PIETRAGALLO

PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP

FALL/WINTER 2008

UNDERSTANDING BANKRUPTCY PREFERENCE LITIGATION: AND HOW BEST TO AVOID IT

by Richard J. Parks, Esq.

If you are a business owner who has avoided being named as a defendant in a bankruptcy preference action, count your blessings and the money that you have been lucky or skilled enough to keep in the bank. Many business owners, manufacturers and suppliers have incurred the expense and frustration of defending preference actions in Bankruptcy Court. The expense and frustration can be heightened when you are dragged to Bankruptcy Courts in Delaware or the Southern District of New York even though the company you did business with is right down the street.

It is no coincidence that these particular Courts are havens for large corporate debtors. These particular Courts have gained the reputation of being the venue of choice for debtors for a number of reasons.

Hundreds of preference action lawsuits are filed in connection with the "large" bankruptcies. Settlement, as opposed to the cost of defending these actions, is perceived by many business owners as nothing more than court sanctioned extortion. It is difficult for a business owner to make sense of a system that takes money away from their business when they did nothing more than receive money for goods they actually supplied to the debtor.

Although the threshold for being named as a defendant in a bankruptcy preference proceeding is extremely low, you can prepare yourself to minimize the expense of defending these actions. The initial threshold to file a preference action only requires that you receive payment on account of an antecedent debt from an insolvent debtor who subsequently files for bankruptcy in the next 90 days and the payment allows you to receive more than you would have received in a Chapter 7 liquidation. Probably the most frustrating part of these actions is that they are filed in a serial shotgun fashion, without any regard for the facts, and usually while the debtor still owes you an additional sum of money.

Congress promised relief in the reforms that were enacted on October 17, 2005 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Unfortunately, Congress did not go far enough. Two Code sections were amended in 2005 in an attempt to help the commercial vendor/supplier from being abused by a debtor who subsequently files bankruptcy. Section 546 of the Bankruptcy Code was altered to help the supplier vendor. Section 546 deals with "reclamation" rights of a vendor. "Reclamation" is your right to demand the return of your product supplied to a debtor. The bankruptcy reform extended your right of reclamation from 10 to 45 days after delivery. Unfortunately, bankrupt businesses rarely have the inventory you supplied after 45 days. In addition, the Bankruptcy Courts interpret this right to be subordinate to secured creditors' security interests in the debtor's inventory.

A second reform enacted in 2005 for the trade creditor is found in Section 503 of the Bankruptcy Code. Section 503 allows a trade creditor to obtain "administrative" status equal to the value of all goods received by the debtor within 20 days of the date the debtor filed bankruptcy. This change is important to be aware of in bankruptcy for two reasons. First, it elevates the business you did with the debtor in the last 20 days before the filing to the same payment priority level as that held by the attorneys and accountants in the case. Second, if you did receive payment on your accounts that were less than 20 days old when the debtor filed, this provision alters the landscape and allows you to defend a claim that the payment was

Continued on page 8

SPECIAL BUSINESS PRACTICE FOCUS

INSIDE THIS ISSUE:

PRACTICE SPOTLIGHT: BUSINESS GROUP..........2

FASB'S PROPOSAL MAY DO MORE HARM THAN GOOD..........3

EMPLOYERS' COST-CUTTING MEASURES IN STRAINED ECONOMIC TIMES..........4

CHANGES TO PENNSYLVANIA'S REALTY TRANSFER TAX REGULATIONS HAVE FAR REACHING EFFECTS..........5

THE NEXT GOLD RUSH..........6

INDEPENDENT CONTRACTOR OR EMPLOYEE..........7

RECENT SUCCESSES..........10

ATTORNEYS IN THE NEWS..........11

UPCOMING EVENTS..........11

PITTSBURGH

PHILADELPHIA

STEUBENVILLE

SHARON

WEIRTON

WEST CHESTER

MECHANICSBURG

www.PIETRAGALLO.com

Practice Spotlight: Business Group

Pietragallo's Business Group is comprised of a team of attorneys who have extensive experience and provide legal services on a broad range of business matters, including general corporate, mergers and acquisitions, joint ventures, securities, finance, corporate governance and director and shareholder issues. The Business Group attorneys are skilled in assisting clients in an efficient and cost-effective manner, whether the client is looking to launch a new business, expand into new markets, protect its technology, obtain certification as a nonprofit or a minority- or women-owned enterprise, buy or sell a business, or simply enter into a contract.

Our clients are varied. We serve individuals, local businesses, start-ups, publicly held domestic corporations and international joint ventures. They are in a multitude of businesses including industrial and manufacturing companies, service companies and Web-based businesses.

- Bankruptcy, Creditors' Rights and Collections
- Corporate Law
- E-commerce
- Emerging Business and Technology
- Family- and Owner-Managed Businesses
- Mergers and Acquisitions
- Real Estate
- Securities Law

For more information, please contact John Wise at (412) 263-4378 or via e-mail at JBW@PIETRAGALLO.com.

Killing the Messenger? How FASB's Proposal to Expand a Company's Obligation to Disclose Litigation Loss Contingencies May Do More Harm Than Good

by Alexandra C. Gaugler, Esq. and Christopher A. Iacono, Esq.

