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Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

I am delighted to introduce this issue of *Inside*, the newsletter of the Corporate Counsel Section. This issue features articles of particular interest to corporate counsel, including an article by Elizabeth M. Hijar and Staci M. Jenkins of Thompson Hine regarding unauthorized employment of illegal immigrants, which surveys recent investigations conducted by the U.S. Immigration and Customs Enforcement and offers practical advice to help avoid unintentional employment of illegal immigrants. This issue also includes an article by Andrew C. Finch of Paul, Weiss, Rifkind, Wharton & Garrison analyzing the Supreme Court's recent antitrust decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, in which the Court held that it is not per se illegal for manufacturers and distributors to agree on setting minimum retail prices.

Our Section's Officers, Executive Committee and New York State Bar Association Staff are working hard to provide programming, materials and opportunities to meet the unique needs of corporate counsel.

Together with the Commercial and Federal Litigation Section, the Section sponsored a program titled "Ten Best and Worst Practices of Outside and Inside Litigation Counsel," which was held in New York City on July 18, 2007.

A planning committee, led by Chair-Elect Gary Roth, is preparing for the Second Corporate Counsel Institute, which will be held at the Yale Club in New York City on October 11 and 12, 2007. The program offers cutting-edge programs led by leading private practitioners and corporate counsel. This two-day program will offer a wide variety of presentations focused on issues facing in-house counsel, including plenary sessions on employment law, working with outside counsel, media awareness, electronic litigation tools and intellectual property. The Institute will also include a wide array of workshop programs including negotiation, accounting, working with outside counsel, employment law, corporate compliance programs, real estate, Sarbanes-Oxley update, intellectual property and creating an in-house diversity program. The Institute will also feature the Section's popular annual program, "Ethics for Corporate Counsel." In addition to gaining knowledge and insight into an array of cutting-edge legal issues, attendees can earn up to 14.5 hours of CLE credit. The first edition of this program sold out well before the program date, so please be sure to save the dates on your calendar and plan to register early.

Our Section's Corporate Governance Committee is being re-energized under the leadership of Janice Handler. The Committee will provide counsel who deal with issues relating to compliance, Sarbanes-Oxley, corporate governance, ethics, privilege and internal investigations, with a forum in which to exchange ideas and learn from one another. It is designed to be valuable not only to practitioners who devote much of their practice to corporate governance issues, but also to those who deal only occasionally with such matters. The Committee plans to form a group of lawyers who can occasion-

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ally meet, call or e-mail each other to exchange ideas and questions. In addition, the Committee plans to publish useful material on the Section's Web site and this newsletter**.** If any lawyer with a question about corporate governance e-mails a request, Janice Handler will coordinate a response by one of the Committee members. Questions and answers will be published on the Web site and in *Inside***.** If you are interested in this Committee, please contact me, or e-mail Janice at handlerj@aol.com.

Our Section's Kenneth G. Standard Internship Program has placed law students from diverse backgrounds as summer interns in corporate law departments in downstate and upstate New York. This is the second year of this internship program. We are grateful for the support of this year's host companies, Goldman Sachs, McGraw-Hill and Oneida. Thanks to Barbara Levi, Chair of the Internship Committee, and to volunteers Mitchell Borger, Fawn Horvath, Gary Roth, David Rothenberg, Howard Shafer and Allison Tomlinson, who have worked hard to provide this unique opportunity to three law students.

Our Section is in the process of creating a blog with the goal of providing not only a means of notifying you of developments affecting corporate practice, but also a forum to exchange practice tips and ideas. The blog will include postings by several authors, along with a moderated forum for readers to post questions and comments. If you are interested in participating as a contributing author, please e-mail me (Steven.Nachimson@compass-usa.com), or send an e-mail message to Barbara Beauchamp at bbeauchamp@nysba.org.

