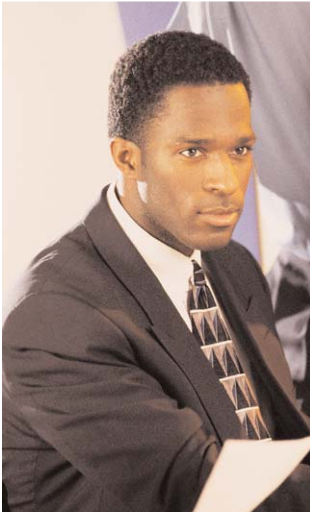
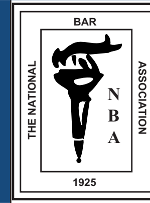


The Commercial Law Connection



The National Bar Association Commercial Law Section

VOLUME 5, ISSUE 2

Spring 2008

CONNECTING PEOPLE, IDEAS AND OPPORTUNITIES

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Message from the Chair

Kimberly R. Phillips, Chair

Greetings! Let me begin by thanking each of you who attended or sponsored our 2008 Corporate Counsel Conference at The Ritz-Carlton in New Orleans. The Conference was a resounding success. With your support, the Section was able to help a number of families by donating $106,000 to Rebuilding Together New Orleans. The funds were used to rehabilitate and reconstruct homes destroyed by Hurricane Katrina. Please visit the Section's website at www.nbacls.com to view photos from the dedication ceremony and our tour of the Holy Cross area of New Orleans. On the Section's website you can also read the article published in the February 21, 2008, edition of the Times-Picayune on the Section's collaboration with Rebuilding Together. Photos from all of the Conference events are posted on the website as well.

Please mark your calendars for upcoming Section activities. The National Bar Association Annual Convention will be held in Houston, Texas, July 26-August 2, 2008, at The Westin Oaks and The Westin Galleria Hotels. You can register for the convention by visiting www.nationalbar.org. On Thursday, July 31, the Section will sponsor a CLE entitled: "Avoiding & Responding to Government Initiated Investigations." On that same afternoon, we will conduct our annual Section meeting, including officer elections. That evening, we will host the Section's annual reception. We are pleased and honored that Schering-Plough Corporation has agreed to serve as the Section's sponsor for this reception. Please come out and participate in the convention and Section activities. Houston is a fabulous destination with tons of activities for the entire family, so I am confident that you will enjoy your visit to my neck of the woods.

Las Vegas here we come!!!! That's right…the 2009 Corporate Counsel Conference will take place on February 19-21, 2009, at the Loews Lake Las Vegas Resort in Lake Las Vegas, Nevada. This is the first time that the Conference has ever been held in Nevada and we intend for it to be spectacular. The Loews is a beautiful resort overlooking a lake and is home to the famed Reflection Bay Golf Course. You will not want to miss the 2009 Corporate Counsel Conference. More details regarding registration and Conference activities will be posted on the website in the coming months. In the meantime, I look forward to seeing you in Houston, Texas and, later, in Lake Las Vegas, Nevada!!

Ethics and Litigation: Ignore Professional Rules of Conduct at Your Own Peril

By Devarieste Curry, Esq.[i]

"A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[ii] In asserting the client's position under the rules of the adversary system, complying with ethical rules is as important as is complying with procedural rules. Litigators thus should not interpret the responsibility to advocate zealously on behalf of their clients as a license to ignore applicable rules of conduct.

The Rules sometimes create tension between zealous advocacy and compliance, but a commentary to the Rules emphasizes a lawyer's duty to follow the Rules. For example, Rule 1.3 – *Diligence* – provides that "A lawyer shall act with reasonable diligence and promptness in representing clients."[iii] The commentary to the Rule delineates the boundary within which the lawyer should operate, noting that "[a] lawyer should . . . take whatever *lawful and ethical* measures are required to vindicate a client's cause and endeavor."[IV] While "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf[,] [a] lawyer is not bound . . . to press for every advantage that might be realized for a client."[V]

Recent cases suggest that either lawyers are woefully ignorant of the requirements of the rules or do not fully appreciate

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Highlights of the NBACLS 21st Annual Corporate Counsel Conference in New Orleans

*By Michael K. K. Choy, Esq.**

I believe the annual NBACLS conference is one of the most important conferences to attend each year. It is filled with informative CLE seminars and gives conference attendees the opportunity to socialize with old friends, make new friends, and meet in-house counsel from major corporations.

The major highlight of the 2008 NBACLS conference was the Section's significant monetary contribution to Rebuilding Together New Orleans. The Section's $106,000 contribution allowed the organization to rebuild the homes of three families in the Holy Cross community of the lower Ninth Ward. These three families were invited and attended the Section's Thursday evening cocktail reception, where they were recognized by our Chair, Kimberly Phillips.

As the conference attendees toured the Holy Cross area, of New Orleans, one of the most significant things I learned was that 90% of the residents of New Orleans are second, third and fourth generation inhabitants. One of the most poignant moments on the tour was seeing a gentleman with two modest trailers, an old Pontiac Firebird, and a large American flag blowing in the wind on his small parcel of land and the inscription on one of the trailers: "God Bless America!" Our tour guide said this man has refused to leave the lower Ninth Ward because "he was living on the land that he and his family has owned for generations." The sight of this gentleman and his modest possessions was a powerful symbol of tenacity, determination, and pride of ownership. It was clear this gentleman was the master of his fate and the captain of his ship.

One of the other many highlights of the annual conference was the Friday luncheon, which featured General Counsels, D. Cameron Findlay of Aon Corporation, a global insurance brokerage and consulting company; Charles "Chet" W. Gerdts, III of PricewaterhouseCoopers LLP, a global accounting, tax, and consulting company; and Kellye L. Walker of Diageo North America, a leading alcoholic beverage producer and distributor in the United States and Canada. The General Counsel panel was moderated by Vernon Baker, Senior Vice President and General Counsel of ArvinMeritor, Inc., a global supplier of automotive integrated system and components.

One tension that became obvious during the panel discussion is the fact that some of these corporations, which have historically retained hundreds of law firms, are in the process of reducing the number of firms, while at the same time making a commitment to diversity and inclusion. It will be interesting to hear follow up discussions of this phenomenon since one natural result of the reduction in the number of outside firms might be the exclusion of minority-owned firms.

At the Welcome Reception on Thursday evening, Ford Motor Company was presented the 2008 Corporation of the Year award. Accepting the 2008 Corporation of the Year award on behalf of Ford Motor Company was Alison R. Nelson. Ford has been a supporter of the Section since its inaugural conference.

