The Florida Bar Out-of-State Division

State-to-State

flabaroutofstaters.org Summer 2014

IN THIS ISSUE:

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COVER:
THE NEW JERSEY STATE HOUSE

Photo credit: Wikipedia

The New Jersey State House is located in Trenton and is the capitol building for the U.S. state of New Jersey. Built in 1790, it is the second-oldest state house in continuous legislative use in the United States; only the Maryland State Capitol in Annapolis is older. The building is currently home to both chambers of the New Jersey Legislature (the New Jersey Senate and the New Jersey General Assembly), as well as offices for the governor of New Jersey, lieutenant governor of New Jersey and several state government departments.

Wrapping up the year as president


D. WORKMAN

Colleagues:

Well, this will be my last column as president of the Out-of-State Division. We've had some great accomplishments I'd like to share. It's been a privilege to serve as president for two years and to work with a great and talented group of attorneys. Your officers work diligently to serve our members.

We conducted another successful reception, this time in Nashville, Tenn., on April 3. We co-hosted with the Young Lawyers Division in conjunction with their out-of-state meeting. These gatherings are open to Florida Bar members, and we invite you to join the OOS Division to participate in the benefits of membership.

We continue to make progress on The Florida Bar Out-of-State President's Goal and Objectives for 2013-2014. You can find them on page 4. I describe these as a "checklist" for what we need to accomplish, and they also will serve as a grading system on my performance and what we accomplished during my presidency.

Here's an update on where we are so far on some of our objectives for this year:

Annual meeting: We are eagerly planning events in conjunction with The Florida Bar Annual Convention, which is scheduled to take place at the Gaylord on June 25-28, 2014, in Orlando. We will conduct the annual meeting of the OOS Division, during which the officers will be sworn into office by the president of The Florida Bar.

Continuing legal education: The division continues to focus on increased webcast continuing legal education seminars. In December, OOSD President-Elect Tim Chinaris presented *Ethics in an Age of Technology* for an hour of ethics credit. In February, Christopher Marquardt, treasurer of the Out-of-State Division, presented *Non-Traditional Labor: Recent NLRB Enforcement Activity in Non-Union Workplaces* by webcast. In March, we presented a CLE course co-hosted with the Young Lawyers Division. It was entitled *The Fourth Amendment: What Can Be Found on Cell Phones With Ethics Update*. Ian Comisky, one of our executive council members and governor, chaired the panel, which featured William Ridgway, assistant U.S. attorney for the Northern District of Illinois, and Gina Spada, member of the International Association of Privacy Professionals. In April, we featured Dena Kessler from BakerHostetler, who presented *Bankruptcy: Navigating the Automatic Stay, Discharge, Preference and More*. Next up was a web CLE that I presented, entitled *Attorney's Fees in Bankruptcy: Fee Applications, Disclosure Requirements and More*. Both the April and May CLEs were co-hosted with the YLD.

As you can see, we're striving to offer more CLE opportunities for our membership. The webinars are available to members with access to the OOS Division website (*www.flabaroutofstaters.org*). We're enthusiastic about expanding our offerings and would value your input.

Long-range planning and bylaws review: We organized a special committee to ensure that our bylaws reflect the current needs of our members. We also continue to evaluate the division's long-range plan so that we enhance value to out-of-state lawyers and encourage their participation as members.

Diversity: We actively encouraged women, minorities and diverse groups to participate and join. Such an effort is a top priority with Florida Bar President Eugene Pettis, as it is for me. We also focus on increasing geographic diversity. The Long-Range Planning Committee will continue to address this topic, and we would value your input and participation.

OOSD publication: The *State-to-State* continues to provide great outreach and substantive articles. We send each edition electronically to all out-of-state Bar members, a circulation of well over 13,000 lawyers. Please note the advertisers in this edition. We encourage you to support these companies, even if you just reach out and thank them. We welcome you to submit articles, and we will strive to publish them all. We also include a description of you and your practice. There's no secret—we want *to help you* get out the word about *you*. So, send us your articles!

Webpage: The OOSD Information Committee has been working to update and improve the division's webpage. You can access the *State-to-State*, CLE, ethics programs and a variety of information. We continue to look for improvements. Please let Mindi Wells or Tiffany McKenzie know any ideas or suggestions. We'd love to have your help, so please contact us.

Speaking of your input, you'll see the contact information of the officers and executive council members in this edition. We are here to serve you. We want your thoughts on how we can seize opportunities to better serve out-of-state lawyers. We want to help your practice and help you do your job.

We will be guided in all we do by our promise to you in accord with the OOSD bylaws "to assist out-of-state lawyers: in administrative, educational and practice development issues; with pro bono activities; in relocating to Florida; and in establishing a network of out-of-state members." That's a big promise; we could use your help. Please join us in this very worthwhile pursuit to make this a great year of opportunities and to finish strong!

Thank you for the opportunity to serve. Many thanks to the OOSD officers and council members who have been so supportive. I also want to thank Susan Trainor and Matt Kahl for their editorial assistance on the *State-to-State*. And thanks to our administrator, Willie Mae Shepherd, for all she does to keep the division functioning.

Best wishes to Tim Chinaris, our incoming president.

Trademark rights and your bottom line

by Kimra Major-Morris

K. MAJOR-MORRIS

Copyrights, trademarks and patents are the three areas covered by intellectual property (IP) laws. Distinguishing between these areas can be tricky. I once overheard someone say, "That's a catchy phrase, and you should *patent* that!" While phrases cannot be patented, most people do have an understanding that the law protects creative works.

The focus of this article is the benefits of trademark ownership. However, for clarity, you should understand the basic protections in IP matters.

Intellectual property basics

Trademarks are words or symbols that identify the source of products and services used in commerce. Nike's "Just Do It" slogan, Apple's symbol (the bitten apple) and Louboutin's red bottom shoes are great examples of each. Federal trademark ownership benefits cited on the United States Patent & Trademark Office (USPTO) site (*www.uspto.gov*) include:

- Public notice of your claim of ownership of the mark;
- A legal presumption of your ownership of the mark and your exclusive right to use the mark nationwide on or in connection with the goods/services listed in the registration;
- The ability to bring an action concerning the mark in federal court;
- The use of the U.S. registration as a basis to obtain registration in foreign countries;
- The ability to record the U.S. registration with the U.S. Customs and Border Protection (CBP) Service to prevent importation of infringing foreign goods;
- The right to use the federal registration symbol ®; and
- Listing in the United States Patent and Trademark Office's online databases.

Copyrights protect original works of authorship, including music, art, literary works, dramatic works and other intellectual works. Owners of copyrights have six exclusive rights to reproduce the work, create derivative works, distribute the work, perform the work (whether visual or a digital audio performance) and display the work. Only the copyright owner can authorize these exclusive rights for others to execute. Read more on the Copyright Office's website at *www.copyright.gov*.

Patents grant special rights to the inventor of: 1) a new process; 2) a machine; 3) an article of manufacture; 4) a composition of matter; and to inventors who create 5) improvements to any of the aforementioned. Patent rights allow patent owners to control the use, sale, offering and importing of their inventions. Patents are applied for through the USPTO's website.

Trademarks add value to your business

As a business owner, you want to do everything possible to strengthen the reputation of your business by offering products and services. Through trademark ownership, allowing the use of your logo in association with other reputable brands adds consumer confidence, drives new business and adds to your bottom line. Although developing an intellectual property portfolio opens additional revenue streams for business owners, trademark ownership and licensing is not included in the initial business plans of the majority of small business owners I have served. Unfortunately, the value of owning intellectual property is widely unknown to small business owners.

Trademark ownership and the authority to license brands is big business. Think of the last sporting event you attended, where you saw logos for each team, the sponsors, the contractors

Florida Bar Out-of-State Division President's Goal and Objectives for 2013-2014

GOAL

To further enhance OOS Division services to members through continued improvement of CLE, publications, student/young lawyer growth, diversity and revenue in order to stimulate growth in membership

OBJECTIVES

- Stimulate perception of OOSD within Bar and BOG through outreach with current and future members
- Ensure OOSD meets or exceeds desire of members regarding the direction and services of the division
- Increase CLE offerings
- Sponsor CLE at October Board of Governors meeting
- Submit proposal for Presidential Showcase CLE at annual meeting
- Continue enhancements to webpage for members
- Continue to develop and enhance use of social media
- Continue active participation of president-elect
- Increase advertising in and revenue from *State-to-State*
- Conduct at least three receptions nationally
- Conduct at least monthly meetings of Executive Board and quarterly meetings of Executive Council in addition to annual meeting

and other vendors. While the lucrative profit margins derived from licensing royalties are not "breaking news" for larger corporations, smaller business owners should know that they have unique opportunities, through technology, to do bigger things with affordable investments.

Take a lesson from the music industry

Music industry artists are, themselves, a brand. Depending on their level of notoriety, some have reached celebrity status worthy of trademark protection under the Lanham Act. New artists once relied on managers and lucky breaks to expose their talents to the world. Now, thanks to YouTube, Reverb Nation, CD Baby and countless other outlets for artists, the price tag for a worldwide stage is extremely cheap.

The music industry took a hit with the devastating profit losses resulting from online piracy. Executives quickly realized that with minimal financial risks, record companies could negotiate a piece of a larger financial pie. About 10 years ago, record companies began offering "360 deals," which entitle labels to a percentage (5%-20%) of the artist's ancillary income derived from tours, reality television shows, film, commercials and other independent projects (outside of record sales). It's the same business model used by profitable trademark owners. Everywhere the artist/merchandise/business logo goes *must* be an opportunity to generate revenue. Simply put, without a trademark, business owners lose money. Record labels couldn't depend on record sales when the industry changed. Business owners can't depend on walk-ins without the assistance of thoughtful product/brand placement. Labels know that their artists add value to various entertainment events. Business owners must ensure added value to other brands. The first step in earning brand recognition is to represent the products and services through the use of a strong trademark.

Selecting a trademark

Selecting a word mark (trademark) should be a thoughtful process that includes forward thinking. For example, if you own a deli that is currently located on 4th Street and your lease will expire next year, you should not have a pending "4th Street Deli" trademark. Aside from pondering the relevance of the mark over time, there are many other considerations, including whether the mark is too generic, merely descriptive or just an unwise choice. A good trademark attorney advises clients against registering weak or problematic trademarks.

Perhaps even more thought should go into selecting a design or a logo for your trademark. Symbols can be extremely powerful in connecting with consumers. Businesses have the option of filing the name and the logo in a single federal trademark application, but if they're filed together, they must always appear together. The same applies for taglines (e.g., "Like a good neighbor"). If a tagline is included in the application, it will be an element of the trademark registration when the application is finalized. Although separate filing fees will be charged, filing one application for the word mark and another application for the logo separately allows for more creative marketing.

Applying for a federal trademark

Individuals and entities can apply for trademark ownership. A federal trademark is applied for through the USPTO's website and does not offer international protection. (Separate applications are required to cover various international territories.) The standard filing fee is $325 per classification of goods and services for domestic applications. If you're applying for a trademark for your business's charitable services *and* its key chain products, for example, the total filing fees will be $650. The charitable service classification greatly differs from the key chain classification, and separate classification fees apply. Detailed descriptions of each class can be found in the "ID Manual" on the USPTO's site.

The application process typically takes between 6 and 12 months to finalize, but the exact time depends on a number of factors. The trademark examining attorney's findings, the applicant's timeliness in responding to the USPTO's requests, oppositions filed against the trademark application and the accuracy of the information included in the application are some of the possible factors. Federally registered marks are valid for 10 years and can be renewed.

Trademark ownership requires monitoring to ensure the proper use of the mark (in accordance with the classifications registered for) and to enforce trademark rights, which can be lost for failure to "police" the mark.