The Financial Accounting Standards Board (the "FASB") recently proposed an amendment to FASB's Statement No. 5, Accounting for Contingencies. The proposed amendment is in response to concerns from investors regarding a company's disclosure related to loss contingencies in financial statements. The amendment, if adopted, would substantially expand a company's obligation to disclose contingent loss liabilities, including litigation loss contingencies. While the goal of increased transparency for investors is laudable, the new requirements, particularly as applied to reporting of litigation loss contingencies, will likely do more harm than good. Specifically, the proposed amendment may, among other things, require a company to prematurely place a value on all pending or threatened litigation and, in the process, potentially disclose key litigation strategy.

The Existing Standard

Currently, a company must accrue for litigation loss contingencies in its financial statement if the loss is probable and the amount of the loss can be determined with reasonable accuracy. If both conditions are not satisfied, a company must disclose the litigation loss contingency in the notes of the financial statement when there is at least a reasonable possibility that a loss may be incurred. Such disclosure, however, is limited to the general nature of the loss contingency, and either the range of the potential loss, or a statement that such an estimate cannot be made.

The Proposed Amendment

The proposed amendment increases the obligations of a company two-fold. First, with respect to pending or threatened claims, the proposed amendment requires disclosure of all loss contingencies unless the likelihood of a loss is remote. Even when the loss contingency is determined to be remote, however, it must be disclosed if the contingency is expected to be resolved within one year of the date of the financial statement, and if the contingency could have a severe impact on the company's financial position, cash flow or operations.

Second, under the proposed amendment, if a litigation contingency must be disclosed, a company is required to provide substantially more information about the contingency than is currently required. The expanded disclosures include:

- The amount of the claim (including punitive or multiple damages, if applicable); or
- If there is no claim amount specified, the company's "best estimate" of the maximum loss exposure;
- A detailed description of the litigation contingency including how it arose, its legal and contractual basis, its current status, and when the company anticipates it will be resolved;
- A description of the "factors that are likely to affect the ultimate outcome of the contingency;"
- The company's assessment of the most likely outcome of the contingency; and
- A list of all significant assumptions the company made in determining all amounts disclosed.

> While the goal of increased transparency for investors is laudable, the new requirements, particularly as applied to reporting of litigation loss contingencies, will likely do more harm than good.

The Adverse Effects of the Proposed Amendment

The FASB's proposal, if enacted, could jeopardize a company's defensive litigation position. It would force a company to make public a "best guess" of the value of pending and threatened claims. A company's public disclosure of its claims evaluation, along with the disclosure of how it calculated the contingent loss figure, opens the door to potentially harmful consequences. These include:

- Disclosing key elements of a company's litigation strategy;
- Forcing a company to value a plaintiff's case before exchanging discovery, taking depositions, or evaluating expert reports;
- Providing plaintiff's counsel with a "floor" of where the settlement negotiations will begin, thereby inflating potential settlements; and
- Jeopardizing waiver of attorney-client and attorney work-product privileges (the required disclosure will more often than not be based upon information provided in part by a company's in-house and trial counsel).

In addition to hindering a company's ability to defend itself against existing or threatened lawsuits, the inherent guesswork required to make the expanded disclosures also opens the door to additional liability. If the required projections turn out to be wrong, for example, a company may be vulnerable to shareholders' suits alleging that the company was not completely forthright.

The FASB attempts to address the potentially harmful consequences of the expanded disclosure requirements by allowing a company to aggregate disclosures, or forego disclosures completely in "rare" circumstances. Aggregation is a small consolation to an entity fighting a bet-the-company lawsuit, as it will likely be obvious that the bulk of the exposure comes from a single piece of litigation. For companies facing a multitude of lawsuits, aggregation only invites greater "guesswork." The FASB's exemption clause similarly fails to adequately mitigate the potential harm because it does not define what constitutes a "rare" circumstance triggering the exemption, state who would determine if the omission was justified, or explain the consequences for omitting a disclosure in error.

Next Steps

The FASB received over 200 comments concerning the proposed amendment. As a result, the FASB has decided to field test the proposed amendment as well as an "alternative model," which should be released shortly. After the field testing, the FASB will hold roundtable discussions. Such discussions are currently scheduled for April 2009.

For more information please contact Alexandra C. Gaugler at (215) 320-6200 or via e-mail at ACG@PIETRAGALLO.com, Christopher A. Iacono at (215) 320-6200 or via e-mail at CAI@PIETRAGALLO.com or John B. Wise at (412) 263-2000 or via e-mail at JBW@PIETRAGALLO.com.

Employers' Cost-Cutting Measures in Strained Economic Times

by Pamela G. Cochenour, Esq. and Daniel J. McGravey, Esq.

The subprime mortgage crisis and related nationwide economic difficulties have caused some companies to review ways to minimize the financial impact on their bottom line. Many employers will immediately consider implementing a mass layoff or reduction in force (RIF) in an effort to adjust to the economic climate. Employers that rush to implement these options without careful planning, the advice of counsel, and considering alternatives could incur the substantial expense of defending against claims of employment discrimination filed by the laid-off employees.

There are certain considerations that every employer must evaluate in planning for a layoff. When properly considered and documented, these decisions minimize potential liability to the laid-off employees, assist in maintaining the morale of those employees who are retained and asked to perform the work of those who have been let go and, additionally, help maintain the quality of service to the company's customers or clients.

Consider Other Options

Rather than immediately assume that an RIF is the appropriate response to difficult economic circumstances, employers should consider other options which could reduce the risk of litigation.

