NYSBA SPRING/SUMMER 2001 | VOL. 19 | NO. 1

Inside

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

Message from the Chair

To the members of the Corporate Counsel Section:

It is my honor and pleasure to serve as your Chair in 2001. Many thanks and much gratitude goes to my predecessor, Bonni G. Davis, for spearheading an active Section last year. I hope that the programs that we sponsor throughout this year will pique your interest and make your membership in our section worthwhile.

On April 17, 2001 we will co-sponsor with the Commercial & Federal Litigation Section and the International Law & Practice Section a program on "Privacy in the Electronic Age." This CLE program in New York City will discuss domestic and international privacy issues, as well as include mock appellate arguments in a hypothetical case involving privacy, data collection and mining. It is sure to be an interesting program.

Our Spring Meeting, which will be held May 18-20, 2001, at the Sagamore Resort in Bolton Landing, N.Y., in conjunction with the Commercial & Federal Litigation Section, will feature a panel discussion on the *Bush v. Gore* election litigation in Florida, with some of the key counsel who kept us glued to our television sets last fall. The second day's program will be a panel on arbitration vs. litigation, from the perspectives of corporate counsel, outside attorneys and the judiciary, who will discuss the pros and cons of each approach, what needs to be done to succeed in arbitration, their arbitration experiences in the U.S. and internationally, and how arbitration and litigation is viewed from the bench. Both programs are sure to be lively and informative. I hope that many of you will be able to attend the meeting to network with fellow corporate counsel and enjoy a spring weekend on beautiful Lake George.

Because of the sell-out success of last fall's *Ethics for Corporate Counsel* program, your Executive Committee has voted to make that program an annual event. This year's session will be held on Thursday, October 25, 2001 in New York City. Mark your calendars now for this program, which allows you to obtain all four MCLE Ethics credits in one sitting, at a course specifically geared toward in-house counsel.

I hope you enjoy this issue of *Inside*. If you or your outside counsel would like to contribute an article for future issues, contact editor Thomas Reed. Also, if you have any suggestions for future Section programs or events, feel free to contact me at groth@bmi.com.

I hope that you will participate in our programs during the year, and that you will be pleased to be a part of a Section that strives to find meaningful ways to enhance being an in-house attorney.

Gary F. Roth

Inside

BOOK REVIEW
Commercial Litigation in New York State Courts: A Current Guide for Commercial Cases

(West Publishing)

Reviewed by Lawrence D. Chesler

Commercial Litigation in New York State Courts is a three-volume, strategy-oriented publication covering both the procedure and substance of commercial litigation. The set provides valuable assistance to inside counsel for working with outside counsel and for advising internal business clients on a variety of business subjects. The distinguished author team is comprised of 63 noted judges from the Court of Appeals, Appellate Division and the Supreme Court and top litigators from the finest firms in New York, under the direction of Editor-in-Chief Robert L. Haig, of Kelley Drye & Warren LLP.

The authors have recently updated their chapters to reflect the multi-faceted activity that has taken place in this area of practice during the year since the 1999 Pocket Parts were published. They painstakingly culled from the thousands of cases reported and statutory activity, the significant developments regarding all aspects of civil procedure and commercial law. The addition in the 2000 Pocket Parts of analysis of hundreds of new cases and legislative changes to the thousands of cases cited and discussed in the bound volumes, keep this unique set current in every respect.

"[Commercial Litigation in New York State Courts] . . . provides valuable assistance to inside counsel for working with outside counsel and for advising internal business clients on a variety of business subjects."

Commercial Litigation in New York State Courts can assist corporate counsel in fulfilling all of their principal roles. To assist in working with outside counsel after a lawsuit has been commenced, this set contains detailed analysis of practical and strategic considerations affecting each phase of the litigation. The nine trial chapters combine to form a detailed and thoughtful analysis of commercial trial advocacy.

