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# Welcome New Members

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## Jonathan Dean President's Message

### Sausage Making

Someone, possibly Will Rogers, said

that no-one wants to watch sausages or legislation being made. However, one of the joys of being the president of the Northeast Ohio Chapter of ACC is watching our sausage for the year in its process of manufacture. I am able to be part of the creation of new projects and events that will emerge in complete condition later on.

One of the tasty sausages under construction is an exciting project in the making with the Cleveland (soon, we all hope, to be Metropolitan) Bar Association and The Legal Aid Society of Cleveland to create a joint structure to provide legal services to not-for-profits in the Cleveland area. John Moran, Cindy Binns, and I have been meeting with John Brittain from the Bar Association, and Colleen Carter from Legal Aid to work on a new approach that will build on our experience with the successful 3Rs program, and our Saturday legal aid clinics to provide an avenue to permit our members to serve non-profits that presently cannot afford legal advice. There is a significant need, and our members have the skills to fill it. We will be back to you with a concrete proposal in the near future, with the hope that we

will make a joint announcement of an effective program at the annual meeting of the Bar Association. This will provide an opportunity for our members, and perhaps retired members, to put their corporate legal skills to use for a different kind of organization.

I have also met several times with Jim Stone from Jackson Lewis's relatively new office in Cleveland. Jackson Lewis has been a strong supporter of ACC on a national level, and is exceptionally active with the Employment and Labor Law Committee of the national organization. For example, Jackson Lewis has authored the Recent Developments section on that committee's website. The firm will be celebrating its 50th anniversary in 2008. We hope to announce an early summer event, sponsored by Jackson Lewis, in celebration of its anniversary and long-standing relationship with ACC. Stay tuned.

However, the key to ACC is the sharing of insights on the practice of law within a corporation with each other. In January, the McMahon DeGuilis firm helped us understand Ohio legislative changes in the area of environmental exposure litigation, as well as the challenges presented by the growing concern over greenhouse gasses—an area where state legislation may be overtaking federal law, with the possibility of piecemeal rules. Even

though this is not my area of expertise, I found the discussion helpful. We are grateful to Wells Fargo Insurance Services for their sponsorship of the session.

Our monthly CLE seminars provide us the opportunity to stay current on many topics vital to in-house counsel. Some of these topics are listed in this newsletter and more detail is always available at [www.acc.com/chapters/neooh.php](http://www.acc.com/chapters/neooh.php).

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## Focus on CLOs: CLO ThinkTanks, Chapter Networks, Insights & Beyond

By Renee Danker, associate general counsel, advocacy and CLO services, ACC

ACC focuses many of its services towards different segments of its membership, including those who are new to in-house practice, legal specialists, law department managers, chief legal officers (CLOs), and small and large department practitioners. While resources and programs may be initially created or styled with one of these segments in mind, anyone may find value in these materials. Large law departments, for instance, invest in resources that can then benefit smaller practices; and something created for an IP specialist may inform a legal generalist who has an IP problem arise that needs attention.

Whether you are the CLO for your law department or you ultimately report to the person who is, ACC's CLO materials and services can help provide a window into thought leadership and issues that are top-of-mind in top law departments around the world. Featured below are some of the initiatives and links to materials we've created for our CLO membership segment. For more information on our

CLO services or resources, check out our CLO "homepage" at [www.acc.com/php/cms/index.php?id=59](http://www.acc.com/php/cms/index.php?id=59), or contact Renee Dankner, associate general counsel, advocacy and CLO services ([dankner@acc.com](mailto:dankner@acc.com); 202.293.4103 x358), or Susan Hackett, senior vice president and general counsel ([hackett@acc.com](mailto:hackett@acc.com); 202.293.4103 x318).

### ACC CLO ThinkTanks

ACC CLO ThinkTanks are invitation-only discussion forums at which a small group of large company CLO thought-leaders discuss in-depth their ideas, concerns, best practices, and forward-thinking advice on the hot topics confronting the in-house bar and their clients.

To date, ACC has held 14 CLO ThinkTanks in the United States and Canada; sessions have included CLOs from more than 100 top-ranked companies. Topics have included: Corporate Governance and Compliance; Establishing and Sustaining an Ethical Culture in a Global Organization; Managing Corporate Business Information: Ediscovery and Beyond; Hot Topics for Private Companies; Compensation and

Career Advancement for In-house Lawyers; and the Law Department's Role in Financial Compliance and Relationships with Auditors.