- Allow natural job attrition to take place without hiring replacement workers.
- Freeze wages across the board or postpone planned wage increases.
- Terminate recent non-essential hires within their probationary period.
- If possible, reduce work hours for hourly employees. Care should be taken, however, to consider the effect on employees' entitlement to fringe benefits.
- Where appropriate, allow and encourage employees to job share.
- Terminate employees who have documented performance problems.
- Reduce fringe benefits, increase insurance deductibles and institute waiting periods for new hires to be eligible for fringe benefits.

A myriad of other options are available to employers to help reduce costs before moving to the more aggressive strategy of instituting an RIF. The list is limited only by management's creativity and willingness to review the company's true financial situation and staffing needs.

When an RIF is Inevitable - PAD!

When the conclusion is reached that a mass lay-off or RIF is inevitable employers should take the time to plan the reduction, analyze the true staffing needs of the business and document the process. A careful PAD approach to an RIF can assist an employer in making the correct business decisions regarding what jobs can be eliminated, therefore, transforming the RIF into an effective business tool. Proper analysis, documentation, and implementation of the decision-making process can provide necessary evidence of the employer's legitimate, non-discriminatory business decisions should any laid-off employees suggest that their inclusion in the RIF was based on discriminatory motive.

> Employers that rush to implement these options without careful planning, the advice of counsel, and considering alternatives could incur the substantial expense of defending against claims of employment discrimination filed by the laid-off employees.

Planning

In planning the RIF, consult legal counsel for advice concerning the applicability of federal and state Worker Adjustment and Retraining Notification Acts (WARN). Failure to follow the notice provisions of these statutes can result in liability to the laid-off employees - costs which can easily be avoided by proper planning.

Counsel should also be sought to properly plan for requirements of state laws relating to wage payments, insurance benefit conversion rights of laid-off employees, severance benefits, and such matters as providing letters of reference for the departing employees. Counsel versed in the Employee Retirement Income Security Act ("ERISA") should be consulted to determine whether the planned RIF could result in a partial termination of pension plans causing a reportable event under ERISA.

Planning for the flow of work after the RIF is equally important in maintaining the morale of the employees who are retained and who will, necessarily, be required to perform additional job functions. Planning for wage increases, bonuses or other non-monetary incentives and rewards should be considered in order to provide optimal service to the business's customers or clients following the RIF.

Analysis

A careful analysis of the business's staffing needs is the cornerstone of an effective RIF. The analysis necessarily begins with the identification of job functions which are essential to the business, and which will continue to be essential following the RIF. Some job positions are redundant or unnecessary and can be eliminated for solid business reasons. Care should be taken to review the effect of any collective bargaining agreements in place relative to position elimination or consolidation.

Decisions regarding the elimination of positions should not be made solely on the basis of how the position elimination may affect the business's payroll. This type of analysis can lead to the costly and unintended consequence of triggering age discrimination claims by laid-off employees. Where employers use the technique of eliminating the highest paid employees in a particular job function, unintentional age discrimination can occur because, often, the highest paid employees in a job category are those with the greatest years of service. The focus of the analysis should begin and end with job functions and the need for essential services.

Continued on page 8

Changes to Pennsylvania's Realty Transfer Tax Regulations Have Far-Reaching Effects

by Andrea M. Bartko, Esq.

Whenever residential, commercial, or agricultural real property is transferred within the Commonwealth of Pennsylvania, the Department of Revenue (the "Department") assesses a realty transfer tax equal to one percent of the purchase price for the Commonwealth, plus an additional tax benefiting the local municipality and school district, ranging from an additional one to three percent, depending upon the municipality. If no purchase price is stated in the deed, a "computed value" will be used to determine the tax. The regulations provide for certain exemptions and exclusions based upon the type of, or relationship between, the contracting parties.

In December 2007, the Department promulgated revisions to the realty transfer tax regulations that affected many otherwise "routine" transactions between buyers and sellers of real estate (or between commercial real estate buyers and their lenders). One common example, used particularly in commercial property transactions, involves a buyer and seller entering into an agreement to purchase a parcel of real property, with the buyer intending to form a special-purpose entity ("SPE") to be the ultimate owner. The agreement would then be assigned by the buyer named on the agreement to the new SPE, who would take title to the property at closing. While the parties were no doubt aware that realty transfer tax would be assessed upon the recordation of the deed, prior to the Department's changes, most parties would not have considered the agreement of sale to be anything other than a contract to purchase the property - not a transfer of title to the property subject to transfer tax.

That changed with the Department's revisions. In a Realty Transfer Tax Bulletin published by the Department in April 2008 (http://www.revenue.state.pa.us/revenue/lib/revenue/RTT_2008-01.pdf), the Department provided several examples of typical transactions, along with its analysis of the tax effect on each transaction. The Department clarified that under certain conditions, the assignment of a sales agreement to an ultimate owner can be considered to be a separate, taxable event. The contracting parties are both jointly and severally liable for the transfer taxes, calculated based upon the sales price stated in the agreement. The *assignment of* that agreement to the ultimate purchaser and title holder is also taxable, based upon the price the ultimate purchaser pays to the assigner for the right to purchase the property. If no price is stated, a computed value will be set.