I hope you find this issue of *Inside* to be interesting and useful. I thank you for your support of the Corporate Counsel Section and welcome your active involvement in the work of our Section. In addition to encouraging you to attend CLE programs, I invite you to become an active member of one or more standing committees. Committee members enjoy rewarding opportunities to enhance expertise, achieve professional development and recognition, and network with other attorneys throughout the state. Through your participation, you can contribute to the work of the Section and help assure that we continue to meet the needs of members of the New York bar working or interested in in-house corporate practice. A list of committees and contact information for each committee chair is at the end of this message.

I look forward to meeting you at future Corporate Counsel Section events.

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Is Your Client Using Illegal Immigrant Workers?

By Elizabeth M. Hijar and Staci M. Jenkins

There are very few issues that are as divisive as immigration—illegal and legal. However, no matter where one stands on this issue, the law prohibits the hiring of illegal immigrant workers. Until a few years ago, the government's enforcement of the law was lax and far from routine. But since the events of September 11, 2001 and the emergence of illegal immigration as a hot-button issue, the government has been stepping up enforcement and investigations on businesses that employ unauthorized workers. Based on the investigations of Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security, many employers (including supervisors and executives) have either been sued, arrested, indicted, fined, and imprisoned for criminal and civil charges ranging from the unauthorized employment of illegal immigrants to engaging in fraud and falsification of documents, and harboring illegal immigrants for commercial advantage. Further, countless employees have been detained and deported for being in the United States illegally.

Some specific ICE investigations have resulted in the following:

- The detention of 1,282 workers for immigration violations employed at plants of Swift & Company, one of the nation's largest processors of fresh pork and beef;
- The guilty plea and payment of fines totaling $300,000 by two corporate executives of the Golden State Fence Company for the hiring of unauthorized alien workers; and
- The arrest of seven current and former managers of IFCO Systems North America, Inc. for conspiring to transport, harboring, encouraging and inducing illegal aliens to reside in the United States for commercial advantage and private financial gain, and other charges related to fraudulent documents.

An Employer's Obligation

These examples underscore the high stakes for employers who fail to comply—wittingly or unwittingly—with their obligations under the immigration laws. In 1986, the Immigration Reform and Control Act (IRCA) was passed into law. IRCA requires employers to verify the identity and work eligibility of all employees hired after the passage of IRCA. In order to fulfill the requirements of IRCA, employers and employees must fill out the Form I-9. Completing the Form I-9 requires that the newly hired employee provide the employer with documentation that confirms the employee's identity and authorization to work in the United States. Employment of illegal workers often results from the employer's exercising a less-than-careful eye over the completion of the I-9 Form.

Unfortunately, a properly completed Form I-9 does not ensure that an employer is not hiring an illegal immigrant worker because it cannot detect cases of stolen identity. Currently, the only indication an employer has from the government that an employee may have stolen the identity of an authorized worker is when it receives a letter from the Social Security Administration (SSA) indicating that the employee's name or social security number does not match the name or social security number on file with the SSA. Adding to the complexity of an employer's obligation, the government has not issued final guidance on how to respond to these "no-match" letters.

The Pitfalls of Using Temp Agencies and Contractors

Even if a company's own employees are properly authorized to work, a company can find itself in legal jeopardy because of its use of contractors or temporary workers. Part of ICE's enforcement strategy includes investigating the hiring practices of temp agencies and contractors that provide workers to other businesses. In many cases, these companies provide workers that are vital to other businesses' production and successes. Recently, ICE searched the Portland, Oregon offices of American Staffing Resources, Inc. ("ASR"), a commercial staffing firm, and Fresh Del Monte Produce, Inc. ("Del Monte"), the well-known fresh produce company. One of the ASR offices was located at the Del Monte plant. According to an ICE press release, warrants were issued to search for evidence of "hiring illegal aliens; harboring illegal aliens; encouraging illegal aliens to reside in the United States; identity theft; immigration document fraud; and Social Security fraud." More importantly, about 170 ASR employees who were production workers at the Portland Del Monte plant were detained for possible deportation hearings, and three managers from ASR were arrested and charged with knowingly hiring illegal workers. Undoubtedly, the searches and detentions caused great disruption to Del Monte's production and operations.