Advance Participant Briefing Binders and Executive Reports of past CLO ThinkTank sessions are available at [www.acc.com/php/cms/index.php?id=264](http://www.acc.com/php/cms/index.php?id=264). The Participant Briefing Binders include discussion outlines and links to related resources of interest. The Executive Reports summarize key takeaways and discussion highlights. Stay tuned for materials relating to upcoming sessions on FCPA Enforcement, Enterprise Risk Management, CLO as Gatekeepers, and more.

### CLO Chapter Networks

Several of ACC's chapters are implementing exciting initiatives to help promote networking and leadership discussions among CLO leaders in their local communities. From CLO lunch clubs, to general counsel forums, to roundtable dinners or GC Brown Bag lunches, chapters are bringing together CLOs to expand their network of peers and share ideas on challenges and best practices. For more on what the DELVACCA,

Mountain West, Charlotte, Central Ohio, San Diego, and WMACCA chapters are doing, see [www.acc.com/php/cms/index.php?id=381](http://www.acc.com/php/cms/index.php?id=381).

Coming soon: posts for additional chapter CLO initiatives—stay tuned and please send an email to [dankner@acc.com](mailto:dankner@acc.com) if your chapter is implementing initiatives you'd like us to add, or to request information on how to create or participate in CLO networks within your chapter area.

### CLO Executive Bulletin

ACC's *CLO Executive Bulletin* is a periodic electronic newsletter designed for CLOs. Read featured perspectives of leading CLOs on hot topics, find executive briefings on ACC public policy initiatives undertaken on behalf of the bar, and find resources of particular interest to law department leaders. Most issues include a lead article that features insights and perspectives of a leading CLO on a hot topic of interest.

Past issues feature insights on a broad range of topics, including: Optimizing Business Needs Through Risk Management (Mick McCabe, Allstate); Leading with a Vision for Innovation (Mike Dillon, Sun Microsystems); CLO as Spokesperson with the Media (Don McCarty, Imperial

Tobacco Canada); and Six Key Principles for Creating an Effective and Sustainable Pro Bono Program (Ken Handal, CA). Links to past issues and featured CLO perspectives articles are available at [www.acc.com/php/cms/index.php?id=266](http://www.acc.com/php/cms/index.php?id=266).

### CLO Club/ACC Annual Meeting CLO Program Series

Each year at its Annual Meeting, ACC offers special programming designed with CLOs in mind. ACC's Annual Meeting 2007 included our signature CLO Club programs (sophisticated networking forum that hosts peer-to-peer discussion groups targeted to the unique executive practice, management, and benchmarking needs of CLOs), plus an entire new line of CLO programs: our CLO Executive Leadership Series sessions.

The CLO Executive Leadership Series sessions are open to all annual meeting participants and feature top CLOs as panelists. In addition, the AM 2007 program slate included ACC insights and presentations on "Cutting Edge Practices from the World's Largest Legal Departments," and "Top of Mind: What General Counsel are Thinking/Worried About." Look for these program materi-

als soon in the Virtual Library<sup>SM</sup> at [www.acc.com/vl](http://www.acc.com/vl).

While the CLO Club sessions are open only to CLOs, we've posted session materials and key takeaway summaries on our website to help provide insights into these discussions and possibly even serve as 'tool kits' for hosting these types of discussions within your law departments. Visit ACC's webpage for more information on ACC's CLO Club and materials, including hypothetical scenarios, reference lists, and key takeaway summaries from this year's sessions on Financial Compliance and Emergency Response Preparedness, available at [www.acc.com/php/cms/index.php?id=267](http://www.acc.com/php/cms/index.php?id=267).

### ACC's CLO Page

In addition to some of the more specialized services and resources noted above, ACC has dedicated a portion of its website to promote the executive, legal and department management roles of today's CLO. Find the resources and connections you need at [www.acc.com/php/cms/index.php?id=59](http://www.acc.com/php/cms/index.php?id=59).

## 363 Bankruptcy Sales: The Benefits and Process of Acquiring the Assets of a Company in Bankruptcy

James M. Lawniczak and Tiara N. A. Patton  
Calfee, Halter & Griswold LLP

Your company has its eye on an acquisition target that is slowly, but surely, losing its ability to operate at a profit. Perhaps there have already been preliminary discussions and negotiations. Then the target company files a bankruptcy petition under chapter 11 of the United States Bankruptcy Code, perhaps even at your insistence. What is the process and what are the benefits of purchasing the troubled company in a Bankruptcy Code section "363 Sale?"