> ...under certain conditions, the assignment of a sales agreement to an ultimate owner can be considered to be a separate, taxable event

A purchaser may be eager to enter into a sales agreement with a seller in order to be certain that the property is taken off the market while he makes arrangements for the purchase, yet he may not yet have clear plans for who will hold title to the property. This type of transaction can be successfully structured without risking a double assessment of realty transfer tax by the careful use of a "straw party." A straw party is a person (or entity) who merely acts as an agent for the ultimate owner, or principal. If a straw party is used, the transaction between the seller and the straw party is considered to be a taxable transfer. Provided that the sales agreement clearly identifies that the straw party is acting on behalf of the buyer and that the straw party will not take title, the subsequent deed transferring the property from the straw party to the ultimate grantee (the principal) will not be considered to be a taxable transfer. The Department looks to the substance of the transaction and, assuming the documentation properly cites the roles of the parties, it regards a seller-to-straw party-to-buyer transaction to be a single, taxable transfer. A clear identity of the ultimate purchaser or grantee of the real estate is essential to an analysis of taxability - the fact that there is only one deed, according to the Department, is "not necessarily determinative of the proper tax result." It is also important that the ultimate owner exists at the time that the sales agreement is entered into - if it does not (such as may be the case if the ultimate grantee is a limited liability company or other entity yet to be formed), there is no principal for whom the straw party is acting at the time it enters into the sales agreement. If there is any ambiguity, the Department is likely to determine that there are two transfers. Obviously, this type of transaction must be carefully structured to ensure that it does not fall within the Department's scope of multiple, taxable transfers.

There are several ways of constructing some of the most common transactions to lessen the likelihood that the Department will consider them to be subject to multiple assessments of realty transfer tax:

- Direct purchase: set up the transaction such that the ultimate grantee/owner is the same as the party on both the sales agreement and the deed - it will result in only one transfer, with only a single assessment of realty transfer tax.
- Use a clearly defined straw party: the sales agreement and the deed between the seller and the straw party must clearly indicate that the straw-party purchaser is acting on behalf of a named party, and disclose that relationship in all documentation; an additional precaution is to expressly state that the straw party is not the intended purchaser, and will either assign the agreement to the ultimate owner or will have the deed executed by the ultimate owner as his nominee. The ultimate owner, if an entity, must have been created at the time the sales agreement between the seller and straw party is signed. A written agreement between the principal (ultimate grantee) and the straw party is also helpful.

If you are planning to use a newly-formed entity to hold the property, be sure that it has been officially formed and is effective in the state of formation (e.g., Certificate of Formation filed with the Pennsylvania Department of State).

Continued on page 8

The Next Gold Rush- The Marcellus Shale Natural Gas Basin

by David P. Franklin, Esq. and Robert J. Monahan, Esq.

Residents throughout Eastern Ohio, West Virginia, Pennsylvania and Western New York are looking to strike it rich. Not with gold, but with natural gas.

It has been known for a few years that this region houses a significant source of natural gas known as the "Marcellus Shale." In 2002, the United States Geological Survey estimated that the Marcellus Shale contained approximately 1.9 trillion cubic feet of gas. Considering the large four-state area of coverage, this did not amount to a substantial amount of gas per acre. As a result, it was deemed too expensive to drill into the Marcellus Shale. However, significant events have occurred since then to turn the Marcellus Shale into a potential major contributor to the natural gas supply in the United States - and local landowners are cashing in.

In 2004, horizontal drilling and hydro-fracing technologies were perfected for shale reservoirs in Texas. Horizontal drilling allows for the intersection of a maximum number of the vertical fractures contained within the shale formation, thereby substantially increasing the exposure to natural gas, which in turn allows for a substantial increase in the amount of natural gas that a single well is able to produce. Obviously, this new technology now makes drilling not only cost effective, but lucrative. In addition, new calculations have been released concerning the potential gas supply contained within the Marcellus Shale. Recent estimates have calculated that the Marcellus Shale might contain more than 500 trillion cubic feet of natural gas.

With such financial possibilities associated with the Marcellus Shale, oil and gas companies have been canvassing the region presenting oil and gas leases to as many landowners as possible. The rapid increase in this leasing activity is staggering. In 2002, oil and gas companies were paying landowners up-front bonuses of just a few dollars per acre. This year, in certain areas, the oil and gas companies are regularly paying up-front bonuses between $1,000 and $3,500 per acre. In addition to this upfront bonus payment, the oil and gas companies are obligated to pay royalties to a landowner once gas is being produced. This royalty represents a percentage of the value of the gas produced by a specific well. The statutory minimum royalty that must be paid to a landowner is 12.5%; however, some companies are willing to pay as much as 17%.

> This year, in certain areas, the oil and gas companies are regularly paying up-front bonuses between $1,000 and $3,500 per acre.

The thoughts of quickly becoming the next Jed Clampett can entice any landowner to enter into an oil and gas lease without taking a step back and considering all of the circumstances surrounding the transaction - both short term and long term. Such haste should be avoided through patience and careful consideration. It is important for a landowner to carefully analyze any offer and the corresponding lease agreement presented by the oil and gas company. Some of the factors to consider include:

- The number of prospective oil and gas companies leasing in your area. As the economic potential of the Marcellus Shale is considered to be very lucrative, there are numerous companies actively leasing available properties. However, in other areas there may be only a few interested companies. This supply and demand impacts price and terms.
- It is imperative to investigate the current rate and royalty that is being offered for acreage in your region as they will vary from location to location.
- Steps should be taken to ensure that important surface rights and conditions are protected.
- Landowners should understand their rights under the oil and gas lease, and how the lease can be terminated or extended by the oil and gas company's activities.

As a general matter, the standard oil and gas lease has been carefully drafted to suit the best interests of the oil and gas company. However, a number of significant provisions can and should be negotiated with the assistance of legal counsel.

