



# THE PHILADELPHIA BUSINESS LAW INSIDER

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## LAUNCH OF THE PHILADELPHIA INSIDER



### FROM THE EDITOR:

I am pleased to introduce the Philadelphia Business Insider, a new publication of the Business Law Section of the Philadelphia Bar Association that will provide a forum for professional and open exchange on all issues related to the membership and the law.

Two of our contributors addressed the recently enacted Dodd-Frank Wall Street Reform Bill signed into law on July 21, 2010. Sponsor Chris Dodd, Senate Banking Committee Chairman from Connecticut issued the following statement upon its enactment:

"At last, we have brought real change to the way Wall Street does business. With this bill, we have protected taxpayers from being forced to bail out companies that threaten to bring down the economy. With new consumer protections the government will no longer sit idly by as consumers fall victim to scams by credit card companies and mortgage giants. After today, regulators will no longer be able to ignore emerging threats to the economy. And financial operators from the trillion dollar derivatives market to small time payday lending will no longer be able to operate in the shadows. Congress has more work to do to ensure the bill is implemented successfully, but today we have created a new, sound foundation for the 21st century economy."

Whether the law lives up to its promise or the hopes of its creators is something I would hope our members would continue to write about. Certainly these two articles, one by Robert M. Kane, Jr. and the other by Heather Tashman Fritts and Kristin J. Jones, help to illuminate the implications of this new law for businesses.

The collision between facebook and trade secrets is described in a fascinating article by Stanley P. Jaskiewicz bringing to the world of business the concerns that many have personally with privacy and the internet. And last, is a review by me of a recent study by Philadelphia's Marina Angel, law professor at Temple University's Beasley School of Law, with a startling conclusion about compensation for women attorneys. This study follows a recent report "A Survey of Women Partners on Law Firm Compensation" conducted by Veta Richardson, Executive Director of the Minority Corporate Counsel Association, Inc. (MCCA), and Cynthia Calvert, Co-Director of the Project for Attorney Retention (PAR) which not surprising concluded that revenue generation is the key factor for promotion to equity partner. That full report can be found at <http://www.pardc.org/Publications/SameGlassCeiling.pdf>.

I want to take this opportunity to thank Lee Applebaum for reviving the Business Section Newsletter and for allowing me the freedom to create a new institution that I hope will serve the section well and for many years. Thank you also to Reneé Bergmann, my friend and co-editor for her invaluable help in getting this initial edition to press and to her law firm of Thorp Reed & Armstrong, LLP for their assistance in publication.

The Insider belongs ultimately to the members of the Business Law Section and invite you all to contribute will articles or with news of your achievements.

**Phyllis Horn Epstein, Esquire, Editor**

## FROM THE CHAIR



The Business Law Section has had a good and productive year. There is not sufficient space to detail the hard work I have seen on the Executive Committee; the teaching and learning that occurred in each of the programs and meetings held by our individual Committees; or the important initiatives and projects that required individual Committee leader's commitment and time. The highlights below can simply mark the results of their determination, persistence and generosity of effort.

After three years of work, the Section adopted a Diversity Action Plan. Many people were instrumental in this achievement, which culminated this Spring. A special acknowledgement is due to past Section Chair Al Dandridge for his consistency and follow-through in leading this work. We now move forward to making the plan a reality. For those who have not seen it, the [Diversity Action Plan \[http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Diversity\\_Action\\_Plan\\_Business\\_Law\\_Section.doc.pdf\]](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Diversity_Action_Plan_Business_Law_Section.doc.pdf) is posted on the Section's website.

We have also expanded on our past efforts to develop the relationship between the Section, our Committees and area law schools. This includes the Business Litigation Committee's Commerce Case Management Program Opinion Project (which I have had the pleasure of coordinating); the [Practicing Business Law Series for Law Students \[http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Practising\\_BLS%20Posting\\_\(00319366\)3.pdf\]](http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Practising_BLS%20Posting_(00319366)3.pdf) which included an excellent discussion forum for students provided by the Bankruptcy Law Committee this Spring; our invitation of law student leaders to the Section's Annual Dinner; and our identifying law student liaisons to work with the Section. We are especially grateful to Rachel Branson and former Chair Merritt Cole for their efforts in these projects. Including law students and law schools as part of the fabric of our legal community is inherently valuable, and can be a vitalizing force to both the practicing Bar and the law schools that must not be overlooked.

As in every year, it is through our individual Committees that the Section lives and breathes. Absent the Committees, their leaders and their members, none of our efforts can become a reality. The vast majority of our 16 Committees put on excellent programs and meetings this year (with more to come), providing not only CLE opportunities, but the time and place to connect with old colleagues and meet new ones. We are fortunate to have a solid core of vigorous Committee leaders who make those opportunities to learn and network take life. The Section has worked to improve the availability of CLE programs for those attending Committee meetings and seminars, and to make those programs a more welcoming experience for Section members.

After considerable effort, for the first time, every one of our Committees has made some use of their individual websites, and we anticipate that this use will continue to expand in the future. As one example, the [Business Litigation Committee \[http://www.philadelphiabar.org/page/BLSLitigation?appNum=1\]](http://www.philadelphiabar.org/page/BLSLitigation?appNum=1) has included a wide variety of materials and media on its website, which demonstrates the potential of how other Bar Association websites can be used. The [Section home page \[http://www.philadelphiabar.org/page/BusinessLawSection?appNum=1\]](http://www.philadelphiabar.org/page/BusinessLawSection?appNum=1) has improved as well, including more on the Section's history, links to projects, a calendar of all Committee events, and links to each Committee webpage, among other things.

The Section's newsletter has been revived after a 5 year hiatus. Our great thanks to Phyllis Horn Epstein for taking on this task and chairing our new Communications Committee. We look forward to contributions from all quarters to the Philadelphia *Business Law Insider*.

