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BLS
BUSINESS LAW SECTION

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The editorial staff of the *Michigan Business Law Journal* welcomes suggested business law topics of general interest to the Section members, which may be the subject of future articles. Proposed business law topics may be submitted through the Publications Director, D. Richard McDonald, *The Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, Michigan 48304, (248) 203-0859, drmcdonald@dykema.com, or through Stephanie L. Stenberg, ICLE, 1020 Greene Street, Ann Arbor, Michigan, 48109-1444, (734) 763-1394, stenberg@icle.org. General guidelines for the preparation of articles for the Michigan Business Law Journal can be found on the Section's website at http://connect.michbar.org/businesslaw/newsletter.

Each issue of the *Michigan Business Law Journal* has a different primary, legal theme focused on articles related to one of the standing committees of the Business Law Section, although we welcome articles concerning any business law related topic for any issue. The primary theme of upcoming issues of the *Michigan Business Law Journal* and the related deadlines for submitting articles are as follows:

Issue	Primary Theme/Committee	Article Deadline
Summer 2017	In-House Counsel Committee	March 31, 2017
Fall 2017	Corporate Laws Committee	July 31, 2017
Spring 2018	Debtor/Creditors Rights Committee	November 30, 2017
Summer 2018	Nonprofit Corporations Committee	March 31, 2018

ADVERTISING

All advertising is on a pre-paid basis and is subject to editorial approval. The rates for camera-ready digital files are $400 for full-page, $200 for half-page, and $100 for quarter page. Requested positions are dependent upon space availability and cannot be guaranteed. All communications relating to advertising should be directed to Publications Director, D. Richard McDonald, the *Michigan Business Law Journal*, 39577 Woodward Ave., Ste. 300, Bloomfield Hills, MI 48304, (248)203-0859.

MISSION STATEMENT

The mission of the Business Law Section is to foster the highest quality of professionalism and practice in business law and enhance the legislative and regulatory environment for conducting business in Michigan.

To fulfill this mission, the Section shall: (1) expand the resources of business lawyers by providing educational, networking, and mentoring opportunities; (2) review and promote improvements to Michigan's business legislation and regulations; and (3) provide a forum to facilitate service and commitment and to promote ethical conduct and collegiality within the practice.

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Volume XXII, Issue 1, and subsequent issues of the *Journal* are also available online by accessing http://connect.michbar.org/businesslaw/newsletter

From the Desk of the Chairperson

By Judy B. Calton

As we begin a new fiscal year for the State Bar of Michigan, I am honored to be the new Chair of the Business Law Section of the State Bar. The other new officers are Mark W. Peters, Vice-Chairperson, Kevin Block, Treasurer, and Jennifer Consiglio, Secretary. We also have two new Council members: Seth Drucker and Ian Williamson. I succeed Douglas L. Toering, who has spent his year in service to the Section by invigorating it with his initiatives, including outreach to all members of the Section, newer attorneys, other State Bar Sections, other organizations, the Judiciary and Legislature, former Section Chairs, and In-House Counsel.

The Section is updating its Strategic Plan under the guidance of former Section Chair Tania E. (Dee Dee) Fuller. There will be more information about the Section's Strategic Plan when the update is completed. Once updated, I will want the Section to work to implement it and the pertinent provisions of the State Bar's 21st Century Practice Task Force.

I plan to continue Doug's outreach efforts, and hopefully increase member participation in Section and Committee activities. One way I hope to do that is with better communication about Section and Committee activities.

One of the most popular Section events is the two-day Business Boot Camp, which is repeated in two locations to serve members across the state. The first event was held in Grand Rapids on November 3-4, 2016, and the second event will be in Plymouth on January 30-31, 2017. The Business Boot Camp is designed for newer business attorneys or other attorneys looking for a refresher, and it provides grounding in the following eight areas of business practice, with guidance from leaders who handle these issues every day:

- Choice of Entity
- Forming an LLC, including Operating Agreements
- Shareholder Buy/Sell and Voting Agreements
- Commercial Loan Transactions
- Business Valuations and Appraisals
- Effective Employment Agreements and Employment Law
- Supply Agreements
- Insurance and Coverage Issues

More information and online registration is available at connect.michbar.org/businesslaw.

The Section's Committees are doing exciting work, which you should check out. To show you how vibrant, substantive, and educational the Committees' activities are, I will focus on the Debtor/Creditor Rights Committee, with which I am most familiar, having been its co-chair for several years.

The Debtor/Creditor Rights Committee scheduled a dinner meeting for November 16, 2016. The Committee discussed the proposed amendments to the Federal Rules of Bankruptcy Procedure, for which written comments are due by February 15, 2017, and a pending Michigan Senate Bill to replace Michigan's Uniform Fraudulent Transfer Act, MCL 566.31 *et. seq.* with the Uniform Voidable Transactions Act.

The Committee has been active all year. It presented a seminar on January 13, 2016, with the Bench of the Eastern District of Michigan Bankruptcy Court on recent amendments to the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules. On May 11, 2016, the Committee held a joint meeting with the Bankruptcy Subcommittee of the Real Property Law Section of the State Bar, which featured presentations on the Uniform Commercial Receivership Act of the National Conference of Commissioners on Uniform State Laws, on the recently adopted SCAO forms for receivership cases, and on the issue of receivership reports not being filed with the Court. The subcommittee of the Committee which drafted the proposed SCAO forms is, at the request of SCAO, presently working on a proposed SCAO form for motions to appoint a receiver. A different subcommittee is advocating amendments to MCL 600.6023(j) and (k).

The Debtor/Creditor Rights Committee organized, and, with 11 other bar groups, co-sponsored the September 14, 2016 reception at The Rattlesnake Club for over 300 guests to honor Bankruptcy Judge Walter Shapero on his retirement and to welcome Bankruptcy Judge Maria Oxholm to the bench.

Get involved. The next meeting of the Business Law Council is on December 3, 2016 at 10:00 a.m. at the new Southfield offices of Foster Swift Collins & Smith, P.C. Contact our Section Administrator, Terri Shoop, tshoop@clarkhill.com, to reserve attendance at the Council meeting.

Suggest activities for the Section and Committees. Write an article for the *Michigan Business Law Journal*. Check the Section's webpage for information, and look for information distributed on the Section's and Committees list serves, e-newsletters, e-blasts, and the *Business Law Digest*.

The Section's Committees are listed on page 3 of the journal—join a committee to network and get involved. Upcoming Committee events are listed on the Section's webpage at connect.michbar.org/businesslaw. In addition, you can contact the Committee Chairs or Terri Shoop for more information.

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 By Julia Dale

Getting to Know the Corporations, Securities & Commercial Licensing (CSCL) Bureau

The Corporations, Securities & Commercial Licensing (CSCL) Bureau is an administrative agency with ministerial powers and charged with the administration of more than 100 different public acts[1] governing a broad range of commercial licenses and entity types. The Bureau is organized by five major areas of responsibility: Bureau Administration, Corporations Division, Licensing Division, Securities and Audit Division, and Regulatory Compliance Division.

The Licensing Division administers several statutes related to professions/licenses not included in the Occupational Code or the Public Health Code. Examples include: security guard agencies, forensic polygraph examiners, private postsecondary schools, and cemeteries.

The Securities and Audit Division's Audit Section conducts audits of the financial records of licensees who maintain trust or escrow accounts on behalf of the public to ensure compliance with applicable laws and rules. The Examination Section conducts examinations of Investment Advisors and Broker Dealers to ensure compliance with the Michigan Uniform Securities Act (MUSA). Under the Living Care Disclosure Act, living care facilities are reviewed for the adequacy of their disclosures, fairness of advertising, and financial viability. The Division is also responsible for coordination filings, qualification filings, and requests for exemptions, under the MUSA.

The Regulatory Compliance Division provides fair and uniform access to the Bureau's public records, and fair and equal due process to licensees and registrants accused of violating the statutes and rules administered by the Bureau by conducting compliance conferences and coordinating or undertaking legal representation of the Bureau at contested case proceedings. The Division also drafts and serves the Bureau's administrative complaints, subpoenas, and other legal pleadings or orders, and ensures compliance with the resulting final orders.

The Corporations Division administers statutes related to the formation, life, and dissolution of corporations, limited liability companies, limited partnerships, and limited liability partnerships. The Corporations Division also administers the statutes for trademarks, service marks, insignias, and empowerment zones. If a person desires to form one of these entities, qualify an existing entity to transact business or conduct affairs in Michigan, or register a mark or insignia, they must submit the appropriate documents to the Corporations Division.

The breadth of services provided by the Bureau is only surpassed by the statutory requirements that govern them. Over the last year as a Bureau, we have applied a heightened level of scrutiny to some of these requirements for the sake of ensuring consistency across all license and entity types. The two areas garnering more attention are those where there are alleged criminal violations and where there are complaints of unlicensed activity. Of the many statutes administered by the Bureau, only 14 of them include criminal provisions. And, while the vast majority of the violations involve misdemeanors, there are six that contain felony provisions.[2] The criminal provisions existing in the statutes administered by the Bureau present an interesting question regarding the role a state agency should play in enforcing them. This is never truer in light of limited state and local resources.

From an agency perspective, any alleged violation of a criminal statute must be reported to law enforcement; however, the question becomes not only one of resources but also practicality. In the majority of instances, the Acts with misdemeanor provisions state broadly that any person that violates the act is guilty of a misdemeanor. For instance, under the Prepaid Funeral and Cemetery Sales Act, 1986 PA 255, MCL 328.211 *et seq*. any violation of any provision (other those related to the conversion of prepaid funds) of this act is guilty of a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both, for each violation. A common violation might be the failure to file an annual report under that act. It remains to be seen whether or not local law enforcement has the resources or inclination to pursue action for a referral related to the failure to file an annual report.

It is the mission of the CSCL Bureau to support business growth and job creation while protecting the health, safety, and welfare of Michigan's citizens. One of the ways we do this is through the licensing and regulation of certain professions, occupations, businesses and services. While the Bureau does not have the authority to enforce the ethical standards of a profession, or to handle fee disputes, it does have the authority to investigate and to pursue disciplinary action against a license, registration, or permit issued by the Bureau. Further, the Bureau also investigates allegations against a person or business practicing an occupation or profession without obtaining the required license and may take administrative action to enforce the licensing statute.

In the last calendar year, the Bureau opened 91 complaints (across license types) for unlicensed activity. Additional information regarding the license types and number of complaints follows.

License Type	Number of Complaints
Carnival/Amusement	4
Cemetery	6
Postsecondary Schools	9
Prepaid Funeral Providers	13
Professional Investigator	6
Securities	46
Security Guard	2
Unarmed Combat	5

In some instances, the above complaints resulted in disciplinary action and fines. In others, they were referred to the Attorney General's office or to local authorities for further action.

I cannot emphasize enough that, as a Bureau, we work diligently to bring respondents into compliance—not put them out of business. In the coming year, we will continue to scrutinize our own programs, the related statutes, and rule sets, questioning not only our processes but also how we might better coordinate with other agencies and the industries in their administration.

Julia Dale is the Director of the Corporations, Securities & Commercial Licensing Bureau for the State of Michigan; Department of Licensing and Regulatory Affairs. She is a member of the State Bar of Michigan and serves on the Business Law Section Council.