For more information, please contact David P. Franklin at (412) 263-2000 or via e-mail at DPF@PIETRAGALLO.com. or Robert J. Monahan at (412) 263-2000 or via e-mail at RJM@PIETRAGALLO.com.

It is Important to Properly Classify a Worker as an Independent Contractor or An Employee

by John B. Wise, Esq. and Martin T. Durkin, Jr., Esq.

Whether an individual is classified as an independent contractor or an employee of a company is an important issue that employers tend to dismiss or "gloss over." However, the misclassification of a worker as an independent contractor instead of an employee can have significant financial consequences for the employer which, in many instances, may arise long after the parties commenced their relationship (and may have already terminated).

Even where there is sensitivity to the issue, proper classification can be difficult as it is has been repeatedly emphasized by the courts and the Internal Revenue Service that no hard and fast rule can be stated for determining a worker's status, and that each case must be treated as unique and must be determined on its own facts.

While Pennsylvania Courts have not articulated a hard and fast rule at common-law for the determination of whether any given relationship is one of independent contractor or that of employer-employee, they have set forth indicia of such a relationship to be used as a guide in making such a determination. Some of the indicia courts have looked at includes:

- the degree of control the employer retains over the performance of duties;
- the level of skill required;
- whether the employer provides the equipment, supplies and site for performing the task;
- the length of the employment relationship;
- the specialization of the individual;
- whether the tasks are performed in the ordinary course of the employer's business;
- the method of payment;
- whether parties perceive themselves in a master-servant relationship.

In addition to the factors enumerated in common-law by the Pennsylvania courts, several Pennsylvania statutes also define "employee" for purposes of applying a particular statute. Examples include, but are not limited to, the Workers Compensation Act - factors include the presence of valuable consideration, whether the employment is casual in nature, and whether the employment is in the regular course of the employer's business; and the Unemployment Compensation Act - factors include whether the services performed are free of the employer's control, and whether the services rendered are of the type performed in an independent trade or business.

In addition to state statutes, federal statutes have also defined "employee" in certain contexts, such as the Occupational Safety and Health Administration (applying the factors under the federal common-law test) and the Internal Revenue Service (applying the IRS' "Twenty Factor Test").

Whether some or all of the above factors noted exist in any given relationship is not controlling. Rather, as noted, the determination of whether a worker is an employee or independent contractor is extraordinarily fact specific. This results in large part from the reality that work performed varies greatly between the countless job classifications.

> ...the misclassification of a worker as an independent contractor instead of an employee can have significant financial consequences for the employer...

Additionally, a written contract, in and of itself, is not sufficient evidence for determining worker status. IRS Treasury regulations provide that the designation or description of the parties is immaterial. This means that the substance of the relationship, not the label, governs the worker's status. In this regard, courts have looked at whether it is the custom of a particular trade for the services rendered to typically be performed by employees or independent contractors.

The central issue most often focused upon is whether company personnel have the right to control what will be done and how it will be done. This is so even if an employer provides a worker freedom of action. What matters is whether the employer has the right to control the details of how the services are performed. Facts that provide evidence of the degree of control and independence generally fall into three (3) categories: behavioral control, e.g. when and where to do the work, tools to use; financial control, e.g. extent of the worker's investment; extent to which the worker makes his/her services available in the relevant market); and the type of relationship of the parties, e.g. permanency of the position.

The financial consequences for misclassification are of little relevance where the relationship is classified as an employer/employee relationship, nor does it matter whether the individual is employed full-time or part-time.

To the contrary, however, if a worker is classified as an independent contractor, and the company has no reasonable basis for doing so, the company may be held liable for: state and federal employment taxes and penalties for that worker; unemployment compensation benefits payments and penalties; workers' compensation benefits payments and penalties; claims under the wage payment and collection law; employee benefits (such as those provided for by the Employee Retirement Income Security Act of 1974); liability under the Occupational Safety and Health Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, National Labor Relations Act , Fair Labor Standards Act; liability for the ordinary negligence of the worker; not to mention legal fees likely to be incurred by the company in resolving the disputes arising out of the misclassification.

The preceding, in some instances, is just the proverbial "tip of the iceberg" as to the type of consequences a company may ultimately confront.

For more information, please contact John B. Wise at (412) 263-2000 or via e-mail at JBW@PIETRAGALLO.com or Martin T. Durkin, Jr. at (412) 263-2000 or via e-mail at MTD@PIETRAGALLO.com.

Bankruptcy Preference Litigation continued from page 1

a preference.

There are precautions you should take to survive or avoid preference litigation. Obtain a financial or credit application from your new or existing customers before you extend credit. Monitor and follow up on your accounts receivable on a regular basis. Make sure your accounts pay in accordance with the terms stated on your invoice. Make sure they pay in the "ordinary course" at regular time intervals. Make sure you make collection calls on a defined time basis and follow up on these accounts.

Monitoring your accounts allows you to determine if you should require cash on delivery (contemporaneous exchange) rather than risk extending additional trade credit to a high risk customer. It is your business and your money. Even though trade credit is sometimes a calculated risk, it is your obligation to make sure the stakes of extending credit are acceptable to your business.

The Bankruptcy Code provides defenses to the preference claim. Was the payment in accordance with the terms of your invoice or the terms experienced in your industry? Was the payment paid contemporaneous to the sale or in the "ordinary course of dealings" based upon the historical payment records or were the payments sporadic? Do you have a lien right or a security agreement securing your payment? Did you give new value to the debtor after the payment in question?

