

St. Louis Chapter Newsletter

SPOTLIGHT ON PRO BONO:

INTERESTED IN PRO BONO OPPORTUNITIES?

THE ST. LOUIS CHAPTER HAS A COMMITTEE FOR THAT!

Our Chapter is committed to promoting participation by our members in pro bono activities. The Chapter's Pro Bono Committee seeks meaningful pro bono opportunities that are responsive to the concerns of in-house lawyers.

In this inaugural report we are highlighting Legal Services of Eastern Missouri (LSEM), the organization most associated with pro bono legal services in the St. Louis metropolitan area. LSEM has an established, active Volunteer Lawyers Program (VLP) for lawyers looking to assist LSEM with its mission of providing equal access to justice for low-income clients. For those not familiar with LSEM, please visit its newly revised website at www.lsem.org.

The Pro Bono Committee has been working with the VLP to identify projects that may be particularly suitable for in-house counsel. Two projects that may be of interest to you are the Special Projects Unit and an initiative with the Consumer Unit. Neither of these projects involves court appearances and should allow flexible scheduling.

The Special Projects Unit opportunity involves helping LSEM clients affected by AIDS/HIV with simple estate planning, including simple wills, durable powers and healthcare directives. LSEM has the necessary forms and will provide training. The work can be done at the LSEM offices. Members involved in this activity might be able to leverage the experience and training to help other organizations, such as Catholic Charities, which has also indicated a need for volunteers to do simple estate planning for its elderly clients.

The second LSEM opportunity involves certain consumer cases in which LSEM clients need assistance obtaining promised performance of work on property that they own or lease. These cases generally do not involve litigation, but entail interviewing the client, reviewing the facts and documents and contacting the breaching party to secure performance. These are situations where a demand letter and/or call from a lawyer may solve the client's problem.

If you are interested in either of these projects or want information about other opportunities with the LSEM Volunteer Lawyer Program, you can contact Jim Guest, Director of the Volunteer Lawyers Program at 314-534-4200, Ext. 1304 or JHGuest@lsem.org.

The Pro Bono Committee is working on other projects, in particular a business pro bono project, which it hopes to have available to the members in the future. If you are interested in assisting the Chapter's Pro Bono Committee in finding and developing pro bono opportunities, or if you have a pro bono opportunity that you would like to bring to the attention of the members, please contact Chris Greensfelder at 314-968-2205, Ext. 149 or cgreensfelder@sugarcreekrealtyllc.com.

Article submitted by Chris Greensfelder of the Lockwood Group, LLP. Chris is a member of the ACC St. Louis Chapter board of directors and may be reached at 314/968-2205, ext. 149 or by e-mail at: cgreensfelder@sugarcreekrealtyllc.com.

Social Hour Success

The Summer was Sizzling at Schneithorst's!

The June 27th Happy Hour/Social at Schneithorst's was very well attended by over 30 members. It was great seeing familiar faces, meeting new members, networking and generally just having a nice time – which, when you get right down to it, are the reasons we have these events! Unfortunately, the weather didn't cooperate and the event was held inside instead of in the rooftop garden as originally contemplated – but the rain did not dampen the mood. Thanks very much to St. Louis ACC Board of Director **Jim Bowlin** and our hosts Robert Half Legal for organizing and sponsoring this festivity! See you at the next one!

Calling All Articles

Do you want to be published? The St. Louis Chapter of the ACC is always looking for articles to include in our newsletter. If you prepare in-house memos for your executives and think the membership might benefit, please send a submission to Jim Susman, Chapter Administrator, at susgrp@charter.net.

President's Message



Dan Lett

It is hard to believe we are approaching the end of Summer 2007. Despite the busy schedules and vacations, your Chapter's Board has continued to work hard in pursuit of its goal to enhance the value of your membership in the ACC. This newsletter highlights some of the initiatives the Chapter is pursuing. We point out pro bono opportunities appropriate for our members. We believe

pro bono activities are important and we try to find opportunities that compliment the talents and schedules of our in-house members. We also spotlight specific member pro bono activities. We are launching a new column on member news. This will allow our membership to keep up with moves, changes and news affecting our members. We are also seeking new opportunities for partnership, including an increased number of event sponsors. These partnerships will give us additional resources to enhance the quality of programs and events for our members. As you read this newsletter, I hope you see the commitment of your Board to make the ACC the preferred association for St. Louis in-house counsel.