NOTES

1. The following list is not exhaustive of the Acts administered by the Bureau, but does identify those that account for a significant majority of our work:

Proprietary Schools Act, 1943 PA 148, MCL 395.101 *et seq.*

Higher Education Authorization and Distance Education Reciprocal Exchange Act, 2015 PA 45, MCL 390.1691 *et seq.*

Ski Area Safety Act, 1962 PA 199, MCL 408.321 *et seq.*

Professional Investigator Licensure Act, 1965 PA 285, MCL 338.821 *et seq.*

Carnival Amusement Safety Act, 1966 PA 225, MCL 408.651 *et seq.*

Uniform Securities Act, 2008 PA 551, MCL 451.2101 *et seq.*

Cemetery Regulation Act, 1968 PA 251, MCL 456.521 *et seq.*

Rural Cemetery Corporations Act, 1869 PA 12, MCL 456.101 *et seq.*

Cemetery Corporations Act, 1855 PA 87, MCL 456.1 *et seq.*

Cremation Companies Act, 1915 PA 58, MCL 456.201 *et seq.*

Private Security Business and Security Alarm Act, 1968 PA 330, MCL 338.1051 *et seq.*

Polygraph Examiners Act, 1972 PA 295, MCL 338.1701 *et seq.*

Continuing Care Community Disclosure Act, 2014 PA 448, MCL 554.901 *et seq.*

Prepaid Funeral and Cemetery Sales Act, 1986 PA 255, MCL 328.211 *et seq.*

Michigan Unarmed Combat Regulatory Act, 2004 PA 403, MCL 338.3601 *et seq.*

Vehicle Protection Product Act, 2005 PA 263, MCL 257.1241 *et seq.*

Michigan Professional Employer Organization Regulatory Act, 2010 PA 370, MCL 338.3721 *et seq.*

Security Alarm Systems Act, 2012 PA 580, MCL 338.2181 *et seq.*

Michigan General Corporation Statute, 1931 PA 327, MCL 450.1 *et seq.*

Business Corporation Act, 1972 PA 284, MCL 450.1101 *et seq.*

Nonprofit Corporation Act, 1982 PA 162, MCL 4501.2101 *et seq.*

Michigan Limited Liability Company Act, 1993 PA 23, MCL.450.4101 *et seq.*

Uniform Partnership Act, 1917 PA 72, MCL 449.1 *et seq.*

Trademarks and Service Marks Act, 1969 PA 242, MCL 429.31 *et seq.*

Registration of Names and Insignia, 1927 PA 281, MCL 430.1 *et seq.*

2. Those Acts including felony provisions are: the Professional Investigator Licensure Act (MCL 338.823), the Uniform Securities Act (MCL 452.2508), the Private Security Business and Security Alarm Act (MCL 3381053), the Continuing Care Community Disclosure Act (MCL 554.985), the Prepaid Funeral and Cemetery Sales Act (MCL 328.232), and the Michigan Unarmed Combat Regulatory Act (MCL 338.3649).

Tax Developments That Impact Your Business Law Practice

Several recent tax developments may impact your business clients. The below summary will point you to more information.

Cyber Threats and Taxpayer Data

On September 2, 2016, the Internal Revenue Service ("IRS") issued IR-2016-119. The release is a stark warning for tax professionals. There has developed a new wave of cyber threats that allow identity thieves to file fraudulent tax returns by remotely taking over the professionals' computers. The IRS reports approximately two dozen such attacks already. Practitioners are urged to consult Publication 4557, Safeguarding Taxpayer Data: A Guide For Your Business. There have been recent global headlines with the hacking of the Panamanian law firm, Mossack Fonseca, creating the so-called "Panama Papers." The political and legal fall-out is still developing. At least one prime minister resigned and countless criminal and civil investigations around the world have been spawned because of the hack and resulting leaks. Tax professionals, business lawyers, and consultants have treasure troves of important client data including names, addresses, social security numbers, financial account names and account numbers, as well as client passwords. The best liability, privacy, and asset protection can be undone in an instant through the soft underbelly of an unsuspecting accountant or lawyer's website. Unraveling the nuisance with the IRS can be mind-numbing, but the business damage can have severe consequences.

401(k) Rollovers

IRS Revenue Procedure 2016-47 provides for a new form of "self-certification" procedure for a taxpayer that may have missed the 60-day deadline for a 401(k) rollover. As a refresher, 401(k) rollovers must be accomplished within 60 days to avoid tax and potential penalty consequences. Until now, a taxpayer who may have missed the 60-day window had to apply for a private letter ruling ("PLR"). A PLR is an expensive and time-consuming procedure. Many times the taxpayer simply elected to take the economic hit. This was especially true of smaller rollovers.

Under the new procedures, a taxpayer that misses the 60-day window can submit a model IRS letter to the new custodian. The letter provides one of 11 acceptable reasons for the delay. The taxpayer certifies the appropriate reason. The custodian submits the letter to the IRS. It must be noted that the IRS may choose to investigate the submission. If they conclude that the cited reasons are unacceptable, the taxpayer could be subject to the tax and penalty. As a further caution, the willful submission to the IRS of a false statement could lead to criminal prosecution.

New User Fees for Taxpayers Seeking Payment Agreements

The IRS has proposed new user fees for taxpayers seeking payment agreements. The IRS is attempting to incentivize taxpayers to use electronic services including automatic payment plans. IR-2016-108 outlines increases in regular installment agreements to $225 from $120. However, by entering into an online, direct debit installment agreement, the fee could be reduced to $107. Of course penalty and interest continue to apply on unpaid amounts. Will the "discount" encourage taxpayers to proceed online? The IRS estimates about one-third of taxpayers currently seeking installment agreements will benefit.

Brownfield Project State Sales and Income Tax Capture

On the Michigan front, new legislation introduced in the senate would allow certain developments of brownfield projects to capture certain state sales taxes and income taxes to help pay for the development. Consult SBs 1061-65 for further details.

IRS Appeals Conferences by Phone except in Limited Circumstances

Effective October 1, 2016, in-person IRS Appeals Conferences will be as rare as Detroit Lion's playoff victories. The Internal Revenue Manual ("IRM") has been revised and now provides that all conferences will be held by telephone except in specifically listed circumstances. Those "limited" circumstances include substantial books and records that cannot be easily referenced with page numbers or indices, judging the credibility of oral testimony (the taxpayer in most circumstances), special needs taxpayers such as the hearing-impaired, and alternative conference procedures such as post-appeals mediation.

Providing New Records to IRS Appeals

Practitioners should note that if *new* records are provided to IRS Appeals, the IRM directs that the new material go back to the examination division for review and consideration. In other words, holding information back from examination or developing new information post examination will not end the involvement of examination. If you are having a difficult time with the revenue agent, be prepared for more good times.

Conclusion

The fact of the matter is that the years of budget pressures at the IRS are taking a material toll. Chronic understaffing in material areas of the IRS are resulting in a meaningful impact on how taxpayers and their representatives interact with the IRS. Automation topics like computer notices and computerized enforcement action have been covered in previous columns. Revenue agents are under tremendous pressure to move cases sometimes resulting in broad disallowances and adjustments. What

were once routine time extension courtesies are now denied and summary reports issued. It is imperative that practitioners inform their clients at the beginning of any IRS matter that time pressures and deadlines are very real and the potential strategy of simply "going to Appeals" has become a thing of the past.

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The New US/EU Privacy Shield is Effective!

In my column in the Spring 2016 issue,[1] I discussed some of the significant changes that have taken place in the European Union involving privacy law and how the changes may affect U.S. businesses. Much of the discussion started with the invalidity ruling involving the U.S./EU Safe Harbor Agreement. Since then, The U.S. Department of Commerce has led efforts to put into place a replacement. The Privacy Shield, which came into effect in August 2016, is that replacement. If you are working with any companies that move personal data of EU citizens out of the EU and into the United States, this is of critical importance.

EU law prohibits the movement of this data unless certain criteria to protect the privacy of personal information of EU citizens are met. Since the Safe Harbor became invalid, the only options have been the use of Standard Clauses[2] or Binding Corporate Rules[3] (both cumbersome and costly). The U.S./EU Privacy Shield now gives U.S. companies another option, but the penalties for noncompliance are now much harsher. This is in addition to increased restrictions that may be put into place with the General Data Protection Regulation (GDPR)[4] that has been adopted in the EU and will begin to take effect over the next few years.

Obligations of U.S. Companies

The obligations under the Privacy Shield are much more stringent than those under the Safe Harbor Agreement. The key obligations and some of the differences follow.

Informing Individuals About Data Processing

The company must include in its privacy policy a statement that the organization will comply with the Privacy Shield Principles. That becomes an enforceable obligation under U.S. law. When a privacy policy is online, there must be a link to the U.S. Department of Commerce's ("DOC") Privacy Shield website.[5] There must also then be an online process to address complaints. Significantly, the company must inform individuals of their rights to access their personal data and disclose that their personal information can be disclosed under a lawful request by public authorities. Additional disclosures about jurisdiction and liability in cases of onward transfer of data to third parties must also be included.

Providing Free and Accessible Dispute Resolution

Individuals have the right to bring a complaint directly to the company, which is obligated to respond and provide a free recourse mechanism to address and resolve complaints. If the individual chooses to bring a complaint to the EU authority, the DOC is obligated to facilitate prompt resolution. The company must agree to binding arbitration if there is no resolution.

Maintaining Data Integrity and Limiting Use

Privacy Shield participants must limit the use of personal information to the information relevant for the purposes of processing. There are also new rules about data retention.

There Need to Be Clear Agreements and Accountability for Data Transferred to Third Parties

To transfer personal information to a third party acting as a controller, a Privacy Shield participant must first comply with a variety of rules under the Privacy Shield. More importantly, the company must have a contract in place with the third-party controller that provides that data may only be processed for the limited and specified purposes consistent with the consent provided by the individual, and that the recipient will provide the same level of protection as the company is required to provide. The company transferring data has to take affirmative steps to make sure that the third party is complying with the restrictions (think audits), and to protect data if the third party is not complying (such as terminating agreements and/or recovering data from third parties).

Certification

While self-certification with subsequent DOC review is authorized, there is a review process, and the review must be done annually.[6] Even if a company leaves the Privacy Shield, the obligations continue as long as the applicable data is held by the company.

Breach Notice

The company now has a separate obligation to notify the data subject of a breach, as well as to notify the relevant data protection authorities of the breach.

What should a Company Do to Prepare?

To prepare to apply for Privacy Shield certification, businesses should take steps to:

- Develop, maintain, and follow a meaningful and compliant privacy policy.
- Secure personal data and ensure the ability to restrict secondary uses.
- Review any existing agreements that involve the movement or sharing of personal data with vendors, partners, and third parties to ensure that the agreements expressly limit data uses to specified purposes.
- Train employees and develop internal policies to ensure compliance with the Privacy Shield.
- Start documenting everything in preparation for the Privacy Shield application.