All of the above are possible defenses to a preference action. Unfortunately, they are defenses which mean you have already been sued and are incurring expense. However, if you know about the defenses, the cost of defense and time spent in Court can be lessened.

You should never consider a settlement of a preference action as a short-term expense. That money rarely comes back to you. Bankruptcy preference litigation is a "cost of doing business" that you need to control and apply your own business judgment to when determining whether to settle or not. You can avoid much of the pain of bankruptcy preference litigation by simply managing your trade credit.

For more information, please contact Richard J. Parks at (724) 981-1397 or via e-mail at RJP@PIETRAGALLO.com.

Employers' Cost Cutting Measures continued from page 4

Document

As with all employment-related decisions, documentation of the decision-making process is paramount to being able to defend against a potential discrimination claim made by the affected employees. Employees must document the economic and financial position of the business which necessitated consideration of the RIF in the first instance. Next, the analysis of the job functions that are considered by management to be necessary to carry on the business of the company following the RIF must be documented. The process by which managers and supervisors were asked to review the job functions in their respective departments in order to make recommendations relative to job elimination must be documented. Any company reorganization that results from the RIF must carefully illustrate and document the elimination of jobs - not the elimination of people.

Effective and defensible reductions in force do not occur overnight. Careful planning for the reduction in force, analysis of the business's work force and essential needs and, documentation of the decision-making process are essential to achieving the desired financial benefit of the RIF and to reducing the potential risk of discrimination-related lawsuits following the RIF.

For more information, please contact Pamela G. Cochenour at (412) 263-2000 or via e-mail at PGC@PIETRAGALLO.com or Daniel J. McGravey at (215) 320-6200 or via e-mail at DJM@PIETRAGALLO.com.

Changes to Pennsylvania's Realty Transfer Tax Regulations continued from page 5

The Department's Bulletin addresses numerous scenarios for purchase transactions, including those involving real estate investment trusts ("REITs"), subsequent subdivisions of purchased property, multiple assignments of the sales agreement, and like-kind exchanges under Internal Revenue Code §1031. This article does not address all of the various transactions covered by the Department's Bulletin but focuses on some of the more common methods used by purchasers.

For additional information, please contact Andrea M. Bartko at (412) 263-2000 or AMB@PIETRAGALLO.com.

TAX ADVICE DISCLAIMER: Any federal tax advice contained in this article is not intended to be used, and it may not be used, for the purpose of avoiding any penalty that may be imposed by the Internal Revenue Service, or for promoting, marketing or recommending to another party any transaction or matter addressed herein.

Pietragallo to Advise Pennsylvania Turnpike Commission on P3s for Development of Mon/Fayette Valley Expressway Project

Pietragallo has been retained by the Pennsylvania Turnpike Commission to advise it on the development of the uncompleted portion of the Mon/Fayette Expressway and Southern Beltway project through the use of a Private/Public Partnership (P3).

The Mon/Fayette system will extend approximately 70 miles south from Pittsburgh through the Monongahela River Valley and western Fayette County to Interstate 68 near Morgantown, West Virginia. It will improve access to development sites in the economically depressed Mon River towns where the steel and coal industries once flourished. Approximately 35 miles of the Mon/Fayette system are operational.

In addition, the Southern Beltway will form a 32-mile arc with a radius of approximately 15 miles out from downtown Pittsburgh, improving access and east-west mobility between the mid-Mon Valley and Pittsburgh International Airport.

The Turnpike Commission is soliciting innovative P3 concepts/solutions for financing, designing, constructing, operating and maintaining the un-built 52 miles of the Mon/Fayette Expressway and Southern Beltway.

The use of P3s in highways and other infrastructure is becoming popular throughout the United States. For example, in Indiana, the rights to operate the Indiana Toll Road - a 157-mile road linking the Chicago Skyway to the west and the Ohio Turnpike to the east - were auctioned to a private group for $3.8 billion. And in Chicago, the Chicago Skyway itself was auctioned to a private group for $1.8 billion.

Kathryn M. Kenyon Elected Partner at Pietragallo

Kathryn M. Kenyon has been elected a partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP.

Ms. Kenyon is a member of the litigation defense practice and is based in the Pittsburgh office. She focuses her litigation practice on complex commercial matters; defense of claims of professional malpractice; insurance coverage; and intellectual property. She has successfully represented a variety of clients in extended pre-trial negotiations, at trial, and in federal and state proceedings.

Earlier this year, Ms. Kenyon was selected by the Allegheny County Bar Association as recipient of its '2008 Outstanding Young Lawyer Award'.

Ms. Kenyon received her J.D. from the Duquesne University School of Law. She received her B.S. from James Madison University.

Pietragallo Named a 'Go-To Law Firm' For IP Law

Pietragallo Gordon Alfano Bosick & Raspanti was identified in Corporate Counsel magazine's special "Who Represents America's Largest Companies" issue as one of Northrop Grumman's Litigation and Patent Prosecution law firms.

Two First-Year Associates Join Pietragallo

Alexander E. Gosfield and Peter S. Wolff have joined Pietragallo Gordon Alfano Bosick & Raspanti as first-year associates.

Both Mr. Gosfield and Mr. Wolff are members of the firm's commercial litigation practice. Mr. Gosfield is based in the Philadelphia office and Mr. Wolff in the Pittsburgh office.