Its title notwithstanding, this set is of significant value to corporate counsel beyond merely the litigation context. There are many chapters that corporate counsel, in the role of pre-litigation advisor, should consult to ensure that all issues and options are fully explored. Corporate counsel called upon to advise internal business clients regarding transactions, compliance and setting corporate policy will readily find substantive information and answers throughout this collection. For example, even before a contract suit arises, counsel can put the corporation in an advantageous position by consulting the relevant chapters and structuring the transactions to include favorable choice of law, choice of forum and arbitration clauses. If a competitor uses improper means to solicit the company's customers, in-house counsel can determine its rights and remedies by consulting the chapter on *Theft or Loss of Business Opportunities.*

"Numerous attorney and judicial reviewers have praised the utility of . . . [Commercial Litigation in New York State Courts]."

The 16 commercial law chapters contain a wealth of legal authority on all significant issues with insightful advice on strategic ramifications. Major areas of commercial law covered include contracts, sale of goods, warranties, agency, letters of credit, insurance, banking litigation, collections, contracts for services, bills and notes, antitrust litigation, torts of competition, right of publicity claims, construction litigation, and environmental litigation. These chapters can help corporate counsel evaluate cases for negotiation and settlement, assist in negotiating and memorializing transactions and in determining and enunciating corporate positions and policies.

Numerous attorney and judicial reviewers have praised the utility of the set. Reviews in *Corporate Legal Times, U.S. Business Litigation* and *The Metropolitan Corporate Counsel* were unanimous in their acclaim. They noted that the set is particularly useful for corporate counsel who are accustomed to the very different rules and practices of the federal courts. Commercial Litigation in New York State Courts and its 2000 Pocket Parts are an excellent means to become informed about the

practice of commercial law and litigation in New York State courts.

The fifth anniversary of the publication of this work coincided with the fifth anniversary of the creation of the Commercial Division of the Supreme Court of the State of New York. That Division, originally established in 1995 in New York County and Monroe County (the metropolitan Rochester area), has now been expanded to the Counties of Nassau, Westchester and Erie (where Buffalo is located). The Commercial Division has attracted an increasing stream of litigators and their clients. The Commercial Division has done so as a result of its proactive case management by judges and court personnel who specialize in commercial matters, its use of alternative dispute resolution wherever it can be meaningfully employed, and its utilization of technology to promote efficiency.

The Commercial Division has achieved dramatic improvements in all aspects of commercial case litigation. For example, in 1992 the average contract case in New York County took 648 days from the date of filing to disposition. Similar cases in the Commercial Division have more recently reached disposition within an average of 412 days, an improvement of 36%. In addition, more than 58% of the cases referred to the Commercial Division's ADR program have been successfully settled.

According to the Foreword to the 2000 Pocket Parts, the more than 25,000 new cases filed in the Commercial Division since its inception have prompted the inclusion in the Pocket Part to volume 4 of (1) the current Operating Statement, Guidelines for Assignment of Cases, Rules of the Justices, and Alternative Dispute Resolution Rules of the Commercial Division in New York County, (2) the Guidelines for the Assignment of Cases and Rules of the Commercial Division in Monroe County, as well as (3) the Guidelines for Cases Assigned to the Commercial Division in Nassau and Westchester Counties and (4) the Rules and Practices of the Commercial Division in Erie County.

Lawrence D. Chesler is Vice President, General Counsel and Secretary of Navigation Technologies Corporation, past Chair and a current member of the Executive Committee of the Corporate Counsel Section of the New York State Bar Association, Vice Chair of Committee R (High Technology Section) of the International Bar Association, a Director of the Computer Law Association, and a Fellow of the New York Bar Foundation.

True Diligence: Looking Below the Surface and Behind the Numbers

By Ernest Brod

Jill Barad was no stranger to controversy. As CEO of Mattel, Inc.—and one of the few women to head a major global corporation—she has been a lightning rod for strong feelings. Some criticized her for being too abrasive; others argued that her style would be applauded in a male. A few months ago, after ten years at the helm, Barad was pushed out. Not because of her management style or strategic errors or falling profits. She lost her job because of faulty due diligence.