Conclusions

The Privacy Shield provides a mechanism that businesses can use to legally move personal data of EU citizens to the United States. The preparation for seeking certification is more stringent and detailed than the requirements under the former Safe Harbor Agreement, but the process looks to be workable for U.S. businesses.

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NOTES

1. *EU Privacy* Developments, 36 MI Bus LJ 1, p. 9-10 (Spring 2016).

2. See "Model Contracts for the transfer of personal data to third countries" at http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm

3. See "Overview on Binding Corporate rules" at http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index_en.htm

4. The GDPR was also discussed in *EU Privacy* Developments, 31 MI Bus LJ 1, p. 9-10 (Spring 2016).

5. The Department of Commerce Privacy Shield website is at https://www.privacyshield.gov/welcome

6. The self-certification process is described on the DOC Privacy Shield website.

Consulting: Is the Grass Really Greener?

After 17 years of working in-house at an automotive company, a friend of mine decided to make a change and take on new challenges. Her name is Rebecca Burtless-Creps. Rebecca is now a consultant at Deloitte in their Enterprise Compliance Services group specializing in Ethics and Compliance. I interviewed her about her decision to take her career in a new direction, and how being a consultant compares with her experiences in-house and at a firm. Here are her words of wisdom to help guide others who may be contemplating a career change.

"I Need a Change"

When is that last time you did something new? Are you in a rut? Not many people feel that they have reached the top of their career, perfected all the necessary skills, and have no need to learn anything new. For those of you who do not feel a need to learn anything new, congratulations and I invite you to share your expertise by writing the next article for this column. When I asked Rebecca what made her realize that she needed a change, the answer was quite simple. She wanted to grow and to learn more. She wanted to step outside her comfort zone and to stretch herself.

With her sights set on a change, Rebecca then put together a plan for her transition. She used many of the tools mentioned in one of the articles in this issue, "Professional Development: Take the Next Step in your Career," which I co-authored with Stewart Hirsch from Strategic Relationships, LLC. She realized that the same key skills for in-house counsel professional development are also critical as a consultant: communication, business understanding, and leadership. As an experienced in-house attorney, she had a good grasp of these skills but realized that she would need to expand her expertise to be a successful consultant. Rebecca used these tools to begin the next step in her career. I asked her to share how these tools continue to be critical to her success.

Communication

As Rebecca began looking for a new position, she knew communication would be fundamental to her search. She began reaching out more actively to her network, which included being more active on social media and speaking at conferences. For example, she sought opportunities to present at national conferences like the Ethics & Compliance Initiative Annual Conference.

Communication continues to be a fundamental skill she seeks to build. For example, listening skills are vital when Rebecca meets with new clients. Really listening to each client's concerns and ideas before giving feedback and advice allows her to hone her messages to have more impact on her audience. She is also learning to communicate with new goals in mind since her client base is no longer easy to define. When working in-house, the people whom you need to reach are fairly well defined. Rebecca now needs to communicate the value of her services to a broader group. Pursuing opportunities to write articles and to communicate with potential clients, as well as effectively using social media, are all part of her plan for development.

Business Understanding

Understanding a client's business is critical to being able to create something that they will find valuable. To succeed in consulting, Rebecca needed to translate her experience and knowledge to show the value of how she can help others by offering creative solutions, crafting a strategy, accelerating projects, and more. Her in-house experience allows her to easily use her business understanding to provide her clients helpful and creative solutions.

In addition, Rebecca has found that she can apply her business acumen to her new role as a consultant in two ways. First, she uses it to understand her clients' business, as well as the business of consulting and marketing. As a consultant, she had to learn a different business model where the workload is less predictable. Now, she uses more forecasting to estimate the expected workload on projects to ensure team members remain productive week after week. She found this to be a new challenge since she was accustomed to focusing on prioritizing time and resources when she was in-house counsel, where frequent requests from the business and continuous improvement projects provide a constant workload.

Leadership

Strong leadership skills often help you to progress in your career. This includes building emotional intelligence (being able to discern emotions—including your own), which is especially useful as a consultant. As in-house counsel, your clients may not have much choice about whether to consult with you. As a consultant, if you do not build rapport and trust with your client, they have many other options and may not return to work with you again.

It is also critical to have an "executive presence," which is a combination of both leadership and communication. Consultants frequently meet new people and speak at high-stake meetings. Cultivating your gravitas, communication and appearance pays dividends on a daily basis. Additionally, what you communicate needs to be strategic. If a client is seeking help, they are looking for a strategic vision. They are looking for you to help them create a strategy that will achieve their goals, not just continue the status quo.

Rebecca's journey as a consultant has just begun, but you can see how professional development was vital to achieving her goal to find a new position and continues to be vital to her continued growth. Stepping out of your comfort zone may be frightening at first, but the growth and reward can be incredible. I dare you

to try it. If you would like to know more about Rebecca's journey, you can also contact her through LinkedIn or e-mail her at rburtlesscreps@deloitte.com. Now it's time for you to take your first step and put together a plan to invest in your professional development. It turns out the grass grows the same way on both sides of the fence.

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Michigan Court-Appointed Receivers: Clarification of Powers

By Sara MacWilliams and Jason D. Killips

Fast Facts

- A corporation's rights to sue are valuable assets.
- Corporations have standing to pursue causes of action against their current and former officers and directors for breach of fiduciary duty.
- When a corporation is placed in receivership, the receiver has standing to pursue the corporation's claims against current and former officers and directors for breach of fiduciary duty.

Introduction

What power does a court-appointed receiver have to pursue breach-of-fiduciary-duty litigation belonging to the corporation, against the officers and directors he or she displaced in becoming a receiver? Until recently, the answer was unclear. Michigan shareholders have long had the right to pursue derivative suits in the corporation's name and seek recovery for breach of duties owed to the corporation,[1] but it was not clear whether a court-appointed receiver, who was personally never owed any fiduciary duties by the former management, could properly pursue breach of fiduciary duty claims.

That changed on November 17, 2015. In *Coppola v Manning*,[2] the Michigan Court of Appeals held in a *per curiam,* unpublished opinion that the receiver could stand in the shoes of the corporation and pursue any cause of action that the corporation could have, including a direct breach-of-fiduciary-duty claim against officers and directors. This decision finally offered clarification as to the scope of the power of a court-appointed receiver under Michigan law.

Choses In Action Are Valuable Corporate Assets

Corporations derive value from the assets they own and control, and rights to bring suit, or "choses in action," constitute valuable property. It is well established that corporations have the power and legal standing to bring causes of action for damages caused to the company.[3] It follows that when a corporation is financially insolvent, one of the most valuable assets that may remain is any chose in action existing against the officers and directors who drove the company into insolvency.

If the corporate officers and directors did drive the company into insolvency, that is actionable if it was done in violation of their fiduciary duties. It has long been the rule that corporate officers and directors owe fiduciary duties to corporations and their shareholders, and when those duties are breached, they are liable for damages incurred as a result of the breach.[4] An insolvent corporation's ability to pursue these actions is a necessary and powerful tool for maximizing the corporation's value for its shareholders. Without it, directors and officers who engaged in bad-faith or self-dealing actions would escape the consequences of their conduct, leaving the corporation and its shareholders with no recourse.

Of course, corporations act through the people who control them, and no corporate officer or director would ever agree to sue him or herself for breach of fiduciary duty. Shareholders should have a path to, in the apt words of Judge Richard Posner of the Seventh Circuit Court of Appeals, ensure that corporations stop acting as "evil zombies" doing management's bidding so that, once "[f]reed from th[eir] spell," the corporation may finally pursue its best interests.[5]

Receivers Maximize Corporate Assets by Pursuing Valuable Litigation

There are different ways to accomplish the goal of rescuing corporations from their zombie spells and forcing them to pursue their best interests. Many insolvent corporations file for bankruptcy protection. When insolvent corporations take the well-trodden march into bankruptcy court, bankruptcy trustees are responsible for managing the bankruptcy estate. Typically, bankruptcy trustees examine whether the directors and officers, who ran the corporation, may

have caused or contributed to the insolvency through breaches of fiduciary duty. Thus, bankruptcy trustees routinely file lawsuits to seek damages that were wrongfully caused by corporate officers and directors who breached their fiduciary duties to the corporation.[6]

However, if the directors and officers remain in control, they may avoid bankruptcy, or the corporation might have other reasons to avoid that path. In those situations, the Michigan Court Rules and Michigan Business Corporation Act provide for an alternative: circuit courts may appoint receivers over corporations.[7] Acting outside the strict confines of the bankruptcy code, unique receivership orders can be crafted, and unique remedies implemented. With careful planning, this flexibility can be a powerful asset.

If the corporate officers and directors did drive the company into insolvency, that is actionable if it was done in violation of their fiduciary duties.

A court-appointed receiver's role is similar to the role of a bankruptcy trustee who is responsible for the liquidation and other duties related to a bankrupt corporation's estate. A court-appointed receiver assumes fiduciary duties to all parties appearing in the receivership action for a corporation in the same manner as a bankruptcy trustee assumes fiduciary duties to all parties appearing in a bankruptcy proceeding.[8] A receiver acts as "an arm of the court," an officer who takes an "unbiased and impartial" view of the corporation.[9] The receiver is charged with managing corporate assets, debts, liabilities, and ongoing business operations, with the goal of preserving and maximizing the receivership estate during the pendency of legal proceedings, and even files routine reports regarding the receivership estate. Specifically, the Michigan court rule governing receiverships, MCR 2.622, at subpart (E) defines the powers of a receiver as follows:

> (1) Except as otherwise provided by law or by the order of appointment, a receiver has general power to sue for and collect all debts, demands, and rents of the receivership estate, and to compromise or settle claims. (2) A receiver may liquidate the personal property of the receivership estate into money. By separate order of the court, a receiver may sell real property of the receivership estate. (3) A receiver may pay the ordinary expenses of the receivership but may not distribute the funds in the receivership estate to a party to the action without an order of the court. (4) A receiver may only be discharged on order of the court.

However, because there is far less precedent governing receiverships in Michigan courts than there is governing bankruptcies, confusion has arisen regarding what claims a receiver appointed by Michigan circuit courts may properly pursue. MCR 2.622 provides only that receivers have "general power to sue for and collect all debts, demands, and rents of the receivership estate, and to compromise or settle claims."[10] The Michigan Business Corporation Act (MBCA) contains scant details about the operation of corporate receivership in the event of an insolvency, and until recently, the Michigan Court of Appeals and the Michigan Supreme Court had not squarely addressed the limits of corporate receivership before the enactment of the MBCA.

The *Coppola* Decision

The recent court of appeals opinion in *Coppola v Manning* helped clarify this area of the law. In the unpublished opinion, the Michigan Court of Appeals examined a court-appointed receiver's powers and confirmed that corporate receivers, like bankruptcy court trustees, may properly pursue the corporation's causes of action for breach of fiduciary duty against former officers and directors.[11] Following the Michigan Supreme Court's June 28, 2016 rejection of the defendants' application for leave to appeal in *Coppola*, the Michigan Court of Appeals' decision is now persuasive precedent.