State trademarks

Local business owners may wish to apply for state trademarks, if state trademark registrations are offered in that state. State registrations are less

expensive than federal applications. Florida offers state trademarks, and the filing fee for a Florida trademark is $87.50 per class. It is important to note that state trademarks do not bar others from acquiring federal trademarks for the same mark. They give superior rights only in the state where the mark is registered.

Benefits of consulting with a trademark attorney

Before applying for a federal or a state trademark, it is advisable to consult with a trademark attorney. While the assistance of an attorney is not required to obtain a trademark, an attorney can provide valuable advice and can prevent business owners from unintentionally infringing on others' rights, wasting money by applying for marks already being used in commerce and applying for marks that will be difficult to enforce.

The price for skipping an important step

When it comes to searching the availability of the desired name, some individuals conduct the free search on the USPTO's website and believe that will suffice. The USPTO contains a list of federally registered trademarks. It does not indicate whether an individual or an entity has acquired common law (superior) rights by using the mark in commerce.

Nevertheless, some take a leap of faith and begin doing business without a clearance search. Diligent trademark owners subscribe to trademark monitoring services to receive alerts whenever their mark is being used in commerce. Once they are alerted to unauthorized use, infringers (including unintentional infringers) are subject to financial consequences that flow from federal and state claims (if applicable) for unfair competition, injuries to business reputation and sales, etc.

Trademark application errors are not immediately apparent to the trademark office's examining attorneys (or the applicant), and the delayed discovery of problems increases financial risks to the affected parties. Case in point: An individual registered a Florida business not knowing there was a confusingly similar federally registered trademark on file. Several months later, the individual received a cease and desist notice from the federal trademark owner and was forced to amend the business name and cease all other uses within 30 days to avoid litigation costs. The business owner had to change all signage (on-site signage and signs on company cars), transfer the domain name to the trademark owner, order new company uniforms, revise business cards, revise business forms, update bank accounts and abandon the company slogan. Although the complaining business owner believed he lost business because of the confusion, he did not file suit. Despite that, failing to conduct a clearance search cost the accidental infringer over $10,000 to comply with the cease and desist notice.

Hopefully you're wondering how to avoid this kind of nightmare. The Florida Division of Corporations system (*www.sunbiz.org*) will not reject a new business filing when your business name infringes on another party's. In fact, a disclaimer appears on the site notifying you that it is the registrant's responsibility to verify trademark rights. Although Florida's system *does* detect and reject filings of *identical* federally registered trademarks listed on the USPTO site, the ease with which unintentional infringers file business names bearing protected trademarks is concerning. A name that is "substantially similar" dilutes the trademark owner's brand and causes confusion regarding the source of the products and services protected by trademark law.

Business owners have flexible options for establishing residual income flowing from royalties on logo licensing, product sales and marketing fees. In this do-it-yourself age, the temptation to absorb complicated data to save money is great. Sometimes the risk is too great. Intellectual property rights and licensing opportunities are well worth the investment for profits and peace of mind.

Chapter 15 of the Bankruptcy Code: No need to panic; it's available to you

by Alvin F. Benton, Jr.


A. BENTON, JR.

With the growing global business marketplace, businesses are looking for useful mechanisms to maintain debt and manage their solvency. Given the various industries of Florida—including hospitality and tourism, agriculture, manufacturing and health sciences—there are plenty of opportunities and ventures available for investment or ownership by foreign individuals or corporations. But what happens when that foreign corporation runs into financial difficulties in its home country? And what happens when that foreign corporation is involved in its home country insolvency proceedings? And what happens to the corporation's assets located in Florida? Chapter 15 of the Bankruptcy Code was created to resolve these issues; however, many practitioners are unaware of the benefits of Chapter 15.

Chapter 15 was added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and replaced Section 304 of the Bankruptcy Code.[1] The purpose of Chapter 15, and the Model Law on which it is based, is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants and other parties of interest involving more than one country. Although a Chapter 15 filing relates to a pending foreign insolvency proceeding, common U.S. bankruptcy concepts such as the automatic stay, the sale of property under § 363 of the Bankruptcy Code and the avoidance of post-petition transfers are consistent throughout the Chapter 15 process.[2]

In most instances, a Chapter 15 case is ancillary to a primary proceeding brought in another country, usually the debtor's home country. As an alternative, the debtor or the creditor may commence a full Chapter 7 or Chapter 11 case in the United States *if* the assets in the United States are sufficiently complex to merit a full-blown domestic bankruptcy case.[3] Under Chapter 15, a court may authorize a trustee or other entity (including an examiner) to act in a foreign country on behalf of a United States bankruptcy estate.[4]

As indicated in 11 U.S.C. §§ 1525-1527, cooperation among the courts (U.S. and foreign) appears to be an unstated goal under Chapter 15. Section 1525 requires that the court cooperate to the maximum extent possible with a foreign court or foreign representative.[5] Section 1526 requires the same cooperation between the trustee and a foreign court or foreign representative.[6] Section 1527 provides various forms of cooperation, including appointment of a person or a body to act at the direction of the court, communication of information and coordination of the administration and supervision of the debtor's assets.[7]

Section 1502 provides definitions for the following terms you'll see throughout Chapter 15: debtor, establishment, foreign main proceeding, foreign nonmain proceeding and recognition.[8] Clearly stated, a debtor is defined as the subject of a foreign proceeding.[9] Establishment is defined as any place of operations where the debtor carries out a nontransitory economic activity. Foreign main proceeding is defined as a foreign proceeding pending in the country where the debtor has its main interests; and a foreign nonmain proceeding is conversely defined as a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment. Simple enough? Not really, as the terms foreign main proceeding, foreign nonmain proceeding, establishment and nontransitory seem to cause the most conflict among bankruptcy practitioners. However, some of these terms will be addressed further in this article as we discuss some of the Chapter 15 decisions entered in 2013.

In terms of *recognition*, many practitioners have viewed Chapter 15 relief as automatic, similar to the former Bankruptcy Code Section 304.[10] Chapter 15 grants courts substantial flexibility and discretion in furthering these objectives; however, courts have little latitude in determining whether a foreign proceeding merits recognition as either a main or a nonmain proceeding. The approach in determining a main or a nonmain proceeding involves a straightforward approach and review of the definitions stated in Bankruptcy Code §§ 1502, 101(23) and 101(24).

Steps in Chapter 15

Section 1509 provides that a foreign representative may commence a case by filing a petition with the court for recognition of a foreign proceeding under 1517. 11 U.S.C. § 1517 provides that the court is authorized to issue an order recognizing the foreign proceeding as either a foreign main proceeding (a proceeding pending in a country where the debtor's center of main interests are located) or a foreign non-main proceeding (a proceeding pending in a country where the debtor has an establishment, but not its center of main interests).[11]

In ruling on a petition for recognition under Section 1517, the court must address the following: 1) Would the proposed recognition be "manifestly contrary to the public policy of the United States" as contemplated under Section 1506; 2) Is the subject foreign action a foreign proceeding as defined in 11 U.S.C. § 101(23); 3) Is the foreign representative who filed the petition for recognition a person or a body; 4) Does the petition meet the formal requirements of Section 1515; 5) Is the foreign proceeding pending in the country where the debtor has the center of its main interests and thus a foreign main proceeding; and 6) Does the debtor have an establishment in the foreign

country where the proceeding is pending, thus making the foreign proceeding a foreign nonmain proceeding?[12] Section 1517 of the Bankruptcy Code summarizes the Chapter 15 recognition process, but practically, how does Chapter 15 work?

In his paper titled "The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty," John J. Chung provides a good outline for a fairly typical case under Chapter 15, summarized as follows: A Canadian company with its headquarters in Toronto commences bankruptcy proceedings in Canada. It has one factory in Canada and one in the United States. Each of the factories has unpaid employees and suppliers. The American factory secures a bank loan from an American lender, and the Canadian factory secures a loan from a Canadian bank. A foreign insolvency proceeding is filed in Canada. Considering the factors stated above, the Canadian representative applies for recognition of a foreign main proceeding under Chapter 15. The American court grants the application. All proceedings and creditor actions in the United States are stayed, and the Canadian representative takes control of all U.S. assets and operates the American factory. The American creditors then pursue their claims in the Canadian proceeding. The Canadian judge has jurisdiction over all the assets and creditors and resolves all claims together.[13]

From the example provided, it is easier to understand that the practical concept of cooperation among the courts is necessary in the Chapter 15 bankruptcy process.

Creditor participation

Chapter 15 gives foreign creditors the right to participate in U.S. bankruptcy cases, and it prohibits discrimination against foreign creditors (except certain foreign government and tax claims, which may be governed by treaty).[14] It also requires notice to foreign creditors concerning a U.S. bankruptcy case, including notice of the right to file claims similar to the proof of claim process in a U.S. bankruptcy proceeding.[15]

Florida decisions

An important Florida decision affecting Chapter 15 jurisprudence is *SNP Boat Service S.A. v. Hotel Le St. James*, 2012 WL 13555550 (S.D. Fla. Apr. 18, 2012). In *SNP*, the court initially upheld the bankruptcy court's ruling ordering discovery of a foreign debtor's principals notwithstanding a French blocking statute that prevented such discovery.[16] The district court later determined that the bankruptcy court acted within its discretion when it disregarded the French blocking statute and ordered representatives of the debtor to be deposed, but also determined that the bankruptcy court abused its discretion when it ordered discovery to determine whether the appellee/third-party's interest were sufficiently protected in the specific French sauvegarde proceeding.[17] In *SNP*, the bankruptcy court recognized the sauvegarde proceeding as a foreign main proceeding, and the recognition order stayed any further collection proceedings in the United States against SNP and its assets.[18] The *SNP* decision reaffirmed the belief that once a United States court determines a foreign proceeding is recognition worthy, it no longer has the discretion to examine whether those safeguards are adequate, and that cooperation is the key in successfully participating in a Chapter 15 case.

The Southern District of Florida Bankruptcy Court also dealt with the jurisdictional reach of Chapter 15 in the *In re British American Insurance Company Ltd.* decision.[19] In the *British American* decision, Judge Kimball provided an in-depth, historical look at Chapter 15 and the purposes and goals of Chapter 15. The court also determined that the provisions of Chapter 15 that empower the court to entrust a foreign representative with the ability to administer and/or realize a foreign debtor's assets "within the territorial jurisdiction of the United States" do not limit the court's subject matter jurisdiction pursuant to 28 U.S.C. § 1334.[20]

The *British American* court held that courts presiding over Chapter 15 cases may also exercise jurisdiction over disputes "related to" those Chapter 15 cases, pursuant to the jurisdictional authority granted in 28 U.S.C. § 1334.[21] The court determined that its interpretation is consistent with Chapter 15's overall goals and focus on comity.[22]

Decisions in 2013 affecting Chapter 15 filings

In addition to the *SNP* and *British American* decisions, there were a few decisions in 2013 that highlight the evolution of Chapter 15 and ancillary and cross-border insolvency practice. Some of these evolutions addressed are: 1) whether a foreign debtor must have a place of business or assets in the United States to be eligible for Chapter 15[23]; and 2) whether insolvency is actually necessary in a

Commit 10 hours this year to the OOSD!

A 10-hour yearly commitment to the OOSD (less than one hour per month) translates to doing just one of the following activities:

1) Support the division by attending executive council meetings;
2) Join and participate in a committee for the next year;
3) Write one substantive article for *State-to-State;*
4) Volunteer to write materials and present one hour of CLE a year;
5) Volunteer to be a mentor for law students; or
6) Help update, improve and maintain the division's website.