Mr. Gosfield received his J.D. from Temple University Beasley School of Law, where he received the Most Promising Civil Litigator Award from the Center for Forensic Economic Studies, the International Academy of Trial Lawyers Prize, and the Robert E. Lamberton Award for Excellence in Constitutional Law.

Mr. Wolff received his J.D., cum laude, from Duquesne University School of Law. While in law school, he participated in the Securities Arbitration Practicum, Business Law Journal, Trial Advocacy and the Corporate Law Society. Mr. Wolff earned a B.S. in business administration, cum laude, from Duquesne University, where he was a member of the Golden Key National Honor Society.

Civil Rights Violation Defense: P. Brennan Hart and **Jeanette H. Ho** obtained a summary judgment from the U.S. District Court for the Western District of Pennsylvania on behalf of the City of McKeesport and two of its police officers in a case involving a 14-year-old girl who ran away to live with a school security guard and stayed with him for 10 years. The woman claimed the City, its police chief and another police officer violated her civil rights by failing to conduct a proper investigation into her disappearance. The Court held that the plaintiff's claims were barred by the statute of limitations.

Slip-and-Fall Defense: Shannon Poliziani was successful in persuading multiple parties to drop their claims against a concert promoter in a case where the plaintiff claimed injury in a fall at a concert. Both the venue owner and the promoter were sued. The venue owner then filed a cross-claim against our client, the promoter. Ms. Poliziani first convinced the venue owner to drop the cross-claim. Then, after the venue owner reached a settlement with the plaintiff, Ms. Poliziani was able to convince the plaintiff to discontinue the action against the concert promoter.

Professional Negligence Defense: Tyler J. Smith obtained a defense verdict in Kanawha County, WV on behalf of a psychiatrist sued by the widow of the decedent following the latter's suicide. The decedent had been under the care of the psychiatrist for five years for depression, bi-polar disease and suicidal thoughts, which increased after the death of his son in 2000. The decedent made it through three anniversaries of his late son's birthday. On the eve of the fourth anniversary, the widow, for the first time, did the following: 1) scheduled an emergency evaluation with the decedent's PCP; 2) made notes detailing the decedent's behavior in the preceding three weeks, including weight loss, not shaving or showering, loss of appetite, sitting in the dark, and suicidal talk; and 3) scheduling an emergency meeting with the psychiatrist that she attended and at which she provided the psychiatrist with the notes. The final words in the notes were: "Please help." The psychiatrist asked the decedent if he thought he could keep himself safe and the response was affirmative. Seventeen hours later, he shot himself in the head. The jury of four women and two men - which were shown a photograph of the death scene over objection - found that while the psychiatrist was negligent, his negligence did not cause the outcome.

Dismissal of Retaliation Claim: Daniel J. McGravey, **Gaetan J. Alfano** and **Amy C. Lachowicz** obtained the dismissal of a retaliation lawsuit brought under 42 U.S.C. § 1983 against their clients, several high-ranking members of a state police organization. The primary claim raised by the plaintiff, a former captain in the state police, was that members of the state police retaliated against him on numerous occasions because he engaged in conduct that allegedly was protected by the First Amendment. The Court granted the defendants' motion for summary judgment in part, dismissing the majority of the plaintiff's retaliation claims and leaving only the plaintiff's allegation that a high-ranking member of the organization failed to promote him to Major because of his purportedly protected conduct. Following extensive pretrial motions by Mr. McGravey and Ms. Lachowicz, the plaintiff elected to voluntarily withdraw his remaining claim, and the Court dismissed the case with prejudice.

Criminal Conviction Reversal: James W. Kraus obtained a reversal of a criminal conviction for his client by the D.C. Court of Appeals in Washington, D.C. The reversal resulted in the immediate release of his client from a sentence of imprisonment, which had approximately 10 years remaining.

Employee Retirement Income Security Act (ERISA) Matter: Daniel J. McGravey and **Alexandra C. Gaugler** successfully challenged the jurisdiction of the U.S. District Court of the Middle District of Georgia on behalf of the Southeastern Pennsylvania Transportation Authority (SEPTA). Plaintiff sued SEPTA for alleged ERISA violations. Prior to responding to the complaint, Mr. McGravey and Ms. Gaugler convinced the Plaintiff's attorney to voluntarily dismiss the claims against SEPTA because: 1) as an agency of the Commonwealth, SEPTA is explicitly excluded from coverage under ERISA; and 2) given that SEPTA has no ties to the Middle District of Georgia, the Court lacked personal jurisdiction.

Case of National First Impression: Joseph J. Bosick and **Alfred S. Pelaez** persuaded the Court of Common Pleas of Allegheny County to grant Penn-American Insurance Company's Motion for Summary Judgment. Penn-America issued a CGL policy to A4 Place, Inc., a Penn Hills, PA bar. On the evening of December 29, 2005, the manager of the bar ordered a patron to leave the premises. When the patron did not immediately leave, the manager went into the kitchen to summon the assistance of his bouncer. An argument ensued that soon escalated into a brawl in the bar's parking lot, which ended when the bouncer fired eighteen shots from a pistol, fatally wounding one of the patrons and wounding three others. Suits were brought against the bar, its owner/manager and the bouncer, contending that the bar and its owners were negligent in failing to properly train and supervise the bouncer. All defendants requested a defense from Penn-America Insurance Company and the insurer, defending under a reservation of rights, filed a Complaint for a Declaratory Judgment seeking a judicial determination of whether coverage was within the scope of the policy's assault and battery exclusion. The Court found that exclusions for assaults and batteries are not contrary to public policy and if this language does not exclude coverage for assault and battery related injuries, no language would be capable of achieving that end. Thus, by holding the clause does not exclude coverage for the claims asserted in the underlying complaints, the court would do something the legislature has refused to do—treat assault and battery exclusions as being contrary to public policy. The trial court found those arguments compelling.