Coppola was brought by the court-appointed receiver of an Ann Arbor-area company. The stipulated order appointing the receiver gave him the general power to "initiate, prosecute, defend, intervene in, or become a party to" any legal actions that "he deems appropriate to carry out his duties." After he began his work, Coppola inspected the company books and records and determined that the former directors and officers had committed egregious breaches of fiduciary duty, causing the financial decline that led to his appointment. He thus determined that his fiduciary duties as a receiver mandated that he file suit, and he did so.

However, since the receiver was appointed by a circuit court subject to the MBCA rather than a bankruptcy trustee, the defendant directors and officers challenged the receiver's authority to bring suit, claiming that the action was unprecedented. The Washtenaw County Circuit Court dismissed the

lawsuit against the defendant directors or officers for breach of fiduciary duty, holding that the receiver did not have standing under either the MBCA or receivership order to file the lawsuit. On November 17, 2015, the Michigan Court of Appeals reversed, holding that the breach-of-fiduciary-duty claims that Receiver Coppola was asserting belong to the company, and, thus, a court-appointed receiver who takes control of the company necessarily takes control of those claims.

Coppola extended established principles of law to a new factual context by presenting a straightforward but previously unanswered legal question: May a receiver initiate and prosecute a breach-of-fiduciary-duty claim against the company's former officers and directors? The decision gives persuasive and practical guidance to parties, lawyers, and judges involved in receiver-initiated lawsuits. The court explained that a receiver's authority to act is derived from "statute and court rules and from the order of appointment and specific orders which the appointing court may thereafter make."[12] The decision also stated that a receiver has the power to pursue all causes of action belonging to the corporation.[13] This is true because, when taking control of an entity's property, a receiver will "stand in the shoes" of the entity in receivership, and thus the receiver can pursue claims that could be pursued by that entity.[14] Such suits are properly brought in the receiver's own name because he or she is the real party in interest with authority to sue on behalf of the receivership entity.[15]

The soundness of this doctrine is clear when the opposite outcome is considered. What if the Michigan Court of Appeals had ruled that the receiver lacked standing to pursue these claims? Under such a ruling, a receivership would have been dramatically changed from a tool to maximize the value of the corporate receivership estate into an escape hatch through which wrongful directors and officers could flee the consequences of their action. A director or officer who engages in self-dealing would only need to put the corporation into a receivership to avoid being held responsible for potential liability related to the corporation.

Conclusion

The *Coppola* Court clarified the scope of the powers of a receiver based on established principles of Michigan law, providing importance guidance regarding a court-appointed receiver's duties and powers. A court-appointed receiver has the authority to pursue every cause of action that the corporation could have, including an action against directors or officers who breached their fiduciary duties to the corporation.

A court-appointed receiver's role is similar to the role of a bankruptcy trustee who is responsible for the liquidation and other duties related to a bankrupt corporation's estate.

NOTES

1. MCL 450.1489.

2. No 323994, 2015 Mich App LEXIS 2152 (Nov 17, 2015)(unpublished).

3. MCL 450.1261(b) (a corporation has the power to "sue and be sued . . . in the same manner as natural persons").

4. MCL 450.1541a(1) (corporate officer's fiduciary duties require acting (a) "in good faith," (b) "with the care an ordinarily prudent person in a like position would exercise under similar circumstances," and (c) in a "manner he or she reasonably believes to be in the best interests of the corporation"); see also, *Wagner Elec Corp v Hydraulic Brake Co*, 269 Mich 560, 564, 257 NW 884 (1934); *Production Finishing Corp v Shields*, 158 Mich App 479, 485, 405 NW2d 171 (1987).

5. *Scholes v Lehmann*, 56 F3d 750, 754 (7th Cir 1995).

6. 11 USC 541 (defining property of the estate) ; 11 USC 704(a)(1)(trustee's duties include collecting property of the estate); *Stanziale v Nachtomi (In re Tower Air, Inc)*, 416 F3d 229 (3rd Cir 2005) (In opinion that opens with the question "How far will the federal courthouse door swing open for a direct suit against corporate directors and officers for breaches of fiduciary duties?" court held that complaint for breach of fiduciary duty was properly pled)

7. MCL 600.2926 (circuit courts, "in the exercise of their equitable powers, may appoint receivers in all cases pending where appointment is allowed by law"); see also MCR 2.622, governing the appointment of receivers.

8. MCR 2.622(A); *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 528–29, 730 NW2d 481 (2007), appeal granted in part, cause remanded, 480 Mich 910, 739 NW2d 622 (2007).

9. *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 392, 853 NW2d 421 (2014).

10. MCR 2.622(E)(1).

11. *Coppola v Manning*, No 323994, 2015 Mich App LEXIS 2152 (Nov 17, 2015)(unpublished).

12. *Coppola*, at *5, citing *Band v Livonia Assocs*, 176 Mich App 95, 108, 439 NW2d 285 (1989) (citation omitted).

13. *Coppola*, at *5, citing MCR 2.622(E)(1).

14. *Coppola*, at *5, citing *Price v Kosmalski* (*In re Receivership of 11910 S Francis Rd)*, 492 Mich 208, 226 n 39, 821 NW2d 503 (2012); *HG Vogel Co v Original Cabinet Corp*, 252 Mich 129, 132, 233 NW 200 (1930); and *Stram v Jackson*, 248 Mich 171, 183, 226 NW 888 (1929).

15. *Coppola*, at *6, citing *Stephenson v Golden*, 279 Mich 710, 762, 276 NW 849 (1937); *McPherson v Gregory*, 271 Mich 580, 583-584, 260 NW 767 (1935).

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NHTSA's New Era of Regulatory Scrutiny and the Challenges It Places Upon Automotive Suppliers

By Thomas S. Bishoff, Benjamin W. Jeffers, and Stefanie Reagan

Introduction

For many suppliers in the automotive industry, it is likely not a matter of if their products will be the focus of a vehicle recall by an automaker, but a question of when and at what cost as a result of cost-recovery initiatives that flow downstream into the supply chain. While the GM ignition switch, Takata air bag inflator, and VW emissions scandals garnered the headlines, the recent data for the industry as a whole has been staggering. In 2015 alone, the National Highway Traffic Safety Administration ("NHTSA") oversaw a record-setting nearly 900 different recalls concerning allegedly defective parts in millions of vehicles.[1]

Although the election of Donald Trump raises questions about the future direction and regulatory emphasis of NHTSA, the regulatory scrutiny leading to recalls is unlikely to abate anytime soon. This is to be expected for component parts that traditionally are considered critical to the safety of a vehicle's occupants, such as seatbelts, air bags, and brakes. But recent events have triggered NHTSA's interest in getting ahead of the regulatory curve in order to foresee and hopefully prevent unintended consequences of new technologies being installed in vehicles too. Suppliers of emerging technologies —like software, that enable communications between after-market devices and a vehicle's control systems—may now encounter scrutiny at development, not years following implementation when the government finally has collected enough in-use data to understand its effects.

In Section I of this article, we discuss the current regulatory environment and NHTSA's initiatives to demand a more proactive, collaborative approach to regulating safety as to emerging technologies. Due to this climate and NHTSA's willingness to push for defect determinations based on broad interpretations of the Motor Vehicle Safety Act, it is likely that recall activity will continue and impact new market participants just as it has for suppliers of traditional safety-related components. In Section II, we briefly examine some challenges facing Tier 1 and other suppliers brought about by this new regulatory era.

Section I: Regulatory Environment

Suppliers and automakers will continue to face significant scrutiny from regulators in coming years. NHTSA has recently called for a more proactive and collaborative approach to preventing safety-related defects in vehicles, and demanded more industry "accountability" when problems arise that are not addressed quickly and effectively. This is particularly true with respect to the development of emerging technologies as vehicles make further use of cellular networks and contain more automated capabilities.

NHTSA Set a New Tone in a Critical Self-Assessment of Its Own Performance

NHTSA's pronouncements about the need for proactive action came on the heels of NHTSA's self-assessment of its own regulatory shortcomings and desire to change. In June 2015, NHTSA issued a scathing critique of its response and conduct in relation to the GM ignition switch recall, which NHTSA viewed as one of the most significant cases in its history. The report, NHTSA's Path Forward, provides a detailed timeline of "what NHTSA knew and when it knew it" concerning field events and data that ultimately were shown to be related to an alleged "faulty" ignition switch in millions of GM vehicles that could impact performance of the air bag systems.[2] Of particular note was NHTSA's realization that, during the early investigation phase, its personnel misunderstood a key technological function of the air bag systems in relation to the ignition switches – that the air bags were designed to disarm themselves when the key was not in the "run" vehicle position unless the system had sensed that a crash was in progress.[3] NHTSA stated that the "unintended consequence of this [de-

sign] decision was that it elevated the ignition switch to the level of a safety-critical component, which was not communicated or well understood within GM and contrary to the expectations of NHTSA's investigators."[4] A key takeaway from the Path Forward report is NHTSA's concern about its ability to effectively monitor and regulate emerging technologies.

Vowing not to be caught off-guard again in terms of how new technology interacts with and affects critical vehicle systems, NHTSA committed in the Path Forward to enhance "its knowledge of new and emerging technologies" and to implement a "systems safety approach to defects investigations" that "requires investigators to study and understand how vehicle systems interact and interrelate and directs them to examine possible explanations (even seemingly remote ones) of a safety issue to help determine whether a defect may exist."[5] The Path Forward also signaled NHTSA's intent to be more proactive in its investigatory approach and in its analysis of technology, including revamping its processes in the Office of Defects Investigation ("ODI").[6] The Path Forward report likewise revealed that NHTSA will demand more open communication from the Original Equipment Manufacturers ("OEMs") and suppliers—it lists various steps it would take to increase NHTSA's ability to collect information and to audit stakeholders. These include putting OEMs on notice when ODI is monitoring what it considers a high-hazard issue but has insufficient evidence of a possible defect, providing more clarity to manufacturers about the Early Warning Reporting requirements, that necessitate additional documentation from companies following reports of crashes and field events, increasing options for consumers to report issues of concern to NHTSA, and demanding, through ODI, that manufacturers produce more embedded vehicle data. NHTSA also signaled its willingness to conduct more audits and enter into consent decrees. All such steps are intended, according to NHTSA, to increase the "accountability" of the automotive industry.[7] The Path Forward clearly set the stage for more to come.

The regulatory scrutiny leading to recalls is unlikely to abate anytime soon.

Congress Joined in the Demand for More Industry Scrutiny in Late 2015

The desire for more accountability was on full display in December 2015 when the Fixing America's Surface Transportation Act, or "FAST Act," was signed into law.[8] While most of the attention on the legislation is focused on its provisions for new funding for transportation infrastructure, the law also includes significant policy changes related to motor vehicle safety and enforcement actions by NHTSA. For example, the FAST Act will:

- Extend the time period that automakers and tire manufacturers must pay for defect remedies for motor vehicles and tires from 10 years to 15 years;
- Require a senior company official to sign and certify that submissions in response to a request for information in a safety defect or compliance investigation do not contain any untrue statements or omit a material fact that could make the statement misleading;
- Increase the period companies must retain safety records from 5 years to 10 years;
- Incentivize dealers to check for open recalls at the time of service for all customers and precludes rental car companies from renting vehicles that are subject to an open safety recall until they are fixed;
- Pay 10 percent to 30 percent of the collected monetary sanctions to whistleblowers for original information about possible motor vehicle safety violations; and
- Triple the maximum cap on civil penalties for violations of motor vehicle safety standards and laws from $35 million to $105 million upon NHTSA's certification that its final rule on civil penalty factors has been completed.