Fortunately for Del Monte, neither it nor any of its supervisors have been charged with knowingly employing illegal immigrants. Yes, it is not only the company that can be held liable, but individual supervisors also risk liability for having knowledge of employing unauthorized workers. Knowledge is defined broadly to include actual and constructive knowledge. Constructive knowledge is present where an employer is aware of circumstances in which he or she should have known that an employee

was not authorized to work and failed to investigate. For example, it would be difficult to argue that no constructive knowledge exists where an employer is aware that an employee goes by two entirely different names (one at work and one socially), and yet fails to investigate.

The problems that a company can face because of the workers used by a contractor or employment agency are aggravated if there is a finding of joint employment. When determining who is the employer and who is the employee, ICE looks beyond payroll and applies the IRS guidelines for defining employment. According to the IRS, determining who is an employer is based on several factors. The most important one is control. The more control a business has over a worker (e.g., control over how, when, and where the worker performs services), the greater the likelihood that an employer-employee relationship exists.

Even when a business does not have an employer-employee relationship with its contract workers, it cannot knowingly use employment agencies or contractors that employ illegal immigrants. As a consequence, an employee or company cannot turn a blind eye to the work authorization of anyone working on its behalf. Wal-Mart knows this all too well. As a result of allegations that it knowingly contracted with janitorial companies that employed illegal aliens, Wal-Mart paid a record $11 million settlement to the government in March 2005. Additionally, part of the settlement directed Wal-Mart to establish a system that verifies that its independent contractors are taking reasonable steps to comply with immigration laws in their employment practices and to cooperate truthfully with any investigation of these matters.

How to Best Avoid Hiring Unauthorized Immigrant Workers

As the government continues to increase enforcement through the efforts of ICE, many companies find themselves asking what steps can be taken in order to avoid hefty fines and potential jail sentences. Large companies that use contract agencies to supplement their workforce ask how they can ensure that they will not be held responsible for the actions of these agencies. ICE has established a Hiring Guide for Employers that provides guidelines as to what steps employers can take to prevent the hiring of undocumented workers. Although some of these steps are somewhat simplistic—such as providing annual training on completion of the I-9 Form and detection of fraudulent documents, only allowing those trained to complete the I-9 Form, and requiring a secondary review of each employee's verification—other suggestions place serious responsibilities on the employer and cannot be taken lightly.

The most onerous suggestion by ICE in its Hiring Guide for Employers is that the employer should utilize the Basic Pilot Program for all hiring. The Basic Pilot Program is a voluntary program that involves verification checks of the Social Security Administration and the Department of Homeland Security databases. The program uses an automated process to verify the employment authorization of all newly hired employees. However, to utilize the Basic Pilot Program, an employer must enter into a Memorandum of Understanding ("MOU") that requires the employer's agreement to utilize this program for every new employee at the location and to grant the government the right to come on-site to review Basic Pilot documentation (including I-9 Forms) as well as interview employees. Many employers find that this agreement opens the door too wide for government oversight. The trade-off, though, is a rebuttable presumption that the employer did not knowingly hire unauthorized workers if all steps are followed in the Basic Pilot Program.

Employers must keep in mind that it is possible to take things too far in attempting to diminish the risk of hiring illegal workers. For example, requesting more documentation than allowed on the I-9 Form or refusing to hire individuals who have a foreign accent could easily result in national origin discrimination claims.

They Work for a Contractor; What Can I Do?

Although the above suggestions are acceptable when dealing with a company's own employees, exerting this much control over a contractor may push the company into a joint employer situation. In other words, if an employer were to train the employees of a contract agency on how to complete the I-9 Forms or to review all of the agency's I-9 Forms, the employer is heading towards establishing an employer-employee relationship with the contractor's employees. This would subject the employer to liability. Instead, when an employer utilizes contract or employment agencies, it should set policies or standards in place that the contractor must meet. This allows the employer to maintain a distance in terms of control. Some options could include that an employer require all contractors to:

- Provide training by an outside source for its employees completing the I-9 Forms;
- Guarantee that only trained employees will complete the I-9 Forms;
- Submit to a yearly review of a small portion of I-9 Forms from a random selection of workers placed at the employer's facility; and/or
- Participate in the Basic Pilot Program.