Dan Lett
President
ACC St. Louis Chapter

ACC St. Louis 2007 Chapter Officers, Directors & Committee Chairs

| | |
|--------------------|-----------------------|
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| Treasurer | Timothy W. Luft |
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Chapter Administrator -- Jim Susman

EXECUTIVE SHOULD UNDERSTAND KEY SECTION 409A CONCEPTS

By Lori W. Jones, Esq.

Internal Revenue Code Section 409A has drastically altered the law applicable to nonqualified deferred compensation. Although deceptively short in length, many practitioners agree that Section 409A equals or exceeds the rules applicable to qualified retirement plans in complexity and scope.

In April 2007, the Treasury Department issued final regulations under Section 409A. Executives and practitioners must now digest several hundred pages of regulations and modify compensation arrangements to comply with Section 409A on or before the December 31, 2007 amendment deadline. The stakes are high because noncompliance will result in the executive being subject to income tax in the year the deferred compensation becomes vested. In addition, the executive must pay a 20% excise tax on noncompliant deferred compensation, as well as interest on the late payment of taxes.

The regulations include many detailed rules and it will be important for executives to work closely with internal legal departments or outside legal counsel to ensure compliance with Section 409A. Executives will provide key input in the ultimate design of compensation arrangements and it is critical that they understand basic elements of the Section 409A regime.

The following is a summary of some (but by no means all) key Section 409A concepts.

- Broad Impact on Executive Compensation Arrangements.** Section 409A defines deferred compensation as a legally binding right to compensation that is payable (and taxable) in a later tax year. Thus, Section 409A can impact not only traditional executive deferred compensation plans and SERPs but also individual employment agreements, severance agreements and unwritten bonus programs.
- Elections of Time and Form of Payment.** Generally, initial deferral elections must be irrevocable before the beginning of the year in which the services are performed. First time participants have a 30 day grace period. Initial deferral elections for performance-based deferred compensation can be made 6 months before the end of the performance period, but only if the performance period is at least 12 months long. Subsequent changes to elections of time and form of payment must be made at least 12 months prior to the original payment date and must defer payment for at least 5 years. The subsequent election is not effective for 12 months.
- Limited Distribution Events.** Distribution of deferred compensation may only be made upon (i) death, (ii) disability,

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“Interpreting, Drafting and Negotiating Common Contractual Terms”

Featured speakers:

Craig Ingraham, retired Vice President and General Counsel, Talx Corporation
Kay Bradley, Assistant General Counsel, Edward Jones
Kim Shaw Elliott, Associate General Counsel, Edward Jones

Craig Ingraham: Craig just retired as Vice President and General Counsel of Talx Corporation following the sale of that company to Equifax. He has extensive experience in negotiating and drafting high-dollar, complex contracts, both domestically and internationally, with an emphasis in high technology transactions. Craig previously served MasterCard, May Department Stores, General Dynamics and other corporations and was in private practice. He is a graduate of Washington University School of Law and the University of Rochester.

Kay Bradley: Please welcome Kay to St. Louis, as she has just joined Edward Jones as Assistant General Counsel, responsible for all vendor agreements with emphasis on technology transactions. She previously served as Vice President and Assistant General Counsel for Sabre Inc., a travel services company best known for its online website, Travelocity, where she was responsible for technology procurement, mergers and acquisitions, and other domestic and international corporate and commercial transactions. She has also served the Commonwealth of Virginia, Dollar Rent a Car, Thrifty Car Rental and other corporations and was in private practice. She is a graduate of University of Tulsa College of Law and the University of Oklahoma.

Kimberly Shaw Elliott: Kim is Associate General Counsel at Edward Jones, where she specializes in a variety of laws effecting securities distribution, investment advice and broker dealer regulation. She previously served as General Counsel and Executive Vice President of First Financial Planners, where she brought many process improvements and negotiated the sale and regulatory approval of the company to another broker dealer. On the business side, she led the private placement businesses of Zurich Life and negotiated many business arrangements for General American, where she began as Assistant General Counsel. Previously, she was in private practice. Kim is a three-time graduate of Washington University, having earned a JD, LLM and Executive MBA from that institution. She earned her undergraduate degree from Southern Illinois University at Edwardsville.