At the Farewell Event on Saturday evening, Arthenia Joiner received the Cora T. Walker Legacy Award. Cora T. Walker was a highly-esteemed New York attorney and former Chair of the NBA Commercial Law Section. As Chair of the NBA Commercial Law Section, she was one of the NBA members whose vision led to our Section's annual corporate counsel conference. Although her firm eventually represented large corporations, such as Ford Motor Company and Texas Instruments, Ms. Walker also continued to represent the members of her Harlem community. In 2005, the NBA created the Cora T. Walker Corporate Partnership Award, and in 2006, the NBACLS created the Cora T. Walker Legacy Award, both in her honor. This year's recipient of the Cora T. Walker Legacy Award, Arthenia Joiner, is a past Chair of our Section and a past President of the National Bar Association. The Section's Executive Committee selected Arthenia to receive the award because of her tireless efforts to ensure that NBA members are included as outside counsel of major corporations.

On Saturday, our members enjoyed the French Quarter, the Ritz Carlton Spa and Lounge, and the TPC of Louisiana golf course. On Saturday evening, at the Farewell Event, I discovered that there is a new award for golf participants: the Most Honest Score Award. This award goes to the team that reported the worst score. Apparently, there is a presumption that the team who reports the worst score in golf is the most honest team that was on the golf course. Sounds like golfers are like fisherman: they tell lies about their scores like fisherman tell lies about what big fish they hooked!!! Thanks to Cheryl Turner, on Saturday evening, we danced to the tunes of Unknown Artist, a local band from New Orleans led by Franklin A. Davis IV.

Networking opportunities were enormous and the camaraderie was enriching and rewarding as usual. I enjoyed seeing old friends and making new ones at this year's conference in New Orleans. I look forward to seeing you at our 2009 conference in Las Vegas.

Michael K. K. Choy is an NBACLS Executive Committee Advisor and a Member of Haskell Slaughter Young & Rediker, LLC in Birmingham, Alabama, where he serves on the firm's Litigation Policy Committee and is a member of the firm's Governmental Relations Group. He tries civil cases in federal and state courts. In 2005, Mr. Choy was appointed by the Governor of Alabama to serve a five-year term on the Alabama Ethics Commission. He can be contacted at 205-251-1000 or at mkc@hsy.com.

"TAKING NOTHING FOR GRANTED"

*By Charlene L. Usher, Esq.**

As February 2008 approached, I was excited about attending the NBACLS Corporate Counsel Conference in New Orleans, Louisiana. Like most of my colleagues, I have been watching reports about post-Katrina New Orleans, but I looked forward to seeing for myself up close and personal just what everyone has been talking about. I was pleased that our group was going to take our dollars to a place that desperately needs help in rebuilding its infrastructure.

The annual NBACLS conference gives us an opportunity to come together in unity, showcasing the best of the best of legal resources in America and Canada. While we convened to experience high-caliber CLE seminars, hear from General Counsels of America's major corporations and network formally and informally with one another, we had an opportunity to personally witness our own "big give."

Our Section, led by DeMonica D. Gladney and David B. Cade, worked with Rebuilding Together to refurbish the homes of three families. We personalized our commitment to these families by not only providing our gift of $106,000, but also by making a personal pilgrimage to the lower Ninth Ward to see with our own eyes the devastation of the Katrina-affected areas.

What I will never forget is seeing the ravaged areas punctuated by pockets of homes still standing, though tattered; businesses and schools supporting the community that still exists; speaking to people who said there had been much improvement, while to me, it appeared that Katrina had been there just the week before.

However, what will be indelibly printed in my memory is the look on the faces of the families when five busloads of attorneys of color stepped onto their street, shook their hands, looked in their eyes and accepted their thanks and gratitude. To hear the families say "thank you, thank you, thank you" to us and know they were going to share this story with their children and grandchildren was overwhelming.

These memories stayed with me as I participated in the interviewing process, listened to the General Counsels report on diversity and inclusion, networked with my colleagues and enjoyed the French Quarter and the Ritz Carlton Spa & Lounge. I was also touched by the graciousness of the people of New Orleans and the professionalism of the staff at the Ritz Carlton.

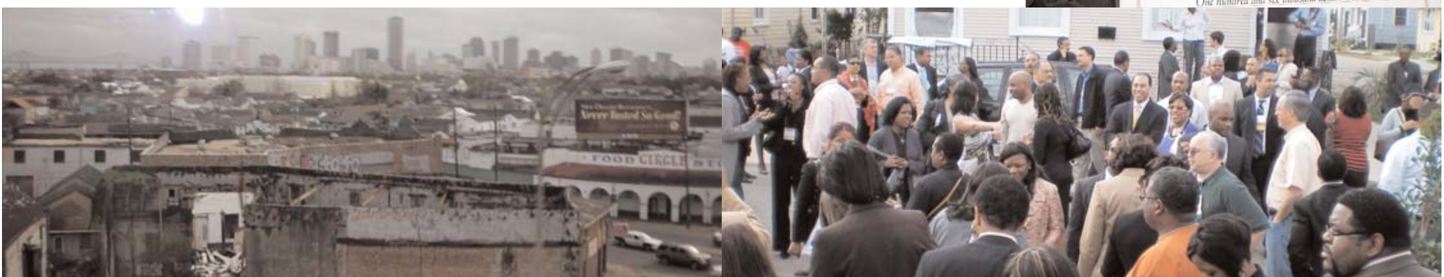
Networking opportunities abounded at each and every seminar, reception, luncheon and break-out session. As always, I enjoyed re-connecting with old friends and meeting new colleagues. Groups of us enjoyed culinary excursions to NOLA, Emeril Lagasse's famed restaurant and were hosted in a suite at the Superdome to watch the Hornets play the Houston Rockets.

On top of all of those wonderful events, we had the special opportunity to honor Arthenia Joyner, a consummate professional and committed NBA and NBACLS member for her unwavering and relentless pursuit of excellence as an attorney, member of the bar and a member of Florida House of Representatives. When addressing us, she reminded us of where we come from as a group and that, despite obstacles faced, we have an obligation to reach back and help others, stating: "to whom much is given, much is required."

Ms. Joyner essentially reminded us that as we climb the ladder of success, we should never take for granted how far we have come and the shoulders upon which we stand. Indeed, having made a lasting and indelible impression upon those families in New Orleans, I believe our Section *takes nothing for granted*.

The 2008 NBACLS Conference for me was an exceptional experience!

** Charlene L. Usher is an NBACLS Executive Committee Advisor and owner and managing attorney at Usher Law Group, a California law firm specializing in the defense of workers' compensation & related employment matters.*



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Bordenave Boykin & Ehret
Radio One, Inc.

Agency Law Viewed Through the Lens of Insurance Brokers

*By Donald O. Johnson, Esq.**

Agency Law Is Part of the Legal Analysis in Many Commercial Law Transactions

Common law agency rules focus on the legal relationships between principals, agents and affected third parties. The introduction to the Restatement (Third) of Agency explains:

> [T]he common law of agency encompasses the legal consequences of consensual relationships in which one person (the "principal") manifests assent that another person (the "agent") shall, subject to the principal's right of control, have power to affect the principal's legal relations through the agent's acts and on the principal's behalf.