Finally, it has been a genuine honor to work with, and learn from, an extraordinary group of people throughout this year, and over the last decade. The true wealth of this experience is hard to measure as it continues to grow. I encourage each person to reach for all of the benefits and opportunities that the Section and its Committees offer.

**Lee Applebaum, Chair of the Business Law Section**

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## DISCLAIMER

The articles and reports contained in The Insider reflect the views of the writer and do not necessarily represent the position of the Business Law Section or The Philadelphia Bar Association or the editors.

## TOP 10 FINANCIAL REFORM LEGISLATION IMPACTS ON THE INDUSTRY

The Dodd-Frank Wall Street Reform and Consumer Protection Act provides for a massive overhaul of the financial industry, but the sweeping bill affects more than just Wall Street. Fifteen pages of the Act are dedicated to the regulation of insurance companies<sup>1</sup>. While those 15 pages pale in comparison to the Act's more than 2,300 total pages, the Act does impact several areas of the insurance sector.



Here are 10 ways the Financial Reform Act impacts insurance:

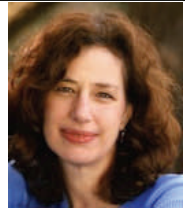
1. **Creates a national voice for the insurance industry.** The Act claims to leave the state-based insurance regulatory scheme intact. Simultaneously, however, the Act creates a Federal Insurance Office as a subdivision of the Department of the Treasury. The FIO speaks on behalf of the insurance industry, advising the Financial Stability Oversight Council on insurance matters and representing the United States in the International Association of Insurance Supervisors.
2. **Monitors state-policed insurers.** As mentioned in Point 1, the Act does not create a national insurance regulatory scheme. However, the Act does provide for research to verify the viability of a national regulatory scheme in lieu of state regulation. Specifically, the Act directs the FIO to prepare studies on three topics: (1) the current state-based regulatory system; (2) whether federal regulation should replace or supplement the current state-based system; and (3) the state of the surplus lines market.
3. **Establishes a national repository for insurance industry information.** The FIO will centralize data created by the insurance industry so that it can monitor the states' regulation of insurance companies. The Act makes clear, however, that the FIO is not a federal insurance regulator. The FIO must seek data from state regulators before demanding information from insurers. The Act leaves the day-to-day regulation of insurance companies with the states.
4. **Revises tax requirements.** The Act imposes new taxes on certain categories, including: (1) insurance companies that are classified as nonbank financial companies or bank holding companies; and (2) diversified insurance groups with \$50 billion in consolidated assets. These tax assessments are expected to raise enough money to offset the costs and expenses of the Act's measures. The Act also standardizes taxes imposed on surplus lines insurance, which has traditionally been subject to confusing and contradictory taxation by multiple states.
5. **Streamlines regulation of surplus insurance.** The Act establishes that only the home state of the insured – not the home state of the surplus lines insurer – can regulate multistate transactions for surplus lines insurance. This translates to a simplified licensing scheme for brokers – only the insured's home state can require a surplus lines insurance broker to be licensed. Also, as mentioned above, this regulation prevents multiple states from taxing surplus lines insurance in multistate transactions.
6. **Changes existing regulations applicable to insurance agents and brokers.** The Act holds insurance agents and brokers to a higher duty of care than they previously owed to their clients. Insurance agents and brokers now owe a fiduciary duty to their clients, comparable to investment advisers. For surplus lines insurance, the Act also prohibits a state from collecting fees for licensing a broker unless that state participates in a uniform national licensing database such as the National Association of Insurance Commissioners.
7. **Sets national underwriting standards for home mortgages.** The Act requires mortgage lenders to verify borrowers' income, credit history and job status. Although this requirement does not directly affect the insurance industry, it indirectly affects mortgage insurance companies, which depend on the accuracy of borrower applications.
8. **Clarifies the scope of state regulatory authority on equity-indexed annuities.** Over the past few years, a debate has ensued as to who should regulate equity-indexed annuities. If the equity-indexed annuities are an insurance product, they should be regulated by the state insurance regulators. If they are a securities product, due to their link to an equity market such as the S&P 500, the annuities should be regulated by the Securities and Exchange Commission. The Act makes clear that state regulators police equity-indexed annuities.
9. **Broadens the access insurance purchasers have to surplus lines insurers.** Traditionally, most states require insurance purchasers to buy insurance from carriers admitted in their state. Before using a non-admitted carrier, the states require proof that admitted carriers will not provide coverage. Under the Act, certain commercial buyers can now go straight to non-admitted carriers before going to the admitted market. These commercial buyers must meet certain criteria, including a minimum net worth.
10. **Increases regulation on certain categories of life insurers.** Life insurance companies organized as bank holding companies or non-bank financial firms are regulated by the Financial Stability Oversight Council. The council's primary responsibility is to act as a watchdog over the financial industry by identifying, monitoring and addressing systemic risks. Using these powers, the council may identify life insurance companies that pose a risk to the financial stability of the United States and subject them to extra regulation.



This top 10 list illustrates the significant effects financial reform has on the insurance industry. Insurers should pay particular attention to the FIO's recommendations and Actions, which could be a harbinger for more extensive federal regulation of the insurance industry.

<sup>1</sup> The Dodd-Frank Act does not include any regulation of the health insurance industry. It does, however, regulate the rest of the insurance industry.

## STATISTICAL EVIDENCE OF A GLASS CEILING FOR WOMEN ATTORNEYS



A new and startling report entitled **Statistical Evidence on the Gender Gap in Law Firm Partner Compensation** has recently been published by Temple University Law Professor Marina Angel and her colleagues Eun-Young Whang (university of Texas-Pan-American), Rajiv D. Banker (Temple University - Fox School of Business) and Joseph Lopez (James E. Beasley School of Law) in which they find empirical evidence of gender discrimination in the compensation of women attorneys.

