model and objectives and is fostered through an open and regular dialogue between business clients and attorneys.

For more information about Outside General Counsel services, visit https://www.swlaw.com/services/outside-general-counsel.

Mark Foster
Mark Foster recently joined the Orange County and Los Angeles offices of Snell & Wilmer after more than 13 years as in-house corporate and real estate counsel to major investment and development companies. His practice includes Outside General Counsel services as well as the representation of institutional owners, operators and developers, financial institutions and investors focused on equity investments, joint venture formations, acquisitions and dispositions, leasing, real estate-related lending, and debt restructuring, workouts and reorganizations. Reach Mark at mfoster@swlaw.com or 714.427.7435.

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Time is Running Out

By Jeffrey M. Verdon
Managing Partner
Jeffrey M. Verdon Law Group, LLP

Nothing in life gives Charlie more pleasure than spending time with his family. With five grown daughters and eleven beautiful grandchildren, his mission to be their life-long provider is his singular goal.

The source of Charlie's legacy — a successful sun shade manufacturing business — will finance his family's needs for generations. He credits the success of his business to his ability to hunt for bargains, leaving no stone unturned. Armed with solid plans for business succession, Charlie thinks he has it "made in the shade," as his business motto proclaims.

But Charlie left one stone unturned. His estate lawyer has been recommending the immediate transfer of his business into a dynasty trust while the law still permits him to value the transfer at substantially discounted rates. By doing so, Charlie's business will continue to appreciate in value outside of his taxable estate and avoid death taxes for up to 365 years. If Charlie instead maintains status quo and waits to pass his business to his heirs without a dynasty trust, the current estate tax on the value of his business at death would result in a 40% tax liability. Because his business is illiquid and the tax is due within 9 months of Charlie's death, his heirs will probably be forced to sell assets (at deep discounts) in order to pay up. That would be a colossal waste.

Advances in estate planning have produced certain popular vehicles like Family Limited Partnerships (FLPs), Family Limited Liability Companies (FLLCs), and flexible dynasty trusts — among others — to allow Charlie to continue to control the business he worked so hard to build while shifting future value out of his taxable estate to save on death taxes. These vehicles also provide the added tax benefit of producing significant valuation discounts which can be as high as 25-45% or more, depending upon the types of assets and the terms of the operating agreement.

Unfortunately, all good things must end, and if the IRS has its way, this opportunity is no exception. New proposed regulations from the IRS are designed to end these popular and commonly used discounting strategies. While current law allows taxpayers to transfer their wealth held in entities such as LP's, LLCs, and corporations at discounts from 25% to 45% or more, these new regulations, expected to go into effect once they become finalized as soon as Q1 of 2017, will eliminate the strategy. The proposed regulations are complex requiring the IRS to fix them delaying the final regulations going into effect until early next year. Once the time period for the public to comment ends, resulting in modifications, the new regulations will become final and these beneficial planning strategies will be gone forever.

Please contact Kathryn Weber, at kathryn@jmvlaw.com to schedule a telephone consultation to discuss how these changes might impact you and your family.

This could be your last opportunity to capture the advantages of discount planning, so like Charlie, you too can be "made in the shade." Act now — time is of the essence!

JEFFREY M. VERDON
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Jeffrey M. Verdon Law Group, LLP is a boutique law firm specializing in Comprehensive Estate Planning and Asset & Lifestyle Protection. For over 30 years we have assisted affluent families and business owners with their comprehensive estate plans, maximizing wealth transfer opportunities, and providing "firewall" asset protection planning to protect estates and family legacies.

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FERRUZZO

Protecting Against Litigation: Take Care to Select and Pay Caretakers Correctly

The oldest members of the aging baby boomer generation began reaching age 65 in 2011. This has created multiple challenges for family members with older adults that require either part-time or full-time caretakers. These challenges include the selection process, conforming to federal and state employment regulations, protecting against predatory caregivers who may have ulterior motives to obtain the care recipient's money or property, and defending against litigious caretakers.