Time: 11:30 a.m.....Registration
Noon.....Lunch
12:15 – 1:30 p.m.....Program

Location: **Marriott West Hotel** (660 Maryville Centre – I-64 & Maryville Centre Drive)

Cost: St. Louis Chapter of ACC Members:...\$25.00/person
Prospective Members:.....\$30.00/person

CLE: This program will satisfy one hour of Missouri CLE

Sponsor: Robert Half Legal

Reservations maybe made calling Jim Susman, Chapter Administrator at 314/997-3390 or by sending an e-mail to: Susgrp@charter.net

UNIGROUP ATTORNEYS HELP CLEAN UP THE TRANSPORTATION INDUSTRY

UniGroup, Inc., the parent company of United Van Lines, LLC and Mayflower Transit, LLC, is the nation’s largest provider of household goods. UniGroup has become a well respected company by truly serving its customers like no other mover in the industry. Unfortunately, not all movers offering moving services to consumers are as reputable.

Today, more consumers are going online to find a moving company, often basing their choices primarily on cost with little regard to a company’s service record or reputation. As a result, an ever-growing number of people—recently estimated at 10,000 cases a year— are being scammed by unscrupulous “rogue movers.” A “rogue mover” is a household goods moving company that sells itself as a reputable service provider, but actually engages in unethical and, often, illegal moving activities. For example, rogue movers often offer low estimates and then, after picking up the household goods, hold shipments hostage demanding higher payment.

In 2004, UniGroup created MoveRescue to assist consumers victimized by rogue movers. UniGroup’s Law Department staff supports MoveRescue by providing pro bono legal assistance to consumers who feel movers have scammed them. Most of the Law Department staff has been involved in supporting MoveRescue in one way or another. Joe Garr, a Senior Staff Attorney, manages the program. Paralegals and secretarial staff answer calls from consumers and obtain intake information. Four law students assist with document review, research, and analysis. In some cases, MoveRescue files lawsuits to recover property belonging to victims. Since its launch, MoveRescue has reviewed nearly 1,000 cases of potential mover fraud and has rescued dozens of shipments. MoveRescue also provides consumers with resources and information to help them avoid becoming a victim of mover fraud. UniGroup’s attorneys utilize their network of outside counsel who have agreed to provide legal services for the MoveRescue program.

MoveRescue works closely with state and federal regulatory agencies and law enforcement officials to encourage and support action against the rogue movers and to provide recovery of property for the victims.

Once a victim’s goods are located, UniGroup’s Operations Department works with United and Mayflower agents across the country to provide a crew and transportation equipment to return the goods to the victim at no or greatly reduced cost. The UniGroup communications department supports the program by publicizing it to potential victims of fraud.

MoveRescue can offer additional tips on how to avoid being a victim of rogue movers as well as help those who have unfortunately been taken advantage of.

Visit www.moverescue.com or call UniGroup General Counsel and St. Louis ACC Chapter Board Member Jan Alonzo at 636-349-2720 for more information.

Member News

In this new column of the ACC St. Louis Chapter Newsletter, we are going to provide members with a forum to announce changes in their legal department. If you would like to publish an announcement, please submit it to Jim Susman, Chapter Administrator at susgrp@charter.net.

Emerson is pleased to announce that **Danny G. Thomas** recently joined its Corporate Law Department to focus on Antitrust and International Trade Compliance. Prior to joining Emerson he was a litigation associate with the firm of von Briesen & Roper in Milwaukee, Wisconsin. Danny also served a law clerk for the Chief Judge, District of Columbia Superior Court. He speaks fluent Malayalam (one of 15 languages in India) and French. He received a B.A. and J.D. degrees from Marquette University in Milwaukee.

Robert Half International has been named to the America's Most Admired Companies list by Fortune magazine, ranking number one in the temporary help industry. Robert Half International is ranked 17th among companies in the 2007 BusinessWeek 50.

Mike Curoe, Deputy General Counsel at Rabo AgriFinance and a member of the Board of Directors, St. Louis Chapter ACC, served on the panel, "Hallmarks of a Successful In-house Practitioner" at ACC's 5th annual Corporate Counsel University, which was held for the first time in St. Louis in the spring.