Chapter 15 case.[24] Year by year, as more brave practitioners venture into the world of Chapter 15, courts are providing more clarity as to what are the essential and necessary things needed in a Chapter 15 case.

Conclusion

Familiarity with Chapter 15 opens up broad opportunities for Florida and non-Florida attorneys to assist their clients—both domestically and internationally—in navigating the unchartered waters of foreign insolvency. Although underutilized, there were at least 65 Chapter 15 cases filed in U.S. bankruptcy courts as of the beginning of the third quarter of 2013.[25] Given the diverse makeup of Florida, it should be expected that this diversity spills over into the international business world. The decisions in the above-mentioned Florida courts prove that Florida judges are extremely competent in handling even the most complex foreign insolvency matters. Thus, an attorney's understanding and willingness to handle Chapter 15 cases will benefit those international and foreign companies and those brave practitioners who opt to go where few others have gone.

Endnotes

1 http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx

2 11 U.S.C. § 1520.

3 11 U.S.C § 1520(c).

4 11 U.S.C. § 1505.

5 11 U.S.C. § 1525.

6 11 U.S.C. § 1526.

7 11 U.S.C. § 1527.

8 11. U.S.C. § 1502.

9 *Id*.

10 As several courts have noted, "many of the principles underlying § 304 remain in effect under chapter 15." *In re Atlas Shipping A/S*, 404 B.R. at 739: *see also In re Artimm, S.r.L.*, 335 B.R. 149, 159-60 (Bankr.C.D.Cal.2005) ("[T]he chapter 15 regime looks somewhat different from that applicable to this case under § 304. However, there is one provision that is strikingly similar. As under § 304, § 1521(b) authorizes the court, upon the request of the foreign representative, to entrust the distribution *785 of all or part of the debtor's U.S. assets to the foreign representative."); Leif M. Clark & Karen Goldstein, *Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies*, 46 Tex. Int'l L.J. 513, 524 (2011) ("Not surprisingly, the case law under former § 304 is still relevant to the interpretation of Chapter 15, especially as it concerns the remedies available to a foreign representative once recognition has been granted").

11 See 11 U.S.C. § 1517.

12 *In re British American Insurance Company Ltd.*, 488 B.R. 205, 214 (Bankr. S.D. Fla. 2013).

13 *See* John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 Nw. J. Int'l. L. Bus. 89, 98 (2007).

14 11 U.S.C. § 1513.

15 *Id*.

16 *SNP Boat Service S.A. v. Hotel Le St. James*, 2012 WL 13555550 (S.D. Fla. Apr. 18, 2012).

17 *Id*. *Sauvegarde* proceedings are the French pre-insolvency proceedings most analogous to U.S. Chapter 11. "The goals of a *sauvegarde* proceeding are to "facilitate the reorganization of the debtor in order to pursue its commercial activity, to maintain its employments and to repay its debts." *See SNP Boat Service SA v. Hotel Le St. James*, 483 B.R. 776, 778 (2012).

18 *Id*.

19 *In re British American Insurance Company Ltd.*, 488 B.R. 205 (Bankr. S.D. Fla. 2013).

20 *British American*, at 226-27.

21 *Id*.

22 *British American*, at 239.

23 *In re Barnet*, 737 F.2d 239 (2d Cir. 2013).

24 *In re Millard*, 501 B.R. 644 (Bankr. S.D.N.Y. 2013).

25 http://news.abi.org/sites/default/files/statistics/Chapter%2015%20Filings.pdf

Carbon capture and the Information Quality Act

by H. Brendan Burke


H. BURKE

On Jan. 8, 2014, the U.S. Environmental Protection Agency (EPA) issued a proposed new source performance standard (NSPS) under the Clean Air Act[1] for carbon dioxide (CO_2) emissions from new or modified electric utility plants that will effectively require implementation of a process known as carbon capture and sequestration (CCS).[2] EPA offers the following explanation of this technology:

> CCS is a three-step process that includes:
>
> 1. Capture of CO_2 from power plants or industrial processes;
>
> 2. Transport of the captured and compressed CO_2 (usually in pipelines); and
>
> 3. Underground injection and geologic sequestration (also referred to as storage) of the CO_2 into deep underground rock formations. These formations are often a mile or more beneath the surface and consist of porous rock that holds the CO_2. Overlying these formations are impermeable, non-porous layers of rock that trap the CO_2 and prevent it from migrating upward.[3]

The new rule would limit CO_2, a previously unregulated greenhouse gas emission, from such generation facilities to a rate of 1,100 pounds per megawatt-hour (MWh).[4] Energy producers, especially those employing coal-fired plants, are strongly opposed to these limits.[5]

On Feb. 3, 2014, the Center for Regulatory Effectiveness (CRE) sent a letter to the EPA administrator alleging that the proposed rule violates the Information Quality Act[6] (IQA) in that it is based on scientific studies that were not peer-reviewed as required by the Office of Management and Budget (OMB)'s regulations implementing the IQA.[7]

Since its passage in 2000, the IQA has been criticized as a tool for corporate interests to suppress unfavorable government reports and actions.[8] In this case, the issue turns on whether the studies cited in the proposed NSPS rule qualify as a "Highly Influential Scientific Assessment" (HISA) within the meaning of the OMB's regulations, thereby triggering enhanced peer-review requirements.[9]

This article will introduce the reader to the IQA and explain competing views as to the extent to which the IQA is legally binding. The article will further analyze whether the science the EPA used to develop the CCS rule is, in fact, a HISA, and to what extent the IQA may or may not apply.

The Information Quality Act

The IQA was passed in late 2000 and was enacted by a lame-duck Clinton Administration.[10] In its entirety, the Act reads as follows:

> (a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
>
> (b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall—
>
> (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
>
> (2) require that each Federal agency to which the guidelines apply—
>
> (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
>
> (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
>
> (C) report periodically to the Director—
>
> (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
>
> (ii) how such complaints were handled by the agency.[11]

The IQA was an amendment to the Paperwork Reduction Act of 1980.[12] The OMB promulgated its first iteration of implementing regulations on Feb. 22, 2002.[13] The IQA and the OMB's implementing regulations apply to "information" that is "disseminated" by virtually all federal agencies.[14] The regulation defines those terms as follows:

> "Information" means "any communication or representation of knowledge such as facts or data ... ." This definition of information ... does "not include opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views."
>
> "Dissemination" is defined to mean "agency initiated or sponsored distribution of information to the public."[15]

In accordance with the statutory language quoted above,[16] the regulations seek to ensure information "quality" by imposing standards for "objectivity, utility, and integrity."[17] Those terms are broadly defined,[18] but remain open to considerable interpretation and debate as to their value as normative standards.[19]

Judicial enforceability of the IQA

Also unclear is the extent to which

the IQA is judicially enforceable. In 2006, the Fourth Circuit Court of Appeals rejected the argument that the IQA established a right to "informational correctness"[20]: "By its terms, this statute creates no legal rights in any third parties. Instead, it orders the [OMB] to draft guidelines concerning information quality and specifies what those guidelines should contain ... . [T]he statute ... does not create a legal right to access to information or to correctness ... ."

In 2010, however, the Court of Appeals for the District of Columbia reached an arguably different result. In *Prime Time International Company v. Vilsack*,[21] a cigar manufacturer challenged the Department of Agriculture's methodology for calculating domestic tobacco farm subsidies.[22] The lower court had dismissed the plaintiff's IQA suit for failure to state a claim, citing the Fourth Circuit opinion discussed above.[23] The circuit court took a different tact.[24] The court still dismissed the IQA portion of the suit, but did so not for failure to state a claim but rather because the subsidy calculations qualified as an "adjudicative process" exempt from the OMB's definition of a "dissemination."[25] One month later, after the CRE had touted the *Prime Time* decision as a victory disguised as defeat, the Department of Agriculture petitioned the circuit court for a rehearing and that "the panel amend its opinion to clarify that the Court did not decide whether the [IQA] creates judicially enforceable rights."[26] The court denied the rehearing request outright.[27]

But in *American Petroleum Institute v. EPA*,[28] a 2012 D.C. Circuit panel reached a different result.[29] In *American Petroleum*, the industry group (API) challenged the EPA's 2010 revision of the CAA national ambient air quality standard for nitrogen dioxide.[30] Among other claims, API asserted that the EPA had failed to adhere to the peer review guidelines in its own 2002 information quality manual, adopted pursuant to the IQA.[31] The court emphasized that the guidelines were precisely just that—guidelines.[32] It found dispositive the fact that the guidelines used the word "should" rather than "shall" in places like this statement: "major scientifically and technically based work products ... related to Agency decisions *should* be peer-reviewed."[33] Dismissing API's IQA claim, the court further noted, "No doubt the EPA believes peer review is important and it intended to impress that value upon its staff, but the agency did not bind itself to a judicially enforceable norm."[34]

Interestingly, the *American Petroleum* opinion does not cite or otherwise mention *Prime Time*,[35] leaving to speculation whether *Prime Time* indicates any judicial enforceability for the IQA and if so, how to distinguish the two cases. In other words, what facts did *Prime Time* have that *American Petroleum* did not that may have led to a different outcome on the question of enforceability? The most apparent distinction is that the plaintiff in *Prime Time* challenged the government's methodology itself while API only challenged the extent to which the results were reviewed.

If that is the distinguishing point between the two cases, it would not bode well for the CRE's chances of challenging the proposed NSPS for CO_2. But it might not necessarily foreclose the peer-review argument. As stated above, in *American Petroleum* the D.C. Circuit's analysis was limited to the discretionary ("should" versus "shall") nature of the EPA's internal guidelines promulgated in 2002. Not subject to consideration in *American Petroleum*, however, was the OMB's 2005 Final Information Quality Bulletin for Peer Review[36] (bulletin).

The OMB's 2005 bulletin and HISAs

The bulletin, like the EPA's 2002 document, established a range of discretionary guidelines relating to peer review of "influential scientific information" disseminated by government agencies.[37] But the bulletin further imposes stricter, mandatory requirements applicable to HISAs, which the bulletin notes are a subset of "influential scientific information."[38] The bulletin defines a HISA as information that could "have a potential impact of more than $500 million in any year, or ... [i]s novel, controversial, or precedent-setting or has significant interagency interest."[39]

For HISAs, the bulletin requires that agencies select a multidisciplinary pool of peer reviewers and recommends that agencies solicit outside nominations for this purpose.[40] The reviewers must be independent of (not employed by) the agency and must be free from actual or apparent conflict of interest.[41] Public notice and opportunity for public comment are mandatory.[42] Each of these requirements is in addition to the more broad guidelines for influential scientific information, and the bulletin also imposes enhanced transparency and management requirements.[43]

NSPS compliance with the IQA

The EPA's proposed NSPS points to four utility-scale electric generation projects, in various stages of development or construction (but none completed), as evidence that CCS is appropriate to consider the best system for emission reduction.[44] Three of those four are U.S. projects that have benefitted from over $2.5 billion in government assistance in the form of Department of Energy grants and investment tax credits pursuant to the Energy Policy Act of 2005.[45] One, Summit Power's Texas Clean Energy Project, received over $1 billion by itself.[46] While the proposed NSPS does not contain cost estimates,[47] these large amounts of government aid suggest that CCS implementation under the proposed rule would easily surpass the $500 million HISA threshold. Even if it didn't, it is apparent that CCS is "novel, controversial, or precedent-setting,"[48] so the science upon which this technology is based would almost certainly qualify as a HISA.[49]

Despite this, the proposed rule evinces no effort by the EPA to comply with the OMB bulletin's enhanced mandatory peer-review requirements for HISAs.[50] Still, given the weight of case law holding that the IQA creates no judicially enforceable rights and the attendant ambiguity as to the distinctions between the *Prime Time* and *American Petroleum* holdings, the CRE's prospects of successfully prevailing on a challenge in this regard are tenuous at best.