Barbie's Dream Acquisition

The now famous merger between Mattel and The Learning Company is in many ways a primer on how failure to engage in detailed and in-depth pre-transaction investigation can result in disaster. Mattel acquired The Learning Company, the second-largest consumer software company in the world (after Microsoft), in 1998. The Learning Company's strong lineup of software offerings included popular titles like *Myst*. Mattel coveted TLC's technology and e-commerce expertise, as well. It envisioned building a global children's products company that would deliver consumer goods and digital content through a dynamite palette of well-developed brands. Best of all, TLC's healthy balance sheet made the deal seem like a natural.

But Mattel didn't have all the facts and paid dearly for it. In barely over a year, Mattel's market value had dropped nearly 70 percent, earnings were crippled, and the CEO was fired. In October of 1999, stockholders filed a class-action lawsuit claiming securities fraud by Mattel and TLC executives in the deal.

Bombs kept dropping on Mattel executives. A First Boston Credit Suisse analyst said,

> The analysis surrounding The Learning Company acquisition was clearly flawed. Mattel overpaid for the acquisition, as real growth and operating profitability forecasts have proven far too optimistic compared with months ago when the acquisition was completed. The disappointing performance of Mattel and The Learning Company will put additional pressure on the management of Mattel to prove that its acquisition analysis was not flawed and that problems can be rectified to get the company back on track.

In September of 2000, the *Wall Street Journal* reported that Mattel was finally able to sell TLC. The paper reported that the sale would probably not even net ten percent of the whopping US$3.8 billion Mattel spent on the acquisition, while a write-down resulting from the corrected book value of TLC left Mattel with an after-tax loss from discontinued operations of roughly US$430 million.

It had all been so promising. What went wrong?

Lifting the Veil

According to the suit filed against Mattel, TLC's 1997 earnings were inflated; the company reported revenues on sales but neglected to mention that its distribution contracts guaranteed retailers broad rights to return unsold product. This led TLC to be overvalued in sale, and skewed Mattel's profit projections for the merged company. In addition, some analysts said, TLC suffered from personnel problems, which had been long-rumored but never confirmed. The synergy promised by the companies when they announced their merger dissolved into near-chaos. Mattel struggled to digest the cost of the merger as well as the write-down of TLC's huge bad debts, all while realizing that the Internet and e-commerce expertise it had paid such a premium for in TLC simply wasn't there.

The problem was that Mattel hadn't looked behind the numbers to the people and the day-to-day business at TLC when it targeted the company for acquisition. All the instincts that led Mattel to the table with TLC were good ones; their complementary businesses and blend of offerings would have made Mattel the 300-pound gorilla of the children's entertainment and educational toys world. But the fundamental information about the quality of TLC's people, the real value of the company, and its ability to deliver on the promise to add technology and skills to Mattel was flawed from the outset.

The list of companies and sophisticated investors who have fallen prey to the limitations of the formal legal and financial due diligence process is long and impressive. After Cendant Corp. acquired CUC, only to discover fraudulently inflated income, its chairman defended the deal by saying he had the right to trust in the work of a "Big 5" accounting firm and in the word of fellow business executives.

Similarly, Hollywood superstar Michael Ovitz's investment in Livent, Inc., producer of "Ragtime" and "Phantom of the Opera," has been anything but entertaining. Ovitz's investment in Livent was quickly followed by disclosures of massive accounting irregularities and fraudulent revenue. Livent's chairman, Garth Drabinsky—currently fighting extradition from Canada—had previously made news when he was discovered with two sets of books at Cineplex Odeon.

The Information Is Out There—Find It!

Recent history is riddled with the sad stories of acquirers and investors who did not go beyond the classic due diligence—and failed to learn vital information that was publicly made available.

While under investigation by federal authorities for a second round of securities laws violations, Peter Caserta launched Spectrum Information Technologies and attracted John Sculley, co-founder of Apple Computer, to his impressive board. Four months later, the entire board resigned in the midst of multiple indictments of Spectrum insiders. When asked by the *Wall Street Journal* how her fraud-prone husband manages to continue to attract investors and partners, Mrs. Caserta said she was mystified because she had rarely heard him tell the truth.