After selecting a caretaker to perform services, the caretaker is typically hired either directly or through an outside agency. During the selection and employment process, it is important to understand that the "employer," (i.e. the individual hiring the domestic worker, which may be the care recipient, care recipient's spouse, the care recipient's child, a trustee of a trust, or an agent acting under a Durable Power of Attorney) is prohibited under Title VII of the Civil Rights Act of 1964, and other laws, from discriminating against the caretaker based on race, color, religion, national origin, and many other protected categories.

Typically, hiring a caretaker through an outside agency is more expensive, and at first glance it appears a less attractive option. But, with the higher costs it also affords some protections to the care recipient and the family. An outside agency is generally considered to be the employer of the caretaker and thus is charged with the responsibility of handling payroll tax filings, ensuring that proper meal and rest breaks are provided to the caregiver, and preparing and filing all required paperwork with state and federal government agencies. Additionally, the outside agency is responsible for paying overtime accurately. It is critical to thoroughly review the outside agency's contract so that it does not include indemnity provisions in its favor, which could place additional liability on the care recipient or family member executing the agreement with the outside agency.

Directly hiring and paying a worker who performs caretaking services can be tricky. To comply with state and federal law, a number of issues must be explored. For example, what is the nature of the worker's job duties and how much time is spent on each of those duties? A "personal attendant" is one who generally spends no more than 20 percent of his or her time performing tasks other than supervising, feeding or dressing the care recipient. Whether the caretaker is properly classified as a "personal attendant" will impact the hours of work and obligation to provide rest and meal breaks to the caretaker. If a caretaker is an employee rather than an independent contractor, who is the employer? Is it the individual receiving the care, a family member, a trust, or someone else? Is the work performed at the care recipient's home, the caretaker's home or place of business, or a different location? Does the caretaker reside with the care recipient permanently or for an extended period of time? Is there is a familial relationship between the caretaker and the individual receiving care? How much control is exerted or retained over the caretaker?

Each of these questions, and others, impact the analysis whether the caretaker is an employee or an independent contractor, how the caretaker must be paid, and whether overtime, meal and rest break laws must be observed. If the caretaker is an independent contractor, wage and hour laws will not apply to the services provided. But the nature of the relationship is not simply based on agreement, and no single factor is determinative. Government agencies such as the Employment Development Department, the Department of Labor, and others, utilize different tests to evaluate whether a worker is an employee or an independent contractor, and the potential liabilities and penalties for misclassification are significant.

It is recommended that a written agreement be used to clarify the nature of the relationship and the hours of work, and care should be taken to consider including a prohibition on working overtime without prior written approval and include reporting obligations for meal and rest breaks, where applicable to the relationship. Having a clear written agreement may help guard against potential future legal claims, too. It is particularly important where it is difficult to monitor the hours of work performed by the caretaker, so meticulous time records are imperative.

Finding the right caretaker for your loved one is often challenging, and ensuring that the caretaker is paid properly is an important part of that challenge that should not be overlooked. Beyond the level of care that the caretaker will provide, safety and predatory practices by some caretakers looking to leverage the relationship to obtain additional monies and property have to be monitored. It is important to obtain and verify references of each caretaker.

In our practice, we have seen increasing claims by caretakers attempting to usurp control of the care recipient's money and property. Understanding that the claims against the care recipient's estate, surviving spouse, and trust estate do not pass with the death of the care recipient is important. If the caretaker elects to bring a wage and hour claim, it may be filed as late as four years after the caretaker provided services, if the caretaker includes an "unfair business practices" claim.

Ferruzzo & Ferruzzo, LLP's continued commitment to the success of our clients is exemplified in the manner in which we work together to move our clients' goals forward. Legal issues, such as the hiring and treatment of a caretaker, potentially implicate estate, trust administration, and employment issues. Our Trust and Estate Litigation Practice Group and Employment Practice Group work together regularly to achieve the results our clients have come to expect from us. Our unique approach to providing legal services just simply works.