Prime Time will likely remain an outlier as the only precedent remotely supporting the notion that the IQA is judicially enforceable. If the CRE or a similarly situated plaintiff were to challenge the peer-review methodology of the proposed NSPS in the context of the IQA and the OMB bulletin, the D.C. Circuit would likely follow the Fourth Circuit's reticence and its own precedent in *American Petroleum* to resist granting relief on these grounds. Even if such a challenge were successful, it would only delay implementation for the time it would take the EPA to remedy the deficiency, unless the results of the peer review showed that CCS was not viable or feasible as a system of emissions reduction.

Conclusion

Opponents of the proposed NSPS have attacked the rule from many different angles.[51] The IQA theory asserted by the CRE in its February letter to the EPA administrator is an interesting, but possibly far-fetched, addition to those challenges. While it is facially sufficient because the science behind CCS qualifies as a HISA, the uncertainty surrounding the enforceability of the IQA and its implementing regulations casts doubt on this particular theory's prospects for success.

Endnotes

1 § 111(f), 42 U.S.C. § 7411(f) (2012).

2 Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430 (EPA Jan. 8, 2014).

3 EPA, *Carbon Dioxide Capture and Sequestration*, http://www.epa.gov/climatechange/ccs/ (accessed Apr. 7, 2014).

4 79 Fed. Reg. at 1,433. Large natural gas-fired plants would be further limited to 1,000 lbs./MWh. *Id.*

5 Juan Carlos Rodriguez, *EPA Delays Greenhouse Gas Emissions Rule For Public Input*, Law360 (March 5, 2014), *available at* http://www.law360.com/articles/515523 (reporting that "[t]he proposed rule has drawn fire from energy industry groups that have called it a 'death sentence' for coal power").

6 44 U.S.C. § 3516 (2012). The IQA is also commonly called the Data Quality Act. Tammy P. Tideswell, *The Information Quality Act: An Environmental Primer*, 51 Naval L. Rev. 91 (2005).

7 Letter from Jim J. Tozzi, Advisory Board Member, Center for Regulatory Effectiveness, to Gina McCarthy, Administrator, EPA 1 (Feb. 3, 2014), *available at* http://www.thecre.com/forum10/wp-content/uploads/2014/02/letter-to-EPA-on-peer-review-ff2.pdf

8 Chris Mooney, The Republican War on Science 103 (2005).

9 *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2,664, 2,675 (OMB Jan. 14, 2005).

10 Treasury and General Government Appropriations Act of 2001, Pub L. No. 106-554, § 515, 144 Stat. 2,763A-153 to 2,763A-154 (Dec. 21, 2000).

11 *Id.*

12 44 U.S.C. § 3501 et seq. (2012).

13 Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452.

14 Tideswell, *supra* note 6, at 112-13.

15 67 Fed. Reg. at 8,453-54.

16 *Supra* text associated with note 11.

17 67 Fed. Reg. at 8,453.

18 *Id.*

19 *See* Tideswell, *supra* note 6, at 104 (quoting Robert Gellman, *What, You Haven't Heard about Section 515?*, Government Computer News, http://gcn.com/Articles/2001/08/16/INFOPOLICY.aspx?Page=1). Because this paper focuses on the peer-review requirements discussed *infra* at the text associated with notes 38-44, detailed analysis of the constituent components (objectivity, utility and integrity) is beyond its scope.

20 *Salt Inst. v. Leavitt*, 440 F.3d 156, 158 (4th Cir. 2006).

21 599 F.3d 678 (D.C. Cir. 2010).

22 *Id.* at 679.

23 *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316-17 (D.D.C. 2009) (citing *Salt Inst.,* 440 F.3d at 159), *aff'd in part, rev'd in part sub nom. Prime Time*, 599 F.3d 678.

24 *Prime Time*, 599 F.3d at 684-86.

25 *Id.* at 686.

26 Appellees' Petition for Panel Rehearing at 2, *Prime Time* (No. 09-5099), *available at* http://thecre.com/pdf/20100603_Government_DQA_Appeal_to_Court.abrev.pdf

27 William S. Jordan III, *D.C. Circuit – Is the Information Quality Act Ready for Prime Time?*, 35 Administrative & Regulatory Law News 17 (Summer 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/adminlaw/PublicDocuments/69034_ABA_Summer2010_FINAL.authcheckdam.pdf (noting that "[t]he decision so disturbed the Government that it asked the court to clarify that it had not intended such an implicit result").

28 684 F.3d 1342, 1349 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1724 (2013).

29 *Id.* at 1349.

30 *Id.* at 1345.

31 *Id.* at 1348.

32 *Id.* at 1348-49.

33 *Id.* at 1348 (quoting the EPA, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency 11 (Oct. 2002)) (emphasis added).

34 *Id.* at 1349.

35 *Id.*

36 70 Fed. Reg. 2,664.

37 *Id.* at 2,675.

38 *Id.* at 2,665.

39 *Id.* at 2,675.

40 *Id.* at 2,676.

41 *Id.*

42 *Id.*

43 *Id.*

44 79 Fed. Reg. at 1,434. The four facilities are Southern Company's Kemper County Energy Facility, SaskPower's Boundary Dam CCS Project, Summit Power's Texas Clean Energy Project and the Hydrogen Energy California Project. *Id.*

45 Plaintiff's Complaint for Declaratory and Injunctive Relief at 6-8, *Nebraska v. EPA*, No. 4:14-cv-3006 (D. Neb. filed Jan. 15, 2014).

46 *Id.* at 7.

47 79 Fed. Reg. at 1,430-519.

48 70 Fed. Reg. at 2,675.

49 *See e.g.* Rodriguez, *supra* note 5 (noting that "[c]ontroversy has surrounded the EPA's proposal" and that the rule was already the subject of one lawsuit (specifically *Nebraska*, cited *supra* at note 46)).

50 79 Fed. Reg. at 1,430-519.

51 *See e.g. Nebraska*, cited *supra* at note 46 (in which the state has challenged the NSPS on the ground that it violates the Energy Policy Act of 2005's prohibition on the consideration of facilities receiving financial assistance pursuant to the Act as "adequately demonstrated" for the purpose of setting emissions limitations); Anthony Adragna, White House 'Strongly Opposes' Bill to Curb EPA Power Plant Regulations, Bloomberg BNA Energy and Climate Report (March 4, 2014) (reporting on a bill introduced in the House of Representatives, H.R. 3826, 113th Cong. (2014), which would prohibit "regulations on the greenhouse gas emissions of new plants ... until technologies like carbon capture and sequestration had been demonstrated at six different sites for at least one year").

Complexities of life insurance policy valuation

by Michael F. Amoia, Jon B. Mendelsohn and Robert C. Slane

Our gift tax rules are based on a simple theory—"where property is transferred for less than adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift … ."[1] Therefore, before anything else is done, the parties involved must know the value of the asset(s) being transferred. Sounds simple, but it is sometimes far from it. For years we have relied on the general rule of the value agreed to by a "willing buyer and willing seller, under no compulsion to sell."[2] However, there are a number of unique and/or non-marketable assets that may fall outside this rule. We must approach these hard-to-value assets with different methods of valuation.

Life insurance is one such hard-to-value asset. Unfortunately, valuation rules for life insurance are out-of-date and too rigid to cover all situations. At a time when only yearly renewable term and whole life insurance products existed, a set of rules under the gift and estate regulations were developed to look at policy reserves.[3] These rules assume that a whole life policy, in a simplified description, is a contract in which the owner pays a premium based on the discounted future value of the death benefit—based on certain actuarial assumptions and discount factors. Alternatively, a term insurance contract is an arrangement in which an owner pays a premium based on the actuarial cost of someone dying in the year the premium is paid—with coverage ending at the end of the year with no value and a new premium paid the next year based on a new set of assumptions (hence the name "yearly renewable term"). Using these valuation methods may have been appropriate at one time. However, the world has changed and these rules are outdated as well as subject to insurance carrier manipulation. We now have universal life, variable universal life, index universal life, universal life with secondary guarantees, level term contracts, refund option contracts and many other products. Applying the old, narrow rules to new policies is impractical and unrealistic.

For life insurance carriers, not only have the products changed, but so have the methods they use to account for reserves. Each carrier has a different method, complicating matters further. As a result, when asking a carrier for a policy value, it is a lot like going to the county fair and looking into the "funny" mirrors—depending on which mirror you look into, you will appear wider, thinner, taller or shorter. The only constant in this process has been the reality that the policy value from the carrier is not what one would have expected.

We are only sure of a policy's value at two points—the day before a premium is paid and the date of death of the insured when the insured owned the contract.[4] Otherwise, there are too many variables to consider in the process that cannot fit into a single set of rules that were last modified almost 40 years ago.[5]

Valuation may be an issue when…

Most practitioners recognize that it is important to establish the value of an asset when evaluating the tax implications of changing ownership, either by gift or compensatory situations, or when calculating the value in one's gross estate. However, there are a number of other situations that might not be as obvious. For example, the termination of a non-equity collateral assignment under a private split-dollar arrangement technically triggers a transfer for gift and income tax purposes, even though the legal ownership does not change.[6] Value is also important when calculating required minimum distributions from a profit-sharing plan that owns life insurance. Another example is working with a private foundation that is trying to determine the fair market of its assets for the "5% distribution rule" when life insurance is one of the assets of the foundation.[7] In the case of a corporate acquisition, it is critical to know the value of life insurance that may have been maintained on the corporate books for years on key executives. There are numerous other examples.[8] In any of these situations, documenting the value of the policy may be more important than the rest of the transaction.

The basic rules

Generally, the value of property for tax purposes is its fair market value (FMV). It appears in approximately 200 sections in the Internal Revenue Code and 900 sections of Treasury Regulations.[9] Unfortunately, defining FMV is extremely difficult and may, depending on the situation, have different meanings. According to Black's Law Dictionary (9th Ed.), FMV is "the price that a seller is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." A similar definition appears throughout the tax rules. Specifically, Treas. Reg. 25.2512-1 makes it clear that FMV is a value in which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. The same regulations go on to say that the value of a particular item of property is not the price that is a result of a forced sale or in a market other than that in which such item is most commonly sold to the public.

Unfortunately, there are some items that may not have an open market, such as the stock of closely held corporations or the stock of corporations where market quotations are not available. In such a situation, Rev. Rul. 59-60 states that "all other available financial data, as well as all relevant factors affecting the fair market value must be considered for estate tax and gift tax purposes."[10] Most importantly, though, it states:

> [a] determination of fair market value, being a question of fact, will depend upon the circumstances in each case. No formula can be devised that will be generally applicable to the multitude of different valuation issues arising in estate and gift tax cases. Often, an appraiser will find wide differences of opinion as to the fair market value of a particular stock. In resolving such differences, he should maintain a reasonable attitude in recognition of the fact that valuation is not an exact science. A sound valuation will be based upon all the relevant facts, but the elements of *common sense, informed judgment*

> *and reasonableness must enter into the process* of weighing those facts and determining their aggregate significance.[11]

Life insurance, until recently, was considered one of these items without an open market. In fact, the only party willing to purchase an in-force contract was the insurance carrier that had issued the contract, in the form of a surrender value. Therefore, life insurance has followed a unique set of rules in which Treas. Reg. 25.2512-1 directs us to life insurance valuation rules under 25.2512-6.[12] (Now, we have to add Rev. Proc. 2005-25 for compensatory situations.)[13]

Treas. Reg. 25.2512-6 (guidance on the valuation of a life insurance policy for gift tax purposes) was originally issued in 1963 and most recently was amended 40 years ago, in 1974.[14] As mentioned previously, this regulation was issued at a time when only whole life and term insurance policies were available to the public. As such, the rules were based on simpler policy design that had a surrender value and a death benefit.