The authors' research covered a five year period of time. Not surprisingly, this study found that for the period of time in question "... men made up roughly 85% of all equity partners during the same years. Women are three times more likely than men to be associates than partners." Moreover the authors found "A positive correlation between women partners and non-equity partners suggests that a higher proportion of women partners occurs in firms that also have a higher proportion of non-equity partners. This is consistent with a glass ceiling effect. Women promoted within a law firm may be left in nonequity partner positions permanently."

The disparity of pay for women attorneys and the failure to advance to positions of power and equity sharing within their firms has often been excused by arguments that are based upon speculation that because of their family obligations, women devote less time to their careers, seek job settings that pay less or are generally less productive. This new report debunks those worn out conclusions.

The authors have summarized their work as follows:

"Our study compiled the largest research sample on the gender gap in compensation at the 200 largest law firms by combining two large databases to examine why women partners are compensated less: because they are less productive than men partners or because they are women. The AmLaw 100 and 200 studies include gross revenue, profits, number of equity and non-equity partners, and the total number of lawyers at each firm. The Vault/MCCA Law Firm Diversity Programs study (Vault/MCCA) includes the gender ratios at each AmLaw 200 firm. Our study covers the years 2002 to 2007.

The ratio of women equity partners to women non-equity partners is 2.546 compared to a ratio of 4.759 for their men counterparts over the six year period studied. An increase of 1% in the proportion of women partners at a law firm is associated with 1.112% lowering of the overall compensation for all partners at the firm. This disparity in compensation between women and men partners exists even after controlling for the lower compensation of non-equity partners and the greater likelihood for women to remain non-equity partners. Women partners are paid less than men partners despite the fact that they are not less productive in generating RPL for their firms.

The average gross revenue of firms with the highest percentages of women lawyers was approximately \$20 million dollars higher than firms with the lowest percentage of women lawyers, but the revenue per lawyer (RPL) of these firms dropped by approximately \$120,000 per lawyer. The average compensation for the lawyers at the firm goes down as the proportion of women at a firm rises, indicating that women in all positions at a firm are paid less than their male counterparts.

Since 1988, a low of 40.6% and a high of 50.4% of first year J.D. students have been women. The proportion of women in positions of power at the AmLaw 200 firms should have increased over the ensuing twenty-six years. Women represented approximately 50% of the associate hires during the eighteen years prior to 2001 but only 15-16% of partners. The women who make it to partner are paid less than their men counterparts.

Our paper examines the gender gap problem in law firm compensation through an empirical lens. The results have important implications for economic discrimination research. Our statistical analysis concludes that women partners are compensated less than men on average at the AMLAW 200 law firms regardless of whether they are equity partners or non-equity partners. This gender disparity is not due to lower productivity of women partners. It is attributable to discriminatory practices under both disparate treatment and disparate impact analyses."

Their paper concludes:

"More than one hundred years have elapsed since the late 1800s when women first emerged in the men-dominated legal workplace. However, women lawyers still need to fight for equality in compensation and promotion commensurate with their contributions to the highest grossing law firms in the U.S. Formal statistical results in this paper document that women lawyers are disadvantaged relative to men partners not because they are less productive in generating revenue for their law practices but because of discrimination. Comparing the average compensation levels of partners across firms, we find that women partners are on average compensated less than men partners. Our results hold even after controlling for the lower compensation of non-equity partners, since women are more likely than men to remain a non-equity partner. This difference is striking because women partners are compensated less than men partners even though their impact on revenue generating productivity is not less than that of men partners.

The gender gap discrepancy in pay could be explained if women lawyers are paid less than their men colleagues, because they devote less time to their careers, are less productive, or opt for lower paying more egalitarian law firms. The analysis presented disproves these claims. Our results are consistent with discrimination."

The full report can be found at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1674630](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1674630)

**Phyllis Horn Epstein, Esquire, Epstein, Shapiro & Epstein, PC.** Ms. Epstein is former co-chair of the PBA Commission on Women in the Profession.



## TRADE SECRETS, RIP

Those of us present at the birth of MTV may remember that it launched with "Video Killed the Radio Star," the Buggles' lament about the unforgiving effect of technological change.

Today, has Facebook similarly killed the trade secret?

That was the opinion of one New York federal court. *Sasqua Group, Inc., et al. v. Lori Courtney*, 2010 U.S. Dist. LEXIS 93442, 2010 WL 3613855 (E.D.N.Y. Aug. 2, 2010)

The case involved the common suit to stop a former employee from using a contacts list for a new employer, in this case, in the financial services industry – typically shot down by a swift injunction.

But not in this case. In the court's view, the fact that information which once was "confidential" had become freely available online, particularly through social networking sites, had so weakened traditional state law trade secret protection, that it was no longer bound by "old" (i.e., pre-from 1990's) precedent protecting such assets.

The new employer was instead able to show the court – literally, in a courtroom demonstration before a magistrate in an evidentiary hearing - that it could recreate the list online, in just a few minutes, using Google, LinkedIn and Facebook. The alleged trade secrets "could be properly acquired or duplicated through a straightforward series of Internet searches in a drilling down exercise that likely could be duplicated."

As a result, the court refused to let the old employer block use of the contact list solely on the basis of New York's common law of trade secrets:

The information in Sasqua's database concerning the needs of its clients, their preferences, hiring practices, and business strategies, as well as Sasqua's acquaintance with key decision-makers at those firms may well have been a protectable trade secret in the early years of Sasqua's existence when greater time, energy and resources may have been necessary to acquire the level of detailed information to build and retain the business relationships at issue here. However, for good or bad, the exponential proliferation of information made available through full-blown use of the Internet and the powerful tools it provides to access such information in 2010 is a very different story.

Curiously, *Sasqua's* holding was in marked contrast to a 2004 California holding, in which the "Court decline(d) to hold that information that becomes publicly available on the Internet can never be a trade secret under California law." *Hirel Connectors, Inc. v. United States*, 2004 U.S. Dist. LEXIS 31036 (C.D. Cal. Jan. 23, 2004).