Timothy J McElfish, Esq. is a Partner and chairs the Firm's Trust and Estate Litigation Practices Group. His practice group dedicates themselves to protecting and defending trust and estate. Additionally, Mr. McElfish also handles all aspects of Estate Planning, Business Succession Planning, and Fiduciary Representation.

Colleen M. McCarthy, Esq. is a Partner and chairs the Firm's Employment Practices Group. She has dedicated her practice to representing and protecting employers, through preventative counseling and sound practical advice. Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure that they are in compliance, and to reduce the chance of costly litigation.

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Insurance Law: A Specialty for all Seasons

by Edward Susolik, Partner in Charge of the Insurance Department, Callahan & Blaine

Insurance law and insurance issues impact a wide variety of legal specialties: litigation, corporate, regulatory, employment, real estate and property, just to name a few. A litigation attorney who also has knowledge and expertise in insurance law is a powerful asset for any business entity. For example, it is a huge advantage for a corporate client in litigation if counsel is able to successfully trigger liability insurance coverage for the lawsuit.

In this article, I will summarize some of the general insurance principles that arise in a wide variety of commercial litigation contexts. Properly applied, these principles can bring a company millions of dollars in insurance benefits.

1. Fundamental Insurance Principles
There are two fundamental principles of insurance law for commercial litigation.

First, through a variety of insurance rules and principles, general liability insurance policies provide coverage for an incredibly broad variety of business lawsuits. The full spectrum of commercial litigation that is potentially covered by insurance is frequently misunderstood by many lawyers, many of whom view insurance policies in a very literal and one-dimensional manner.

The reality is that through coverages such as advertising injury and personal injury, general liability policies can potentially provide coverage for a wide variety of commercial litigation lawsuits, including copyright and trademark infringement, misappropriation of trade secrets, unfair competition and many others.

Even business lawsuits that center on allegations typically not covered by general liability policies – such as breach of contract, fraud, shareholder or partnership disputes and wrongful termination – nevertheless frequently involve secondary allegations of defamation, disparagement, invasion of privacy or related torts which do implicate insurance coverage. *See Buss v. Transamerica* (1997) 16 Cal.4th 35.

The second fundamental principle of insurance coverage for business litigation is that corporations must aggressively pursue insurance benefits. Insurance companies are not the "good hands people" of marketing lore. These are multi-billion dollar, international corporations whose fundamental objective is to maximize profits for owners/shareholders – just like any business entity.

If a corporation does not aggressively pursue its insurance benefits, such benefits will likely ultimately be denied or minimized.

2. Tender Early/Tender Often
It is black-letter law that an insurance company's duties to provide coverage for third party liability claims are not triggered until the policyholder tenders the claim to the insurer. Thus, it is absolutely critical that in-house tender all lawsuits, arbitration demands, regulatory complaints and other legal proceedings to all insurance companies. Even threats to sue or other contentious communications need to be reported to the insurance company as potential claims.
The failure to tender, or a delayed tender, may have significant negative consequences. As a threshold matter, the insured will likely not be able to recover any defense fees incurred pre-tender. Second, the policy may have "claims made and reported" deadlines which require notice within the policy periods or shortly thereafter. Finally, even if the policy does not have such reporting deadlines, a carrier may argue that it has been substantially prejudiced by late notice, and deny the claim.

3. Duty to Defend
The duty to defend is the most important concept in insurance. Black letter California law requires an insurer to immediately defend their insureds if the allegations in the complaint fall within, or may potentially fall within, the scope of coverage provided by the terms and definitions of the policy. *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263.

Triggering the duty to defend can result in a significant shift of power in litigation. It can provide a defendant significant leverage against a plaintiff, as suddenly a company's defense fees are being paid by an insurer. For complex cases, such a benefit can be worth millions of dollars.

4. The Insurance Magic of the Cross-Complaint
Many defendants in business litigation cases file cross-complaints against the plaintiff. When a cross-complaint is filed by a defendant, the plaintiff must immediately tender the cross-complaint to its insurance company for coverage. An insurance company has duty to defend a cross-complaint if the allegations are potentially covered.