The rules looked at three stages in the lifecycle of a life insurance policy: 1) newly issued policies; 2) paid-up/single-premium policies; or 3) policies requiring ongoing premiums. The most straightforward regulations apply to newly issued contracts, where the general rule is that the value of a newly purchased life insurance policy is "the cost" of the contract (premiums paid).[15] Consequently, this method should require a simple accounting of premiums paid into the contract. The only outstanding item is defining what constitutes a new contract. Generally, we assume it is a contract within its first year. However, examples in the regulations for life insurance valuation cite an "existing" contract (and therefore, not new) as one that has been in force for nine years.[16] As such, one would ask if a contract was "new" until then and if the "costs" method of valuation could be used for more than one year. Unfortunately, there is no authority on this point, so most practitioners consider the first year "costs" or premium and other amounts paid to the insurance carrier—including 1035 exchange amounts.

But what about a life insurance policy in which no further payments are to be made to the company (e.g., a single-premium policy or a paid-up policy)? The regulations under example 3 state the value shall be an amount that the company would charge for a single-premium contract of the same specified amount on the life of a person of the attained age of the insured (also known as the replacement cost).[17] However, Rev. Rul. 78-137 goes further. It states that the economic benefits of a single-premium life insurance policy consist of an entire bundle of rights including the right to surrender the policy, the right to retain it for investment virtues, the right to borrow the cash surrender value of the policy and the right to payment of the face amount on the death of the insured.[18]

In-force policies with ongoing premiums have a completely different approach. Making specific reference to a contract that has been "in force for some time," the value *may be* approximated by using the interpolated terminal reserve plus unearned premiums (hereafter referred to as ITR).[19] However, the regulations make it clear that this method may not be used if "because of the unusual nature of the contract, such approximation is not reasonably close to the full value." Also, if there is a concern of imminent death, then the valuation

should be based on the shortened life expectancy and the probability of collecting the death benefit.[20]

Historically, the Internal Revenue Service has looked to ITR for valuing contracts. In PLR 9413045, insurance policies were sold to a single trust created by the husband and wife. The IRS, citing the valuation standard for estate tax purposes (Treas. Reg. §20.2031-8), ruled that the interpolated terminal reserve plus unapplied premiums was the full value of the policies for purposes of the "adequate and full consideration" exception. Also, in PLR 201235006, a taxpayer sold a policy based on the policy's "replacement value" as determined under Treas. Reg. §25.2512-6 (i.e., ITR) without raising any income or estate tax issues.

However, in *U.S. v. Past*, 347 F.2d 7 (9th Cir. 1965) and *U.S. v. Allen*, 293 F.2d 916 (10th Cir. 1961), decisions from half a century ago, the court found that if a property interest that would be includible in the gross estate under the lifetime transfer rules is transferred before death, any consideration received for the transfer is not adequate and full unless it equals the value at which the property would have been included in the gross estate if it had been retained by the decedent.[21]

Carrier reporting: Form 712

Reporting the gift value of a life insurance contract is generally associated with IRS Form 712. As noted in the instruction, this form is generally associated with gift and estate tax calculation and should be attached to the corresponding gift or estate tax form (Forms 709 and 706, respectively). If the policy is not paid up, then the carrier must use the ITR value.[22] Or, if policy is paid up/single premium, the carrier must use cost. If Form 712 is not attached, the taxpayer must provide a full explanation of how the value was determined for adequate disclosure.[23]

> ***Practice point:*** *It should be noted that Form 712 is a gift and estate tax form and is not specifically intended for income tax purposes (especially in determining PERC under Rev. Proc. 2005-25) or policies being sold for fair and adequate consideration. Even so, some professionals may order the form to support certain valuation methods.*

A carrier officer must certify that the information on Form 712 is true and correct. Therefore, once produced, the form's values are stated and irrevocable. Therefore, one should never order a Form 712 prior to requesting an estimated value and understanding the implications. When working with an estimate, it may be possible (although extremely difficult) to request an adjustment to the estimated value. Common adjustments may include a value without a deficiency reserve (see description below) or a calculation closer to policy renewal when tax reserves decrease slightly.

Also, term insurance contracts will have a value greater than unearned premiums. This is because most contracts are not yearly renewable terms. Certain actuarial rules put in place to account for a levelized premium structure require a high level of reserves on these policies for the carriers. As a result, the ITR or other forms of calculating reserve values can be significantly higher than unearned premiums (the perceived value for term insurance contracts).

Further, it should be noted that each carrier has a different way of calculating reserves. Even using exactly the same set of facts, carriers often produce extremely different values because of their methodology. Knowing this prior to a planned transfer may be critical because it may allow one to transfer certain contracts with lower values and to reevaluate other contracts with higher values.

Why ITR can't be the only value considered

Assuming ITR is being considered as a method for valuing a life insurance policy, the difficulty is that recent valuations for the insurance carriers have been void of common sense. For example, when a policy owner recently requested a value of his life insurance policy from an insurance carrier after paying approximately $840,000, the carrier provided the following:

> The values were calculated using AG38 with the deficiency reserve since this is an NLG [No Lapse Guarantee] product. The NAIC reserve of $1,799,980 is broken down as follows:
>
> Base Reserve = 551,926
>
> Axxx Basic Reserve = 781,377
>
> Axxx Deficiency Reserve = 466,677
>
> and here is a further statement regarding NLG:
>
> XXX Life (the "company") interprets the interpolated terminal reserve ("ITR") value for a universal life policy as the NAIC statutory reserve. A policy's ITR is determined based upon a policy's statutory reserve. The statutory reserve is the amount of the company's liability under the policy. NAIC Rules are intended to be conservative. For some policies, under certain conditions, the NAIC reserve attributable to a policy's no lapse guarantee feature may result in a policy valuation that substantially exceeds the policy's current account value, replacement cost, or sale value.
>
> To date, the IRS has not issued guidance with respect to the valuation of the no lapse guarantee feature for estate and gift tax purposes. XXX Life, therefore, is providing two policy valuation statements: the NAIC statutory reserve (Line 58A) and the policy's current account value (alternate Line 58A). Ultimately, the fair market value that you report to the IRS is up to you.

When requesting support for a carrier's reserving calculation, the following options are available to a carrier:

- Tax reserve—reserve value used in the determination of the carrier's federal income tax, calculated according to IRS requirements[24]
- Statutory reserve—reserve reported in the carrier's statutory financial statement filed with the state insurance departments, calculated in accordance with the requirements of the NAIC's Accounting Practices and Procedures Manual
- AG 38 reserve—reserve for a UL policy with a no-lapse secondary guarantee is calculated using Actuarial Guideline 38; AG 38 applies to calculations of both statutory and tax reserves
- Deficiency reserve—the UL Model Regulation and the AG 38 both require the calculation of minimum reserves for some policies; deficiency reserves are the excess of the minimum reserves over the UL Model Regulation reserve or the AG 38 basic reserve

Of course, there is no consistency on which method(s) are used by the carriers. As a result, there is a significant difference in values given by carriers on similar contracts.

Recent cases that tell a different story

As discussed earlier, Rev. Rul. 59-60, although used to value unmarketable stocks, sets the standard across so many levels and truly summarizes the process of valuing an asset—including, in the opinion of the authors, a life insurance policy in today's environment. As a foundation, it states that "[a] sound valuation will be based upon all the relevant facts, but the elements of *common sense, informed judgment, and reasonableness must enter into the process* of weighing those facts and determining their aggregate significance."[25]

So, how are the recent cases consistent with life insurance valuations? Although most of the recent cases have focused on income tax issues, which still consider an analysis of ITR, the courts have quickly realized this is not a simple process. As the tax court noted in *Schwab v. Comm'r.* (Feb. 7, 2011), "the fair market value of [life] insurance contracts can be a slippery concept."[26] On appeal, the Ninth Circuit cited this quote and added "a particular method for ascertaining value may be appropriate in one situation but inappropriate in another."[27] Although the case involved a dispute over the value of a distribution from a welfare benefit plan under 402(b), the case does highlight how one rule cannot be applied across all contracts.

Specifically, in *Schwab*, the tax court ruled that the participants in a terminating welfare benefit § 419A(f)(6) multiple employer plan were required to include in income the FMV of the variable universal life insurance policies distributed to them. Even though the net surrender value was a negative value, the court took a different approach than others to find that the FMV to be included in income was the value of the paid-up insurance coverage remaining on the policies as of the date of distribution—much like a cash flow analysis, which is commonly used by appraisers in determining FMV.[28]

In the *Estate of Kahanic*, the tax court found, by applying a similar valuation methodology as in *Schwab*, that a life insurance policy was included in the decedent's estate because the policy was worth more than zero.[29] What was also interesting in this case was the fact that the court realized there was an additional value in a no-lapse feature that extended coverage two years after the decedent's death. Therefore, looking at all the parts and not just the ITR, the court supported an alternative method for valuing a life insurance policy.

The tax court found in *Matthies v. Commissioner* that the interpolated terminal reserve value method did not apply in a situation valuing a life insurance policy sold by a profit-sharing plan to the taxpayer.[30] Instead, the "entire cash value," not reduced by surrender charges, was the applicable standard under Sec. 402.[31] Again, the court realized that there may be more than one way to establish the value of a life insurance policy.

Other methods—willing buyer and willing seller

We started with a foundational rule that the FMV of an asset is measured by the price at which an asset would change hands between a willing buyer and a willing seller under no compulsion to sell. Ironically, this methodology has not been widely considered in valuing a life insurance policy until recently. Of course, also until recently there has been no market for a life insurance policy other than surrendering a contract back to the issuing carrier. However, there are other options available in today's mature secondary market.[32]

The secondary market for life insurance has reached a tipping point in the frequency and volume of transactions, the regulations implemented by the states and the overall transparency throughout the market. The secondary market for life insurance has continued to grow for many reasons in spite of the credit crisis in 2008, and it has helped policy owners garner billions over the stated cash surrender value of their contracts. Both domestic and global buyers are attracted to the secondary life insurance market due to the relatively strong performance of life insurance carriers during the 2008-2009 downturn. Life insurance is also appealing to investors looking for non-correlated assets because it is not tied to the equity markets or other traditional markets. In addition, sophisticated buyers such as pension plans, reinsurers, private equity, municipalities and others have realized that they can deploy large amounts of capital while benefiting from an aging population that has a more predictable mortality.[33]

The methodology to estimate the FMV of a client's life insurance policy in the secondary market is similar to valuing other assets. Specifically, the process employs standardized industry practices and analytics to combine an analysis of the insurance contract, policy values, required capital outlay (premiums), the life expectancy of the insured(s) and a comparison to contracts that have sold in recent history. Because almost all policy types may qualify for settlement, newer policy structures and features can be evaluated by the market to determine if, for example, a policy feature truly adds value or is just a marketing feature created by the insurance company to sell the initial contract. After evaluating all parts, a value can be provided based on what a willing buyer would pay if a policy owner was willing to sell.[34] Although there is no specific authority pertaining to the use of the secondary market for valuing a life insurance policy, in the authors' opinion it is now a reasonable place to seek additional information when analyzing the FMV of a life insurance policy and should be a component in the process. In fact, failure to consider such a value may trigger significant transfer taxes and/or fiduciary liability—especially if the value is significantly higher than the ITR.

