THE TKD ADVISOR

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WELCOME

A message from Andrew N. Krinsky

Andrew N. Krinsky

As we enter the new year and reflect on the one just passed, I think of the unusual, and unusually rewarding, experiences that 2009, a year of change, and sometimes of crisis, has presented. This year has forced upon us the opportunity to focus on things we otherwise might have overlooked, had we continued to enjoy broad economic expansion.

In my area of litigation, we experienced more compromise and settlement than usual. Adversaries seemed to appreciate the pressures and business stresses imposed on each other. Companies made efforts to stand by their clients, customers and suppliers. It was a year of drawing closer to one another in recognition of mutual concerns and inter-dependency. Let's keep the insights of this year of challenge in mind as the business environment and economy start their ascent. Memory is only as short as we let it be.

The new year has brought us a new Partner in our Real Estate Practice Group, Bill Weisner, and a new Counsel in our Banking and Finance Practice Group, Kelly Skalicky. We are delighted to welcome Bill and Kelly, who bring outstanding experience that is particularly valuable for our clients under current economic conditions.

I hope you enjoy this issue of The TKD Advisor and welcome your feedback and suggestions. Please do not hesitate to contact me by phone or email.

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EMPLOYERS, BE WARNED: NY EXPANDS LAYOFF PROTECTION FOR EMPLOYEES

By Richard L. Steer

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Since 1989, the federal Worker Adjustment and Retraining Notification Act ("federal WARN Act") has required employers with 100 or more employees to give their employees advance notice of mass layoffs and plant closings. New York has implemented the New York State WARN Act ("NY WARN Act") requiring employers with 50 or more employees to provide notice to affected employees.

An "affected employee" is an employee who may reasonably be expected to experience an employment loss as a result of a proposed plant closing, a mass layoff exceeding six months, covered reduction

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in hours, or relocation. These events triggering the notice requirement are known as "WARN events."

A "plant closing" is a permanent or temporary shutdown of a single site of employment, or an operating unit within a site, that results in an employment loss of 25 or more full-time employees. A "mass layoff" involves at least 250 employees, or at least 25 employees if those employees account for at least 33% of the employees at the site, and covers any 30-day period of loss of employment or a reduction in hours of work of more than 50% during each month of any consecutive six-month period.

While the federal WARN Act requires employers to provide notice 60 days in advance of a potential WARN event, the NY WARN Act requires an employer to provide notice at least 90 days in advance of a potential WARN event to affected employees, their union, if any, the Commissioner of Labor and the local Workforce Investment Board. Among other things, the notice required under the NY WARN Act must include specific language informing employees of their right to obtain unemployment insurance benefits.

An employer who fails to give proper notice under the NY Warn Act may be subject to a civil penalty. In addition, an employer who fails to give proper notice may be liable to employees for up to 90 days' worth of back pay, plus the value of any benefits.

There are important exceptions under the NY WARN Act to the requirement of giving notice. One is the "faltering company" exception, which may apply where a company is actively seeking capital or business sufficient to avoid layoffs and has a realistic opportunity of succeeding in its efforts. If the employer reasonably, and in good faith, believes that giving notice under such circumstances would preclude the employer from obtaining capital or business, the notice need not be given.

Similarly, where a dramatic condition outside the employer's control occurs, requiring layoffs, the employer may fall under the "unforeseeable business circumstances" exception. The unanticipated loss of a principal client or contract could fall under this exception. Our firm recently advised an employer in a situation where the employer's landlord unexpectedly obtained an order of possession leading to the closing of the employer's restaurant. The New York State Department of Labor found that the employer's failure to give a full 90 days' notice before the restaurant closed fell within the "unanticipated circumstance exception."

Natural disasters and strikes or lockouts may also provide exceptions to the notice requirements. With all exceptions, employers have the burden of proof to prove the applicability of the exception.

The NY WARN Act highlights the need for employers to plan in advance and to consult with employment counsel before closing a plant, laying off employees or significantly reducing hours.

About Richard L. Steer, Partner

Richard is a Partner of Tarter Krinsky & Drogin LLP. Richard concentrates his practice on employment and labor law. He has extensive experience in the area of Employment Practices Liability Insurance and has defended a wide range of employers and insurance companies and their policy holders in employment discrimination, labor and employment relations litigation. Richard can be reached at rsteer@tarterkrinsky.com.

INTRODUCING WILLIAM WEISNER AND KELLY SKALICKY

William W. Weisner, formerly a Partner with Patterson Belknap Webb & Tyler LLP, joined Tarter Krinsky & Drogin LLP as a Partner in our Real Estate Practice Group in January 2010. Bill handles a wide variety of commercial real estate and finance matters for lenders, developers, investors, landlords and tenants nationwide. He focuses on designing creative yet practical and efficient solutions to real estate issues and client needs. He has been repeatedly named as a leading real estate lawyer in the New York Metro edition of Super Lawyers magazine and has been recognized by Chambers USA since 2008.