Although these cases were in different jurisdictions, the pervasive growth of online information in the intervening 6 years, combined with readily available tools that make it just as easy to find the proverbial needle as to find the haystack, have undermined a traditional method for businesses to protect themselves without having to resort to attorneys and legal fees for routine hiring decisions.

Of course, as any business lawyer knows, the old employer would have been on far stronger ground if it had just required the employee to sign a standard "new hire" a confidentiality agreement, much less a non-solicitation agreement. Moreover, if the old employer had in such agreements specifically prohibited its employees from sharing critical information online, particularly at social media websites, the court may have been more willing to uphold traditional trade secret protection.

Certainly no one can wear blinders about the beneficial, but disruptive, effect of increasingly popular online communication on protection of confidential information - especially when employees must routinely use social media as part of their jobs. The challenge for employers – and their counsel – is to create ways of protecting what is critical, without losing the business benefits of social media. Until our courts and society reach a consensus on what is secure and protected, employers should train employees about the business risks of online "friendships" – and make sure their counsel update their form agreements to reflect the realities of the workplace today.

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**Stanley P. Jaskiewicz, Esquire**, of Spector Gadon & Rosen, PC, assists closely held and family firms with business and technology law questions, and advocates for persons with disabilities (particularly autism). Mr. Jaskiewicz may be reached at Spector Gadon & Rosen, PC, 1635 Market Street, 7th Floor, Philadelphia, PA 19103, 215-241-8866, [sjaskiewicz@lawsgr.com](mailto:sjaskiewicz@lawsgr.com). Information about his practice and publications is available at <http://www.lawsgr.com/attorneys/Stanley+P./Jaskiewicz/>.

## SAVE THE DATE: JANUARY 25, 2011 ANNUAL RECEPTION

Business Law Section Annual Reception featuring the presentation of the annual Dennis H. Replansky Memorial Award. The event will be held at The Westin Philadelphia at 99 South 17th Street, Philadelphia, PA 19103.



## INSURANCE LAW COMMITTEE PROGRAM OFFERS *STRAIGHT TALK ABOUT THE RISKS FACING DIRECTORS & OFFICERS*

Recently, the Insurance Law joined with the Securities Regulation Committee in co-sponsoring the *program Straight Talk About the Risks Facing Directors & Officers*. The program was moderated by Heather Fritts, the chair of the Insurance Law Committee. Panel members included Larry Fine from Chartis, Ken Ross from Willis and David Laigaie from Dilworth Paxson. The panel addressed current risks effecting directors and officers; provided an overview of the D&O Liability Insurance Policy; and gave insight on recent case law on ethical risks facing directors & officers during internal investigation and coverage disputes. The Insurance Law Committee is also co-sponsoring with the Business Litigation Committee a program entitled *Business Insurance: Key Risks and How to Cover Them*. Craig Blackman from Stradley Ronon and Ned Dunham of Kleinbard Bell & Brecker will be leading the discussion of the types of insurance available to businesses; risks that are covered or not covered under various policies and their typical exclusions; risk assessment and coverage for varied and emerging risks, including cyber-risks; and avoiding common pitfalls which may lead to coverage disputed before and during litigation.



## MEMBERSHIP ANNOUNCEMENTS



**Lisa C.S. Burnett** (1995) has joined Klehr Harrison Harvey Branzburg as a partner in the Corporate Department. Ms. Burnett advises in the areas of private equity, mergers and acquisitions, securities, venture capital, and general corporate matters. She has negotiated and structured numerous domestic, international, hostile, and negotiated transactions on behalf of leading equity sponsors and their portfolio companies.



**Christopher Scott D'Angelo** was the Moderator for the program, *Ethics: The Erosion of the Attorney-Client Privilege and the Work Product Doctrine, and Its Effect On In-House Counsel*, that was presented at the Federation of Defense & Corporate Counsel's Corporate Counsel Symposium, held this year in Philadelphia, Pennsylvania in September, 2010. The program addressed the latest trends, impact of business versus legal roles for in-house counsel, protecting privilege globally, privilege concerns in dealing with insurance carriers, change of ownership or control of a corporate client, and dual capacity issues. The title of

this year's Symposium was *"Protecting the Company In Challenging Times - Best Practices for In-House Counsel Who Manage Corporate Risk and Litigation*. Mr. D'Angelo is a partner in the litigation department of Montgomery, McCracken, Walker & Rhoads LLP and is Chairman of its Products Liability & Risk Management Section and Vice Chairman of its Sports, Entertainment & Amusements Law Practice. Mr. D'Angelo may be reached at [cdangelo@mmwr.com](mailto:cdangelo@mmwr.com)

**Phyllis Horn Epstein**, of Epstein, Shapiro & Epstein, PC, was appointed liaison between the Pennsylvania Bar Association and the Internal Revenue Service in a collaborative association known as "Pennsylvania IRS & Practitioner Liaison" where she is joined by representatives of the IRS and Accounting Associations in a dialogue to resolve systemic issues within the IRS that impact the profession. Attorneys are welcome to contact Ms. Epstein with related issues at [phyllis@eselaw.com](mailto:phyllis@eselaw.com)



**Joseph M. Donley**, Partner-in-Charge of Thorp Reed & Armstrong, LLP's Philadelphia office, and Leader of the firm's Insurance & Reinsurance practice group, has been elected to serve on the Executive Committee of Thorp Reed & Armstrong, LLP.



**Reneé F. Bergmann**, a member of Thorp Reed & Armstrong, LLP's Commercial and Corporate Practice Group, served as a panelist in a teleconference/integrated visual webcast titled "Business Strategies That Attract Clients" sponsored by the ABA Law Practice Management Section and the ABA Center for Continuing Legal Education on November 18, 2010.



**James S. Ettelson**, a partner in Thorp Reed & Armstrong's real estate practice group, presented an NBI live teleconference titled "Step-by-Step Through the Real Estate Contract" on November 2, 2010.