Conclusion

As with other assets, there is no one simple method to determine the value of a life insurance contract. What has made this process even more complicated is the fact that life insurance policies have become much more complex and are designed with so many layers of features that most professional advisors are unaware of the complexities inherent in such a contract. Furthermore, each carrier has determined its own methodology for calculating reserves, therefore removing any consistency in the process. As highlighted in Rev. Rul. 59-60, the FMV of an asset is "based upon all the relevant facts, but the elements of *common sense, informed judgment and reasonableness must enter into the process* (emphasis added) of weighing those facts and determining their aggregate significance." Knowing this, relying on outdated valuation methods provided in 40-year-old regulations to report the transfer of a life insurance policy is telling only part of the story and is unreasonable. An appropriate analysis must include ITR provided by the carrier as well as an analysis of the value a

willing buyer will pay for an item that a willing seller will sell, a review of the cash/account value, how long the contract will support itself without any further premiums (as in *Schwab*), replacement value and any other reasonable method that may be considered for other hard-to-value assets.

Endnotes

1 IRC Sec. 2512.

2 Treas. Reg. §25.2512-6 & §20.2031-8 [T.D. 6680, 28 FR 10872, Oct. 10, 1963, as amended by T.D. 7319, 39 FR 26723, July 23, 1974].

3 *Id.* Rev. Proc. 2005-25

4 TAM 9323002 (It was determined, that under state law, no contract existed for insurance until the first premium had been paid.); IRC Sec. 2042 (The value of the gross estate shall include the value of the death benefit.)

5 Fn 2.

6 Treas. Reg. 1.61-22(c)(1)(ii)(B)(2).

7 Treas. Reg. 53.4942(2)-2(a)(4) set the rules for valuations as "… all assets shall be valued at their fair market value. Fair market value shall be determined in accordance with the rules set forth in paragraph (c)(4) of § 53.4942(a)-2, except in the case of assets which are devoted directly to the active conduct of the foundation's exempt activities and for which neither a ready market nor standard valuation methods exist (such as historical objects or buildings, certain works of art, and botanical gardens)." Under paragraph (c)(4)(iv)(c), an "acceptable method" for valuation would be those used under IRC § 2031 (and applicable rules). Therefore, under § 2031, one has to look at the valuation of life insurance under Treas. Reg. §20.2031-8 [T.D. 6680, 28 FR 10872, Oct. 10, 1963, as amended by T.D. 7319, 39 FR 26723, July 23, 1974]. For a contract not paid-up or a single premium, the general rule under paragraph (a)(2) is interpolated terminal reserve (ITR) plus unearned premiums.

8 These include transferring a policy from one entity to another, completing a business valuation, valuing a convertible term contract for a buy/sell or key executive, M&A or bankruptcy transactions and exit-planning recommendations.

9 John A. Bogdanski, *Federal Tax Valuation* par. 1.01 (2012).

10 Rev. Rul. 59-60 *preamble.*

11 *Id.* at 3.01 (emphasis added).

12 The estate tax rules for incidents in a contract mirror the gift tax rules. See Treas. Reg. 20.2031-8.

13 Prior to Rev. Proc 2005 -25, the IRS stated its desire to have consistency between the rules for valuing life insurance policy in gift and compensatory situations (Rev. Rul. 59-195 (1959-1 C.B. 18).

14 Fn 2.

15 Treas. Reg. §25.2512-6(a), Ex. (1).

16 *Id.* Ex. (3).

17 Treas. Reg. §25.2512-6(a); Treas. Reg. §20.2031-8(a)(2).

18 *Guggenheim v. Rasquin*, 312 U.S. 254 (1941), Ct. D. 1487, 1941-1 C.B. 445; *Candler v. Allen*, above at 437.

19 Treas. Reg. §25.2512-6(a), Ex. (4); Treas. Reg. §20.2031-8(a)(2).

20 (*Estate of Pritchard*, 4 TC 204 (1944)).

21 *See Estate of Silverman*, 61 T.C. 338 (1973), where only a portion of the death benefit was included in the gross estate under Sec. 2035 based a calculation of premiums paid after the policy was transferred.

22 IRS Form 712, line 58a.

23 *See* Estate & Gift Tax Regulations: §301.6501(c)-1. Without adequate disclosure, then any gift tax imposed at any time by chapter 12 of subtitle B of the Internal Revenue Code on the transfer may be assessed, or a proceeding in court for the collection of the appropriate tax may be begun without assessment.

24 IRC Sec. 807(d).

25 Rev. Rul. 59-60 at 3.01 (emphasis added).

26 *Schwab v. Comm'r.*, 136 T.C. 120, 131 (2011*); aff'd Schwab v. Comm'r.*, 2013 PTC 80 (9th Cir. 4/24/13) (Although the case involved a dispute over the value of a distribution from a welfare benefit plan under 402(b), the case does highlight how one rule cannot be applied across all contracts.)

27 *Schwab v. Comm'r.,* 2013 PTC 80 (9th Cir. 4/24/13).

28 The court determined that the amount distributed to the taxpayers was the amount calculated by applying the base rates for the guaranteed maximum monthly cost of insurance rates to the number of days that the taxpayers continued to have insurance coverage. Also *see Estate of Kahanic v. Commissioner*; T.C. Memo. 2012-81. In determining that a life insurance policy was included in the decedent's estate because the policy was worth more than zero, the court applied a similar valuation methodology as in *Schwab*. In addition, the court realized there was a value in a no-lapse feature that extended coverage two years after the decedent's death—without a premium payment being made.

29 *Estate of Kahanic v. Commissioner*; T.C. Memo. 2012-81.

30 134 T.C.141 (2010).

31 Although prior to Rev. Proc. 2005-25.

32 Also known as the Life Settlement Market.

33 The most attractive policies to buyers are those that were issued standard or preferred where there has been a change in the insured's health since issue. Ideal policies were issued by highly rated insurance carriers, with very low credit risk or volatility, and have a manageable carrying cost or future premium streams. This is important due to the illiquid nature of the asset itself. Buyers in the current market require returns similar to other alternative investments, as they are committed to a longer duration and have to maintain considerable capital commitments and reserves.

34 Of course, it is also possible there is no value in excess of the policy's cash value because of the factors considered. If this is the case, then such information shall be considered additive to other valuation methods being considered.

2014 Report of Nominating Committee

Proposed officers and executive council membership

The Nominating Committee, composed of Bard Brockman, Brian Burgoon, Duffy Myrtetus, Don Workman and Mindi Wells, files this report and recommended slate of executive council members and proposed officers for consideration at the Out-of-State Division's annual meeting, to be held on Friday, June 27, 2014, at 3:30 p.m., in Orlando. In accordance with the OOSD's bylaws, nominations from the floor may supplement the recommendations of the Nominating Committee. The following persons noted in bold are proposed to serve in their respective offices as noted:

EXECUTIVE BOARD NOMINATIONS		
Timothy P. Chinaris (Nashville, Tenn.)	**President**	
Chris Marquardt (Atlanta, Ga.)	**President-Elect**	
D. Pearson Beardsley (Atlanta, Ga.)	**Treasurer**	
Tiffany McKenzie (Atlanta, Ga.)	**Secretary**	
Donald A. Workman (Washington, D.C.)	**Immediate Past President**	
EXECUTIVE COUNCIL (INCLUDES EXECUTIVE BOARD)		
Brian D. Burgoon (Atlanta, Ga.)	BOG Member	
Ian M. Comisky (Philadelphia, Pa.)	BOG Member	
Eric L. Meeks (Cincinnati, Ohio)	BOG Member	
Richard A. Tanner (Verona, N.J.)	BOG Member	
John C. Voorn (Palo Heights, Ill.)	At-Large Member	Term expires 2016
W. Bard Brockman (Atlanta, Ga.)	At-Large Member	Term expires 2016
Larry Kunin (Atlanta, Ga.)	At-Large Member	Term expires 2016
Mindi L. Wells (Columbus, Ohio)	At-Large Member	Term expires 2015
E. Duffy Myrtetus (Richmond, Va.)	At-Large Member	Term expires 2015
Bill A. Lee III (Waterville, Me.)	At-Large Member	Term expires 2015
TBD	YLD Liaison	

A liaison to the Young Lawyers Division will be appointed by the YLD president, pursuant to Art. 4.3(A) of the OOSD's bylaws.

Standing committee chairs will be appointed by the president for the following standing committees, pursuant to Art. 5 of the OOSD's bylaws: CLE; Information; Budget; and Multi-State Practice. Special committees are approved by the president with the concurrence of the Executive Council, and the chair of each special committee appointed by the president shall also be a member of the Executive Council.

The Nominating Committee also acknowledges the recommendations of its members that greater diversity in terms of geography, gender, etc., should be a continuing consideration in identifying prospective candidates.

Your opportunity to be involved
Committees seek members

The Out-of-State Division of The Florida Bar is seeking members who are interested in serving and becoming involved with the OOSD.

Members can serve and become chairs of the following committees of the division:

- **Budget Committee**
- **CLE Committee**
- **Communications Committee**
- **Membership & Long-Range Planning**
- **Nominating Committee**

If you are interested in becoming active with the OOSD, please send an email and include your name, contact information and any other information you would like us to consider. Individuals who are interested in serving should provide a written request for consideration to me at *dworkman@bakerlaw.com* and a courtesy copy to our bar administrator, Willie Mae Shepherd, at *wshep@flabar.org*.

On behalf of the entire Out-of-State Division, I look forward to receiving requests for consideration from all interested individuals. Thank you.

—Donald Workman

Out-of-state members of YLD board elected

L. UTIGER

R. LeBLANC

Leslie A. Utiger was reelected to her second two-year term as an out-of state representative on the board of the Young Lawyers Division in December 2013. Utiger is an associate with Akerman LLP's consumer finance litigation and compliance practice group in Dallas, Texas. Utiger is a graduate of Vanderbilt University and the University of Florida College of Law.

Ryan Eastmoore LeBlanc has been newly elected to the YLD board. LeBlanc received her undergraduate and law degrees from the University of Florida, and she is an associate general counsel for Yingli Green Energy Americas Inc. in San Francisco. Her term will begin at The Florida Bar Annual Convention in June.

Burgoon, Comisky reelected to Board of Governors

B. BURGOON

I. COMISKY

Out-of-state attorneys Brian D. Burgoon and Ian M. Comisky were both reelected to The Florida Bar Board of Governors in December 2013. Their new two-year terms representing out-of-state lawyers will commence at The Florida Bar Annual Convention in June.

Burgoon practices in the areas of business litigation and disputes, civil litigation and personal injury with The Burgoon Law Firm LLC in Atlanta. Burgoon chairs The Florida Bar Disciplinary Review Committee and has served on The Florida Bar's Executive Committee since 2011. In addition to his service on the Board of Governors, Burgoon is president-elect of the University of Florida College of Law Alumni Council, and he serves on the board of directors of the University of Florida Alumni Association.

Comisky is a partner at Blank Rome LLP in Philadelphia. He practices in the areas of white collar criminal defense, tax litigation and complex corporate and commercial litigation. Comisky chairs The Florida Bar's Investment Committee. He also serves as special projects chair for the ABA Tax Section and serves on the boards of directors of the Citizens Crime Commission of the Delaware Valley, Historic Philadelphia Inc. and the Madlyn and Leonard Abramson Center for Jewish Life.

Mark your calendar

June 25-28, 2014
The Florida Bar Annual Convention
Gaylord Palms Resort and Convention Center
Orlando, Florida

Friday, June 27, 2014 • 3:30-5:30 p.m.
OOSD Executive Council Meeting &
Annual Membership Meeting
(In Conjunction With TFB Annual Convention)
Meeting Room: St. George 106

Board of Governors' update

We want you to stay informed on actions taken by The Florida Bar Board of Governors. So, here is the latest Board of Governors' update.