In October 2009, the firm welcomed Kelly A. Skalicky, Counsel in our Banking and Finance Practice Group. Kelly focuses her practice on banking and regulatory compliance, secured transactions and commercial finance, loan workouts and debt restructuring, and creditors' rights and remedies. She was previously Counsel in the New York City office of Stetson Law Offices, P.C., and Counsel to Stearns Bank, N.A.

STAY THE COURSE: STICKING WI

By Ira R. Abel

Here is a familiar fact pattern: You sold goods to a customer, which then files for bankruptcy within 90 days of the sale. Can you keep the customer's payment or is it a preference?

By Ira R. Abel

Here is a familiar fact pattern: You sold goods to a customer, which then files for bankruptcy within 90 days of the sale. Luckily, you think, the customer paid you for the goods upon receipt, as usual. Next thing you know, though, you are being sued by your customer (or its bankruptcy trustee) for return of the payment because it is supposedly something called a "preference." And oh, yes, your customer plans to keep the goods even after recovering its payment.

How could this happen? The answer lies in the historical development of bankruptcy law. In medieval England, debtors in financial straits would often pay the creditors whose goods they most needed – for example, the hay purveyor, so the debtor could buy hay to feed its sheep – but would delay paying their other creditors. Today, a payment by a debtor to a creditor that can be recovered by the trustee in bankruptcy is called a "preference." The term derives from the historical situation where certain creditors were given "preferred" treatment by the debtor.

English courts decided that permitting a debtor to favor some creditors over others was not fair. What was fair, the courts decided, was requiring a debtor

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to make equal payments to all equally-situated creditors. The court would therefore appoint a trustee to collect back from the creditors whom the debtor had given preference over others – the hay purveyor, in our example – all payments made by the debtor so that the money could be split equally among all of that debtor's equally-situated creditors. In practice, that meant the trustee would sue the hay purveyor to recover the payments.

The hay purveyors did not take this lying down. They argued they should be given a credit if the debtor paid them "in the ordinary course" of business, when the hay purveyor did not suspect anything was amiss with the debtor's payment. Moreover, the hay purveyors (and other preferred creditors) argued, even if they did suspect something was financially amiss with the debtor, but nevertheless kept selling it hay, they should get credit for the hay they sold to the debtor because they gave "new value" to the debtor in exchange for payment.

These arguments were looked on favorably by the English courts, and were brought into the law as defenses to a trustee's lawsuit to recover preferences.

Fast forward to today. Under the bankruptcy code, a preference is, generally, a transfer of anything of value from a debtor to a creditor within the 90-day period prior to the debtors' filing for bankruptcy. If you are sued for return of a preference, you have a number of defenses.

"Ordinary course of business" is the easiest defense to establish. To show that you were paid by the debtor in the ordinary course, a creditor must demonstrate that nothing changed during the period while the debtor's finances deteriorated. The debtor kept paying the creditor on the usual terms in place between the parties, and the creditor kept shipping on the usual terms. That, in a nutshell, is ordinary course.

But what about a situation involving a new customer, where there was no long-established course of dealing between you and the customer, although you made two sales to the customer during the 90-day period prior to the date the customer filed bankruptcy? All is not lost. Even though you and that particular new customer may not have had a specific credit history, if you can demonstrate there is an "ordinary course" of dealing in your industry, which you and the customer adhered to in your two sales, you may still be entitled to the "ordinary course" defense.

The defense of "new value" involves the situation where you keep shipping to the customer while it is sliding towards bankruptcy. Each time you ship goods, the customer pays you, so you ship again. There is no change to the credit terms, because the customer has not failed you yet. Then, the customer files for bankruptcy.

Your defense is that you provided "new value" to the bankruptcy estate (*i.e.,* the customer's business) in exchange for each payment because you agreed to ship more goods to the customer in reliance on the fact you were paid for the previous shipment. In such cases, you will generally get credit for each shipment you made after receipt of each payment.

This article is intended as an introduction to the topic, not as legal advice. If you have a specific question involving preferences, or would like advice on dealing with a financially-troubled customer or supplier, please feel free to call.

About Ira Abel, Associate

Ira is in Tarter Krinsky & Drogin's Bankruptcy and Corporate Restructuring Practice Group. He concentrates his practice in the areas of sophisticated Chapter 11 cases and non-judicial corporate restructurings and reorganizations. Ira can be reached at iabel@tarterkrinsky.com.

TO WAIVE OR NOT TO WAIVE: ATTORNEY-CLIENT PRIVILEGE IN THE CONTEXT OF REGULATORY/WHITE COLLAR INVESTIGATIONS

By Kieran Batts Morrow

Kieran Batts Morrow

One of the most important issues facing a corporation or individual confronted with a criminal or regulatory investigation is the question of when, and to what extent, the attorney-client privilege should be waived. The issue has made legal headlines lately because of the decision by Bank of America to waive its attorney-client privilege in the lawsuit brought against it by the Securities and Exchange Commission alleging violations of the disclosure laws related to the bank's fall 2008 merger with Merrill Lynch.