By obtaining insurance coverage for a cross-complaint filed against it, a plaintiff can pay for and subsidize much of the attorney's fees and costs it incurs for prosecuting its plaintiff's case, as such fees and costs are inextricably intertwined with purely defense related fees. Moreover, all of the defense fees for the cross-complaint are also paid for.

5. Independent Counsel
One of the most important principles in California insurance law is the right to independent counsel. A corollary of the duty to defend, California Civil Code section 2860 imposes a mandatory duty upon insurers to provide independent counsel when the resolution of a third party claim bears directly on the outcome of the coverage dispute between the insurer and its insured. *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364.

Attorneys must recognize the situations under which the right to independent counsel is triggered, as well as the practices and procedures which are required to obtain Cumis counsel.

Further, after a company has successfully obtained the right to Cumis counsel, the real work begins. Outside counsel must act as both defense counsel and coverage counsel for the lawsuit. Having defense counsel with insurance law expertise is the very essence of the Cumis doctrine. Cumis counsel must provide an aggressive and comprehensive defense of the third party claims while at the same time maximizing the insurance benefits available to the client.

6. Corporate Plaintiff Strategies and Insurance
A company that is a plaintiff in commercial litigation must consciously manage the litigation such that the defendant's insurance coverage is maximized. By carefully focusing the plaintiff's cases toward covered claims, the plaintiff ensures that judgments are collectable against the insurance company and that carriers are forced to respond in settlement and mediation.

In the alternative, in some cases the plaintiff does not wish to trigger insurance coverage so that the defendant must bear the cost of defense by itself. In that case, the claims must be carefully drafted by corporate litigation counsel to avoid triggering the duty to defend.

Conclusion
Expertise in insurance law is an extremely powerful weapon for lawyers representing business clients. An attorney handling litigation for corporate clients who is an also an expert in insurance law can bring millions of dollars of insurance benefits to such companies.

Edward Susolik

Edward Susolik is the partner in charge of the Insurance Department at Callahan & Blaine, an Orange County boutique litigation firm with 30 attorneys. Mr. Susolik has handled over 1000 insurance law disputes in his 26 years of practice, and has recovered over $1.0 Billion in insurance benefits on behalf of his policyholder clients. He has been an adjunct professor at USC Law School, where he has teaches Insurance Law, and is an editor of the Rutter Guide on Insurance Litigation. Mr. Susolik has been named one of the "Top 100 Attorneys in Southern California" by Super Lawyers every year from 2010 to 2016. He can be reached at 714.241.4444. Callahan & Blaine's website is found at *www.callahan-law.com*, and its insurance website is at *www.insurance-litigation.com*.

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Fraud in the Workplace

by Deborah Dickson, CPA, CFF, MAFF, Smith Dickson, An Accountancy Corporation

Most employers never would expect that a trusted employee might commit fraud, yet every year numerous businesses are forced into bankruptcy due to fraud. Even when it isn't that extreme, the Association of Certified Fraud Examiners' (ACFE) 2014 Global Fraud Study revealed that the typical organization loses a median of 5% of revenues each year due to fraud.

The Fraud Triangle

Employers can utilize the "fraud triangle" to monitor and identify factors in the lives of key personnel that can lead to fraud. The fraud triangle is a model for explaining the factors that cause someone to commit occupational fraud. It consists of three components which, together, can lead to fraudulent behavior: pressure, perceived opportunity and rationalization.

Pressure originates from a financial problem (personal or professional) that the individual is unable to solve through legitimate means, so he may consider stealing cash or falsifying a financial statement. Next comes opportunity, using a position of trust to solve the financial problem with a low risk of getting caught. It is worth noting that many white collar crimes are committed to maintain social status and pay for lavish lifestyles. The final step is rationalization - fraudsters typically do not see themselves as criminals, instead feeling that they are caught in a bad set of circumstances. They may even justify it by thinking that the employer underpaid them or is dishonest and deserved it.

