BURNS & LEVINSON LLP

Winter 2007

Focus

Merging Interests, Growing Together

A Message from David P. Rosenblatt, Managing Partner

Dear Colleagues:

The past year has been a time of positive change and growth for Burns & Levinson.

Our merger with Perkins Smith & Cohen bolsters our standing as a leading midsize business law firm with a strong science and technology practice. Activities during 2006 – ranging from successful deals throughout our corporate practice and many successes in the courts to philanthropic endeavors with our "Power of an Idea" scholarship for Boston high school students – have infused us with a renewed sense of purpose. Our firm culture is strong, our spirits are high and our relationships – with each other and with our clients – continue to blossom.

But there are challenges ahead in 2007, too. Large Boston law firms are growing ever larger as the premise is that bigger is better. National law firms have flooded the Boston market during the past five years, jockeying to attract clients. Competition is stronger than ever as firms attempt to tout their value to their clients. There is considerable risk in the big strategy, not the least of which is that some firms may effectively price themselves out of the market.

We are clearly at the intersection of an interesting legal dynamic. Amid the increasing clutter of the Boston

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DAVID ROSENBLATT

is Managing Partner of Burns & Levinson LLP.

Got Them Old ERISA Blues: Responsibility For Retirement Plan Losses

By Harry S. Miller

More Americans than ever before have their retirement savings held in stock. For many, their retirement plans are "self-directed plans," where the participant selects the investments. With the crash in the stock market of not so long ago, countless individuals found their retirement savings decimated, with supposedly nobody responsible. This may now be changing in a manner which could be very important for employee/participants in retirement plans and for company management and plan trustees.

Retirement plans are regulated by a federal law known as ERISA (Employee Retirement Income Security Act). ERISA requires that the employer ensure that the retirement plan is invested in a prudent manner. Company officers, directors, and the retirement plan trustees all have a fiduciary responsibility to the employee participants to minimize the risk of large losses.

But does this responsibility extend to self-directed retirement plans? Where the trustees are "directed trustees" who may only invest as directed by the employees, must they still ensure that the retirement plan investments are prudent? ERISA did not seem to provide a clear answer.

All Your Cookies

An element of the duty for prudent investing in a retirement plan is diversification, the principle that one should not concentrate the account in one stock. Even a limited choice among, for example, ten mutual funds, can provide a variety of alternatives for diversification for plan participants with differing degrees of risk tolerance and expected retirement time horizons.

HARRY MILLER

is a Partner in the Firm who focuses on Securities Fraud, Investor Protection and Estate Planning.

Self-directed plans, however, may be exempt from the diversification requirement of ERISA. If employees decide to concentrate their account in one particular eligible investment, they have the right to do so.

The Pleasure of Your Company

Many employees believe that they know their own company best, and they are most comfortable investing in the company where they know the product, the market, management, etc. Some companies also encourage their employees to invest in the company stock for their retirement accounts.

But this opportunity can also present a danger. Most people are not trained in the field of investment analysis. People investing in their own company's stock may be influenced by emotion and peer pressure, and they may not know their company's finances nearly as well as they might think.

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CLIENT FOCUS

MaestroMD – *A Case of Musical Germs*

As cold and flu season descends upon us, parents are telling children to bundle up, wash their hands and drink their juice. But those who have children in the school band should also focus on cleaning their wind instruments.

"Parents have never considered that the rental instrument provided by the school could make their child sick when in fact, infectious microbes can live for extended periods of time in the dark, moist environments provided by wind instruments and their cases," says Dr. Lorenzo Lepore, who developed the revolutionary MaestroMD system for sterilizing wind instruments.

The practicing dentist and accomplished clarinet player explains that "the inside of a wind instrument is like a Petri dish," capable of fostering the growth of germs that could cause bronchitis, sinusitis, strep, and more serious infections, such as tuberculosis and meningitis.

Lepore tackled this problem in the mid-90s after a music teacher asked for his medical opinion regarding a school instrument being passed from a student with an infectious disease to a healthy student. "That's when I learned that wind instrument sterilization was not practiced or even available," says the doctor.