For membership information, please contact:

Randy Hayman
Membership Chair
314/768-6209

Jim Susman
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fax 314/432-5894
e-mail -- susgrp@charter.net

www.acc.org

Upcoming Programs

Thursday, October 4

**Social sponsored by
Lex Mundi and
Armstrong Teasdale**

**Membership & Prospective Member Social
5 -- 7 p.m.**

**Ruth's Chris Steakhouse
1 N. Brentwood
Clayton, MO**

CLE Program

**Thurs. November 15
Program Begins 4 p.m.
Reception 5:15 p.m.**

**Lobbying Activities and
Political Contributions
-- the Real Story**

1.5 hours of CLE credit

**Presented by
Tom Campbell, Partner,
Gallop, Johnson
& Neuman**

**101 S. Hanley Road
Suite 1700
Clayton, MO**

**RSVP to
Jim Susman
314/997-3390**

Welcome New Members!

Welcome to the following new members of the ACC St. Louis Chapter

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U.S. Supreme Court Overturns 100-Year-Old Rule Making Minimum Resale Price Agreements Automatically Illegal

On June 28, 2007 the U.S. Supreme Court handed down its opinion in the case of *Leegin Creative Leather Products, vs. PSKS*. The case overturned an antitrust rule that had been in place for almost 100 years. This rule was a general prohibition on minimum resale price setting. The newspaper headlines on this case have been somewhat misleading and may create some confusion in your businesses. As a result, it may be beneficial to highlight a few issues that are either not mentioned or that are buried in the articles that you may have read on this subject. Most importantly, minimum resale price setting agreements are still subject to antitrust scrutiny, but the Court has removed these types of agreements from the list of automatic violations.

Alleged antitrust violations are analyzed by courts under one of two categories of analysis. The first treats certain practices as being so plainly anticompetitive and without redeeming pro-competitive virtues as to be *per se*, or conclusively, unreasonable. The consequence of applying the *per se* label can be far reaching. If the *per se* label is applied, the plaintiff need only to prove that the practice occurred; the plaintiff is not required to affirmatively demonstrate the practice's competitive unreasonableness, and the defendant is precluded from attempting to justify the practice as being reasonable. For the last 96 years, minimum resale price setting was deemed to be a *per se* violation.

The second category of analysis consists of practices that are analyzed under the "rule of reason." This summer's Supreme Court decision moved minimum resale price setting from a *per se* violation to an activity that would be analyzed under a "rule of reason" analysis. Under a "rule of reason" analysis there is an inquiry into whether the specific practice deployed results in an unreasonable restraint on competition. Relevant factors under a "rule of reason" analysis include such diverse factors as:

(i) the defendant's intent and purpose in adopting the restriction;

(ii) the market power of the party applying the restriction;
(iii) the structure of and competitive conditions within the affected market;
(iv) the relative competitive positions of the defendants;
(v) the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practice; and
(vi) the apparent justifications for the restriction such as enhanced efficiencies, protection of product or service goodwill, etc.

Under the "rule of reason" analysis no single such factor is decisive. Rather, a court weighs all of the circumstances in deciding whether the challenged practice is, on balance, competitively unreasonable and as such illegal under the Sherman Act. Since there is now only one case in which the Court has applied the "rule of reason" analysis to minimum resale price setting, we do not have a significant amount precedent on which to forecast how the Court will interpret future cases (actually, to be 100% accurate, the Court has remanded this case for the lower court to apply the "rule of reason" test but I do not believe the Court would pick a case that would not survive the "rule of reason" analysis). As a result, it is anticipated that most businesses will proceed into this area with great caution. Recall, in 1997, the Court moved maximum retail price setting from a *per se* violation to a practice analyzed under the rule of reason, yet businesses have continued to exercise extraordinary caution in this area.

While this recent development is a step forward in aligning law and economics, businesses must still exercise caution in establishing these practices.

Article submitted by Tim Luft. Mr. Luft is an Assistant General Counsel at Emerson. He is responsible for the commercial legal work of its Tool and Storage divisions and manages litigation for the company.

Extern Program -- The ins and Outs

The 2006-2007 school year marked another successful year of the Chapter's law school externship program. Since 1997 the St. Louis Chapter of ACC has sponsored a program in conjunction with Saint Louis University School of Law to provide third year law students with hands-on experience in the in-house practice of corporate law. This past spring semester 11 students were paired with legal departments at ten area companies to further their legal educations by applying their skills and knowledge of legal doctrine to real-life issues faced by in-house attorneys. Students in the program generally spend 6 to 9 hours per week in their corporate settings, and earn 2 to 3 credit hours. The program focuses on providing the students with practical legal skills and problem-solving training through exposure to the realities of corporate practice and instilling in students a sense of professional responsibility to represent the interests of others.