Restatement (Third) of Agency at 3 (2006).

These common law rules of agency play an important role in the analysis of laws governing many aspects of commerce in the United States, such as the Uniform Commercial Code and corporate governance laws. They play an especially important role in the analysis of insurance broker liability — a role that the remainder of this article examines.

Insurance Brokers Are Necessary Participants in Most Commercial Insurance Transactions

The insurance industry has developed a broad array of insurance policies that provide coverage for the wide range of significant risks that commercial entities constantly face. Such policies include: commercial property, business interruption and extra expense, inland marine, commercial general liability, excess liability, umbrella liability, directors and officers liability, errors and omissions liability, employment practices liability, products liability, products recall, and fidelity policies. Because of the proliferation of the types of policies available in the insurance market and the various coverage limitations and exclusions that these policies contain, insurance brokers are necessary participants in most businesses' purchase of commercial insurance.

Insurance brokers have specialized knowledge about the insurance products on the market and about the insurance companies offering those products. Businesses that use brokerage services give insurance brokers substantial information about the risks that they face. Consequently, insurance brokers frequently play a significant role in, among other things, identifying the type of policies that a business wants, negotiating the terms and conditions of coverage with insurance companies, selecting one or more insurance companies to write the coverages, collecting premiums from insureds, and notifying insurance companies about property and business interruption losses suffered by insureds and liability claims made against insureds.

Insurance Brokers Are Different Than Insurance Agents

Although some people mistakenly use the terms "insurance broker" and "insurance agent" interchangeably, an insurance broker's relationship with an insurance applicant or the named insured generally is different than an insurance agent's relationship with such parties. Insurance brokers usually represent the insurance applicant or the insured, not insurance companies. They are not employed by insurers, although they may receive commissions from insurers based on their placement of insurance with those companies. In contrast, insurance agents represent insurance companies. Insurance agents usually are employed by insurers who pay them a salary and who may pay them a commission based on their insurance sales.

These distinctive relationships sometimes are imposed by state statute. For example, California Insurance Code § 33 defines "insurance broker," stating: "'Insurance broker' means a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer." *See also* Cal. Ins. Code § 1623 (West 2008). California Insurance Code § 31 defines "insurance agent," declaring, in pertinent part: "'Insurance agent' means a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." In some states, the distinction is the product of state common law.

The various names used in the insurance industry to refer to different types of insurance brokers contributes to the confusion that people outside of the industry often have about the distinction between insurance brokers and insurance agents. For example, among other designations, some insurance brokers are called "independent insurance agents" and some others are called "surplus lines agents." An independent insurance agent is a synonym for an insurance broker who deals with multiple insurers admitted to sell insurance in the state for typical risks but who, as noted, is independent of all of the insurers. A surplus lines agent is an insurance broker who deals with insurers that the state department of insurance has not admitted to sell insurance in the state but that sells insurance for risks for which there is no normal insurance market available in the state at issue.

The confusion caused by the sometimes overlapping terminology used to refer to insurance brokers and insurance agents and the underlying agency relationships between insurance brokers and the parties with whom they deal can have significant legal consequences when insurance brokers become involved in litigation commenced by dissatisfied insurance applicants, insureds, additional insureds, insurers, or third parties.

The Dual Agency Problem - Analysis of the Particular Purpose of the Broker's Act

Notwithstanding the fact that statutes in some states and the common law in some other states pronounce that insurance brokers are agents of insurance applicants and insureds, agency law may cause a different result in some situations. As the Supreme Court of South Dakota recently concluded, "[s]tatutes regulating licensing and defining agents, brokers and solicitors, are not intended to change or to exclude the general laws of agency." *North Star Mut. Ins. Co. v. Rasmussen*, 734 N.W.2d 352, 361 (S.D. 2007) (internal quotation marks and citations omitted) ("*Rasmussen*"); *see also Oakland-Alameda County Coliseum, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, P.A.*, 480 F. Supp. 2d 1182, 1196 (N.D. Cal. 2007) ("an agency relationship can exist outside the formal provisions in the [California] Insurance Code").

Based on agency law, the vast majority of states, if not all, recognize the concept of dual agency; namely, that an insurance broker can be an agent of the insurance applicant or the insured for some purposes (*e.g.,* negotiating policy terms) and the agent of the insurer for other purposes (*e.g.,* collecting and transmitting premiums). *See, e.g., Astenjohnson v. Columbia Cas. Co.*, 483 F. Supp. 2d 425, 462 (E.D. Pa. 2007) (applying Pennsylvania law) ("*Astenjohnson*"). The *Astenjohnson* court summarized the applicable agency principles, which, essentially, are the same in all states:

> 21. "The basic elements of agency are 'the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the

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NBACLS ACTIVITIES AT THE NBA'S 83RD ANNUAL CONVENTION & EXHIBITS

The Commercial Law Section will convene its annual meeting on Thursday, July 31, 2008, at the 83rd Annual National Bar Convention in Houston, Texas. A networking reception, for the membership, will follow the meeting.

Also, on the same day, the Section will sponsor a CLE course entitled: *Avoiding & Responding to Government Initiated Investigations*. This seminar will provide participants with a practical and informative discussion about the current climate of government investigations, the government's perspective in an investigation, compliance and risk management best practices, and effective internal investigation practices. The panel of experts will be Tamika Tremaglio (Huron Consulting Group), Mike Coleman (Locke Lord Bissell & Liddell LLP), Preston Pugh (GE Healthcare) and Yvette Ostolaza (Weil, Gotshal & Manges LLP). Holly Loiseau (Weil, Gotshal & Manges LLP) will be the moderator.

THE NBA CRUMP LAW CAMP: A MODEL EDUCATIONAL PROGRAM FOR TEENAGERS

The National Bar Association's Crump Law Camp provides students who are between the ages of 14 and 17 and are entering the ninth through eleventh grades with an introduction to the American judicial system. The goal of the two-week camp is to encourage more young students of color to seek careers in the legal profession.

The camp was first held during the summer of 2001 at Howard University School of Law. The Ford Motor Company Fund sponsored the camp. That year, thirty-two students of diverse backgrounds and races were introduced to law school and learned some of the skills required to be an effective lawyer.

The faculty for the camp includes members of the NBA's Law Professors Division, which consists of professors and deans of several U.S. law schools, and visiting guest lecturers. The NBA's Law Students Division members and college students act as teaching assistants and student monitors.