Martin Armstrong, accused of bilking 80 Japanese companies out of almost US$1 billion they invested in his Princeton Economics International, was cited by the Securities and Exchange Commission for failure to register and maintain investment records. Two years later, he was fined and suspended for improper risk disclosure and misrepresentation of his trading returns. Long before he entered the investment world, Armstrong saw an opportunity in exotic stamps—until he was tossed out of that elite fraternity for selling stamps he didn't own and couldn't deliver.

In their eagerness to work for and invest in *Hitsgalore.com*, neither employees nor shareholders noticed the company's founder and majority shareholder spent ten months in a federal prison in 1992, after being convicted of wire fraud. They may have been more focused on his earlier experience with another Internet company, which ended in 1997, when he and his wife were ordered by the FTC to pay US$600,000 to 100 customers they defrauded.

With a biography filled with a fabricated list of accomplishments, Chris Bagdassarian trolled Wall Street in search of an underwriter for his company, Normandy America. One by one, the houses checked him out and sent him on his way. He finally found one that was willing to do the deal. Then, having learned the truth just after underwriting the IPO, the firm had to reverse and unravel the offering.

Are We Finally Getting the Message?

Preventive services tend to be a hard sell, but the constant headlines seem to have had some impact. Financial institutions and other companies are overcoming their traditional resistance to paying for background investigations and intelligence gathering. Of course, once the business partner's destructive behavior is repeated—as it inevitably is—the victims have little choice but to pay the expense of digging out from under non-performance, fraud, or litigation.

Cost is far from the only obstacle to checking people out thoroughly. Executives are constantly swayed by their personal meetings and evolving relationships with potential partners, ignoring the fact that personality and appearances are the fraudster's stock-in-trade. Just as we all believe we are better-than-average drivers, we all like people to believe we are outstanding judges of people. We quickly forget about all the people we hire and enter business relationships with, who turn out to be somewhat different from what we expected. But when a senior official in the organization meets and puts his personal imprimatur on a potential partner, others are chilled from taking a harder look.

Even when investigative due diligence is employed, there is often an incentive for clients to rationalize away the information in their eagerness to deal. As a result, investors have actually been met with responses like, "So, he was only a social cocaine user," or "wasn't he only 31 when he committed the felony?"

That senior officials at more and more organizations are pushing for more effective due diligence is clear not only from the increasing volume of calls, but also from the number of last-minute, panicky calls placed by staffers who have been asked—at the commitment committee conference or at the merger-and-acquisition meeting—"Have you really checked them out?" Investigators constantly hear about the appalling failure rate of transactions and other business relationships. The lesson is finally getting around that your chances of having a successful experience are increased by looking below the surface and behind the numbers.

Ernest Brod is the Executive Managing Director of Kroll, an investigative consulting and risk mitigation organization with 55 offices worldwide.

Battling the Counterfeit Menace

By Peter Humphrey

I recently took a call from a company in Canada that had produced an innovative machine used in plastic molding process. The executive who called described how a Chinese company that had visited the Canadian's factory had copied the design and was now—surprise, surprise—exporting a replica to the Canadian markets overseas, thus posing a disastrous threat to the business.

The Canadian firm was outraged that the Chinese had "stolen" its patent. I went to the trouble of carrying out some preliminary research and then drafted a consulting proposal to help the Canadians tackle this threat to their business. In an ensuing discussion I spoke of the need to file the patent in China in order to protect it. The executive said: "But we haven't even registered it in Canada!"

Not everybody may be as naïve as the executive in this incident, but it was a fairly typical reminder of how many multinationals fail to take necessary steps to mitigate business risk in China and to protect their bottom line. The point in this case is that no multinational company should neglect the need for serious intellectual property (IP) protection measures in their dealings with China, not to mention other emerging market countries in Asia. Whether it is patents, trademarks, designs, copyright, or whatever, a comprehensive protection strategy is required.

Protection Strategy

The protection strategy is a three-legged stool comprising prevention, recovery and lobbying. Prevention covers everything that you can do to mitigate risk at the front end—to reduce the chances of your intellectual property being abused in the first place. Recovery means what a company can do to get its brand out of trouble if it does become the victim of IP pirates. Lobbying encompasses all that a company can do to sway official and public opinion in favor of the victims and against the criminals.