This cooperative program not only benefits the students and sponsoring corporations from a practical standpoint, it also enhances the Chapter's continuing efforts to support programs that provide interaction between in-house practitioners and other legal institutions in the St. Louis area. Professor Alan M. Weinberger administers the program and oversees its academic component for the School of Law. Professor Weinberger has noted that students consistently rate the experience as a highlight of their law school education, and a springboard to successful legal careers. Most of the participating companies have accepted students for a number of years, further attesting to the program's success. If you would like more information please contact the Chapter coordinator for the program **Tom Burke** at 314-854-4098 or tburke@brownshoe.com.

Understanding 409A Concepts

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As noted below, most of these terms are specially defined under Section 409A (except death, which even the Treasury Department didn't try to redefine).

4. **Acceleration of Benefits is Generally Prohibited.** Under Section 409A, the accelerated payment of benefits is prohibited. This is true whether acceleration occurs at the discretion of the employee or the employer. There are a few exceptions to this rule. However, even acceleration of benefits upon plan termination is strictly limited.

5. **Section 409A Has Unique Definitions for Common Terms.** Application of Section 409A is particularly difficult because commonly defined terms have a much different definition under Section 409A. Example: A plan includes all plans of the same type that cover a single individual. Example: A separation from service occurs only if the executive no longer works for any member of the controlled group. If the executive continues consulting at a level at least 50% of prior service, there is a presumption that no separation from service has occurred. If the executive works less than 20% percent of prior service, there is a presumption that a separation from service has occurred. Example: The definition of "good reason" under Section 409A includes a reduction of base pay but not a reduction of incentive pay.

6. **Plans of the Same Type are Treated as a Single Plan.** Plans of the same type are treated as a single plan for purposes of determining compliance with Section 409A. There are 9 types of plans. Thus, for example, a Section 409A violation with respect to a participant's salary deferral plan will also constitute a violation with respect to the participant's bonus deferral plan and penalties will be calculated based on benefits under both plans.

7. **Short-Term Deferrals.** Short-term deferrals are not treated as deferred compensation that is subject to Section 409A. Compensation that is paid not later than 2½ months after the close of the plan year in which it is no longer subject to a

substantial risk of forfeiture, i.e., vested, is not considered deferred compensation. Note that if the plan permits the possibility of payment after the 2½-month limitation, it will not qualify as a short term deferral even if the compensation is actually paid within the 2½ month period. Note, also, that vesting is uniquely defined under Section 409A. For example, non-compete provisions do not delay vesting and, generally, elective deferrals, such as salary deferrals, are not considered subject to a substantial risk of forfeiture.

8. **Separation Pay.** Generally, severance pay is subject to Section 409A unless it satisfies one of several exceptions set forth in the regulations. For example, severance pay due to involuntary separation that (i) does not exceed the lesser 2 times annual compensation for the preceding year or \$450,000 (for 2007) and (ii) is paid no later than end of second year after the year of the separation is exempt from Section 409A. Special rules apply in determining whether separation for "good reason" is considered involuntary separation.

9. **Six Month Delay for Publicly Traded Companies.** Payments of Section 409A deferred compensation to key employees of public companies may not commence for at least 6 months following separation from service.

10. **Substitutions will be Scrutinized.** Under the Section 409A regulations, payment of compensation in exchange for future deferred compensation may be treated as payment of the deferred compensation on an accelerated basis. For example, it is critical to examine the impact of subsequent employment agreements on existing deferred compensation benefits to determine whether an impermissible substitution has occurred.

As evidenced by the above, Section 409A contains many complicated rules applicable to deferred compensation. Executives will benefit themselves and their companies by becoming familiar with key Section 409A concepts and seeking assistance from their legal departments or outside counsel as soon as possible to ensure that deferred compensation arrangements are amended to comply with Section 409A by the December 31, 2007 deadline.



legalease

We get it. You don't want to deal with someone who is just looking to rack up their billable hours. You want the process to be as easy and pain-free as humanly possible. We will partner with you to come up with solutions that are both creative and legally sound. After all, we earn our reputation from the companies we keep. It makes a difference. Your bottom line will show it.

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MERITAS

The choice of a lawyer is an important decision and should not be based solely upon advertisements.