The campers are paired with college and law students, professors, and practicing attorneys to serve as mentors as they continue through high school, college and law school. The camp provides students with an exciting academic and social agenda, which includes field trips in the Washington, DC area. The competitive highlight of the camp is the Event L. Simmons Mock Trial Competition. The four winners of this competition are invited to the NBA's Annual Convention.

Although people of color comprise more than 30 percent of the United States and are projected to comprise more than 50 percent by the year 2050, more than 90 percent of this nation's lawyers are white, as are more than 80 percent of the students enrolled in law school. Thus, a dire need exists to develop more attorneys of color — attorneys who are willing to serve others who look like them. The NBA Crump Law Camp has been at the forefront of efforts to address that need.

This year the Crump Law Camp will be held, as always, at Howard University School of Law and will run from July 6th to July 19th. The NBA Commercial Law Section wishes John Crump and the campers continued success.

Member Spotlights

Shelton Dennis Blunt - New Partner

Shelton Dennis Blunt was elected a Partner at Phelps Dunbar LLP. Mr. Blunt practices in the firm's Baton Rouge, Louisiana office. He is a graduate of Southern University Law Center and is a member of the Louisiana Bar. Mr. Blunt's practice focuses on business torts and disputes, insurance company solvency and regulations, corporate governance, directors and officers disputes, wage and hour collective action litigation, state and local tax disputes, and general litigation. He can be contacted at dennis.blunt@phelps.com.

Tony L. Richardson - Moves to ReedSmith

Mr. Richardson, who is a Stanford University Law School graduate, has joined the Los Angeles office of ReedSmith as a Partner in the Commercial Litigation Group. He is an experienced trial attorney who has tried insurance coverage actions, contract disputes, and products liability cases. He also has litigated mass tort, antitrust, unfair business practices, intellectual property, and other complex business matters in federal and state courts. For the past several years, Mr. Richardson has been selected as a Southern California "Super Lawyer." He also has served as a Special Master in a federal district court and as a Judge Pro Tem for the Los Angeles County Superior Court. He can be contacted at trichardson@reedsmith.com.

Continuing Opportunities for NBA Members to Help Katrina Victims

By Davida Finger, Esq.

The Katrina Clinic originated in the fall of 2005 after Hurricane Katrina displaced Loyola Law School and its Law Clinic from New Orleans, and those entities relocated in Houston, Texas. There, Law Clinic students and faculty, in association with Lone Star Legal Aid and the University of Houston, worked in Disaster Relief Centers to assist others who also had been displaced by Katrina. Since the spring of 2006, the Katrina Clinic has operated from the Loyola University New Orleans College of Law.

Nearly three years after the storms, daily emergencies persist as those displaced try to rebuild and come home. The legal landscape is complex: house demolitions without proper notice; states' confusing and backlogged programs to distribute federal rebuilding funds; FEMA's inexplicable terminations of rental assistance and collection of emergency grants already distributed, including to the elderly and disabled; insurance companies' failures to pay claims; and contractor and home rebuilding fraud.

Hundreds of volunteer attorneys and law students from around the country have helped our clinic assist thousands of clients. We do not underestimate the impact volunteers have had throughout our community. As we take stock of our real situation, we cannot underestimate the tremendous need that remains. Rebuilding entire communities is a slow process that has been made slower and even blocked by systemic barriers. Volunteer attorneys willing to give time to tackle individual and widespread issues will no doubt have a lasting positive impact in our community.

To volunteer or obtain more information, please visit hurricanelaw.org and contact staff attorney Davida Finger at dfinger@loyno.edu or 504-861-5596.

PROTECTING YOUR CLIENT'S BRANDS FROM DOMAIN NAME THEFT AND SCAMS

*By Debra Y. Hughes, Esq. and David A. Bell, Esq.**

Why Should You Pay Close Attention Now to Domain Name Issues?

In short, the right domain name is prime "virtual" real estate that can leverage a company's visibility, and for this reason, domain names, especially <.com> domain names, are highly valued in today's marketplace. For example, this past year, <sex.com> sold for $12 million, <diamond.com> purportedly commanded $7.5 million, and <vodka.com> was purchased in the $3 million range. Vodka.Com Domain Sells For $3 Million, DOMAINNEWS.COM (Dec. 16, 2006), at http://www.domainnews.com/aftermarket/0920061216/vodkacom-domain-sells-for-3-million/ (last visited July 2, 2007). Because of the value attributed to domain names, cybersquatting and other illegal and unfair uses of trademarks on the web remain a source of major concern.

Cybersquatting is nothing new, but certainly deserves the continued attention of brand owners and their counsel. Cybersquatters are buyers of domain names that incorporate another's trademark, with a bad-faith attempt to profit from holding those domain names. According to a recent study of some of the world's strongest brands by a leading trademark monitoring service, cybersquatting increased nearly threefold during 2006 alone, and by another thirty-three percent in 2007. MarkMonitor, Brandjacking Index (Apr. 30, 2007); MarkMonitor, Brandjacking Index (Winter 2007). This increase is due, in part, to the new trends in the domain name infringement arena discussed below.

Domain name tasting. A five-day grace period exists, during which a domain name registration may be rescinded, without the buyer (known as a registrant) incurring the usual registration fee. The listed purpose for this policy is to remedy typographical errors and the like that can occur during the registration process. However, some unscrupulous companies are using this grace period to test the marketability of certain domain names, many which consist of misspellings of company and brand names. The registrants track the amount of traffic received at those sites, and cancel the lesser visited domain names with no fee or penalty. Approximately four million domain names are tasted each day, and this practice is only increasing. National Arbitration Forum, Critics grow as "Domain Tasting" Becomes More Prevalent (Jan. 24, 2007), at http://www.adrforum.com/rcontrol/document/newsletters/DomainNews-Vol08No01.htm (last visited May 24, 2008) (noting comment of Jay Westerdal of Name Intelligence).

Domain name kiting. Some "domain name tasters" register domain names, drop them within the five-day grace period, then reregister them, and continue this approach in perpetual cycles. This activity, referred to as domain name kiting, provides domain name owners with an economic benefit, as they receive money when visitors to their websites click on advertising links therein. Not only do these sites crowd the Internet, but they also may cause various harms to brand name owners, including customer confusion, loss of goodwill, and loss of revenues.

Domain name spying. This development involves the practice of purchasing domains shortly after learning that an interested party checked their availability. Put another way, the companies that perform this activity monitor third parties' searches for domain names that may contain new trademarks, and then purchase domain names containing those phrases before the rightful owners can obtain them. Some companies appear to make spying their entire business model; thus, this practice might not be as rare as you might expect.

Phishing. Some thieves operate by sending out emails to divert people to websites that appear very similar to companies' true sites, but are instead phony sites used to obtain personal financial information. Banks and other companies in the financial sector are the most common targets of phishing schemes. In addition to stealing money and identifications, phishing has been dissuading many people from transacting business online, and it could lead to less business for some companies.