Counterfeits cost global business US$250 billion (HK$1.94 trillion) in lost revenues each year, or about 5 percent of world trade. Software piracy in Asia alone has been costing at least US$4 billion a year. Losses to international businesses through various kinds of intellectual property piracy in China are said to amount to US$1.45 billion a year. The true depth of the scourge in China is very difficult to fathom, although all experts tend to agree that it is growing very fast. Some experts have estimated that counterfeiting could account for as much as 8 percent of China's economy. Increasingly, IP violators have international dimensions. They are exporting the goods. They may be financed from overseas. It is becoming like the narcotics trafficking syndicates. But the criminals see much less risk in it. They are not going to be jailed for life or executed for peddling counterfeit wares.

The worst-hit industries are famous brand apparel, software, entertainment products, VCDs, DVDs and CD ROMs, food and beverages, pharmaceuticals, cosmetics, personal hygiene products, chemicals and components. The thieves erode the legal brand owner's market share, whittle away revenue earning opportunities, dilute the brand itself, expose the multinational to health and safety liability risks as well as damage to reputation, and undermine corporate morale.

In one case, a multinational making chemicals, cosmetics and other goods, set up numerous joint ventures and contract manufacturing arrangements in China to manufacture and distribute its products. The company has been plagued by counterfeiting, unauthorized production, gray market and other problems that have ruined its markets in China. Inquiries by independent experts showed that much of this activity was orchestrated by corrupt individuals within the joint venture partners and contract manufacturers.

Another multinational developed an innovative plastic molding technology. An employee left the company and took the blueprints with him. He formed his own company, began making his own version of the machine and exported it. The product line was destroyed. The multinational had not carried out pre-employment vetting, and workplace security was lax. The situation starkly illustrated the need for preventive risk mitigation.

Distribution Channels

A leading watch manufacturer in the United States discovered counterfeits of one of their more popular styles in the South American market. Officially, the style was made only in one facility in Asia. Inquiries showed that a factory in China, which was licensed to make other styles, was also making this one. Further inquiries showed that the factory was in fact pirating many styles. Inquiries in South America exposed the distribution channels.

In another case indicative of how international and global the problem can be, manufacturers visited toy trade fairs and asked mold manufacturers to duplicate

designs. They used unauthorized molds to make toys in China, Taiwan and Vietnam, infringing the multinational's trademark. Cunningly, different parts of the toys were made in different factories and zigzag routes were used for shipment to overseas markets. The toys were shipped to Hong Kong, then Los Angeles, then Central America, then Europe! Investigators and consultants mapped out the syndicate, exposing their schemes, and then designed monitoring systems to improve controls and prevent a recurrence.

The IP problem often runs in tandem and other illegal activity such as overproduction by licensed factories, distribution frauds, gray market and transshipment problems, official corruption, and industrial espionage. In over-run scenarios, licensed manufacturers produce the agreed quota for the brand owner, and then produce more of the goods for themselves, shipping the excess out of the back door on to the market at a lower price, thus disrupting what the brand name company thought was the market, and siphoning away illegal profits.

Distribution frauds involve unscrupulous multinational local managers setting up their own distribution companies to rip off the foreign company. Gray market and transshipment problems involve licensed factories shipping goods into territories designated as the market turf of another licensed manufacturer. All of these problems are often complicated by the involvement of corrupt officials. Very few of these situations could arise without the theft and abuse of company secrets by the criminals concerned.

Sales Up, Revenues Down

In one complex case, a major multinational selling consumer goods discovered that although sales of its products were expanding rapidly in China, its revenues were declining. Investigative consultants found out that former employees of the firm colluding with staff had set up a rival operation and were selling gray market imports, that high-quality counterfeits were also being produced along with low-quality copies that were tarnishing the company's reputation. The consultants took action to close down the rival business, neutralize the counterfeit infringers and assist the multinational to put in tighter business controls.

Starting from the IP scourge, all of these problems can damage a brand's reputation, harm your distribution operations and hurt your bottom line. All can be mitigated preventively through appropriate protection measures. All require constant monitoring and, before you can go on the counter-attack, all require constant intelligence gathering. You cannot take action unless you are well armed with accurate and timely information.