The whistleblower provisions of the FAST Act, widely seen as a response to the Takata and other recent recalls, are of particular interest.[9] They apply to employees or contractors who provide "original information" relating to motor vehicle defects, non-compliance, or violations of any reporting requirement, that are likely to cause an unreasonable risk of death or serious injury. The whistleblower can be any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership. Whistleblowers can receive up to 30 percent of collected monetary sanctions.[10]

NHTSA Further Articulates Its More Aggressive Position in Early 2016

Weeks after the FAST Act was enacted, NHTSA spearheaded another initiative focused on proactive cooperation among NHTSA and the automotive industry in order to increase vehicle safety. In January 2016, 18 automakers[11] and NHTSA agreed to a written statement called the Proactive Safety Principles.[12] A key theme among the list of goals is evident from the name of the document itself—the need for industry to be "proactive" in its approach to ensuring motor vehicle safety. Coupled with the aspiration that stakeholders should "collaborate" and share data and scientific information, the message is clear: NHTSA expects industry participates to try and predict problems and get ahead of issues, not simply to investigate and react to field events when they unfold.

NHTSA also signaled that it would not rely just on the aspirational goal of industry cooperation, and instead would use its full enforcement powers to regulate emerging vehicle technology. In April 2016, it NHTSA issued a Request for Public Comment on Enforcement Guidance Bulletin 2016-02: Safety-Related Defects and Emerging Automotive Technologies ("Proposed Guidance").[13] The Proposed Guidance contains, on the one hand, a basic primer of NHTSA's view of its own jurisdiction and enforcement powers under the National Traffic and Motor Vehicle Safety Act, as amended ("Safety Act").[14] NHTSA has authority over motor vehicles, original equipment installed in or on the vehicles, and also motor vehicle replacement equipment. NHTSA may determine the existence of a defect that poses an unreasonable risk to safety and order a manufacturer to conduct a recall.[15]

The real import of the Proposed Guidance, however, is NHTSA's message that it was planting a regulatory flag in the area of emerging technology, including over suppliers of software and automated vehicle technology.[16] NHTSA clearly views after-market technology as within its authority to scrutinize insofar as that technology affects vehicle component performance too, noting for example that "software located outside the motor vehicle (*i.e.*, portable devices with vehicle-related software applications) could be used to affect and control a motor vehicle's safety systems."[17] Software often interacts with a motor vehicle's safety systems such as braking, steering, and acceleration features, therefore the functionality of those systems could be impacted by after-market software updates.[18] If software leads to a performance failure, then it "presents an unreasonable risk to safety" and itself constitutes a "defect" that warrants a recall.[19]

NHTSA also explained that it was particularly concerned about cybersecurity and the ability of hackers to interfere with a vehicle's computerized control systems. NHTSA is well aware that automobiles are in many respects drivable computers that contain microprocessors and electronic control units, miles of wiring, and millions of lines of software code.[20] An example of cybersecurity vulnerability arose just ten months prior to NHTSA issuing the Proposed Guidance. On July 24, 2015, FCA US LLC ("FCA") initiated a voluntary safety campaign of approximately 1.4 million vehicles due to a "software vulnerability" that could allow third-parties access to networked vehicle control systems through vehicle cellular/WiFi connection capabilities.[21] The concern was that the vehicles were subject to a cyber-attack from outside hackers.[22] Although FCA denied that its vehicles had a "defect" as defined in the Motor Vehicle Safety Act, 49 USC 30102(a)(3),[23] FCA nonetheless made a software update available to consumers as a remedy, after having mitigated the potential effects of the vulnerability by having the wireless service provider close the open cellular connection.[24]

Clearly NHTSA's staff plans to be more proactive in evaluating risks like these going forward. In contrast to an approach of evaluating technology over time after being informed by years of in-use experience, the Proposed Guidance reveals NHTSA's intent to regulate, and even deem equipment to have a "defect," based on the probabilities and foreseeability of an event in relation to opportunities and abilities of third-parties to exploit the technology. NHTSA Administrator Mark R. Rosekind's prepared written remarks at the July 2016 Automated Vehicle Symposium noted that in the past, it was only after technology was proven and converges that NHTSA wrote "new safety standards and then put them into place."[25] But because technology is changing so fast and any given "rule [NHTSA] writes today would likely be woefully irrelevant by the time it took effect years later," NHTSA intends to be more nimble, and more specific, in developing guidance for industry as opposed writing tomes of regulations. It looks to move away

The desire for more accountability was on full display in December 2015 when the Fixing America's Surface Transportation Act, or FAST Act, was signed into law.

from what Administrator Rosekind labeled a "slow," "legacy approach."[26] Indeed, NHTSA explicitly stated in the Proposed Guidance that it would not necessarily wait for field events or actual incidents of hacking.[27] If a vulnerability exists in a vehicle's "entry points" (e.g., Wi-Fi, infotainment systems, the OBD-II port) that allows remote access to a vehicle's safety systems, then "NHTSA may consider such a vulnerability to be a safety-related defect compelling a recall."[28]

Additional concrete evidence that the regulators intend to change their approach also is evident in the U.S. Department of Transportation's publication on September 20, 2016, of a "Federal Automated Vehicles Policy."[29] The policy sets forth sweeping guidance for industry concerning the DOT's and NHTSA's approach in regulating "highly automated vehicles," or "HAVs." The policy outlines "guidance" to industry for the predeployment design, development and testing of HAVs prior to commercial sale or operation on public roads, advances a "model" state policy for state involvement, highlights NHTSA's regulatory powers with respect to HAV technology, coupled with a promise that NHTSA will speed up its review process for HAV-related interpretations, and lists new potential regulatory powers and "tools" that the DOT and NHTSA may consider in order to enhance the speed in which they respond to industry developments.

NHTSA also signaled that it would not rely just on the aspirational goal of industry cooperation, and instead would use its full enforcement powers to regulate emerging vehicle technology.

And no one who has followed current events can doubt NHTSA's resolve to use its enforcement powers in this current environment. The Proposed Guidance, for example, was issued while NHTSA continued to manage the Takata air bag inflator matter, which Administrator Rosekind called the "largest and most complex recall in U.S. history."[30] Totaling approximately 28.8 million inflators as of early 2016, NHTSA announced on May 4, 2016, an expansion of the recall to include an additional 35 to 40 million inflators.[31] The schedule for replacing these inflators will be phased over a period of years pursuant to a Coordinated Remedy Program issued to Takata and the affected automakers.[32] Even before the dramatic expansion of the recall, NHTSA acknowledged that its oversight of the recall and the Coordinated Remedy Program constituted "perhaps the most aggressive use of the agency's enforcement authority in its history."[33]

It is against this backdrop that we turn to an examination of some challenges facing Tier 1 and other suppliers brought about by this new regulatory era.

Section II: Supplier Challenges

Historically, recalls began with field incidents and reports that percolated up either to OEMs or NHTSA through dealer repair and warranty work and reporting, customer complaint hotlines, or complaints submitted directly to NHTSA, such as Vehicle Owners Questionnaires, or VOQs. Generally speaking, a sufficient number of incidents or complaints triggered more scrutiny and elevated the level of consideration and analysis within OEMs and, in some instances, NHTSA. Isolated field incidents were often analyzed, but frequently not pursued robustly given the lack of data and information. For example, VOQs, which are consumer-populated forms submitted directly to NHTSA, often do not identify precisely the component or condition in the vehicle at issue. Early identification of safety concerns was frequently more art than science. In addition, OEMs sometimes did not act to implement service initiatives, such as issuing technical service bulletins ("TSBs") to their dealer networks or conducting voluntary safety campaigns or recalls until the evidence was clear that action needed to be taken.

The new regulatory environment has changed all of this. NHTSA is demanding better and more proactive analysis of field incidents and data. Perhaps the best example of this is found in the July 2015 Consent Order between NHTSA and FCA.[34] Among other things, the Consent Order requires FCA to appoint an independent monitor who is to prepare a monthly list of every safety-related issue under consideration by FCA's vehicle safety department.[35] It also requires that "FCA US shall meet with NHTSA on a monthly basis for one year to discuss new TSBs or other dealer communications reportable under Section 579.5 and decision-making associated with safety-related or high frequency warranty claims or safety-related field reports, as well as any other actual or potential safety-related defect issues identified by the Independent Monitor."[36] NHTSA recently exercised its option under the Consent Order to renew the monthly submissions and meetings for an additional year, through July 2017, in order to "facilitate continued communication between FCA and NHTSA on potential defect issues."[37]

Similar scrutiny has been imposed upon General Motors, which entered into a Consent Order with NHTSA in May 2014 in connection with its ignition switch recall.[38] Under the terms of GM's Consent Order, GM was directed to improve its processes for identifying and reporting safety-related defects more quickly, including improving its ability to analyze data, improving information-sharing across function areas and disciplines, and increasing the speed with which recall decisions are made.[39] It is a sure bet that other automakers have taken note of this and are examining, if not overhauling, their processes and procedures for detecting, analyzing, and reporting safety-related issues.

The new regulatory environment presents several unique challenges to Tier 1 and other suppliers that supply and support their OEM customers. *First*, because NHTSA is demanding more proactivity and quicker analysis of data and field incidents, the number of root cause investigations is increasing in the automotive industry at a rapid pace, which requires a significant expenditure of time and resources by Tier 1 and other suppliers. This is most acute in the engineering ranks of suppliers, where requests for technical information are usually directed initially. Engineers are being to ask to revisit and make a deep dive analysis of programs that were developed and launched several months, if not years, ago. Doing so shifts vital resources away from new programs and product development. Although engineers are usually the first line of response, root cause investigations almost always implicate and require support from other aspects of a supplier's business, such as the purchasing and legal departments.

Second, OEMs are mirroring NHTSA's demands for proactivity upon their supply base. Shortly after NHTSA's Office of Defects Investigation hangs up the phone with the OEM compliance manager, the compliance manager is calling his counterpart at the Tier 1 component supplier demanding lot acceptance test data and a complete history of any part changes. In response, suppliers will need to be more proactive in how they seek and gather information internally and from their sub-suppliers, particularly during root cause investigations. In other words, now is a good time for a supplier to confirm that its quality control policies and procedures are robust and being followed by its personnel. Being responsive to requests for information will ensure that suppliers are not perceived as dragging their feet or at odds with NHTSA's stated goals. It will also have a more practicable impact: suppliers will be in a better position to support their customers and shape the solution if they are actively engaged in the process of gathering relevant data and information.

Third, not only is the frequency of root cause investigations increasing, but they are occurring earlier in a vehicle's life cycle, often before warranty and field data is fully developed. Without adequate data, it is often difficult to identify the "true" root cause from among several competing theories. This too counsels in favor of proactive supplier engagement.