## REED SMITH LAUNCHES *THE SWAP REPORT BLOG*

Reed Smith is pleased to announce its newest blog, *The Swap Report*. The Swap Report is designed to serve the needs of the friends and clients of Reed Smith. Our goal is simple - to provide our perspective on a variety of regulatory and transactional issues relating to derivatives.

View the latest entries at [theswapreport.com](http://theswapreport.com).

## BUSINESS LAW SECTION'S 2010 AWARD RECIPIENTS

The Business Law Section is pleased to announce the following 2010 annual award recipients. These awards will be presented at the Section's Annual Dinner on January 25, 2011 at the Westin Hotel.

Former Bar Chancellor, and 2001 Business Law Section Committee Chair of the Year, Jane Leslie Dalton will receive the Dennis H. Replansky Memorial Award. Dennis Replansky, a former Business Law Section Chair, passed away in 1994 at the age of 51 and was among the Bar's most esteemed and beloved members. In 1997, the Section established the Award in recognition of his career as a lawyer and his contributions to legal, civic, religious and other charitable causes. Jane Dalton, through her years of accomplish-

ments and service, continues the line of award recipients who exemplify the abilities and qualities that honor Dennis Replansky's memory, and whose lives are exemplars to other lawyers.

The 2010 Chair of the Year is Graham R. Laub. Gray was Chair of both the Mergers & Acquisitions Committee and the Securities Regulation Committee. His commitment, leadership and industry are deeply appreciated by the Section and by those who have directly benefitted from the many programs offered by those Committees.

The 2010 Committee of the Year is the Antitrust Committee, chaired by Gerard A. Dever. The Committee has put on a series of fascinating and well attended seminars that are a genuine boon to the Antitrust Bar. The

Section is enriched by such an active and productive committee.



### Antitrust Law CLE – December 16, 2010

The Antitrust Law Committee announces an upcoming CLE program Thursday December 16, 2010 at 12:30 at the Pennsylvania Bar Institute CLE Conference Center Wanamaker Building, 10th Floor. The program, **Maximizing Your Impact in Antitrust Cases** has been approved for 1.0 Substantive CLE credit. The program features speakers **Ann T. Greeley, Ph.D. and Steven J. Son, Ph.D. of DecisionQuest** who will address how to create powerful demonstratives for a variety of antitrust matters with clips from mock trial research to illuminate certain concepts. Jurors' reactions to class actions, evidence regarding parallel conduct and joint defense agreements and position as plaintiff or defendant at trial will also be discussed. Check the Business Law website for more sign up information.

## COUNSELING THE CORPORATION

The Business Law Section hosted a panel discussion at the 2010 Philadelphia Bar Association Bench Bar Conference at the Borgata in Atlantic City titled "Counseling the Corporation". The panel consisted of John Chou and Marilyn Heffley. Mr. Chou graduated from Harvard College and the University of Pennsylvania Law School, was a partner with Eckert Seamans, and held in-house positions with CIGNA and ARCO Chemical before becoming Senior Vice President, General Counsel, and Secretary of AmerisourceBergen. Ms Heffley graduated from the Temple University Beasley School of Law and was a partner at Reed Smith LLP before becoming Chief Litigation Counsel at Sunoco, Inc.. The discussion was moderated by Eric Milby, a partner with Lundy Flitter Beldecos & Berger and former Chair of the Business Law Section. The panel discussed such topics as the process of hiring outside counsel, the relationship with outside counsel, diversity, communications and billing.

On the topic of soliciting work from corporate clients, both panelists remarked at how frequently firms that are given the opportunity to sell their services come to the meeting unpre-

pared and without a coherent and organized sales pitch. It is most frustrating for general counsel to feel that they have to carry the conversation. Although a PowerPoint presentation is by no means necessary, those firms that show up with a PowerPoint tend to follow a logical sequence in their presentation and ultimately make a much more compelling impression. There was no clear consensus on a trend toward using fewer or a larger number of firms. AmerisourceBergen has trended toward using a broader array of firms for its work considering such matters as geography and practice area. Sunoco, on the other hand, has trended toward consolidating its work among fewer full service firms with a broad geographical reach. The panelists, however, prefer to allow the associate counsel in their department work with those outside counsel with whom they have a comfortable working relationship. Understand the client's business. While this is widely known to be an important part of the relationship with a corporate

legal department, it is often overlooked. The panel explained that there are many ways that you can learn about and understand your potential corporate client's business. Some of these methods are as simple as using Google. However, in-house counsel will often take the time to sit with potential outside counsel and educate them about the nature of the Corporation's business.

Communication is everything. The panelists prefer short emails that can be scanned in about 10 seconds for routine matter updates. Faxes have largely fallen by the wayside as a means of communication. Missed deadlines were likened to a delayed flight. If the departure time comes and goes with no communication from the airline as to the cause of the delay



## COUNSELING THE CORPORATION (CONT'D)

and the anticipated new deadline, anxiety ensues and time is lost. However, if the airline gives sufficient advance notice of the delay and communicates the problem, you can plan accordingly. Similarly, if counsel cannot make a deadline previously set, that should be communicated to General Counsel so they can plan accordingly and reallocate their time wisely. All communications should be funneled through General Counsel. It is bad protocol to communicate directly with the business people and could strain your relationship with the General Counsel.

New technologies are often well received and technologies that can simplify the workflow or lower the overall cost to the client should always be considered. As an example, General Counsel appreciate the advent of electronic data rooms, or extranet document databases, as they often eliminate travel, reproduction and transmission costs related to traditional document reviews and because the searchable database of documents is always available. Video conferencing and e-billing are also well received.

When considering the legal team that will service the client, it is useful to have a relationship partner who can always be reached that has general oversight and

familiarity with all matters. However, the panelists and in-house counsel expect to and do work directly with the attorneys handling each matter. The responsible lawyer for each matter should be a good project manager and should be efficient thus eliminating the need for matters to be overstaffed. One large firm associate questioned how they can get noticed by in-house counsel as a positive contributor to the legal team. The panelists responded that they are watching and know who all of the team members are that are working on their matters. The message was 'do good work and you'll be noticed.'