On the prevention side, it is vital that multinationals doing business in China take appropriate steps to register all of their intellectual property. Otherwise they will not have the legal leg to stand on if somebody does steal their IP and copy their product. Very often, companies find that somebody has pre-emptively, maliciously registered their trademark or other IP such as Internet domain name before they have even entered the market. The victims need to gather adequate intelligence on these pirates before swinging into action against them.

Sometimes, the best tactic here is not to sue for trademark cancellation but to negotiate. Irritatingly, the best way is sometimes to buy back the pirated IP from the enemy. But know who the enemy is first, carry out a thorough investigation. Companies also need to undertake regular market surveys to keep abreast of the situation in their market. How much of the real product is out there and how much counterfeit product? This information, tied in with information gathered by investigating cases of counterfeiting, produces a body of intelligence that can be analyzed and used as a roadmap for tackling the violators.

In the course of anti-counterfeit investigations through local trademark agents, law firms and detective agencies, many multinationals have adopted a piecemeal approach in an effort to avoid spending too much money to fight the counterfeiters. This approach has been like swatting mosquitoes and has had very little impact on the plague of counterfeits. But the counterfeit problem is very broad based and is linked to many other risk mitigation issues such as security, business controls, and employee integrity.

Big Picture Investigations

So it is necessary to take a more strategic and holistic risk mitigation approach and go for big picture investigations. Discreetly investigate manufacturers, trading companies, distributors, and identify the masterminds and their patrons, their overseas associates and funding channels. Go for the big picture, don't swat mosquitoes. Obtain evidence of infringement and improper trading, including samples, sales data, receipts and photographic evidence. Use this documentation and sales data to support administrative and law enforcement actions and civil or criminal prosecutions.

The investigation results must be followed up by organizing raids against factories and distributors in conjunction with official regulators, enforcement agencies and Customs. The objective is to seize and destroy counterfeit goods, equipment, molds, packaging and related materials, confiscate data and documentary evidence of criminal activity, and shut down the counterfeit

production lines and distribution channels. However, instead of the failed piecemeal approach adopted by most multinationals, it is advisable to carry out a strategic offensive. Get the big picture before raiding. Maximize the financial pain for counterfeiters and the concern of the Chinese authorities by launching simultaneous multiple raids against many factories in different cities.

None of this can happen without strong contacts with regulatory and enforcement agencies across China including Administration of Industry and Commerce, the Technical Supervisory Bureau, the trademarks and patents offices, the police and other institutions. The evidence developed from such broad-based investigation and raid actions can be further developed to trace the criminal syndicate's activities in other countries and to pursue criminal prosecutions in China and globally.

Sometimes, though, the investigation and raid process also has its snags. In a recent case, a multinational manufacturer complained to its international law firm that it suspected reports of seizures of counterfeit goods were being fabricated because the raids had no impact on markets where they occurred. Inquiries showed a local lawyer engaged by the international law firm was taking kickbacks from an investigation agency to provide the detectives with work, and then turning a blind eye to falsified reports. The "seized" goods were actually being returned to the market.

Other trickery may also foil justice. Very often goods are seized and then, after the multinational representatives have left the scene, are returned to the market or returned to the criminals. Multinationals often suspect that goods destined for punitive destruction are never actually destroyed. Local protectionism is a major issue. Sometimes, an entire village or township depends on counterfeiting of a single brand for its livelihood, so local government bodies are reluctant to crack down because they have too much at stake.

Lobbying Local Governments

The third leg of the strategic stool is lobbying. This is the high end of the IP war. Victims must lobby for support in China and abroad to influence policy on enforcement and the evolution of the IP protection regime. This means lobbying local governments, national governments, and international bodies. The lobbyists need to exploit the public relations value of major anti-counterfeiting raids to maximize international pressure and the concern of the Chinese authorities. Multinationals who share this common pain need to stand shoulder to shoulder in tackling the issue, despite the fact that they are competitors. They should build alliances of companies with similar products, organize united lobbying efforts, coordinate multiple raids and seizures and maximize publicity.