What Can You Do to Protect Your Client's Brands From Such Attacks on the Internet?

Several steps may be taken to prevent cybersquatting, including:

- **Registering key domain names.** A company can never own all possible domain names that incorporate its brands. However, companies should consider purchasing the obvious spellings and misspellings of its primary brands, with the extensions that are most commonly used and searched, namely .com, .net, and .org. If the company conducts business outside of the U.S., or is likely to do so in the near future, then also consider registering domain names with the appropriate "country code" extensions, such as .ca (for Canada), .cn (for China), .co.uk (for the United Kingdom), or .eu (for Europe). Use experienced intellectual property counsel to obtain Chinese domain names and keywords. The best offense is defensive registration.

- **Registering without hesitation.** To avoid domain name spying, companies should register domain names of interest as soon as they learn that the domain names are available, and use only reputable companies

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Protecting Your Client's Brand... *continued from page 8*

to conduct searches.

- **Renewing domain names.** Remember to prompt your client to renew the domain names it has acquired. Some companies configure their domain name settings to automatically renew the domains annually, or purchase them for years in advance to minimize the need for monitoring them. Also, make sure that any departing employee hands over access to company domain names.

- **Monitoring the Internet.** Several services charge annual fees to monitor the Internet for possible infringement of key brands, and intellectual property counsel can assist with this process. There are also free websites that companies can use for searching for domain names incorporating your trademarks or company names, such as Namedroppers.com and Tldscan.com.

What Can You Do If a Third Party Has Already Registered a Domain Name that Is Valuable to Your Company's Business?

Various enforcement tactics could be considered, including the following:

- **Sending a demand letter.** Sending a cease and desist letter is a common, simple and cost effective method to acquire a domain name.

- **Offering to purchase the domain.** Consider making an anonymous offer to the registrant to buy the domain name at issue. Concealing the company's identity could improve the likelihood that the registrant will agree to sell for a reasonable amount.

- **Placing a backorder for the domain name.** Another tactic is to consider placing a backorder to purchase the domain name, whereby the company can get in line to offer to purchase it. Typically, backordering services only charge a fee (and a relatively small one, at that) when the backorder is successful.

- **Filing an administrative complaint.** A procedure governed by the Uniform Domain Name Dispute Resolution Policy (UDRP) allows for the filing of an administrative complaint to request that a domain name be transferred. This procedure is available in many instances of cybersquatting and, depending on the company's goals, can be more cost-effective than proceeding with litigation. The most popular service providers for this procedure are The World Intellectual Property Organization ("WIPO") and The National Arbitration Forum ("NAF").

- **Filing a lawsuit.** In some instances, the facts might warrant proceeding with litigation. For example, a California court recently enjoined a company from registering any domain names confusingly similar to Verizon's trademarks, after the court reviewed the defendant's domain name tasting, kiting, and other cybersquatting activities. *Verizon Cal. Inc. v. Ultra RPM, Inc.*, No. 2:07-cv-02587-PA-CW (C.D. Cal. Sep. 10, 2007). Dell is also suing a handful of registrars for a variety of allegedly abusive domain name registration practices. *Dell Inc. v. Belgiumdomains, LLC*, No. 07-22674 (S.D. Fla. Oct. 10, 2007). Additionally, note that, under certain laws, significant monetary damages may be awarded. For instance, under the Anti-Cybersquatting Consumer Protection Act of 1999, a company could be entitled not only to transfer of the domains at issue, but also treble damages, attorneys' fees, and statutory damages of up to $100,000 per domain name. 15 U.S.C. §1125(d).

Conclusion

Companies are unlikely to prevent or stop all unfair and illegal activity on the Internet affecting their trademarks. Additionally, the vast size of the Internet and large scale of cybersquatting can be overwhelming. However, taking some of the steps listed above can be extremely useful in protecting valuable brands.

As with all areas of the law, the most appropriate steps to take will vary depending on each scenario. Factors to consider include the importance of the domain name and brand to your client's business, your client's budgetary constraints, the timeframe by which your client desires to retrieve the domain name, the type of website content currently found at the domain name of interest, and the history and current behavior of the domain name registrant.

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Frequently Asked Questions

To enhance our communications concerning the Corporate Counsel Conference and its various aspects, we thought a recurring column in the newsletter addressing the most frequently asked questions ("FAQs") might be helpful. You may find answers to these and other FAQs on the Section's website at www.nbacls.com.

Q. What is the Corporate Counsel Conference?

A. The Commercial Law Section ("CLS") hosts the Corporate Counsel Conference annually. The purpose of the Conference is to afford in-house counsel of major corporations an opportunity to meet and network with our Section's members. Through the Conference's networking opportunities, we hope that our members will be given the opportunity to hear what needs in-house counsel have and to express their capabilities to meet those needs. The goal of the Conference is for Section members to establish long-standing mutually beneficial relationships with in-house counsel at major corporations. These relationships should increase and improve the diversity of the representation of major corporations.

Q. What is the format of the Conference?

A. While the format may change slightly from year to year, traditionally, the Conference is a three-day event that includes CLE seminars, a luncheon, networking breakfasts and receptions each day, golf and spa outings, and other activities.

Unlike other conferences, the Corporate Counsel Conference offers a unique interviewing session. Interviews are conducted in fifteen (15) minute intervals on designated dates. While there is no guarantee that outside counsel will be granted an interview or retained for representation, the interviews offer another avenue for outside counsel to meet and network with in-house attorneys. To participate in the interview process, outside counsel must submit a typed Resume/Questionnaire along with the completed conference registration form and payment. In advance of the Conference, Resumes / Questionnaires are bound into a Corporate Resume Book and distributed to in-house counsel for their selection of outside counsel interview candidates.

Due to the specific needs of the participating corporations, some outside counsel attendees may not be interviewed during the formal interview part of the Conference. The Conference, however, provides numerous other opportunities for outside counsel to network with in-house counsel attendees. Many in-house counsel have retained outside counsel as a result of the informal networking offered by the Conference.

Q. Who should attend the Conference?

A. If you are an in-house attorney seeking to identify a talented and diverse cross-section of outside counsel, the Corporate Counsel Conference offers the opportunity to meet lawyers from around the country, whose practices include a broad spectrum of substantive commercial law areas.

If you are an attorney in private practice, you should attend the Conference to meet and network with representatives of international and national corporations who are actively seeking retention of ethnically diverse attorneys to serve as outside counsel. The companies that attend the Corporate Counsel Conference not only seek talented African-American attorneys, but also recognize diversity as an essential component of their corporate business model.

Q. What if I don't have any scheduled interviews?

A. If you do not have a scheduled interview, do not worry. The conference is structured so that you will have many opportunities to meet in-house attorneys. In fact, many relationships are formed outside of the scheduled interview sessions, so you should come prepared to network during the entire conference.