Finally, the panelists addressed the topic of fees. Notwithstanding the increasing buzz about the use of alternative billing arrangements, they have not taken hold. There is no clear understanding that such arrangements result in a lower overall cost to the client. The panelists preferred to

negotiate discounted hourly rates. Other cost saving strategies often include the outsourcing of services that, while they have traditionally been provided by law firms, are now being offered by other companies. E-Discovery providers is an example of one such service.

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## PHILADELPHIA BAR ASSOCIATION BUSINESS LAW SECTION DIVERSITY ACTION PLAN Task Force Draft Proposed December 14, 2009 Adopted by the Executive Committee May 10, 2010

The Business Law Section of the Philadelphia Bar Association ("**Business Section**") believes that inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities is essential.

To help guide the Business Section's effort to increase inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities, the Business Section's Executive Committee created a task Force ("Task Force") to assess the Business Section's current Environment and Efforts around diversity.

The Task Force was charged with recommending specific ways the Business Section could improve its current initiatives to encourage active involvement in the Business Section and its committees by lawyers regardless of race, ethnicity or religious background, national origin, gender, sexual orientation, disability, age, geography or work environment (large, small and mid-size firms, sole practitioners, government

lawyers, in-house counsel, judiciary, part-time, full time). The Task Force focused on four areas: (1) Business Section Environment; (2) Leadership; (3) Outreach and (4) Professional Development.

To consider the four focus areas in greater depth, the Task Force discussed the underlying issues that hindered the Business Section's growth in its area and recommended actions to improve the Business Section's outreach. The Task Force has created an overall Diversity Action Plan (the "**Plan**") for the Business Section. The Plan was submitted and reviewed by the Executive Committee, and adopted on May 10, 2010, with a recommendation for the Task Force to develop measurements and metrics by which to evaluate progress on implementation of the Plan and to report its findings to the Executive Committee from time to time.

To create a culture where all members of the bar association feel valued, supported, comfortable and included in an environment that affords an opportunity to contribute and

thrive by attorneys from underrepresented groups.

### **ACTION STEPS**

1. Assess information gathered from interviews with members of the Business Section to identify diversity issues and challenges.
2. Ensure that the Business Section includes attorneys from underrepresented groups as active members, committee chairs and on the Executive Committee, as appropriate
3. The Task Force will report on the progress of the Plan to the Executive Committee every six months. The Task Force will also make recommendations for action by the Executive Committee, if necessary.

**PHILADELPHIA BAR ASSOCIATION**  
**BUSINESS LAW SECTION DIVERSITY ACTION PLAN**  
**Task Force Draft Proposed December 14, 2009**  
**Adopted by the Executive Committee May 10, 2010 (CONT'D)**

4. Allocate an amount in each annual budget to implement the Plan and for events and programs recommended by the Task Force and approved by the Executive Committee.
5. Expand the role of the YLD Liaison to include serving as an avenue of communication from the Business Section with concerns regarding diversity and inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities.
6. Solicit input from the affinity bar associations regarding effective means for communicating opportunities to their memberships.

To demonstrate the commitment of the Business Section's Executive Committee to inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities by developing policies, practices and plans that effectively and proactively implement this Plan.

**ACTION STEPS**

1. The Executive Committee will determine whether a member of the Executive Committee or someone else should be designated as Diversity Liaison to the Business Section's committees.
2. The Executive Committee will develop a process that strives to ensure that the Business Section's committees will follow the guidance of the Executive Committee to develop policies, practices and plans for membership and programs in a manner that supports and promotes diversity and inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities.
3. The Executive Committee will work and cooperate with the Business Section's committee leaders in advancing inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities within their committees, and will encourage, facilitate and support the leaders in each committee to take real and practical steps toward increasing diversity within the committee's leadership and within its activities.
4. The Task Force will explore the possibility of sponsoring an event, conference or an organization that is focused on increasing inclusion, participation and involvement of

attorneys from underrepresented groups in Business Section programs and activities.

To recruit a more diverse pool of attorneys both for committee membership and for Business Section presentations.

**ACTION STEPS**

1. The Executive Committee will communicate its interest in increasing the participation of attorneys from underrepresented groups.
2. The Business Section will host or sponsor discussions, panels, networking events or other events organized by the various affinity bar associations. Where appropriate, the Business Section will seek opportunities to participate in panels or give presentations at these events.
3. The Executive Committee will pursue initiatives to attract inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities by participating in the various bar and other legal associations for attorneys from underrepresented groups and by spreading the word that the Business Section is a comfortable, welcoming place to participate.
4. The Business Section should increase the diversity of the pool of actively recruited attorneys from underrepresented groups as candidates from which it recruits for positions as Business Section officers, Executive Committee and committee members, individual committee leaders and promotes and develops Business Section membership and individual committee membership.
5. The Business Section will participate in the Philadelphia Diversity Law Group programs, where appropriate.
6. The Executive Committee will include attorneys from underrepresented groups whenever it participates in law school programs. To establish and maintain a systematic and structured process and approach to professional program development that is proactive and will ensure full and equal opportunities and support for attorneys from underrepresented groups to be full and active participants.

**ACTION STEPS**

1. Conduct periodic surveys of the Business Section and other attorneys for ideas of how

to improve inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities.

2. Implement suggestions from the survey for the improvement of inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities, and otherwise work to increase the inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities.

3. Identify and promote meaningful inclusion, participation and involvement of attorneys from underrepresented groups in Business Section programs and activities at all levels of committee activities and program assignments.

4. Seek the advice, and learn from the experience, of persons or groups who have studied and successfully achieved greater diversity in organizations or groups with significant similarities to the Business Section. Streamline the process, and educate our Executive Committee and committee leaders, as much as possible by learning from others who have experience in materially similar circumstances. Budget reasonable funding where warranted.