Fourth, and somewhat related to the point above, suppliers are increasingly taking a greater role in root cause investigations during their infancy. This is in contrast to previous years when OEM engineers often kept suppliers in the dark about the progress of the root cause investigation and conclusions of defect. But being actively involved in the root cause investigation process early on is not a bad thing. Indeed, suppliers should consider seeking a greater role in root cause investigations at early stages. Although this may seem counter-intuitive to the automotive supply base, the reality is that fast-moving root cause investigations lead by OEMs that are not well informed may wrongly implicate a supplier's goods, or focus on a root cause that is not supported by the complete range of data or testing. Stated differently, when one of NHTSA's enumerated goals is to increase the speed of recall decisions by OEMs, and hence the root cause investigations that undergird them, it is reasonable to assume that the frequency of instances where the OEM does not get it right, or does not identify the "true" root cause, may increase.

Fifth, fast-paced root cause investigations and early recall decisions may accelerate the time period in which a supplier should put a sub-supplier on notice of breach under the Uniform Commercial Code (UCC) in circumstances where the sub-supplier's component or part is determined to be the root cause.[40] UCC 2-607 contains a significant notice provision that, if not satisfied, bars a buyer "from *any* remedy" against a seller for breach of the party's contract. That section is codified at MCL 440.2607(3)(a) and provides in relevant part:

(3) Where a tender has been accepted

NHTSA is demanding better and more proactive analysis of field incidents and data.

> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]

Given the significance of this issue in terms of its impact on a supplier's legal rights and remedies, it merits some examination of Michigan law, which, unfortunately, is not well-settled when it comes to the issue of what constitutes sufficient notice.

Comment 4 to § 2-607 is often relied on by Michigan courts to determine whether the notice is sufficient. Comment 4 explains that the "content of the notification need merely be sufficient to let the seller know the transaction is still troublesome and must be watched." However, the comment further states that "[t]hat the notification which saves the buyer's rights . . . need only be such as informs the seller that the transaction is claimed to involved a breach, and thus opens the way for normal settlement through negotiations."[41] As noted by the Michigan Court of Appeals in *American Bumper & Mfg Co v Transtechnology Corp*,[42] these sentences have been interpreted as providing a "lenient" standard (the former sentence) and a "strict" standard (the latter sentence) as it relates to the adequacy of the notice. While the court in *American Bumper* did not adopt either standard, the court concluded that the notice in that case was not adequate because "the notice did not satisfy the policies underlying the UCC's notice provision and plaintiff's conduct did not satisfy the UCC's standard of commercial good faith."[43] Specifically, the court identified the following purposes of the UCC's notice requirements:

> (1) to prevent surprise and allow the seller the opportunity to make recommendations how to cure any nonconformance;
>
> (2) to allow the seller the fair opportunity to investigate and prepare for litigation;
>
> (3) to open the way for settlement of claims through negotiation; and
>
> (4) to protect the seller from stale claims and provide certainty in contractual arrangements.[44]

The *American Bumper* case involved a contract between plaintiff, an auto parts supplier, and defendants, suppliers of U-nuts, which plaintiff required to fulfill plaintiff's contract with Ford to manufacture the front bumpers for Ford F-series pickup trucks.[45] During the course of the contract, defendants changed the coating of the U-nuts from a phosphate coating to a zinc, water-based coating pursuant to Ford's requirements and approval.[46] In late November 1993, Ford received reports from its dealers that the U-nuts were failing, causing the bumpers to become loose or fall off. Ford informed plaintiff of the same and in December 1993, plaintiff canceled the contract with defendants.[47] In February 1994, Ford issued a report identifying the causes of the U-nut failure and finding plaintiff and defendants at fault.[48] In June 1994, plaintiff presented a report to Ford that exonerated plaintiff and defendants and concluded that Ford was at fault for failing to test the coating.[49] Ford and plaintiff entered into settlement negotiations in March 1995 and an agreement was reached in May 1995.[50] However, defendants were not aware of, or involved in, the settlement negotiations. Plaintiff did not notify defendants of the plaintiff's report or the settlement, and instead, filed suit against defendants in August 1997, nearly three and half years after canceling the contract with defendants.[51] Plaintiff sued defendants for breach of express and implied warranties and breach of express and implied indemnification.[52] Defendants moved for summary disposition based on plaintiff's failure to comply with the UCC notice provisions under MCL 440.2607(3).

As noted above, the court in *American Bumper* did not adopt a strict *or* lenient interpretation of MCL 440.2607(3)(a) but found that plaintiff's notice, the filing of the lawsuit, was not adequate because such notice did not satisfy the policies of the UCC or the standards of commercial good faith.[53] The court concluded that merely notifying defendants of a problem, but not notifying them of the breach until the suit was filed three and half years later, did not satisfy the policies of the notice provision.[54]

The Michigan Court of Appeals had another opportunity to revisit the notice requirements under § 2-607(3) in *Gorman v American Honda Motor Co, Inc.*[55] There, plaintiff, a new car buyer, brought an action against defendants, the dealer and manufacturer, for breach of warranty and other claims alleging that the 2007 Acura MDX she purchased was defective.[56] The trial court granted the defendants' motion for summary disposition because, among other reasons, plaintiff failed to notify defendants of plaintiff's breach of warranty claims within a rea-

sonable time.[57] The court rejected plaintiff's argument that UCC 2-607(3) applies only to transactions between commercial buyers and sellers, noting that the language of the statute does not exclude its application to consumer retail transactions.[58] The court also rejected plaintiff's argument that an issue of fact arises if the notice places an agent of a manufacturer on notice that the "transaction is still troublesome and must be watched" as provided in Comment 4.[59] The court found plaintiff's reliance on that particular language misplaced and held that Comment 4, read in its entirety, requires actual notice that the seller is in breach.[60]

Thus, a buyer's notice is not sufficient if it merely notifies the seller that the buyer is having difficulty with the goods.[61] Rather, the buyer's notice must include notification that the buyer considers the seller in breach of the contract in order to satisfy the underlying purposes of the UCC's notice requirements, particularly to open settlement negotiations between the parties.[62]

The somewhat unsettled nature of Michigan law on this issue, coupled with the quickening pace of recall decisions at the OEM level, suggests suppliers would be wise to alert their sub-suppliers of a potential nonconformity even at the stage when a sub-supplier's component is under investigation—*i.e.,* before a root cause determination is made. In that instance, the form of notice may be short of the notice of breach contemplated by the UCC and *American Bumper*, but it serves many of the same purposes. It puts sub-suppliers on notice early in the process and prevents surprise, allows sub-suppliers the opportunity to offer recommendations on a fix, and may open the way for settlement in the event a recall is ultimately launched that involves the sub-supplier's component or part. In short, it goes a long way in satisfying the purposes of the UCC's notice requirement and blunting any lack of notice defense.

Sixth, new entrants to the automotive industry that are supplying emerging technologies to the OEMs, a clear focus of NHTSA going forward, will need to get up to speed quickly on the new regulatory environment, but also the traditional framework for resolving and, if necessary, litigating recall recovery actions. They will have to understand the claims that they face in the event they are the target for a recall recovery action – not only traditional breach of warranty claims under the UCC and contract, but also express, implied, and common law indemnification theories of recovery that may be more relevant when the UCC statute of limitations has arguably expired. They will have to understand the defenses too. For example, they must understand when it is appropriate to vigorously defend the component because the true root cause is found at the vehicle system level, which the OEM owns, and not the component level. They will also have to understand how to parse OEM damage claims to separate the wheat from the chaff—for example, to eliminate internal profit markups on parts utilized in the recall fix, and know that those profit margins are often inflated in OEM damage estimates due to statutory mark-ups dealers are allowed to place on parts used in recall repairs.

Conclusion

NHTSA's new regulatory era is upon us. It will require a more proactive, collaborative approach among OEMs and suppliers of emerging and traditional technologies. Based on NHTSA's interpretation of the Motor Vehicle Safety Act, it is very likely that recall activity will increase and impact new market participants just as it has for suppliers of traditional safety-related components. How Tier 1 and other suppliers handle the challenges posed by this new era will shape, to a large degree, their success in the long run.

NOTES

1. Testimony: House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade, April 14, 2016, Prepared Oral Statement of NHTSA Administrator Mark R. Rosekind, Ph.D.

2. NHTSA's Path Forward, June 2015, US Department of Transportation, National Highway Traffic Safety Administration.

3. *Id.*, at p. 18.

4. *Id.*

5. *Id.* at pp.18-19.

6. *Id.* at p. 20.

7. *Id.* pp. 20-21. Interestingly, NHTSA likewise made explicit its intent not to rely just on information gathered from industry, but also that NHTSA's Office of Chief Counsel was strengthening its relationship with the plaintiff's bar as a way of learning about additional death and injury incidents that may be of interest. *Id.*

8. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

9. The portion of the FAST Act known as the Motor Vehicle Safety Whistleblower Act is codified at 49 USC 30172.

10. 49 USC 30172(a)-(b).

11. The term "automaker" is used in the document but several of the signatories are actually US-based marketing or technology affiliates of foreign

manufacturers. *See* www.transportation.gov/briefing-room/proactive-safety-principles-2016.

12. Proactive Safety Principles 2016. *See* www.transportation.gov/briefing-room/proactive-safety-principles-2016.

13. Federal Register, Vol. 81, No. 63, April 1, 2016. Although this is merely "proposed" guidance, we refer to is because it is a clear example of NHTSA's current perspective. Once NHTSA gathers public comment and input, it will develop and issue a final Bulletin on the topic.

14. 49 USC 30101 *et seq*.

15. *Id.*, Section II, p. 18936.

16. ". . . NHTSA's enforcement authority concerning safety-related defects in motors vehicles extends and applies equally to new and emerging automotive technologies." *Id.*, Section III, p. 18938.

17. *Id.*, Section III, p. 18938. The rationale for NHTSA's regulatory position as to software code lies in the view that software, including after-market software updates, could be considered "motor vehicle equipment" insofar as they "connect" to vehicle systems. *Id.*, II(A), p. 18937.

18. *Id.*

19. *Id.*, Section III, p. 18938.

20. NHTSA PowerPoint, "NHTSA and Automotive Cybersecurity," Briefing to the Information Security and Privacy Advisory Board, p. 3, October 2015.

21. NHTSA's July 24, 2015, Recall Acknowledgement letter to FCA concerning NHTSA Campaign Number 15V-461.

22. *Id.*

23. In the initial Part 573 Safety Recall Report to NHTSA, dated July 23, 2015, FCA stated on page 5 that: "Although FCA US has not determined that a Defect exists, it has decided to conduct a remedial campaign as a safety recall in the interest of protecting its customers."

24. *Id.* Unrelated to the specific recall, but clearly still interested in preventing future cyber-attacks, FCA announced a year later on July 13, 2016, that it was offering a "bug bounty" financial reward for the discovery of vehicle cybersecurity vulnerabilities. Press Release, July 13, 2016, www.fcanorthamerica.com/News.

25. Mark R. Rosekind, Ph.D., Administrator, NHTSA, Remarks: Automated Vehicle Symposium 2016 (as prepared for delivery), San Francisco, July 20, 2016. See http://www.nhtsa.gov/Speeches. It has been reported that Administrator Rosekind will step down prior to the inauguration in January 2017.