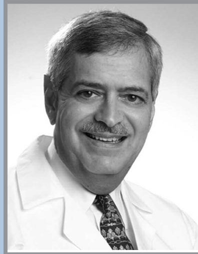
For the next several years, Lepore searched for a way to sterilize delicate wind instruments without damaging them. The dentist eventually seized upon the idea of specially adapting the methods for sterilizing surgical instruments, bandages and gowns.

"This gas process involves no excessive heat or moisture and does no damage to the instrument, which never has to leave its case," says Lepore, explaining that he got the idea of working with ethylene-oxide gas from his dental experience.

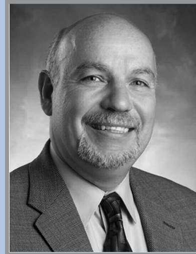
Finding a solution was only the beginning though, as the dentist-musician had to develop a company that could successfully bring the solution to market. "A friend told me there was no way I could do it all with an active dental practice, and he was right," says Lepore.

That's when Lepore sought the advice of Ken Owens, who had relevant management experience gained from launching public offerings, integrating acquisitions, and delivering bottom line growth and results for

Featured Client



LORENZO LEPORE
Founder
Encore Etc. Inc.



KEN OWENS
President and CEO
Encore Etc. Inc.

billion-dollar companies. "Coincidentally, I was at a point in my career where I was looking for a change from the corporate life," Owens recalls.

After a few lunches with Lepore, the former drummer dove into the task of building a new company, Encore, Etc., Inc. ("EEI") with the promising MaestroMD service.

In short order, EEI sponsored laboratory studies to prove what Lepore intuitively knew – that harmful bacteria can survive and propagate inside of a musical instrument. The studies not only confirmed Lepore's suspicions; they showed that most bacteria grow by more than 60 percent in seven days while tuberculosis germs can linger for many months.

Armed with this information, Lepore and Owens were prepared to run the gauntlet of government regulatory approvals to launch their service. They first approached the EPA because ethylene-oxide is a potent gas, but the agency rejected them. "They were supportive of the concept, but the government is not set up to break new ground or to do preventive work," Owens surmises.

So they spent a year climbing to the top of the FDA. "We did not start there because wind instruments are not a medical device, nor a food or drug, even though they do go into your mouth," recalls Lepore. The FDA finally agreed that musical instruments were analogous to medical devices cleaned with gas, but they too avoided any formal decision on the sterilization process. "Nobody wanted to add something else to what they must regulate," Lepore quips.

But the agency did provide a letter of support for appeal to the EPA. "We agree that [EEI] is addressing a valid public health issue consistent with the universal precautions adhered to in medical/dental settings," they wrote.

That led to positive results and now, more than four years after its launch, EEI has valid regulatory approvals, patent protection of its process, and sufficient finances from two rounds of private fundraising to be successful.

"We could not have done it all without the guidance of our lawyers," says Lepore about the long march through the regulatory hurdles associated with licensing, patent protection and private financing. He particularly credits lead lawyer Andy Merken of Burns & Levinson for being "a good and thoughtful counselor who connects us to the right people and takes a true personal interest in our company."

Owens agrees, adding that "intellectual horsepower is just the rule of entry to the game, but personal interest makes the difference." He adds that "we have been treated like the most important client at Burns & Levinson since day one, even though we're a start-up."

The outside legal team is a supplement to the in-house management team that Owens has assembled, including professionals experienced in finance and technology, software and hardware engineering, sales and marketing, and music education.

Thanks to this team, EEI has inked its first major client to a contract – the Medford public schools – and the company has been warmly greeted by "Good Morning America" and other media outlets. "Our service makes intuitive sense and has the backing of science but the 'yuk' factor is a real driving concern," says Lepore, who explains that "nobody would pick a water bottle off the park bench and drink from it, yet that is analogous to using a non-sterile wind instrument."

Owens says the company is focused now on spreading the word about "awareness and choice" in sterilization. "We want awareness not just among customers, but the medical community, the school systems, pediatricians and others," he explains.

"After that the choice is easy – we are the first and only sterilization option. We make it affordable and achievable to be germ free," Owens concludes.

Interested readers can view more information about the company and its service at www.MaestroMD.com.