The bank decided to waive its attorney-client privilege after the judge presiding over the lawsuit, United States District Judge Jed S. Rakoff, refused to approve a proposed $33 million settlement, stating that it was "neither fair, nor reasonable, nor adequate," and ordered the parties to prepare for trial. Subsequently, the bank chose to waive the attorney-client privilege, which it had previously fought hard to protect.

Bank of America faced the same dilemma confronting many companies and individuals that find themselves the subject of government investigations or parties to lawsuits. On the one hand, a party may want to defend itself against charges of intentionally violating the law by showing that it relied upon the advice of counsel, as is the case with Bank of America. For example, expect Bank of America to argue that it obtained, and followed, advice from its lawyers concerning what disclosures needed to be made about executive bonuses and other matters.

On the other hand, a waiver of the attorney-client privilege can be tantamount to opening Pandora's Box. A company cannot limit the privilege waiver to documents that are "good" for the company; the "bad" documents will have to be produced as well. In addition, it is not always possible under the prevailing rules of evidence to limit the scope of a waiver, which means that litigants in other lawsuits (such as securities class actions or shareholder derivative actions), other regulators, government investigators, and others can obtain possession of the formerly privileged documents.

The decision to waive the attorney-client privilege, whether in the context of a civil or criminal investigation or lawsuit, should be made only after careful consideration and consultation with experienced counsel. The scope and nature of the waiver itself must be negotiated and drafted with care and precision. While navigating the tricky waters of privilege waivers without counsel may initially seem like a thrifty decision, a poorly-considered or poorly-executed waiver can turn out to be extremely costly.

About Kieran Morrow, Associate

Kieran focuses her practice on commercial litigation, especially contract disputes and shareholder derivative suits, and corporate compliance investigations ranging from accounting practices to potential Bank Secrecy Act violations. Kieran can be reached at kmorrow@tarterkrinsky.com.

GETTING TO KNOW… AARON ABRAHAM

What do you find most satisfying about practicing construction law?

I like being part of creating and building something that is tangible, has permanence and can be used and enjoyed by others.

Who has had the greatest influence on your legal career?

My partner, David Pfeffer. We have worked together since I entered private practice, and have developed our practices together, including when we joined TKD to start the Construction Practice Group.

What is the best professional advice you've ever received?

Do what you have a passion for, don't be afraid to be different, and don't be afraid to take risks.

If you weren't a lawyer, what would you be?

A professional baseball player, probably a pitcher for the Yankees or the Dodgers.

What are your colleagues and clients most surprised to learn about you?

That I have a sense of humor.

What was your proudest childhood accomplishment?

Working with my father, learning to build and fix things.

Which historical figure do you most admire, and why?

Franklin D. Roosevelt because he was a true leader.

Tell me about your hobbies.

I enjoy running. Also, I like taking road trips because I enjoy learning about the many different cultures and communities that exist within our own country.

What is your idea of a perfect way to spend a weekend?

No schedules, no appointments; totally figuring it out as I go along.

About Aaron Abraham, Partner

Aaron co-chairs the Construction Practice Group at Tarter Krinsky & Drogin LLP. His practice focuses on negotiating and drafting a full range of development and construction agreements, as well as resolving and litigating complex construction and design-related disputes.

FIRM NEWS

TKD PLANS EXPANSION

Tarter Krinsky & Drogin LLP has signed a 13-year lease renewal and expansion that will provide space for us to meet our strategic objectives.

The firm has occupied 16,500 square feet on the 11th floor of 1350 Broadway since August 2007. We added over 2,000 square feet on the 12th floor in September 2009, and by 2011 we will add an additional 8,500 square feet on the 12th floor. We also have additional expansion options to add another 6,000-plus square feet over the next five years.

VICTORY IN SECOND CIRCUIT FOR TKD CLIENT

The United States Court of Appeals for the Second Circuit recently affirmed the District Court's dismissal of a legal malpractice claim against a client. The central issue on summary judgment involved the interpretation of German property law regarding the identity of heirs entitled to the restitution of artworks and other assets confiscated by the Nazis in 1939. The case concerned the propriety of an attorney's identification of entitled parties within the scope of his representation of members of the community of heirs.

Partner Andrew N. Krinsky and Counsel Debra Bodian Bernstein defended this case for our client.

The information contained in The TKD Advisor is of a general nature and does not constitute legal advice. Consultation with our personnel is recommended before taking action based upon any of this information. Under the rules of certain jurisdictions, this material may be considered attorney advertising. Prior results do not guarantee a similar outcome.

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