Q. Must I pay my NBA and CLS dues to attend the Conference?

A. Yes. Registration for and participation in the Corporate Counsel Conference requires membership in the National Bar Association and Commercial Law Section for prospective outside counsel. To pay your NBA and Commercial Law Section Dues you may visit the NBA web site at www.nationalbar.org.

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the seriousness with which state bars and courts view a breach of the rules. *See, e.g., Qualcomm, Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (Jan. 7, 2008), *vacated in part and remanded by Qualcomm, Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. Mar. 5, 2008);[vi] *Gordon Partners. v. Blumenthal*, 244 F.R.D. 179, 191 (S.D. N.Y. 2007) (A court has authority to impose sanctions on a party for discovery misconduct "under its inherent power to manage its own affairs or under Rule 37 of the Federal Rules of Civil Procedures.").[vii] The range of sanctions for violating the Rules is broad, including referring the offending lawyer to the state bar for disciplinary action.

Qualcomm illustrates the peril of elevating zealous advocacy over compliance with the Rules. To be sure, skillful litigators may try to argue that the Judge in *Qualcomm* got it wrong, or that the ethical rules discussed in this article are not applicable. Irrespective of whether one agrees with the conclusions reached in *Qualcomm*, the facts of the case serve as a useful backdrop for emphasizing the importance of a litigator making the Rules a critical part of her toolbox and for discussing Rules that should be of concern to any litigator as she seeks to balance her responsibilities for zealous advocacy with her responsibilities as an officer of the legal profession and as a public citizen having a special responsibility for the quality of justice.

In *Qualcomm*, a patent infringement action, the Judge imposed an $8.5 million sanction on Qualcomm for "its monumental and intentional discovery violations."[viii] She also sanctioned six of its "retained lawyers" and referred six lawyers to the California State Bar for appropriate investigation and possible disciplinary actions.[ix] The sanctions followed litigation in a suit in which Qualcomm alleged that Broadcom infringed its patent. Broadcom asserted as an affirmative defense that the patents were unenforceable because Qualcomm had participated in industry activities that resulted in a waiver of its rights to the contested patents (hereinafter "waiver activities"). It sought information during discovery to confirm its view. The conduct of Qualcomm's counsel during discovery and trial contravened several of the Rules.[x]

Qualcomm produced two 30(b)(6) corporate designees without having performed the due diligence required by the Model Rules. The first designee had been "prepared" for her deposition, but counsel for Qualcomm had not searched her computer for any relevant documents or emails or provided her with information to review. Not surprising, she testified that Qualcomm had not participated in the critical waiver meeting. When Broadcom impeached her with a document showing the contrary, Qualcomm offered another 30(b)(6) deponent. Qualcomm's counsel did not search the witness' computer for relevant documents or take any other action to prepare him.

Presenting the corporate designees for depositions without having searched their computers for relevant documents or emails and without having provided them other documents to review raises the question of whether the lawyer met the basic obligation to serve the client competently, as required by Model Rule 1.1 – *Competence* – which provides that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." Noting that major litigation normally requires more preparation than would a matter of lesser complexity, Comment 5 of the Rule provides that competence requires inquiring into the problem; following methods and procedures competent practitioners customarily follow; and preparing adequately. Even a junior litigator should know that preparing a corporate designee for deposition or trial should include a search of the designee's files, including computer files, and a review of relevant documents with the designee.

Competence includes the lawyer's ability to spot issues and ask the right questions. To comply with electronic discovery requirements, lawyers need to work with information technology specialists and other experts to understand the responding party's computer system and how data is maintained and stored. *See Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

A lawyer's obligation to probe the witness about documents and to review documents with the witness as components of deposition preparation also flows from Rule 1.3, which requires lawyers to "act with reasonable diligence and promptness in representing clients." As noted earlier, inherent in acting with diligence is a "commitment and dedication to the interest of the client."[xi] The interest of the client includes making sure the client representative has been thoroughly prepared; being aware of and thoroughly familiar with all relevant documents, including potentially damaging documents; and having a plan for handling such documents. Destroying or unreasonably denying access to potentially damaging documents should not be a part of any plan. There would have likely been a very different outcome in *Qualcomm* had Qualcomm legitimately contested production of the documents at issue in the case. This could have been done, for example, through a motion to quash or limit production of the requested documents on the basis of attorney-client or work product privileges, or because of the duty to maintain client confidences. Legitimate concerns about protecting confidential documents could have been addressed by a protective order.

Qualcomm's response and tactics in responding to written discovery suggest that it did not seek to withhold the documents legitimately. Counsel's failure to produce the documents thus violated the Rules and leads to the ineluctable conclusion that their failure to search employees' computers prior to producing corporate designees for deposition was by design.[xii] Even after Broadcom attempted to impeach the second 30(b)(6) corporate designee with a document showing an email address for a Qualcomm official who would have participated in waiver activities, Qualcomm apparently made no concerted effort to search for requested documents.[xiii]

Rather, as the case progressed, Qualcomm became increasingly aggressive in asserting that it had not participated in the critical waiver activities. For example, Qualcomm filed in court an expert declaration stating that there were no corporate records to indicate its participation in waiver activities. Further, arguing that the appearance of a Qualcomm official's email address on the waiver group list did not establish receipt of any waiver-related information or other participation with the waiver group, Qualcomm filed various pleadings in court arguing that the "facts demonstrate" Qualcomm had not participated in the waiver meetings.[xiv]

Qualcomm's lack of diligence went further. During preparation of a witness for trial, counsel discovered an email that seemed directly responsive to a document request. Afterwards, he searched the client's computer and discovered 21 additional emails, none of which counsel had produced in discovery. The trial team, however, decided not to produce the newly discovered emails to Broadcom, although the emails undermined Qualcomm's argument that it had not participated in the waiver meeting. Moreover, Qualcomm did not conduct further investigations to determine if there were other emails that had not been produced.[xv] More troubling, a few days later counsel essentially misrepresented facts to the Court. At a sidebar discussion with the judge, counsel for Qualcomm argued that the list of email addresses used by Broadcom to try to establish waiver participation was "just a list of email addresses," and that there was no evidence that Qualcomm had received emails. Not one of Qualcomm's attorneys at the sidebar mentioned the discovery a few days earlier of the 21 emails.[xvi]

By failing to produce the requested documents and by arguing in Court that there were no documents to support Broadcom's view of Qualcomm's waiver activities, Qualcomm's counsel breached their duty to the tribunal and to a non-client. Rule 3.3(a)(1) – *Candor towards the Tribunal* – provides that, "A lawyer shall not knowingly: make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." By not informing the Court during the sidebar of the newly discovered relevant documents, counsel for Qualcomm violated this Rule.[xvii] Given that counsel was aware of the discovery of 21 emails that had not been produced, counsel knowingly made a false statement of fact to the tribunal. "There are circumstances where a failure to

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make a disclosure is the equivalent of an affirmative misrepresentation."[xviii]

Counsel not only made a false statement to the Court, they offered false evidence in violation of Section 3.3(a)(3) of the Rule, which provides that "[a] lawyer shall not knowingly offer evidence that the lawyer knows to be false." When Qualcomm's counsel filed declarations and memoranda asserting that there was no evidence to demonstrate its participation in the waiver activities, it offered false evidence.[xix] Even if counsel argues that Qualcomm insisted that they offer the evidence, this section prohibits the lawyer from offering evidence he knows to be false, regardless of the client's wishes.[xx]

By strictly enforcing this Rule, lawyer regulatory agencies demonstrate their commitment to making lawyers recognize and honor their duties as officers of the Court as well as the agencies' commitment to regulating conduct that would undermine the system of justice.

Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Section 3.4(d) of the Rule provides that in pretrial procedure, a lawyer shall not "fail to make reasonably diligent effort to comply with a legally proper discovery request by the opposing party." It is difficult to imagine more blatant violations of this Rule. Assuming for the sake of argument that Qualcomm's counsel had a good faith basis for not searching further and producing documents after Broadcom confronted the second corporate designee with a document showing that the name of a Qualcomm official was on the email list of waiver participants, counsel could not be given that benefit of the doubt after the trial witness' computer was searched and over 20 relevant documents were discovered. Rather than make an effort to comply with their ethical and procedural obligations, counsel, in the words of the Court, continued their "gamesmanship."

Qualcomm's counsel also arguably violated Rule 4.1 – *Truthfulness in Statements to Others*, which provides that a lawyer shall not knowingly "make a false statement of material fact or law to a third person." The operative terms are "knowingly" and "material fact." As discussed earlier, given counsel's knowledge of the discovery of the 21 emails, the "knowingly" prong of this Rule is met. Further, as the Court observed, considering that the issue of whether Qualcomm participated in waiver activities during the contested time frame was crucial to the litigation, statements about that participation would constitute a material fact. Accordingly, Qualcomm's counsel's statement to Broadcom that it had no evidence to demonstrate that it participated in the waiver activities would constitute a violation of Rule 4.1.

Finally, counsel's acts and omissions constitute misconduct under Rule 8.4 – *Misconduct*, commonly referred to as the "catch all" Rule. Qualcomm's counsel's failure to inform the Court of the discovery of relevant documents and their argument in Court (including through the filing of declarations and motions) that Qualcomm had no records to support Broadcom's assertion that the patents were unenforceable involved dishonesty and deceit or misrepresentations and also were prejudicial to the administration of justice.[xxi] Qualcomm's failure to search for and produce relevant documents, and its failure to prepare its witnesses for depositions were prejudicial to the administration of justice.[xxii]

In conclusion, lawyers who ignore ethical rules face serious sanctions, up to and including disbarment.

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[ii] MODEL RULES OF PROF'L CONDUCT, *Preamble* (2002). Lawyers are governed by the ethics rules of the state in which they are licensed to practice. Because of the national applicability of this article, the ABA Model Rules, which serve as a model for the ethics rules of most states, are being used as a backdrop for my analysis.

[iii] To preserve space, the standard citation format is not being used when the Rules and their comments are referenced in the text.

[iv] MODEL RULES OF PROF'L CONDUCT R.1.2 cmt. 1 (2002) (emphasis added) (hereinafter "MODEL RULE").

[v] MODEL RULE 1.3 cmt. 1.

[vi] The issues vacated and remanded do not affect the ethical issues discussed in this article.

[vii] *Compare In re Jacalyn S. Nosek, Debtor*, No. 02-46025, 2008 Bankr. LEXIS 1251 (U.S. Bankr. D. Mass., Apr. 25, 2008) (Court sanctioned two law firms and a partner of a firm for not being candid with the Court. MODEL RULES 3.3 and 3.4 implicated) *with In re Matter of Adrian Edwards Cooper*, 2008 S.C. LEXIS 84 (S.C. Mar. 10, 2008) (Lawyer disbarred for violating ethical rules governing competence, diligence, and candor to the Court and third party).

[viii] Op. at *63.

[ix] *Id.* at *5.

[x] While I recognize that the Judge sanctioned Qualcomm and its attorneys for discovery abuses only, she discussed trial conduct that arguably breached ethical guidelines.

[xi] MODEL RULE 1.3 cmt. 1.

[xii] Retained and in-house lawyers were involved in the prosecution of the case. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization. If at any point counsel for Qualcomm believed that any Qualcomm officer or employee had committed any improper or unlawful act or omission that could be imputed to Qualcomm or that was likely to result in substantial injury to Qualcomm, counsel was obligated to take necessary action to protect the organization, including, but not limited to, reporting up the chain of command. *See* MODEL RULE 1.13 and commentary.

[xiii] That the corporate designee had not seen the particular document and, thus, could not be impeached by it does not excuse Qualcomm's inadequate search.

[xiv] Op. at *12-13 & n.3.

[xv] Ultimately Qualcomm located more than 46,000 documents that had been requested but not produced in discovery. *Id.* at *23.

[xvi] Op. at *16-17.

[xvii] *Id.* Comment 1 suggests that a lawyer must balance her duty to maintain her client's confidences with her duty of candor to the tribunal. It should be noted, however, that Rule 3.3(a)(1) unqualifiedly requires the lawyer to correct a false statement previously made. It does not provide a safe harbor in Rule 1.6, which requires lawyers to maintain confidences and secrets. State rules may provide that safe harbor. For example, Rule 3.3(a)(1) of the District of Columbia Rules of Professional Conduct requires lawyers to correct a false statement "unless correction would require disclosure of information that is prohibited by Rule 1.6."

[xviii] MODEL RULE 3.3(a)(1) cmt. 3.

[xix] Obviously, the operative term on which analysis will turn in Rules 3.3(a)(1) and 3.3(a)(3) is "knowingly." The facts suggest that the lawyer knowingly offered the false evidence. If a lawyer only reasonably believes the evidence to be false, under Rule 3.3(a)(3), the lawyer may offer it.

[xx] SEE MODEL RULE 3.3(A)(3) CMT. 5.

[xxi] MODEL RULE 8.4(C)(D).

[xxii] MODEL RULE 8.4(D).

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parties that the principal is to be in control of the undertaking.'"

22. Apparent authority is the "power to bind a principal which the principal has not actually granted but which he leads persons with whom his agent deals to believe that he has granted," for instance where "the principal knowingly permits the agent to exercise such power or if the principal holds the agent out as possessing such power."

23. If a court determines an individual or entity is an agent of another, the actions and knowledge of the agent are binding on that person, the principal.