Forensic Accounting Support

Forensic accounting engagements can be specifically tailored to deter fraud and potentially prevent it. Attorneys engage forensic accountants to determine whether fraud occurred, estimate the extent of monetary loss, and uncover who committed the fraud. When litigation is selected as a means to recover losses, forensic accountants prepare reports on the damages and render expert testimony. At Smith Dickson, our forensic accounting specialists have logged thousands of hours of forensic accounting, deposition and trial experience, both as expert witnesses and consultants in matters ranging from economic damages to fraud and embezzlement. Smith Dickson's forensic accounting specialists will support your case with the highest level of expertise available.

Deborah Dickson
Deborah Dickson, CPA, CFF, MAFF is President of Smith Dickson, An Accountancy Corporation (www.smithdickson.com) based in Irvine. The firm's Litigation Support Services include forensic accounting, expert testimony, economic damages, lost profits, intellectual property, fraud and embezzlement, real estate, trust and estate beneficiary disputes, and stockholder/partnership disagreements. Ph. 949.553.1020.

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Ethical Considerations in Selecting Counsel for Derivative Lawsuits

by Sherry S. Bragg, Shareholder, and Darrell P. White, Associate, Weintraub Tobin

It is Q4 and that means year-end planning, meetings, events, evaluations, and the non-stop bustle of running a business. When faced with a derivative lawsuit (i.e. an action brought on behalf of the company) and relatively short time-tables to address the concerns, counsel is often selected based on their long-time relationship with either the company or the top executives within the company. But what happens where the insider is accused of fraud and/or breach of fiduciary duty, and the attorney is asked to represent both the insider and the company in the same matter, or the attorney is retained to represent the insider despite having previously represented the company in a previous matter? Under such circumstances, several well-established conflict rules may come in to play. Without caution, a company or the insider can face disqualification of their chosen counsel.

California courts have identified two separate scenarios in which actual or potential conflicts of interest arise in counsel's representation of multiple clients. One is concurrent representation of multiple clients whose interests are adverse. When a law firm concurrently represents the company *at the time* it also appears on behalf of a shareholder in the litigation, disqualification is required. *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284–285. Thus, for example, if a Court found that a law firm represented both the insider and the company in the purported lawsuit asserting the insider committed fraud or breached a fiduciary duty, the law firm would likely be disqualified.

Another conflict scenario involves the successive representation of multiple clients – that is, where the attorney's representation of the current client may conflict with the interests of a former client. *See, e.g., M'Guinness v. Johnson* (2015) 243 Cal. App. 4th 602. Under this circumstance, if a Court found that a law firm had previously represented either the insider or the company in prior litigation wherein the issues in dispute were substantially related, the law firm may be disqualified.

Companies and insiders alike should take great care when selecting counsel to address litigation involving accusations of fraud and/or breach of fiduciary duty. A number of factors need to be considered, and the time to do so is before hiring counsel, not after.

For more information on this subject, please contact Darrell White directly at 949.760.0204 or dwhite@weintraub.com.

About Weintraub Tobin
Weintraub Tobin (previously practicing in Orange County as Waldron & Bragg) is a sophisticated provider of legal services. With offices in Newport Beach, Los Angeles, Sacramento, San Francisco and San Diego, we have been supporting California business since 1852. Visit Weintraub Tobin at 23 Corporate Plaza, Suite 200, Newport Beach, CA 92660.

Darrell P. White
Darrell P. White is an associate at Weintraub Tobin, Darrell specializes in complex business litigation matters.

Sherry S. Bragg
Sherry S. Bragg is a shareholder in the firm's Litigation Practice and Employment Law Groups, and a member of the firm's Board of Directors. As an AV-rated attorney, Sherry has represented both plaintiffs and defendants in a wide variety of business disputes and tort cases for 29 years.