The Florida Bar Board of Governors met on Mar. 28, 2014. The major actions of the board and reports received included:

With the 2014 Legislative Session nearing the halfway mark, The Florida Bar continues to advocate for court funding including requests for staff pay and retention as well as district and trial courts' maintenance/repair and technology needs. Initial budgets released by the House and the Senate are good starting points. An April 1 *Florida Bar News* article provides additional court system budget request details. Both houses have approved civil legal assistance funding—$2 million in the Senate and $1 million in the House—and advocates are working to educate the Governor's Office on the importance of the program. Bills that would exempt certain activities from criminal penalties for the unlicensed practice of law are being opposed by the Bar. For weekly summaries of legislative activities related to bills being tracked by The Florida Bar, please visit *www.floridabar.org/session*.

Florida Bar President Eugene Pettis announced his appointment of a task force to bolster diversity among Florida's judges and members of Judicial Nominating Commissions (JNCs). The task force's recommendations will also assist the governor in implementing *F.S. 43.291(4): In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit*. In May, The Florida Bar will be nominating slates of three candidates for two vacancies on each JNC and will be sending those slates to Gov. Rick Scott for appointments. The Bar received 679 applications with approximately 45 percent falling into a category for diversity: women, Hispanics, African-Americans and Asians.

Lawyer Referral Service rules amendments were approved by the board and will now be submitted to the Supreme Court. The lawyer referral service rule amendments are a multi-year effort that began with the Special Committee on Lawyer Referral Services. Among the changes are: requiring lawyers who belong to lawyer referral services to report their participation to the Bar; requiring that clients make the initial contact after being referred to a lawyer; and strictures against suggesting a referred client use other services provided by the referral service—such as medical treatment—unless the lawyer is satisfied that the referral is in the client's best interest and the client gives written confirmation that he or she has been told about the potential conflict. Proposed new amendments to trust account rules were also approved for submission to the court.

A new policy regarding advertising filing fees was approved. Any change of any kind to an advertisement renders the ad a new ad with a new filing fee of $150 per timely filed ad and $250 per untimely filed ad. The only exception is a revision to an existing ad that is solely to comply with a Bar opinion that the ad does not comply with the lawyer advertising rules, for which no additional fee will be charged. The Board of Governors also directed staff to monitor the cost of program administration compared with fees and report back whether a reduction in filing fees is warranted. The new fees will be effective July 1. More information will be posted on the Advertising Rules webpage.

The Communications Committee of the board received approval to expand the Bar's social media use to include LinkedIn, Google+, YouTube and Pinterest. In addition to posting timely announcements and the weekly tech tips, The Florida Bar's current Facebook page—which now has almost 1,800 likes—will include a daily summary of news articles from around the state, section/division and voluntary Bar information and court system, law school and national news. All Facebook posts will be tweeted. Communications also reported that a best practices manual for effective electronic communication is being developed to address e-etiquette issues. The Standing Committee on Professionalism is being asked to review all current professionalism guidelines and to amend them as necessary to include electronic communications.

The 2014-2015 budget was approved with no fee increase for the 13th year in a row. Fees for active members will remain at $265, and fees for inactive members will stay at $175. Membership fees represent approximately 65 percent of the total revenues and continue to increase approximately 2 percent per year reflecting the increase in the number of members. Operating expenses are budgeted for approximately $41.7 million. The regulation of the practice of law accounts for 43 percent of expenses and administrative expenses continue to be under 10 percent. The budget, which now goes to the Supreme Court for approval, will be published in the April 15 issue of *The Florida Bar News*.

The board voted to oppose a petition by Bar members

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asking the Supreme Court to amend Bar rules to allow for annual membership fees to be increased by up to $100 to fund legal aid for the poor to ameliorate the current funding crisis. Instead, the board committed to finding alternative and more cost effective ways of delivering legal services to the under-served. President Eugene Pettis said the effort will be broad-based, involving many interests including the courts, the Bar, the Florida Bar Foundation, court clerks who work with pro se litigants, the business community, legislators and others. Bar rules required that the petition be filed with the board before it is submitted to the court.

Special Appointments Schedule: Please see the special appointments schedule on the website for more information, terms and the application for the following appointments to be made at the May 23 meeting. The deadline is April 11 to apply for: two lawyers to the ABA House of Delegates (includes under 35 delegates), five lawyers for the Florida Legal Services, Inc.'s board, three lawyers for Florida Lawyers Assistance Inc.'s board, one lawyer to the Medical Malpractice Joint Underwriting Association and one lawyer to the Supreme Court's Judicial Ethics Advisory Committee.

If you have questions or concerns, contact your Board of Governors representative(s): Brian Burgoon, *burgoon@burgoonlaw.com*; Ian Comisky, *icomisky@blankrome.com*; Eric Meeks, *emeeks@meekslawfirm.com*; and Richard Tanner, *rt7@dbksmn.com*.

Join the OOSD now!

Not a member of the Out-of-State Division? Join now!

Membership in the division is just $30 and provides a number of valuable benefits to out-of-state attorneys, including discounts on CLE registration, a free annual ethics CLE and opportunities to network with other Florida lawyers. Join now! Invite a colleague!

(For your convenience, an application is on page 25.)

For more information, please contact:

Mindi Wells, Chair
Membership & Long Range Planning Committee
mindi.wells@sc.ohio.gov

Willie Mae Shepherd, Program Administrator
wshep@flabar.org

The Florida Bar and LegalSpan: Bringing online CLE to attorneys

Since August 2000, The Florida Bar has been offering quality CLE programs as online, on-demand seminars through a partnership with LegalSpan. The popularity of this type of delivery method has been growing exponentially ever since.

With increasingly hectic schedules and the rising cost of travel, attorneys are turning to the Internet to meet their educational needs. Online CLE programs offer the flexibility of viewing programs at your own pace, anytime, anywhere.

Whether a first-time or net-savvy user, Florida attorneys are finding that online CLE programs are time saving and easy to use:

"I am very pleased to be able to have these seminars made available to members of The Florida Bar. With the format you have provided, I feel that I am at the seminar, and I have the materials which I can download and save for future reference. Thanks for a great product well presented and technically friendly!"

—Andrew, Live Oak

"Excellent resource. A very convenient way to engage in continuing education that has high-quality speakers and content."

—Bruce, Miami Beach

"This is the greatest thing ever invented. I can now complete my CLE requirements at home. Everything was so easy. Thank you."

—Sheila, Largo

"Terrific site and material. It makes it much easier to get CLE credit, and makes the materials much more useful since they can be viewed multiple times."

—Thomas, Brandon

"I found this online seminar to be convenient, understandable and user-friendly. I will use this method more in the future. Thank you for this informational and convenient seminar."

—Gerald, West Palm Beach

With the explosion of MP3 players and iPods in the market, LegalSpan developed the technology to enable The Florida Bar to introduce downloadable audio versions of its CLE programs. Since its inception in March 2006, the downloadable versions of The Florida Bar's CLE programs have become as popular a method of obtaining education as online CLE. "We want to foster greater collaboration among members and a more vibrant educational dialogue. Attorneys learn best at their own pace, in their own way, in a comfortable environment. Our online options give members educational content when and where they want it," says Programs Division Director Terry Hill.

The Florida Bar's catalog of online and downloadable programs is robust, offering more than 200 programs, covering all practice areas. Attorneys are able to enjoy time and money savings, without sacrificing content, by participating in these types of programs. The complete catalog of Florida Bar CLE courses can be viewed at *www.floridabar.org/cle* by accessing the LegalSpan link under Online Courses.

EDITOR'S CORNER

Your Out-of-State Division wants to help grow your practice

D. WORKMAN

We hope you continue to enjoy the all-cyber version of *State-to-State*. You should be receiving a link to each edition of the newsletter that allows you to view the edition online in color at your desk or on your mobile device. Of course, you can also choose to print it.

We continue to look for ways to enhance the *State-to-State*. By doing so, we can better serve out-of-state lawyers. Remember, too, that you can feature yourself or your law firm as well. It should be a win-win for everyone.

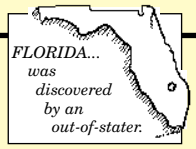
You'll see in this edition the many programs available to OOSD members. Joining provides many benefits. One of my favorites involves the work of this publication to introduce you to other out-of-state members who share a desire to develop their respective practices. We're not shy—we want to help you develop business. So, please get involved!

Your publication continues to grow. And we'd like even more! You'll see throughout the *State-to-State* our requests for contributing authors. Our content continues to increase because of you. We feature our contributing authors prominently and include the information you'd like others to read about your practice. We have two goals here: to present your ideas to a broad audience and to introduce the readers to you. We want to help your practice.

So, send us your articles and we'll get you published as quickly and as often as we can. And by all means, please let us know how we can serve you better. Please feel free to contact me via email at *dworkman@bakerlaw.com* or by telephone at 202/861-1602. We also look forward to seeing you at one of the local receptions.

The Out-of-State Division is here to serve you!

—Don Workman, Editor



S t a t e - t o - S t a t e

THE PUBLICATION OF THE FLORIDA BAR OUT-OF-STATE DIVISION

State-to-State is devoted to Florida and multi-jurisdictional legal matters. It is editorially reviewed and peer reviewed for matters concerning relevancy, content, accuracy and style. State-to-State is sent electronically to more than 13,000 legal practitioners throughout the United States.

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the division.

The deadline for the FALL 2014 issue is JULY 11, 2014. Articles should be of interest to legal practitioners with multijurisdictional practices. Please submit articles in a Word format via email to Don Workman, *dworkman@bakerlaw.com*. Please include a brief biography with contact information and a photograph of the author.

Author! Author!

The Out-of-State Division offers its membership a valuable forum for the exchange of information on legal issues affecting our interstate practices. To be truly effective, it is essential for a large cross section of our members to contribute articles, news and announcements to this newsletter.

For those of you who would like to see your work in print, the rules for publication are simple: The article should be related to a subject of general interest to legal practitioners with multijurisdictional practices. Articles focused on your home state are less appealing than issues impacting a number of jurisdictions.

Please send documents in MS Word format via email to Don Workman, *dworkman@bakerlaw.com*.

Please help your colleagues to get to know you by including a brief biography with contact information, and include a head and shoulders photograph. Your photo and bio will be kept on file and need only be submitted once.

Contributing authors

The Out-of-State Division appreciates the articles submitted for this edition by our contributing authors. They can serve as a resource to fellow division members who might have a question regarding these authors' areas of expertise or if a referral is needed.