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## PUBLIC REOPPORTING REQUIREMENTS OF SWAP TRANSACTIONS UNDER THE DODD-FRANK ACT

On July 21, 2010 President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act") into law.<sup>1</sup> The Act is a sweeping piece of legislation designed to "promote the financial stability of the United States."<sup>2</sup> This article will focus on the Act's public reporting requirements for parties to swap transactions.

Title VII of the Act amended the Commodity Exchange Act to establish a "comprehensive new regulatory framework for swaps and security-based swaps." The Act delegates regulatory authority over "security-based swaps"<sup>3</sup> to the Securities and Exchange Commission and gives regulatory authority over all other swaps to the Commodity Futures Trading Commission ("the Commission").<sup>4</sup> Title VII requires that parties to swap transactions publicly report information relating to the swap transaction. Whether a party is required to publicly report the information will depend on their status as a "swap dealer," "major swap participant," or neither under the Act.

Companies will need to review all of their swap positions and counterparties in order to determine their reporting responsibility for each individual swap transaction. It is important to note that a company's reporting responsibility may be different for each swap they own. Additionally, one must note the Act does not solely cover prospective swaps. The Act also establishes reporting requirements for swaps entered into before the Act whose terms have not expired as of the date of enactment.

The first section of this article will review the "real-time public reporting" requirement. The second section will review the reporting duties of parties to swap transactions. Finally, the third section will review reporting requirements for "pre-enactment unexpired swaps."

### REAL-TIME PUBLIC REPORTING

Section 727 of the Act amends the Commodity Exchange Act to require "real-time public reporting" of swap transactions. "Real-time public reporting" is defined by the Act as reporting "as soon as technologically practicable after the time at which the swap transaction has been executed." The purpose of Section 727 is to "authorize the Commission to make swap transaction and pricing data available to the public . . . ."

Section 727 classifies swaps into four categories for the reporting requirement. The first two categories cover (1) swaps that are subject to the mandatory clearing requirement and (2) swaps that are not subject to the mandatory clearing requirement but are cleared at a registered derivatives clearing organization.<sup>5</sup> Section 723 of the Act establishes a mandatory clearing requirement for swaps. This section makes it unlawful to engage in a swap transaction unless the swap is cleared at a derivatives clearing organization registered under the Commodity Exchange Act. Swaps that fall into the first two categories must be reported "as soon as technologically practicable."

The third category consists of swaps that are required to be cleared under new section 2(h)(2) of the Commodity Exchange Act but are not cleared.<sup>6</sup> Swaps in the third category must also be reported "as soon as technologically practicable." The fourth category is swaps that are not cleared at a registered derivatives clearing organization and "which are reported to a swap data repository<sup>8</sup> or the Commission." These swaps must meet the "real-time public reporting" requirement. However, in meeting the reporting requirement, these swaps can be reported in a manner that "does not disclose the business transactions and market positions of any person."

Section 727 mandates "real-time public reporting" for swap transactions. However, the manner in which swap transactions meet this requirement is different depending on whether the swaps fall under the mandatory clearing requirement. To ensure compliance with the Act, companies should implement a recordkeeping system that will track whether their swaps meet the mandatory clearing requirement outlined in Section 723 of the Act. Companies will also need to keep track of which swaps were cleared at a derivatives clearing organization. Finally, companies will need to record which swaps were reported to a swap data repository or the Commission.

### REPORTING DUTIES OF PARTIES TO A SWAP TRANSACTION

Section 729 of the Act requires that any swap that is not accepted for clearing at a derivatives clearing organization be reported to either a swap data repository<sup>8</sup> or to the Commission. The Act classifies swap transactions into three categories based on the identities of the parties.

The first category is a swap transaction in which only one of the parties is a "swap dealer"<sup>9</sup> or "major swap participant." In this transaction, it is the responsibility of the swap dealer or major swap participant to report the transaction.<sup>10</sup> In the second category, one of the parties is a swap dealer and the other is a major swap participant. In this transaction, the swap dealer shall report the transaction. The third category is where companies will have to be vigilant in tracking the counterparties to their swaps. In the event that neither of the parties is a swap dealer or major swap participant, then the parties shall elect one party to report the swap transaction to a swap data repository or the Commission.

In order to comply with the reporting requirement under Section 729 of the Act, companies will need to maintain a list of every counterparty with whom they have entered into a swap transaction. Upon reviewing a list of counterparties, companies will need to assess what counterparties meet the definition of swap dealer or major swap participant. Swaps entered into with a swap dealer or major swap participant will relieve the company of any reporting obligations. However, if the counterparty is not a swap dealer or major swap participant, then the company must come to an agreement with their counterparty to determine who will report the swap transaction.

### REPORTING & RECORDKEEPING OF PRE-ENACTMENT UNEXPIRED SWAPS

Section 729 of the Act requires all swap transactions entered into before the enactment of the Act whose terms have not yet expired as of the date of enactment ("pre-enactment unexpired swaps") shall be reported to a registered swap data repository or the Commission not later than thirty days after issuance of the interim final rule or by a date determined by the Commission to be appropriate.<sup>11</sup> On October 14, 2010, the Commission issued an interim final rule to cover the reporting of swap transactions entered into before July 21, 2010 whose terms had not expired as of that date.<sup>12</sup> The interim final rule is effective October 14, 2010<sup>13</sup> and will remain in effect until the permanent reporting rules for swap transactions are adopted by the Commission within 360 days of the enactment of the Act.