FRAGOMEN WORLDWIDE

Think Your Company Is Too Small to Have an Immigration Program? Think Again!

by Mitch Wexler, Managing Partner, Fragomen Worldwide

Big companies, or companies with a significant number of foreign national hires have "immigration programs" to provide structure to this critical hiring and staffing function. This enables them to efficiently execute when the next foreign national candidate is identified. It also provides efficiencies when confronted with future steps in the life cycle of a foreign national employee such as work visa extensions, permanent resident (green card) options and processes. A "program" also identifies relevant in house and outside stake holder and makes sure each has a defined, non-overlapping role. It identifies who has authority for what and what the case process flow should optimally look like.

Having a true "program" around the critical immigration function, as opposed to an ad hoc fire drill when the need occurs, also provides for critical case processing metrics to be maintained and analyzed. This allows for the process to be reviewed and improved on an ongoing basis. It also provides a mechanism to track "spend" which helps in capturing all associated costs and identifying spikes which can be analyzed.

Other items typically addressed in the design and execution of company immigration programs include:

▶ For which type/level employee do we consider visa sponsorship?
▶ Who pays for what? All family members?
▶ Do we agree to apply for the permanent green card after obtaining a temporary work visa?
▶ If so, is there a waiting period or other criteria (perhaps performance based) in determining if we will permanently sponsor?
▶ Do we allow each foreign national to pick his or her own attorney to represent our company in these applications or do we establish a relationship with a reputable immigration law firm to look out for our best interests?
▶ What program reports would be most meaningful to our organization? (spend, visa type, nationality of foreign national population, stage in the process of each foreign national, etc.)
▶ Any non-U.S. issues? Even if the company has no overseas offices, it may from time to time send sales or technical staff out to see foreign based customers. They will likely need appropriate work visas.
▶ I-9 Process: Often, a company's I-9 process (employment verification) is incorporated into its immigration program. It is during the onboarding process of a new employee that any immigration/visa needs are identified so this is a good point at which to get critical related issues onto the radar.
▶ Training: What training do our internal stake holder need to effectively play their role? Recruiters, managers and the foreign nationals themselves will also benefit from specific training.
▶ Other unique needs/concerns of the business

As with any critical function of an organization, companies with one or more current foreign nationals would benefit from viewing the immigration/visa function holistically. It can then put in place a thoughtful program that can be of various levels of detail and complexity but one that will provide guidance to management once the next foreign national is identified or immigration related critical decision that must be quickly addressed.

Mitch Wexler
Mitch Wexler is the Managing Partner of Fragomen Worldwide's Irvine and Los Angeles office. Fragomen is the world's leading immigration law firm and represents companies of all sizes in their immigration/visa needs. Mitch is a California State Bar Certified Specialist in immigration and nationality law, and has been practicing immigration law exclusively for more than 30 years. He welcomes all queries to mwexler@fragomen.com or 949.660.3531.

Sunwest Bank

If Your Firm's Banker Does Not Specialize in Your Industry, It May Be Time for a Change

by Sharyn R. Kohara, Vice President & Senior Relationship Manager, Sunwest Bank

Law firms face unique banking challenges that are best tackled with a seasoned banking partner by your side. This is one of the reasons why financial institutions such as ours are focused on providing specialty services specially designed to meet the needs of the industry.

Unique Cash Flow Challenges
Law firms of all sizes can face cash flow issues. We know it's not uncommon for cash flow to tighten significantly during the first two quarters of the year; in some cases, well into the third quarter.

Whether your clients are attempting to renegotiate the original terms of their service agreement or your firm is distributing quarterly or year-end distributions, chances are that your cash flow isn't as consistent as you would like it to be. A line of credit can help bridge the timing gap between services rendered and collection of payment, especially when the collection process may take as long as 180 days.

Continuing Growth While Limiting Costs
The increased growth in the presence of smaller boutique law firms has caused a need for greater flexibility in the banking solutions offered to the legal industry as a whole. Regardless of the size of your firm, costs should always be a concern. Curbing costs and finding the best solutions often comes down to finding a financial partner who is willing to provide specialty services and custom packages at a competitive rate. Oftentimes cost savings can be achieved throughout multiple facets of the relationship from deposit accounts to credit facilities.