Id. at 461 (internal citations omitted); *see also* Restatement (Third) of Agency §§ 1.01, 2.01, 2.03, 3.03, 7.03 (2006).

Given that, under agency law, an agent's actions and knowledge bind the principal, agency law analysis is critical in insurance coverage cases in which an insurance broker's actions play a significant part in a dispute between the insurance applicant or insured and the insurer about the existence of coverage for a particular loss or claim. Whichever party the court determines is the principal with respect to the broker action in question will be bound by that action. *See, e.g., L.A. Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 67 Cal. Rptr. 3d 917, 923-24 (Cal. Ct. App. 2007); *Matter of Temple Constr. Co. v. Sirius Am. Ins. Co.*, 40 A.D.3d 1109, 1111 (N.Y. Sup. Ct. App. Div. 2007).

The agency question also is important in claims brought against an insurance broker because the answer will determine whether an insurance applicant, an insured, an insurer, or a third party potentially has a cause of action against the broker.[1]

Actions by Insurance Applicants and Insureds Against Insurance Brokers

The typical causes of action that insurance applicants or insureds bring against insurance brokers include breach of contract and negligence actions for:

(1) failure to procure requested insurance;

(2) failure to procure the appropriate insurance;

(3) failure to provide the insurer with timely notice of a claim or a suit;

(4) failure to provide accurate information about the insurance applicant in the application for insurance; and

(5) failure to investigate the financial stability of the insurer.[ii]

Potential Broker Defenses to Actions by Insurance Applicants and Insureds

Potential defenses to the above-mentioned actions that insurance applicants or insureds sometimes bring against insurance brokers include establishing that:

(1) no coverage for the insurance claim would have existed under the requested policy even if the broker had procured it (*i.e.,* the broker can raise the same coverage defenses that the insurer could have raised if the policy had been issued);

(2) the requested coverage was unavailable in the insurance market;

(3) the broker did not assume a duty to advise the insurance applicant about which coverages to purchase and did not charge a fee for such service;

(4) the broker was not the insurance applicant's or the insured's agent with regarded to the alleged wrongful act;

(5) the insurance applicant or the insured was contributorily or comparatively negligent (*e.g.,* supplied inaccurate information, failed to read the policy); and

(6) the statute of limitations expired.[iii]

Determining Which Entity the Broker Represented With Regard to the Act in Question

Determining which entity the broker represented with regard to a particular action by the broker sometimes can be difficult. The determination depends upon a number of factors. Among other factors, courts consider: (1) the existence of a written contract detailing the broker's duties and scope of authority; (2) communications between the broker and the applicant or insured and between the broker and the insurer; (3) the identity of the entity that hired and paid the broker for the services at issue; (4) whose interests the broker was trying to protect; (5) the nature of any past dealings between the broker and the insurance applicant or insured or between the broker and the insurer; (6) the complaining entity's reliance, if any, on the broker to act in its behalf; and (7) any applicable state statutes concerning broker representation.

The *Astenjohnson* case illustrates the application of some of these factors in determining who a broker represents in a particular situation. In that case, the insured contended that an asbestosis exclusion in its commercial liability policies was inapplicable because the exclusion was ambiguous and the insured did not understand its alleged function when it purchased the policies. With respect to the broker's negotiation of the policy provisions, the insured alleged that broker was the agent of the insurer. *Astenjohnson*, 483 F. Supp. 2d at 461-62.

The court disagreed, observing that the insured hired the broker to obtain the best available coverage for it, placed minimum restrictions on the broker's insurance acquisition efforts, and trusted the broker to represent the insured's best interest in the broker's dealings with insurers. *Id.* at 462. The court, therefore, concluded that the broker was the insured's agent during the negotiations for the placement of the policies and that the broker's knowledge and understanding of the policies, including the asbestosis exclusion, was imputed to the policyholder. *Id.*

Conclusion

Insurance applicants and insureds often rely upon insurance brokers to help them obtain adequate insurance coverage, submit claims to insurers. and provide other services. Although state statutes and case law may indicate that insurance brokers represent insurance applicants and insureds, as opposed to insurance companies, the common law of agency — and, especially, the principle of dual agency — may change that result in particular situations.

Therefore, when insurance applicants, insureds, insurers, insurance brokers, and/or third parties become involved in insurance coverage litigation in which an insurance broker's actions play a key role, these parties and their counsel should evaluate the facts of the case and the law of the relevant jurisdiction carefully to determine the scope of the duties and obligations, if any, that the

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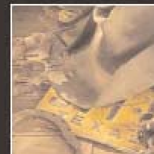

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insurance broker owed to the complaining party and the likelihood that that party can establish that the insurance broker breached its duty to, or contract with, the complaining party.

In other areas of law in which agency law principles will impact the result of a legal dispute, the parties and their counsel should undertake a similar principal/agent analysis.

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[i] This article focuses on potential broker liability to insurance applicants and insureds. It should be noted, however, that some broker actions can make them liable to insurers (e.g., failure to remit premiums). Courts, occasionally, also hold brokers liable to third parties for breach of contract under a third-party beneficiary theory. *See e.g., Flattery v. Gregory*, 498 N.E.2d 1257 (Mass. 1986).

[ii] Some states, such Florida, consider the relationship between an insurance broker and an applicant or insured to be a fiduciary relationship, which gives rise to a heightened duty of care on the part of the broker, and recognize a claim against brokers for breach of fiduciary duty. *See e.g., Moss v. Appel*, 718 So. 2d 199, 202 (Fla. Dist. Ct. App. 1998). Other states, such as Maryland, do not recognize a separate tort action for breach of fiduciary duty. *See Teamsters v. Willis Corroon Corp. of Maryland*, 802 A.2D 1050, 1052 n.1 (Md. 2002).

[iii] Some states have specific statutes of limitations that pertain to insurance brokers. *See, e.g.,* R.I. Gen. Laws § 9-1-14.1 (2008); 735 Ill. Comp. Stat. Ann. 5/13-214.4 (West 2008).

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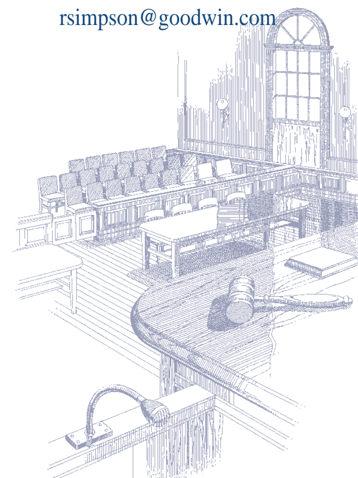

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If you have comments concerning the NBACLS newsletter, or if you are a NBACLS member who wants to submit an article to us for publication consideration, please contact Donald O. Johnson at dojohnson@mckennalong.com.

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