26. *Id.*

27. Federal Register, Vol. 81, No. 63, April 1, 2016, p. 18938.

28. *Id.*

29. See https://www.transportation.gov/AV

30. As-prepared remarks: Mark R. Rosekind, Ph.D., Administrator, NHTSA on May 4, 2016, concerning the expansion and acceleration of the Takata air bag inflator recall.

31. *Id.*

32. Amendment to November 3, 2015 Consent Decree, *In re: EA15-001 Air Bag Inflator Rupture*.

33. As-prepared remarks: Mark R. Rosekind, Ph.D., Administrator, NHTSA on May 4, 2016.

34. U.S. Dept. of Transportation, Nat'l. Highway Traffic Safety Admin., *In re FCA US LLC*, AQ14-003, Consent Order (July 2015).

35. *Id.*, Att. A § C(4).

36. *Id.*, Att. A § C(2).

37. July 15, 2016 letter from NHTSA to FCA.

38. U.S. Dept. of Transportation, Nat'l. Highway Traffic Safety Admin., *In re* TQ14-001, Consent Order (May 2014).

39. *Id.*, p. 8, ¶21.

40. The Uniform Commercial Code governs the sale of goods in Michigan, *see* MCL 440.1101, *et seq*.

41. *American Bumper & Mfg Co v Transtechnology Corp*, 252 Mich App 340, 345, 652 NW2d 252 (2002).

42. *Id.*

43. *Id.* at 345-46. *See also Gorman v American Honda Motor Co*, 302 Mich App 113, 125-26, 839 NW2d 223 (2013).

44. *American Bumper*, 252 Mich App at 346-47 (citing *Aqualon Co v MAC Equip*, 149 F3d 262, 269 (4th Cir 1998), *abrogated in part on other grounds* by *Grupo Dataflux v Atlas Global Group, LP*, 541 US 567, 572, (2004)).

45. *American Bumper*, 252 Mich App at 341-42.

46. *Id.*

47. *Id.*

48. *Id.* at 343.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 344.

53. *Id.* at 345.

54. *Id.* at 347.

55. *Gorman v American Honda Motor Co*, 302 Mich App 113, 839 NW2d 223 (2013).

56. *Id.* at 114-15.

57. *Id.* at 122.

58. *Id.* at 126.

59. *Id.* at 126.

60. *Id.* at 126-27. Plaintiff relied on the history of repairs to her vehicle as notice to defendants. However, such history did not give defendants notice that plaintiff considered them in breach of their warranties. Rather, the history of repairs demonstrated that defendants honored the warranty, made the necessary repairs, and returned the car to plaintiff without objection. Plaintiff never gave notice to defendants that plaintiff considered them in breach until after the warranty had expired and then only by filing the lawsuit. Thus, plaintiff was barred from seeking any remedy against defendants.

61. *Id.*

62. *Id.* (citing *Eastern Air Lines, Inc, v McDonnell Douglas Corp,* 532 F2d 957, 978 (5th Cir 1976)). Additionally, even if adequate notice is timely given, a buyer's subsequent actions may negate the effect of that earlier notice. *See, e.g., Aqualon Co*, 149 F3d at 268 (holding that the buyer's acceptance and payment for leaky valves *after* the parties engaged in six months of letters to resolve the defective valve dissipated the effect of the buyer's earlier complaints). Thus, the buyer's conduct taken as a whole must constitute timely notification to the seller that the buyer claims that the transaction involves a breach. *American Bumper*, 252 Mich App at 347-48; *see also SSI Tech, Inc v Compaero Inc*, No 13-CV-12672, 2014 US Dist LEXIS 123046, at * 6 (ED Mich, 2014).

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Maximizing Receiverships in Business Cases: A Practical Guide

By Gavin J. Fleming and Angela N. Herman

Introduction

In a business case, under MCL 600.2926, a circuit court has the power to appoint a receiver. A receiver is best described as "[an] arm of the court, appointed to receive and preserve property of parties to litigation and in some cases to control and manage it for persons or party who may be ultimately entitled thereto."[1] Thus, a receiver is an individual who is appointed by the court for a stated purpose, such as winding down a company, preserving property, or liquidating collateral.

While many commercial debtor/creditor agreements contain specific provisions allowing for the creditor to move for the appointment of a receiver, the remedy of appointing a receiver is supposed be exercised sparingly.[2] And there is good reason to exercise caution. While a receiver can facilitate the wind down of a company or effectively liquidate collateral, the success of the receivership is premised on the ability of the receiver to do his or her job effectively and efficiently without straying into areas of the case where the parties do not need or desire assistance.

This article provides practitioners with a practical guide to a receivership case, outlining specific tips and suggestions for maximizing the receiver for the benefit of all parties. The article concludes by posing a question: Even if a contract provides one party with the ability to appoint a receiver, *should* that right be exercised?

Background

For the better part of a century, Michigan courts have been discussing the merits of the appointment of the receiver.[3] Indeed, the admonition that receivers are to be appointed cautiously dates back to, at least, 1871,[4] and the initial codification of MCL 600.2926 took place in 1846.

For practical purposes, any debtor/creditor relationship involving a business loan is set forth in a contract containing a clause permitting the appointment of a receiver. These types of clauses have become almost boilerplate in commercial loan agreements. While the law has generally developed in lockstep with advances in the business world, the scope, duration, and expense associated with receiverships remain very much within the discretion of the court, which makes them, in certain cases, inherently unpredictable.

Many litigators therefore understand that the appointment of a receiver is a vexing proposition that may add a layer of complexity to any dispute. And, as the description of the receiver's job implies, such a process can take significant time and will cost a lot of money. For example, a receiver is entitled to his or her own attorney and expert.[5] Also, a receiver's compensation is charged on and is paid out of the property within the receiver's control. As such, counsel must attempt to avoid a scenario where the receiver's compensation overshadows the value of the remaining property.

Discussion

The decision-making process regarding the appointment of a receiver should involve asking the following five critical questions. These questions are non-exhaustive; indeed, they are a starting point for any business lawyer. However, if counsel, clients, and the court pose such questions and allow room for argument and compromise, the receivership should function optimally and efficiently.

What Is the Business Case for the Receiver?

For a creditor, the appointment of a receiver must be viewed in the same light as any business decision. The creditor and counsel should seriously weigh the advantages and disadvantages of any such appointment and thoroughly understand the cost. By way of example, in a case where a business debtor has defaulted on repayment of a significant loan and there is valuable collateral that needs to be gathered and preserved, the receivership option may make sense.

Instead of litigation counsel filing a motion for appointment of a receiver at the outset of the case, in-house counsel or transactional counsel should evaluate whether the option even makes business and financial sense. For example, if there is a deadlock be-

tween owners of a business on a buyout issue, but the business is able to operate on a day-to-day basis, appointing a receiver should be considered carefully. Indeed, depending on the nature and character of the business, a receiver's presence and expense may cut into the profit margin and may place the business in default of loan covenants. Alternatively, consider the example of a business involving collection of rents from individual tenants. If the status quo is interrupted, and tenants are told to pay somebody they do not know, will this benefit the business? Often, the answer is "no." As such, the decision to move for the appointment of a receiver should be made carefully.

What Is the Scope of the Receivership Order?

If there is to be a receiver appointed, the most critical document in any receivership case is the order appointing the receiver. This order provides the receiver's rights, duties, powers, and privileges. If a creditor or a debtor is going to expend time and effort in the case, this is an area where all counsel should focus. The order should, at a minimum, address the scope of the receivership; duration of appointment; powers, rights and duties of the receiver; obligations of the parties in cooperating with the receiver; compensation of the receiver; the parties' access to information; and how the receiver will communicate with the court. If an order is entered *ex parte*, counsel has the absolute right to challenge it. In short, while it is ideal for a receiver to seek feedback and comment on an order, in reality, this is an area where litigation should be utilized to ensure that the receiver is not given unlimited power and authority by way of an overly broad order.

How Will the Receiver Be Held Accountable?

A receiver always has the burden of accounting for the property in his or her care.[6] However, this question goes further. The idea behind this inquiry is how the receiver is being held accountable to the parties for performing his or her tasks efficiently and effectively. This requires careful review of receivership reports, accounting reports, and any documents that counsel for the receiver or an expert employed by the receiver generates. Again, this is an area of the case where all counsel should expend resources.

Similarly, when it comes to payment of fees, receivers should not be perceived to receive a rubber stamp from the court. Indeed, there are examples in the caselaw where parties have successfully challenged payment of fees to a receiver.[7] Given that the parties are ultimately responsible for paying the receiver's fees, all fee requests should be carefully scrutinized.

How Do You Advise a Client Who Wants to Litigate Against the Receiver?

Unfortunately, many litigants feel aggrieved after a receiver is appointed and begins performing his or her duties, which is normal when a business owner loses control of his company or a debtor can no longer utilize collateral. However, counsel should be careful to balance the client's level of outrage against the realities of litigating against the receiver, which include the receiver's ability to charge for the services of an attorney at both the trial and appellate levels.[8] Consequently, the old adage of "picking your battles" is especially apt. While there is precedent for the removal of a rogue receiver, and the court may remove a receiver quickly,[9] these cases represent the minority.[10] As such, while inappropriate conduct should not be tolerated, receivers receive a measure of protection from the courts.[11]

Should the Receiver Be Discharged?

Under Michigan law, the trial court is tasked with bringing a receivership to close as quickly as possible without injury to creditors.[12] While this is an area where debtors and creditors likely will not agree, both sides should, however, have a vested interest in saving fees and costs. If the debtor moves for discharge of the receiver too early or too often, it will result in the debtor simply helping the receiver accrue greater fees. However, neither the debtor nor the creditor should permit the receiver to delay or otherwise prolong the process. Thus, while joint motions for discharge are likely better received, both parties should confidently assert that the receiver has finished his or her job.

Conclusion

In closing, the authors of this article present experienced and inexperienced counsel alike with a challenge: Armed with the knowledge set forth above, does appointing a receiver in the case that just came across your desk make sense? If not, is there a different solu-

While many commercial debtor/creditor agreements contain specific provisions allowing for the creditor to move for the appointment of a receiver, the remedy of appointing a receiver is supposed be exercised sparingly.

tion to the problem at hand? If yes, tell us what the solution was and why it made business sense. In short, let us learn from your approach, such that we may better navigate the choppy waters of the receivership estate, or, avoid them entirely.

Gavin J. Fleming is a partner at Fleming Yatooma & Borowicz, PLC, in Bloomfield Hills, MI. His practice focuses on business litigation and family law issues.