You Need to Have More Control Than Ever
With Internet fraud on the rise, it is imperative to maintain strict controls over the daily operations of your firm and be equipped with the most current fraud prevention tools in place. A strong partnership with your bank will help safeguard your banking operations, which can ultimately protect the growth of the firm.

At Sunwest Bank we truly understand the unique financial challenges firms are facing in this economic environment and we're here to help. Our Legal Specialty Banking Group is committed to providing elite banking services that will assist in the expansion, profitability and success of your firm.

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Sharyn R. Kohara
Sharyn R. Kohara is a Vice President & Senior Relationship Manager in the Specialty Banking Group at Sunwest Bank. In her Banking career she has held successful positions in The Private Bank, Commercial Banking, Business Banking and Retail Banking. She has been dedicated to the Legal Specialty Banking sector for the past ten years where she interfaces daily with law firms, managing partners and attorneys. Contact Sharyn at 714.730.4495 or skohara@sunwestbank.com.

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A Matter of Trust

by Steve Kaufman, Founding Partner, Kaufman Steinberg LLP

Who do you trust with your financial information? You trust banks, credit card companies, the government, but do you trust your spouse with it? Many marriages have ended over one spouse's inability to share financial information with the other.

Married couples in California owe the highest duty of loyalty to each other. They occupy a confidential relationship, and they are fiduciaries to one another. California family law courts take that fiduciary relationship very seriously, and the law provides serious penalties for the breach of a spouse's fiduciary duty. One case, *In Re Marriage of Rossi*, illustrates this.

In 1996, Mrs. Rossi won $1.3 million in the lottery. She came home and told her husband, "I want a divorce!" They made a settlement agreement and ended the marriage. Of course, she said nothing about the $1.3 million, and she had the payments mailed to her mother's house so Mr. Rossi wouldn't find out.

Left broken, a year later Mr. Rossi filed for bankruptcy. After he filed, he received a letter, addressed to Mrs. Rossi, asking her if she wanted to cash out her lotto winnings. Mr. Rossi took Mrs. Rossi back to court. He claimed Mrs. Rossi breached her fiduciary duty to him by failing to disclose her winnings. The court agreed, and awarded Mr. Rossi the *entire* lottery prize to punish Mrs. Rossi for her breach of fiduciary duty to her spouse.

Mrs. Rossi had a duty to disclose all material facts and information to Mr. Rossi regarding the parties' property when she filed for divorce and made a settlement agreement with him. Especially when contemplating divorce, when there may be little or no trust between spouses, they must share all material facts and information with each other.

The duty to share financial information with your spouse starts when you say, "I do." Entering marriage means entering a confidential relationship that requires spouses to share all financial facts and information with each other. When spouses share confidence in each other, when they both know "where all the bones are buried," their trust in each other strengthens their relationship.

Spouses who do their financial planning together have a greater chance at success, both financially and marriage-wise. And couples who are planning to marry should make financial planning part of the process of becoming one. With an undeserved bad rap as unromantic, discussions in forming premarital agreements set the tone, and create understanding between the parties on how the couple will handle their money.

Formalized, premarital agreements require each spouse-in-waiting to fully disclose their assets and debts, and to plan how they will grow together, financially. While the conversation may be hard to start, and may feel uncomfortable at first, reaching this understanding puts a couple on a clear path toward a successful marriage.

Whether planning a wedding or planning a divorce, California law requires transparency between spouses from the date of marriage, onward. The better parties communicate about their finances, the more successful they will be in the future, together or separately.

Stephen Jay Kaufman, Esq., CFLS
Steve Kaufman is a founding partner of Kaufman Steinberg LLP. Certified as a family law specialist by the California State Bar, Steve has practiced family law for 24 years, and has been named as a Super Lawyer since 2015. Steve lives in Irvine. He is a volunteer counselor to victims of domestic violence at Human Options, and he is involved in community affairs throughout Orange County. Contact him at steve@kaufmansteinberg.com.