Michael F. Amoia *is senior vice president of advanced sales and life product management for Crump Life Insurance Services. He has over 19 years of experience within the financial planning and life insurance industry. He received his B.S. in economics from George Mason University. He graduated cum laude from the University of Baltimore School of Law and recently received his LL.M. in taxation and a certificate in estate planning from Georgetown University Law Center. He is admitted in Maryland. He can be reached at 301/272-9196 or michael.amoia@crump.com.*

Alvin F. Benton*, an associate attorney in the Dallas office of Holland & Knight LLP, is a part of the firm's creditors' rights practice group. His practice consists of bankruptcy, commercial and general business litigation. He has represented creditors in a variety of commercial settings, including lenders, creditors and lessors in sophisticated Chapter 11 reorganizations, Chapter 13 cases and Chapter 7 liquidations. In addition, he has represented creditors in receiverships; debt restructuring; commercial, residential and timeshare foreclosures; and fraudulent conveyance claims as well as assisted in breach of contract actions and employment litigation matters. He can be reached at 214/964-9500 or alvin.benton@hklaw.com.*

H. Brendan Burke *is a commander in the United States Navy Judge Advocate General's Corps. He recently completed an assignment as assistant fleet judge advocate, U.S. Fleet Forces Command, in Norfolk, Va. He will soon report as officer in charge, Region Legal Service Office Mid-Atlantic Detachment, in Groton, Conn. He received his bachelor's degree in journalism from the University of Missouri, his J.D. cum laude from Stetson University College of Law and his LL.M. in energy and environmental law from The George Washington University. He can be reached at h.brendan.burke@gmail.com.*

Catherine Peek McEwen *is a U.S. bankruptcy judge for the Middle District of Florida, Tampa Division, and is the vice-chair of the 13th Judicial Circuit (Florida) Pro Bono Committee. One of Judge McEwen's mantras is that "judges admire pro bono volunteers."*

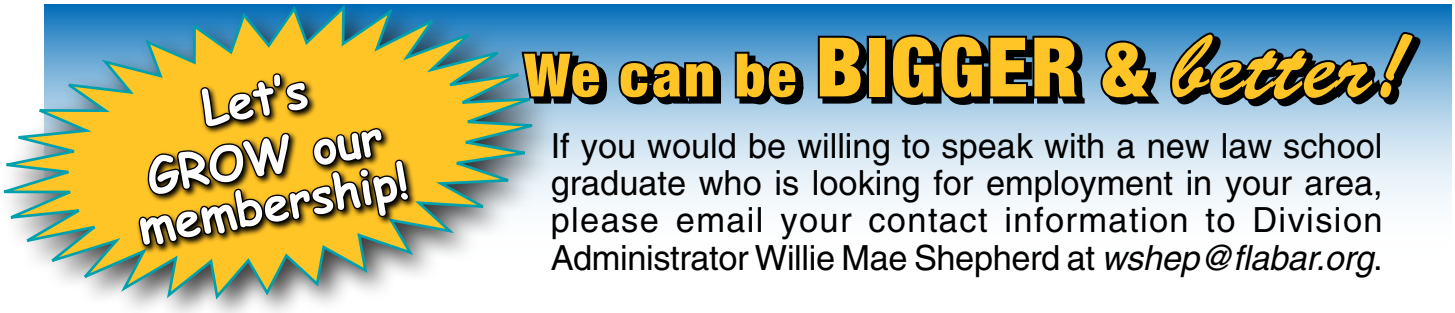
Jon B. Mendelsohn *is co-founder and CEO of Ashar Group LLC, a nationally licensed firm specializing in the institutional secondary and tertiary markets. He has worked tirelessly to collaborate with members of the insurance and financial services, legal and trust communities. He obtained years of hands-on experience in all facets of the secondary market and valuation process by working closely with estate and business planning firms. He earned two bachelor's and a master's degree from the University of Florida. He can be reached at 321/441-1113 or jon@ashargroup.com.*

Kimra Major-Morris *is the owner of Major-Morris Law LLC in Apopka, Fla., and practices as an entertainment, copyright and trademark attorney. She is the CLE chair for The Florida Bar's Intellectual Property Committee and is the author of "Avoiding Copyright Infringement in Your Church" (self-published), "The Quest for IP Protections in a Digital Age" (Editor's Choice award winner, Winter 2012 International Law Quarterly) and "Fixed Rights, Practical Applications: Why Register Your Client's Copyright?" (with Josh Brown, Esq., in The Briefs, July 2012). She can be reached at 407/230-0540 or attorneykimra@gmail.com.*

Robert C. Slane *has over 30 years of experience in the high-net-worth life insurance market. He is president of The Wealth Transfer Group Inc., a fee-based planning organization located in Winter Park, Fla., dedicated to serving the estate and wealth transfer planning needs of an elite clientele with estates exceeding $10 million. He received his Chartered Life Underwriters (CLU) designation from the American College and his Accredited Estate Planner (AEP) designation from the National Association of Estate Planners and Councils. He can be reached at 407/339-5787 or rslane@wealth-transfer.com.*

Donald A. Workman*, OOSD president and State-to-State editor, is a partner in the Business Group and head of BakerHostetler's bankruptcy and creditors' rights practice in the Washington, D.C., office. His practice areas include business bankruptcy, creditors' rights, debtor reorganizations, general insolvency, stockbroker liquidations and commercial litigation. He can be reached at 202/861-1602 or dworkman@bakerlaw.com.*

Become a contributor! See submission information on page 22.



OUT-OF-STATE DIVISION EXECUTIVE COUNCIL

Donald A. Workman, President
Baker Hostetler LLP
1050 Connecticut Avenue N.W.
Ste. 1100
Washington, DC 20036-5318
202/861-1500
Fax: 202/861-1783
dworkman@bakerlaw.com

Timothy P. Chinaris, President-Elect
P.O. Box 210265
Montgomery, AL 36121-0265
334/386-7214
Fax: 334/386-7223
tchinaris@gmail.com

Christopher C. Marquardt, Treasurer
Alston and Bird LLP
1201 W. Peachtree Street N.W.
Atlanta, GA 30309
404/881-7827
Fax: 404/253-8741
chris.marquardt@alston.com

John C. Voorn, Secretary
6231 W. 129th Place
Palos Heights, IL 60463-2336
708/403-5050
Fax: 708/403-9667
jcv@hdoml.com

Scott E. Atwood
Stout Atwood LLC
2248 1st Street
Fort Myers, FL 33901-2960
239/898-4130
Fax: 770/349-8210
scott@stoutatwood.com

D. Pearson Beardsley
1827 Powers Ferry Road S.E.
Bldg. 6, Ste. 302
Atlanta, GA 30339
404/558-7646
pbeardsley@dpblegal.com

W. Bard Brockman
Bryan Cave Powell Goldstein LLP
1201 W. Peachtree Street N.W.
Floor 14
Atlanta, GA 30309-3471
404/572-6600
Fax: 404/572-6999
bard.brockman@bryancave.com

Brian D. Burgoon
Burgoon Law Firm LLC
659 Auburn Avenue N.E., Ste. 147
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Ian M. Comisky
Blank Rome LLP
One Logan Square
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Matthew L. Kahl
Morris Hardwick Schneider
1303 Hightower Trail, Ste. 315
Sandy Springs, GA 30350
678/298-2117
Fax: 678/946-0276
mkahl@closingsource.net

Lawrence H. Kunin
Morris Manning & Martin
3343 Peachtree Road N.E.
Atlanta, GA 30326-1022
404/233-7000
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William A. Lee III
O'Donnell, Lee, McCowan and
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Waterville, ME 04903-0559
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Fax: 207/872-0002
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Eric L. Meeks
Meeks Law Firm Inc.
P.O. Box 8098
Cincinnati, OH 45208-0098
513/826-0229
Fax: 513/826-0231
emeeks@meekslawfirm.com

E. Duffy Myrtetus
Two James Center, Ste. 1400
1021 E. Cary Street
Richmond, VA 23219-4058
804/771-5750
Fax: 804/771-5777
edmyrtetus@kaufcan.com

Richard A. Tanner
6 Pompton Ave.
Cedar Grove, NJ 07009-2042
973/632-0736
rt7@dbksmn.com

Leslie Utiger
Akerman Senterfitt
2001 Ross Avenue, Ste. 2550
Dallas, TX 75201-2991
214/720-4300
leslie.utiger@akerman.com

Mindi Wells
The Supreme Court of Ohio
65 S. Front Street, Floor 7
Columbus, OH 43215-4131
614/387-9500
mindi.wells@sc.ohio.gov

Membership Application for
The Florida Bar
Out-of-State Division

Of the 81,000 members of The Florida Bar, more than 13,000 members reside outside the state of Florida.

Although the division represents the interests of all lawyers outside the state, active participation in the division requires an election on the annual dues statement and, of course, the payment of dues (only $30).

Membership in this division will provide a forum for communication and education for the improvement and development of your practice through:

- a reduced fee for division-sponsored continuing legal education programs
- a newsletter especially designed for out-of-state practitioners
- a ready network for referrals and access to information through regional coordinators
- a web page especially designed for out-of-state practitioners
- an annual free online ethics CLE

To join, make your check payable to The Florida Bar and return your payment in the amount of $30 and this completed application form to OOS Division, The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-2300. **Membership will expire June 30**. Dues will not be prorated.

- OS Member Division Dues (Item number – 8161001)
- OS Affiliate Division Dues (Item number – 8161002)

Name: _____ Florida Bar Number: _____

Firm: _____

Office Address: _____

City/State/ZIP: _____

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To learn more, visit our website at www.flabaroutofstaters.org or contact the program administrator at wshep@flabar.org.

Share with a student!

THE FLORIDA BAR – OUT-OF-STATE DIVISION APPLICATION FOR STUDENT MEMBERSHIP

Of the 81,000 members of The Florida Bar, more than 13,000 members reside and/or practice outside Florida. The Out-of-State Division of The Florida Bar represents the interests of all Florida lawyers residing and/or practicing outside the state.

The Out-of-State Division seeks to keep its members informed of recent developments that could impact their practice as out-of-state Florida attorneys. Further, the division promotes opportunities to network—both socially and professionally—with other out-of-state Florida attorneys. Membership in the division provides access to the division's newsletter (*State-to-State*), the division's website (*www.flabaroutofstaters.org*), division-sponsored continuing legal education programs and division meetings.

Student membership in the division will:

- ✓Afford an opportunity to network with out-of-state Florida attorneys who can offer insights on practicing law as a Florida attorney outside the state.
- ✓Allow for communication with Florida lawyers practicing in a variety of locales nationwide.
- ✓Provide the member with access to the division's newsletter and website, which are designed especially for out-of-state practitioners, and an opportunity to submit articles for publication.
- ✓Entitle the member to a reduced fee for division-sponsored continuing legal education programs.

To join, send this completed application form to:

Out-of-State Division, The Florida Bar, 651 E. Jefferson St., Tallahassee, Florida 32399-2300.

(The application form also may be sent by email to *OOSD.Student.Member@gmail.com*.)

Student membership will expire upon admission to The Florida Bar or one year after graduation from law school, whichever occurs first. There is no membership fee for students.

NAME: _____

SCHOOL: _____

DATE OF GRADUATION (MO./YR.): _____

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LIST ANY CITIES/STATES IN WHICH YOU HAVE A PARTICULAR INTEREST: _____

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Continuing Legal Education
Application for Course Attendance Credit

The Florida Bar
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(850)561-5842 (Phone) (850/561-9421 (Fax)

ATTORNEY # _____ NAME: _____

ADDRESS: _____

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DATE AND LOCATION OF COURSE: _____

PLEASE ATTACH A COURSE BROCHURE AND/OR OUTLINE WHICH:

(A) FULLY DESCRIBES THE COURSE CONTENT AND LEVEL OF PRESENTATION
(B) INDICATES THE TIME DEVOTED TO EACH TOPIC COVERED WITHIN THE PROGRAM
(C) INDENTIFIES THE INSTRUCTORS

CERTIFICATION CREDIT

Indicate if credit is to be assessed for Board Certification.

CERTIFICATION AREA(S): _____

TOTAL MINUTES ON INSTRUCTION: (EXCLUDING BREAKS, MEALS AND INTRODUCTIONS AND BASED ON A 50 MINUTE HOUR)

$\frac{\text{TOTAL CREDIT}}{50}$ (TOTAL MINUTES DIVIDED BY 50 = _____ CREDIT HOURS)

If requesting Ethics, Professionalism, Substance Abuse, and/ Mental Illness Awareness Credit, please check appropriate box below.

☐ Ethics ☐ Substance Abuse
☐ Professionalism ☐ Mental Illness Awareness

NOTE: If you have completed the minimum number of required CLER hours, and are not seeking Certification credit, please do not submit further courses for evaluation. **There is no carry over of hours in Florida from one reporting period to the next.**

You may submit this application to clemail@flabar.org with the proper documentation.

Materials submitted for CLE credit review will be discarded once the credit has been determined.
Should you wish to have your materials returned, please enclose a self-addressed stamped envelope.

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