### The "363 Sale"

The term 363 Sale refers to the Bankruptcy Code provision that is the statutory basis for the sale of a debtor's assets. Generally, a debtor will try to find an initial buyer, who is willing to enter into a contract to buy the assets. Many refer to this initial buyer as the "stalking horse," whose bid sets the floor for subsequent auction bids. Often the incentive for the stalking horse is a "break-up fee," payable in the event it is outbid at a subsequent auction. A break-up fee in the range of 3-5% of the initial bid is not out of line, with a lower percentage more appropriate for a sale with a relatively high price and a higher percentage more appropriate for a lower priced sale. To ensure that the estate does not lose out if someone overbids the stalking horse, the debtor will propose an initial overbid that is larger than the break-up fee.

The 363 Sale is usually accomplished in a two step process: (1) the debtor seller obtains court approval for the bidding procedures, including any break-up fee, overbid requirement and the auction process; and (2) the debtor then obtains court approval for the sale itself. Each step generally requires 20 days' notice, so that a sale in 40 days is fairly quick. The bankruptcy court can reduce the time periods in an emergency, for example, where the business has run out of cash and will have to shut down and send employees home if it is not sold quickly.

### The Benefits of a "363 Sale"

There are several important benefits to the buyer in a 363 Sale. In fact, potential buyers of financially troubled companies frequently insist on a bankruptcy filing in order to obtain these benefits.

- The bankruptcy court order approving the sale eliminates the risk that someone could later challenge the transaction as a "fraudulent transfer." In general, a fraudulent transfer is a transfer for less than reasonably equivalent value at a time when the seller is insolvent or lacks adequate capital. This risk is particularly great when buying part but not all of a company outside a bankruptcy proceeding, because the surviving company, still financially troubled, is likely to end up in a bankruptcy proceeding. In the subsequent bankruptcy proceeding, the prior sale to your company will likely be carefully scrutinized, and litigation brought against your company if there is any basis, perhaps even if there is no basis, to argue that you paid less than reasonably equivalent value for the assets.
- The 363 Sale will be free and clear of all liens, claims and encumbrances, pursuant to § 363(f) of the Bankruptcy Code. Although this will not completely eliminate risks of successor liability, it is the best available means to reduce the risk.
- Under the Bankruptcy Code, a debtor can assume and assign executory contracts and unexpired leases to the buyer, usually without the consent of the other party to those contracts.

### The Downside of a "363 Sale"

The main disadvantage of a 363 Sale is the fact that there will be open bidding for the company or assets, and therefore your company might be outbid or forced to pay a higher price. This risk is usually weighed against the risk of being subject to a fraudulent transfer claim and the benefits of the bankruptcy court order selling the assets free and clear of liens and claims, as well as by the fact that in the event the stalking horse loses

the deal, it usually has expenses covered by the break-up fee.

For more information, see volume 2 of Lexis's treatise, Asset Based Financing, chapter 16, section 16.11, which contains a detailed discussion of 363 Sales. Also, please

feel free to call or email one of the authors for more information.

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## Upcoming Events and Seminars

### March 13

CLE seminar: *Raising Capital Under the New SEC Rules*, presented by Roetzel & Andress

### April 7

CLE seminar: *Employment Law Update for 2008*, presented by Schneider, Smeltz, Ranney & LaFond

### April 26

Brief Advice and Referral Clinic  
Volunteers needed 9:00 AM. until 12:00 noon at St. Martin de Porres Family Center, East 123 and Superior Road in Cleveland

### May 15

CLE seminar: *Litigation 2008: Big Decisions for In-house Counsel*, presented by McDonald Hopkins

## Why are these people smiling?



Because they just finished working at an NEOACCA Brief Advice and Referral Clinic on September 8, 2007. (L-R) John Ritchey, Cindy Binns, Natalie Peterson, Betsy Rader, Jonathan Dean, Michelle Proia, and Kristina Arcara.

Why don't you join the group by participating in the next Brief Advice and Referral Clinic on April 26, 2008, 9:00 AM until Noon at the Martin de Porres Family Center, East 123 and Superior in Cleveland?

The three hours you donate will make a difference in so many lives. Volunteer TODAY!  
Call Nancy Schneider at 440.988.3213.