NOTES

1. *Westgate v Westgate*, 294 Mich 88, 89, 292 NW 569 (1940).
2. *People v Israelite House of David*, 246 Mich 606, 607, 225 NW 638 (1929)
3. *Jenks v Horton*, 96 Mich 13, 13, 55 NW 372 (1893).
4. *Barry v Briggs*, 22 Mich 201, 207 (1871).
5. *Lalley v Tuller Hotel Co*, 256 Mich 105, 106, 239 NW 258 (1931).
6. *Corell v Reliance Corp*, 295 Mich 45, 47, 294 NW 92 (1940).
7. *See, e.g., Locke v Aetna Cas & Surety Co*, 256 Mich 438, 439, 240 NW 39 (1932); *Detroit Fidelity & Surety Co v King*, 264 Mich 91, 92, 249 NW 477 (1933).
8. *Cohen v Cohen*, 125 Mich App 206, 210, 335 NW2d 661 (1983).
9. *Brandimore v Dickens*, 256 Mich 128, 129; 239 NW 346 (1931).
10. *See Locke v Aetna Cas & Surety Co*, 256 Mich 438, 439, 240 NW 39 (1932); *Detroit Fidelity & Surety Co v King*, 264 Mich 91, 92, 249 NW 477 (1933).
11. *Corell v Reliance Corp*, 295 Mich 45, 47, 294 NW 92 (1940) (commingling of funds was harmless error; discretionary orders of trial court are entitled to abuse of discretion).
12. *Detroit Trust Co v Detroit City Serv Co*, 262 Mich 14, 20, 247 NW 76 (1933).

Angela N. Herman is a second year law student at Michigan State University College of Law.

Professional Development: Take the Next Step in Your Career

By Kim Yapchai

With over 4000 in-house counsel in Michigan, there are a lot of diverse roles and talented people. Over two years ago, the *In-House Insights* column was launched to give you a glimpse into their daily lives. I hope that you have benefited from the insights regardless of whether you are working in a law firm, on a company's legal team, or flying solo. While I have enjoyed sharing insights into what it takes to be successful in an in-house role, this article is a bit different. It focuses on how to prepare yourself for the next step in your career. Below is a simple overview that will hopefully pique your interest in learning more.

Let's start with the basics. Michigan law does not require CLE credit, but you probably have continued to develop your knowledge of the law. Have you also invested in your professional development? Another way to look at it is: What percentage of your resources is dedicated to your career advancement versus the percentage of your resources dedicated to doing your current job? Not everyone has a company-supported development program, so this may be a new thought for you.

Professional development is the realm of skills we need to function as professionals who are lawyers, as opposed to just practicing law. Law school does not teach these skills, but executive leadership programs and executive coaches do. I have worked with a couple of executive coaches during my career as part of leadership development programs, and they have provided me with unique insights and perspectives. They served as sounding boards and helped me take my career to the next level. I interviewed one of those executive coaches, Stewart Hirsch,[1] about professional development. His insights are below.

Why Invest in Professional Development?

We are each responsible for own careers according to Cliff Hakim, author of *We Are All Self Employed, How to Take Control of your Career*. Investing time and money into your professional development will help you acquire the additional skills you need to advance in your field. If you are not willing to take time to do it, how can you expect anyone else to do it?

Create Your Professional Development Plan

Professional development can include anything that will help you progress on your current career path or on a new one. The first step is to create a roadmap. That roadmap is your personal professional development plan.

To create your roadmap, inventory your skills and compare them to the list of key skills below. A roadmap is a highly personalized plan, so feel free to tailor it to your needs.

Communication

Communication skills are essential to any role you have, whether you are an associate, partner, in-house practitioner, manager, or leader.

- **Listening.** This skill helps you to get the facts you need and understand the reasons behind the client's needs. Too many of us jump to conclusions and rush to give advice before hearing out the person who needs it. The result is that the client does not feel heard, you lose trust, and you get pegged as someone who does not listen. Instead, if you listen well, then people will want to share with you, which helps build trust and aids in business development.
- **Writing.** Business people usually do not like academic legal writing. They want practical, grounded advice—something they can use—now. Understand the style of writing your client prefers and use it. C-Suite executives and business unit leaders usually prefer succinct and clear writing. Less is more. For firm lawyers, it is also great for business development. Being able to

write articles or blogs that are easy to understand will help your credibility.

- **Speaking.** Speaking well is an art; however, not all lawyers are comfortable with being in front of people. If you are not comfortable, it is harder to be perceived as genuine, trustworthy, and credible. For firm lawyers, speaking at a conference is a great way to meet a lot of people. Speaking well is more likely to get you invited back, get you more clients, and get you more opportunities to represent the firm. Presenting to your team, the C-Suite or Board will require strong presentation skills that use various styles tailored for your audience. And it is often a plus to have speaking credentials when applying for your next role or job. Consider a Dale Carnegie course, joining Toastmasters International, or other training to improve your speaking skills.
- **Social media. L**earning to communicate with social media tools effectively, such as blogging, LinkedIn, Twitter, and even Facebook, is an important skill. Social media communication is short and focused. Readers can then click if they want more information, but if you cannot convince readers in the first few moments, they will move on. These communication skills are good skills to develop whether you use them online or not. For firm lawyers, it will help with business development and following your clients' activities. For in-house lawyers, it can help you stay connected for your next role, recruit, and better understand your company's business.

Professional development is the realm of skills we need to function as professionals who are lawyers, as opposed to just practicing law.

Business

Being a trusted advisor changes the way that business people interact with you and value you. Trust starts with relationships and shared understandings. Being able to speak the language of your clients helps your advice be heard. Understanding the implications of what your clients tell you makes your advice better. Business skills are also essential for leadership.

- **Business understanding.** Understanding clients is one key to success. To do that, you need to understand how business works. Ask questions and walk a factory floor (or your business' equivalent) once in a while. Law firm lawyers that do not understand the business are more likely to give advice that is not practical or relevant.
- **Financial acumen**. While the ability to review financial documents helps all lawyers who have to provide advice on business deals of any kind, it is an essential skill for lawyers on the way up the corporate ladder in-house. GCs and many Deputy GCs must be able to communicate effectively with their CFOs and those on the financial side, or responsible for P&Ls. Law firm lawyers that have this skill can often better assist their clients plus be more adept at understanding how to run a profitable legal business.

Leadership

Leadership skills can facilitate your career path whether you are leading others or not. Leadership today requires the ability to manage others, exhibit executive presence and emotional intelligence, and think strategically.

- **Manage others.** While management is not leadership, it is a valuable skill. It includes creating and following plans, delegating, and other skills, all important in both firms and in-house.
- **Emotional intelligence**. This is about self-awareness. It is also the ability to discern emotions (including your own) and to influence behavior, among other things. Known as EQ, it is derived from the landmark book by Daniel Golman, *Emotional Intelligence*. Some companies have a matrix organizational structure or cross-functional teams where emotional intelligence can help you to navigate the organization and to engage others that do not directly report to you. Whether you are in a firm or a company, getting others to work together or to follow you is sometimes like herding cats. Having the emotional intelligence makes it easier.
- **Executive presence**. We know it

when we see it, and this skill can be learned. In her book, *Executive Presence, The Missing Link between Merit and Success,* Sylvia Ann Hewlett provides practical suggestions for what to do and how to do it based on research. She describes what she calls the three pillars of executive presence: gravitas, communication, and appearance.

- **Strategic thinking**. Newer lawyers often feel their job is to provide the pros and cons, and let the business people decide what to do. Leaders think strategically and have the ability to consider opportunities and risks from an enterprise perspective, among other things. In firm leadership, or as a GC or leader in a law department, having this skill will set you apart. Today's general counsels are often members of the C-Suite, and are expected to think strategically along with the other leaders. Firm leaders who think strategically will be more likely to prepare for the future with a rapidly changing law firm landscape. Stewart describes this skill in more detail in *Inside-Counsel Magazine*, "Strategic Thinking for GCs," and "Framing Risk: Integrate Functional Areas."

Now that you know some key skills, take the time to consider your professional future. Where do you want to go and what do you need to do to get there? Be strategic and pick at least one skill that will help you to reach the next step in your career. No one else is going to do it for you. Create a plan to develop and refine the skill, and, if needed, find a coach to help you. If you take the time and effort to invest in professional development, you may be surprised at what opportunities open up for you and what your future will hold next.

Kim Yapchai is Chief Compliance Officer at Whirlpool Corporation and former co-chair of the Business Law Section's In-House Counsel Committee. Kim is currently working with Stewart Hirsch on the Detroit Project 20/35 for the Women's In-House Counsel Leadership Institute.

NOTES

1. Stewart Hirsch, a former firm and in-house lawyer, is a business development and leadership coach for lawyers and is Managing Director of Strategic Relationships, LLC.

Case Digests

***Trinity Health-Warde Lab, LLC v Charter Township of Pittsfield*, No 328092, 2016 Mich App LEXIS 2026 (Nov 3, 2016)**

The tax tribunal erred when it allowed the petitioner to use the tax exempt status of its parent corporation although it itself is a for-profit entity. The petitioner, a for-profit lab wholly-owned by a charitable institution, does not meet the requirements for exemption under MCL 211.7r (exemption for real property owned or operated by non-profit trusts used for hospital or other public health purposes) or MCL 211.7o (exemption for property owned by a charitable institution).

***Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, __NW2d__ (2016)**

The court of appeals erred in holding that the commercial noncompete and nondisclosure agreements in this case were unenforceable due to failure of consideration when the parties exercised their rights as plainly contemplated by the agreements. The court of appeals also erred by failing to review the agreements between two businesses under the rule of reason rather than the analysis applying to noncompete agreements between employers and employees. The supreme court reversed in part, affirmed in part, and remanded for analysis under the rule of reason and determination of whether certain parties breached the nondisclosure and termination agreements.

Index of Articles

(vol 30 and succeeding issues)*

**For cumulative index from volume 16, go to http://connect.michbar.org/businesslaw/newsletter.*

ICLE Resources for Business Lawyers

Books

Receiverships in Michigan

By Patrick E. Mears, Hon. John T. Gregg, Daniel J. Yeomans, and Michael David

Learn how to assess the opportunities and risks in seeking appointment of a receiver or in opposing it. Also includes expert analysis of the emergency manager law for local governments and school districts.

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Online Book/5-29 Lawyers: $225.00 ***Product #: 2013551730***

Michigan Business Formbook, Third Edition

Edited by Mark A. Kleist, Robert A. Hudson, and Daniel D. Kopka

Draft like an expert with business forms for all major areas of business practice. This book includes organizational forms for all major types of business entities. You will easily locate the right Michigan-specific form to adapt for your client's transaction; know what each provision means and what to negotiate, with valuable drafting notes and detailed commentary; and learn to draft efficiently, using the electronic version of the forms as your starting point.

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Seminars

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Presented by Leslie Stein, Melissa Demorest LeDuc, and Anthony A. Pearson

Negotiate and draft better promissary notes for business-to-business loans or interpersonal loans. Avoid unwanted UCC gap fillers. Get the most favorable terms for your client, whether you represent the borrower or lender. Insure your note includes all of the key elements for enforceability. Improve the odds of repayment with collateral and personal guaranties. Protect the borrower from unnecessary credit enhancement requests. Cosponsored by the Business Law Section of the State Bar of Michigan.

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Presented by Kurt B. Piwko, Alexander G. Domenicucci, and Andrew W. MacLeod

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SECTION CALENDAR

Council Meetings

DATE	TIME	LOCATION
December 3, 2016	10:00 a.m.	Foster Swift Collins & Smith PC, Southfield
March 2, 2017	3:30 p.m.	State Bar of Michigan, Lansing

Seminars

Business Boot Camp

DATES	LOCATION
January 30-31, 2017	Inn at St. John's, Plymouth