Any or all of these suggestions could be included in a company's contract with the contract or employment agency. By doing so, the company begins to protect itself from being considered the contractor or agency's employee's co-employer.

Changes on the Horizon for Employment Verification

The recent Comprehensive Immigration Reform Bill, referred to as the "Grand Bargain," and recent laws passed in a handful of states provide insight as to the direction that workplace enforcement is headed in the near future. The Grand Bargain proposed to require all employers to electronically verify all new hires within eighteen months of the enactment of the bill. The bill also proposed that all current employees would need to be verified in the system within three years. Although the electronic verification program proposed by this bill was not defined, many believe it would have had many similarities with the Basic Pilot Program.

In the past, employment verification was an area of law that was left to the federal government. Yet, several states are now stepping forward with laws of their own that will require companies to take additional steps to ensure that their employees are authorized to work. Some states that have already passed laws include Colorado, Georgia, and the most recent addition, Arizona. The Arizona bill that was signed into law by Governor Janet Napolitano on July 2, 2007 requires that all employers participate in the Basic Pilot Program by January 1, 2008 and imposes aggressive consequences to employers who knowingly or intentionally hire undocumented workers. For example, a second offense may result in a permanent revocation of the employer's licenses to do business in the State of Arizona. In a written statement from the Governor to the Arizona Speaker of the House, the Governor stated that "Because of Congress' failure to act, states like Arizona have no choice but to take strong action . . . [and] other states are likely to follow . . . [T]he United States Congress must act swiftly and definitively to solve this problem at the national level."

Increased enforcement by ICE, closer scrutiny of employers utilizing contractors, and the push towards electronic verification of employees on both the federal and state level leave employers no choice but to take a detailed look at their I-9 policies and employment practices. One way to do so is to have your immigration counsel perform an I-9 audit to identify any problem areas. A detailed audit will help companies and supervisors to best protect themselves from severe business consequences, such as permanent revocation of business licenses, fines and even imprisonment.

Elizabeth M. Hijar is an associate in Thompson Hine's Labor & Employment practice group. She focuses her practice on employment-based immigration, I-9 and immigration-related workplace compliance. Elizabeth received her B.A. from the University of Texas and her J.D. from Harvard Law School. She can be reached at (216) 566-5912 or Elizabeth.Hijar@ThomsponHine.com.

Staci M. Jenkins is an associate in Thompson Hine's Labor & Employment practice group. She focuses her practice on employment-based immigration, I-9 and immigration-related workplace compliance and affirmative action plan compliance. Staci received her B.A. from Hanover College and her J.D. from the University of Cincinnati Law School. She can be reached at (513) 352-6734 or Staci.Jenkins@ThompsonHine.com.

Supreme Court Overrules *Dr. Miles* and Holds That Vertical Price Restraints Are Not *Per Se* Illegal

By Andrew C. Finch

On June 28, 2007, the United States Supreme Court issued a decision overruling a nearly century-old antitrust precedent and holding that agreements setting minimum resale prices are not *per se* illegal under Section 1 of the Sherman Act. (Under the *per se* rule, certain types of restraints that are recognized to have manifestly anticompetitive effects are summarily condemned without any inquiry into their competitive effects.) Although the Court's decision gives manufacturers, distributors, and retailers additional flexibility to reach vertical price agreements, it does not mean that all such agreements are permissible. Instead, businesses considering such an agreement will need to evaluate whether it would pass muster under the rule of reason, which requires an analysis of its expected benefits and potential anticompetitive effects. Businesses must also exercise caution to ensure that discussions concerning such vertical price agreements do not—either directly or indirectly—give rise to horizontal agreements between competitors that could constitute *per se* antitrust violations.

The Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, concerned a manufacturer of leather goods that adopted a marketing policy requiring certain retailers to pledge not to sell its products below the manufacturer's suggested retail prices. A retailer that was terminated for violating that policy sued the manufacturer, claiming that the policy resulted in agreements setting minimum resale prices that constituted *per se* violations of Section 1 of the Sherman Act. After a jury trial, the district court entered judgment against the manufacturer, and the United States Court of Appeals for the Fifth Circuit affirmed. Both courts relied on the Supreme Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, which established that it was *per se* illegal under Section 1 for a manufacturer and distributor to agree on the minimum price the distributor could charge for the manufacturer's goods. The Fifth Circuit explained that, "[b]ecause the [Supreme Court] has consistently applied the *per se* rule to such agreements, we remain bound by its holding in *Dr. Miles*." 171 Fed. App'x 464, 466 (5th Cir. 2006) (*per curiam*).

In its decision last week, the Supreme Court expressly overruled *Dr. Miles* and held that vertical price restraints are not *per se* illegal, but are instead to be evaluated under the rule of reason. The Court explained that its more recent antitrust jurisprudence had rejected the rationales on which *Dr. Miles* was based and had instead focused on significant "differences in economic effect between vertical and horizontal agreements" that *Dr. Miles* failed to consider. Among other things, the Court noted that "[m]inimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand." Vertical price restraints, the Court explained, can thus "encourage[ ] retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers" and may "give consumers more options" to choose between brands offering different prices and levels of service.

The Court acknowledged that minimum resale price agreements can have anticompetitive effects. For example, the Court explained that a vertical price agreement may facilitate manufacturer cartels by helping them identify price-cutting manufacturers. They may also be used to organize a price-fixing cartel among a group of retailers that "compel a manufacturer to aid the unlawful arrangement with resale price maintenance." Indeed, the Court expressly noted that an agreement setting minimum resale prices may "be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel."

Despite this potential for anticompetitive effects, the Court concluded that "it cannot be stated with any degree of confidence" that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output" such that it should be condemned as *per se* illegal. At the same time, however, the Court cautioned that lower courts must diligently scrutinize vertical price restraints under the rule of reason. The Court identified several factors that may be relevant to this inquiry, including whether many or only a few manufacturers make use of vertical price restraints in a given industry, whether a manufacturer adopted the restraint independently or as a result of retailer pressure, and whether the manufacturer or a particular retailer has market power.

In light of the Supreme Court's decision in *Leegin*, firms at virtually every level of the supply chain—from manufacturers to retailers—should evaluate the extent to which vertical price restraints might impact their businesses. Manufacturers, for example, may want to explore whether adopting such restraints might enable them to achieve some of the potential benefits identified by the Supreme Court in its decision. Retailers, on the other hand, may want to consider how to respond if suppliers

begin imposing vertical price restraints. In every instance, businesses should bear in mind that, although vertical price restraints are no longer *per se* illegal, they may still be deemed unlawful in particular situations under a rule of reason analysis; as a result, businesses should seek legal advice and carefully analyze such restraints before adopting them. Businesses should also be aware that vertical price restraints might be used improperly to orchestrate *per se* illegal horizontal price-fixing agreements, and that communications between firms about adopting such restraints might be cited by plaintiffs as evidence of horizontal collusion. Accordingly, businesses should seek legal advice concerning the types of communications that may be appropriate and those that may be potentially problematic from an antitrust perspective.

This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content.

This article was authored by Andrew C. Finch, antitrust counsel at Paul, Weiss, Rifkind, Wharton & Garrison. Resident in the firm's New York office, Mr. Finch has extensive antitrust experience, including government investigations, private litigation and appellate matters. His recent work has included defending a major insurance company against antitrust claims brought in federal and state courts by commercial insureds alleging bid-rigging and improper use of contingent broker commissions. Prior to joining Paul, Weiss, he served as counsel in the Antitrust Division of the U.S. Department of Justice, where he worked on civil merger and non-merger investigations, matters proceeding to trial, and appeals. He also worked on projects involving the application of antitrust law to intellectual property, including the drafting of the joint report of the DOJ and Federal Trade Commission entitled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*.

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Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Request for Articles

If you have written an article and would like to have it considered for publication in *Inside*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information, to its Editor:

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Submission of Articles

Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information. Please submit articles to:

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