New Client Service: We are pleased to announce that we now provide **Income Tax Return Preparation Services** for individuals, trustees, executors and other fiduciaries, both private and charitable. Howard E. Schwartz has joined our Private Client Group as Tax Manager and will supervise this aspect of our practice. Howard is also available for trust and estate accounting services. Please call your Private Client Group attorney or call Howard directly at 617.345.3575 to see if we can make your tax season an easier one!

Estate Planning For Clients With Intellectual Property

by Marshal S. Grant

MARSHAL GRANT

is an Associate in the Firm's Trust & Estates and Tax Groups.

Intellectual property presents the estate planner with many challenges and opportunities. As with all estate planning, the goal of estate planning with intellectual property is to achieve an orderly disposition of a person's wealth that minimizes tax and other transfer costs and maximizes the ultimate benefit enjoyed by the objects of the person's bounty. Intellectual property requires special consideration by the estate planner because the rules governing intellectual property are often complex and counterintuitive. It is well known that such rights are of limited duration. A copyright for a work created after 1977 lasts for the life of the author plus 70 years. A patent is generally a 20-year exclusive right to make, use, or sell an invention. It is less well known, however, that the transfer of a copyright made by an author can be terminated, if the author has died, by his spouse and children during a 5-year window between 35 and 40 years from the date of that transfer. The author also has this right, but the right is inalienable and cannot be sold with the copyright in the first instance. An author's heirs may thus be in a unique position to retrieve the value of an asset that they had believed was long gone. On the other hand, an inventor who would be able to obtain favorable long term capital gain treatment on the sale of her patent, even though she created this property herself and even if she has held it for less than one year, may be surprised to find that this income tax advantage is lost if she follows traditional estate planning wisdom and transfers this asset to her children (or to an entity, such as a limited partnership or irrevocable trust, for their benefit) prior to the sale in order to remove the appreciation in the value of the patent from her taxable estate.

Separating the Tangible From the Intangible

Intellectual property is often embodied or expressed in or through some physical object, but it is distinct from that object. A patent is distinct from the plan or diagram that describes the new idea. Likewise, a copyright is distinct from the manuscript or work of art that captures the artist's expression. Intellectual property thus does not pass in accordance with ordinary will provisions that bequeath a person's tangible property to specific people or organizations. An inventor may not be surprised that a bequest of her plans or a prototype of her invention does not affect the disposition of her patent. But an artist may well be surprised to find that he cannot make a tax-free bequest of a piece of his artwork to his alma mater unless he bequeaths his copyright to the school as well. In both cases, the bequest disposes of the person's tangible property, but the intellectual property embodied in the physical objects passes otherwise, often in a prior transfer or with the residue of the person's estate. The artist in this example cannot make his intended tax-free bequest unless he bequeaths the copyright as well because the charitable "split interest" rules disallow a tax deduction for gifts which are not gifts of a donor's entire interest in the property.

Special Expertise of Fiduciaries

Deriving the maximum value from intellectual property often requires special expertise. It is therefore common for an author to name a "literary executor" or an artist an "art executor" who has the requisite ability and experience to maximize the value of the creator's works. The executor of an inventor may likewise need special knowledge and skills to exploit fully the value of the inventor's patents. More is needed in this case than an honest and diligent person whom the testator trusts to dispose of his property in accordance with the terms of his will. While any executor can and should retain professionals (such as accountants and real estate brokers) to handle estate matters beyond the executor's own skill, an executor with special expertise may be advisable for a person with significant intellectual property, since the ultimate decision-making authority will lie with the judicially appointed executor rather than any retained professional. Thus, if a "literary executor" or "art executor" is named, it may be desirable for that person to be an executor in fact and not in name only. Similarly, trustees of trusts which acquire significant intellectual property should have special expertise in exploiting the value of such property.

Conclusion

Estate planning with intellectual property requires a special awareness of the nature of such property and the legal regimes governing its transfer and taxation. The estate planners at Burns & Levinson work together with our intellectual property attorneys to insure that the planning techniques used to minimize estate taxation also maximize the benefit of our clients' intellectual property to the objects of their bounty.

At Burns & Levinson, your personal and business success is our top priority – so whatever your legal need, consider it done. Our core practices include Business/Corporate, Business Litigation, Intellectual Property, Real Estate and Private Client services where we represent dynamic, growth-oriented businesses, privately and publicly held companies, universities, institutions and individuals.