Successful Negotiation of a Plea Agreement: Philip P. Keating successfully negotiated a plea agreement for a client in Washington County. The client's driving privileges were not suspended for a motor vehicle code violation. The client's job was at risk, if his license was suspended.

Attorneys in the News

William Pietragallo, II (Bet-the-Company Litigation), **Mark Gordon** (Workers' Compensation), **Marc S. Raspanti** (Health Care Law), **Francis E. Pipak** (Workers' Compensation Law) and **Paul K. Vey** (Medical Malpractice Law) were selected for inclusion in the 2009 edition of *The Best Lawyers in America*. The publication is widely regarded as the preeminent guide to the legal profession in the United States. Mr. Pietragallo, Mr. Gordon and Mr.Pipak have been listed in '*Best Lawyers*' for more than 10 years.

Kathryn M. Kenyon (Business Litigation), **James F. Marrion** (Business Litigation), **Daniel J. McGravey** (Employment Litigation Defense), **Michael A. Morse** (White Collar Criminal Defense), and **Alexandra C. Gaugler** (White Collar Criminal Defense) are included in Pennsylvania Super Lawyers Rising Stars 2008. The publication recognizes the top young attorneys in the state.

Louis C. Long was re-elected to serve as Vice President of the Board of Directors of the National Sprint Car Hall of Fame and Museum Foundation, Inc., a charitable organization located in Knoxville, Iowa that operates a museum dedicated to the oldest form of American motorsports.

James W. Kraus, **Heather A. Trostle** and **Shannon L. Poliziani** presented a Lorman Education Series seminar on "Document Destruction and Retention in Pennsylvania."

Marc S. Raspanti and **Michael A. Morse** made presentations at the AHLA/HCCA Fraud and Compliance Forum. Mr. Raspanti spoke on "Negotiating the Resolution of Healthcare Fraud Allegations", while Mr. Morse spoke on "How to Conduct an Internal Investigation and Not Screw it Up."

Andrea M. Bartko and **Bryan S. Neft** spoke at a Pennsylvania Bar Institute seminar on "Piercing the Corporate Veil."

Marc S. Raspanti spoke on "Qui Tam: A Litigator's Perspective" to Drexel University's Health Care Fraud class.

Michael A. Morse spoke on "Federal Anti-kickback and Stark Laws" to a symposium of medical industry experts.

Marc S. Raspanti made a presentation to the New Jersey State Bar Association's Health and Hospital Law Section on "The New Jersey False Claims Act: Risks for Providers; Opportunities for Whistleblowers."

Marc S. Raspanti and **Michael A. Morse** made a presentation on "Preparing for the Fight of Your Life: Anatomy of a Health Care Fraud Prosecution" at the Pennsylvania Bar Institute's A Day on Health Law.

Marc S. Raspanti has been admitted to practice in the state of New York.

Marc S. Raspanti and **Michael A. Morse** spoke at the Eight Annual Taxpayers Against Fraud Conference on “Fleshing Out Your Complaint, Obtaining Evidence: A Case Study.” Mr. Raspanti also spoke on “Pharma Fraud: AWP and Beyond.”

Marc S. Raspanti spoke at the ALI-ABA Telephone Seminar/Audio Webcast on "What To Do When the Feds Come Calling?"

Michael A. Morse spoke on "Whistle Blower Cases Under the False Claims Act" at a seminar for the Allegheny County Bar Association.

Upcoming Events

- February 12, 2009, Philadelphia, PA, **Marc S. Raspanti** will speak on "Defending White Collar Cases - The Ultimate Heavyweight Fight" for the Pennsylvania Bar Institute. Contact: PBI at 1-800-932-4637.
- March 12-13, 2009, Philadelphia, PA, **Tyler J. Smith** will speak on "Safe Informed Consent: A Cost-Effective Systems Approach" to the Pennsylvania Bar Institute. Contact: PBI at 1-800-932-4637.
- April 29, 2009, Las Vegas, NV, **Marc S. Raspanti** will speak on "Negotiating False Claims Act Settlements" at the Health Care Compliance Association's Compliance Institute.

PIETRAGALLO

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

ATTORNEYS AT LAW

This newsletter is for general informational purposes only. It is not intended to be and should not be considered legal advice or a substitute for obtaining legal advice from independent legal counsel. Publication of this information is not intended to create, and receipt does not constitute, an attorney-client relationship.

If you would like to be removed from our newsletter mailing list, please let us know by e-mailing us at INFO@PIETRAGALLO.com or by calling 412.263.2000. While this general e-mail address is monitored on a daily basis, it is not intended for time-sensitive matters. If you require immediate attention, please contact your attorney directly.

Address Service Requested

PITTSBURGH, PA 15219
38TH FLOOR, ONE OXFORD CENTRE
ATTORNEYS AT LAW
BOSICK & RASPANTI, LLP
PIETRAGALLO GORDON ALFANO
PIETRAGALLO

PRESORTED STANDARD
U.S. POSTAGE
PAID
PITTSBURGH, PA
PERMIT NO. ------