The interim final rule establishes a reporting time frame for pre-enactment unexpired swaps. The rule requires swap transactions be reported on the earlier of: (1) 60 days from the date an appropriate swap data repository is registered with the Commission, or (2) by the compliance date established in the swap reporting rules required by Section 2(h)(5) of the Commodity Exchange Act. The interim final rule requires that the party reports to the swap data repository or Commission a copy of the swap transaction confirmation and, if available, the time the transaction was executed. A note to the interim final rule requires the following information be retained by each

## PUBLIC REPORTING REQUIREMENTS OF SWAP TRANSACTIONS UNDER THE DODD-FRANK ACT (CONT'D)

party (assuming the information presently exists): (1) any information necessary to identify and value the transaction; (2) the date and time of execution; (3) information relevant to the price; (4) whether the transaction was accepted for clearing and the identity of the clearing organization; (5) any modifications to the term of the transaction; and (6) the final confirmation of the transaction.

In order to comply with the reporting requirement for pre-enactment unexpired swaps, companies will need to take inventory of all swaps held on July 21, 2010 that were unexpired. The same reporting obligations for counterparties established under Section 729 for prospective swaps will also apply for pre-enactment unexpired swaps. Companies will need to retain required supporting information of the swap transaction.<sup>14</sup>

### CONCLUSION

To comply with reporting requirements of the Act, any company or pension holding swaps that were unexpired at July 21, 2010 or enters into swap transactions after July 21, 2010 will need to maintain a list of their swap transactions and respective counterparties. Companies will then need to determine if their counterparties meet the statutory definitions of “swap dealer” or “major swap participant” in order to determine the company’s reporting requirement under the Act. Because the reporting requirement may be different for each individual swap a company has entered into, it is imperative that companies begin to take an inventory of their swap positions and counterparties.

**Disclaimer:** The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee. This article expresses the author’s views and does not necessarily reflect those of the Commission or other members of the staff. The author is a former volunteer intern in the Philadelphia Regional Office, and can be reached at [Robertkane@gmail.com](mailto:Robertkane@gmail.com).

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> A sample of the areas covered by the Act include creation of a Financial Stability Oversight Council, liquidation procedures for financial companies, regulations of advisers to hedge funds, and investor protections.

<sup>3</sup> 75 Fed. Reg. 63,081 (Oct. 14, 2010). Section 721 of the Act amends Section 1a of the Commodity Exchange Act to define swap. Section 761 of the Act amends Section 3(a) of the Securities Exchange Act of 1934 to define security-based swap.

<sup>4</sup> See Section 2 of the Act (defining the “primary financial regulatory agency”).

<sup>5</sup> See 7 U.S.C. § 1a(9) for a definition of derivatives clearing organization.

<sup>6</sup> New section 2(h)(2) of the Commodity Exchange Act mandates the Commission will conduct an ongoing review to determine what types of swaps should be required to be cleared.

<sup>7</sup> Section 721 of the Act amends Section 1a of the Commodity Exchange Act to define swap data repository as “any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purposes of providing a centralized recordkeeping facility for swaps.”

<sup>8</sup> Section 728 of the Act requires that a swap data repository be registered with the Commission.

<sup>9</sup> Section 721 of the Act defines a swap dealer as any person who (1) holds itself out as a dealer in swaps; (2) makes a market in swaps; (3) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (4) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. Satisfying any of the above categories will result in a person being classified as a “swap dealer” under the Act.

<sup>10</sup> Section 721 of the Act defines a major swap participant as any person who is not a swap dealer and (1) maintains a substantial position in swaps for a major swap category; (2) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the stability of the United States banking system; or (3) is a highly leveraged financial entity not subject to capital requirements from a Federal banking agency and maintains a substantial position in outstanding swaps in a major swap category.

<sup>11</sup> The Act is written to allow the swap transaction to be reported to the Commission in the event no swap data repository would accept the swap. In the background of the interim final rule, the Commission noted there might be circumstances whereby no swap data repository has been approved for an asset class. 75 Fed. Reg. 63,082.

<sup>12</sup> Interim Final Rule for Pre-enactment Swap Transactions, 17 C.F.R. §§ 44.00-44.02 (2010). On October 20, 2010 the Securities and Exchange Commission issued an interim final rule for the reporting of pre-enactment security-based swap transactions. Interim Rule for Reporting Pre-enactment Security-based Swap Transactions, 17 C.F.R. § 240.13Aa-2T (2010).

<sup>13</sup> 17 C.F.R. § 44.01.

<sup>14</sup> The note to the interim final rule does not require that a party to a pre-enactment unexpired swap create new records. Parties may report to the Commission the information in the form that it presently exists. 17 C.F.R. § 44.02.

## BUSINESS LAW SECTION: WHO ARE WE?



As the largest substantive law section in the Philadelphia Bar Association, the Business Law Section, through its many committees, promotes the objectives of the Association and the interests of business law practitioners in the fields of corporate, banking, securities, intellectual property, municipal finance, and related areas of the law. The Section, made up of in-house, government and private practice business lawyers, sponsors numerous committees which provide important networking and continuing legal education opportunities for Section members. The Business Law Section advocates legislative changes in Harrisburg under the umbrella of the Association.

## MISSION STATEMENT

It is the mission of the Communications Committee of the Business Law Section of the Philadelphia Bar Association to foster improved communication among its members in the furtherance of the goals of the Section. To this end, The Insider provides a forum for professional and open exchange among the Section membership on all issues related to its members and the law. The

Insider shall be utilized for the following purposes:

- To publicize opportunities and events that may be of interest to the Section membership;
- To provide information to the membership on topics that may be of general interest;
- To reach a wider audience and increase the visibility of the

Section;

- To inform the Section membership of its projects and goals;
- To share information with the Section membership regarding accomplishments of members and public figures.

## BUSINESS LAW SECTION OF THE PHILADELPHIA BAR ASSOCIATION



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## EDITORIAL POLICY

The Business Insider is a publication of the Business Law Section of the Philadelphia Bar Association. The purpose of the publication is to facilitate communication among the membership of the Section on topics and events of

general interest to business law practitioners. The editors of The Insider reserve the right to accept or reject any submission and to edit any submission to ensure its suitability for publication, its adherence to the Mission

Statement of the Communications Committee, and its furtherance of the objection of the Business Law Section.



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## APPLAUSE APPLAUSE



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