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Merging Interests, Growing Together

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legal market, we need to remember that Burns & Levinson's core was built on personal and professional relationships and tireless client service. That will remain our touchstone this year and for every year.

As we grow together in 2007, I encourage everyone to continue the dialogue. To our clients, let us know how we can better serve you and your businesses. To my friends and colleagues at the firm, let us always keep sharing ideas. It is only through ongoing discussions with you – that we will truly show sustained growth and momentum in the year ahead.

Here's hoping for a happy, healthy and rewarding 2007.

David P. Rosenblatt

Fraud and Counterfeiting on the Internet

by Mark Schonfeld

There has been an explosive growth in Internet commerce. Total U.S. online sales are reported at about $200 billion. Unfortunately, the Internet has also become a haven for illegal and counterfeit merchandise. There are thousands of websites selling counterfeit handbags, pharmaceuticals, computer parts, apparel, electronics and many other items. Companies and consumers need to be very careful when doing business over the Internet.

Some famous brands are victimized more than others. For certain brands, more than 98% of the new goods sold on the Internet bearing their world-famous luxury trademarks can be counterfeit. Consumers need to be extremely careful in buying luxury goods on the Internet. You should follow the rule "If it sounds too good to be true, it probably is."

Here are some tips for the careful consumer and business person:

Be careful about buying luxury goods from any site other than the brand's official website.

MARK SCHONFELD

is a Partner and Co-Chairman of the Firm's Intellectual Property Group.

Use extreme caution about buying pharmaceuticals on the Internet. Pharmaceutical counterfeiting is a widespread, highly sophisticated, worldwide enterprise. It is worth an estimated $512 billion in global sales each year.

Remember that the Internet provides the seller with virtual anonymity. It is very easy to open a website under a false name and address. Many Internet criminals are never caught, and they know it.

Businesses should use extreme caution in making bulk purchases from Internet online export-import marketplaces. Many of these sites are havens for the sale of illegal merchandise. Remember that these B2B sites often do not screen their sellers. Even if you request samples, the order you receive may contain different merchandise. Always ask your seller for references in the United States and check them carefully.

Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

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Got Them Old ERISA Blues: Responsibility For Retirement Plan Losses

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Investing a large portion of a retirement plan in the stock of one's own company may produce unimagined wealth if the stock skyrockets. Unfortunately, more often this can result in financial disaster and dashed dreams if the stock plummets.

When people find that their self-directed retirement plan account has incurred substantial losses due to a drop in the value of the company's stock, the first question which arises is: Who is responsible? Employees tend to believe that it was their decision, and assume that therefore they must be responsible for their own losses. However, that may not be entirely true.

Help On The Way

Based upon a recent case which we filed in federal court in Boston, officers and directors must now consider their own possible liability for losses in employees' self-directed retirement plans. Participants in such plans, in certain circumstances, may now be able to recover their losses from the company, the officers, directors, and the plan trustees.

Employees who invest in their company's stock tend to rely on communications from the company in forming their opinions about the stock. The fiduciary duty of the officers, directors, and the plan trustees, includes protecting the employees from making ill-advised investment decisions regarding the company's stock. Management personnel cannot look the other way and allow the employees to continue investing in the company stock if it is no longer a prudent investment.

It is the responsibility of the officers, directors, and the plan trustees, to make sure that the permissible investment options of the plan continue to qualify under ERISA as prudent investments. The court ruled that the plan fiduciaries could be liable for following the directions of the participants of a self-directed plan, if the fiduciaries knew or should have known the directions were contrary to ERISA.

Participants and Managers, Protect Your Retirement Plan

The fiduciary duty imposed by ERISA is a strict duty, which can result in potentially enormous liability for management personnel and plan trustees. In light of the recent case, every company and anybody in management, or in the administration of such retirement plans, should carefully review the exposure for liability and their insurance coverage.

For participants, obviously, one should be very cautious when investing one's own retirement savings. It is recommended to consult with a professional investment advisor, to avoid high-risk investments, and to maintain a balanced, diversified portfolio. But if you have not done so, don't assume that you have only yourself to blame – you may have a right of recovery.

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