Beyond product alliances, the victim multinationals should organize united fronts of companies, lawyers, governments, international bodies, non-governmental organizations (NGOs) such as consumer and advocacy groups, and work together to influence government policy and to stiffen the governments attitude towards enforcement, currently very lax. Chinese companies are also massively losing market share to counterfeiters. For example, 80 percent of China's prized Wu Liang Ye label liquor market is counterfeit, according to a Customs source. So get Chinese companies into these alliances to join the fight.

In recent months, some western companies have finally begun taking the alliance-building road. A very promising organization, the China Anti Counterfeiting Coalition, has started to take on this role. But much mutual suspicion still stands in the way of cooperation between multinational giants hawking similar products.

It is clear that multinationals need to make a major shift in attitude and approach to IP piracy if they are ever going to beat the problem. Buying on bust alone cannot serve as a cure. The victim companies need to act on both the strategic and tactical levels. Political developments, such as China's expected entry into the World Trade Organization (WTO), may help to make a difference, but China's compliance with WTO standards, especially those concerning IP, will take many years to kick in. There is a need to understand the political issues from both sides—the socioeconomic value of the counterfeiting business is so enormous in China that it is genuinely difficult for the Chinese government to take swift action without sparking social unrest. Tens of thousands of Chinese, perhaps millions, could lose their jobs and rice bowls if there is a real crackdown.

So, tremendous challenges lie ahead in battling the counterfeit menace.

Peter Humphrey is a former Reuters correspondent in Asia and Eastern Europe. He is now the China chief representative of Kroll, an investigative consulting and risk mitigation firm with 55 offices worldwide.

Business/Corporate Law and Practice*

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This monograph, organized into three parts, includes coverage of corporate and partnership law, buying and selling a small business and the tax implications of forming a corporation.

The corporate and partnership section offers advice to the general practitioner or new attorney on the basics of forming a business for a client. The more popular types of business entities are discussed, along with the advantages and disadvantages of each. The chapter also examines considerations relative to the different forms of doing business, including domestic and foreign corporations and limited liability companies.

Part two, on buying and selling a small business, guides practitioners through the necessary procedures and corresponding responsibilities as a transaction passes from proposal to completion. It covers the pre-contract, contract, pre-closing, closing and post-closing stages.

Whether the corporate form of business organization is appropriate is a preliminary question you must answer after meeting with your client and determining the particular facts and relevant circumstances. The tax implications of such a decision are the focus of the third part. Alternative business organizational forms are discussed, including the general partnership, limited partnership, sole proprietorship, S corporation and the limited liability company.

This last part addresses important questions that should be considered when advising a client on forming a corporation: What is the *desirable* tax treatment to the client—that gain or loss on the exchange of his or her property for stock of the corporation be taxed in the tax year in which the transfer occurs or that it be deferred? Is deferral of gain or loss on the exchange *feasible*? What are the *consequences* of the client's deferring to a later year the reporting of gain or loss realized by the client on the exchange?

The updated case and statutory references and the numerous forms following each section, along with the practice guides and table of authorities, make this latest edition of *Business/ Croporate Law and Practice* a must-have introductory reference.

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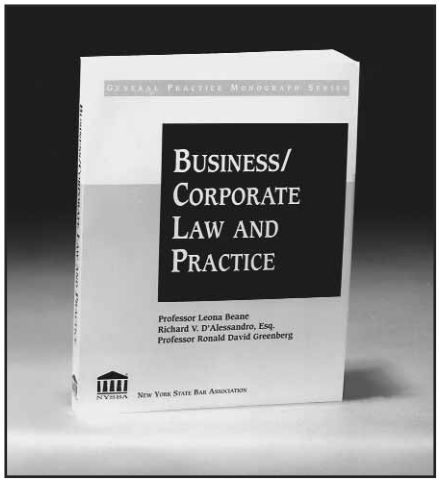

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New York State Bar Association

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Susan DeSanti

Corporate Counsel Section Co-Sponsors Two Half-Day Programs at NYSBA Annual Meeting

Jaime Malet

Here are some photos from the two programs co-sponsored by the Corporate Counsel Section at the State Bar's Annual Meeting in New York City on January 24, 2001. The morning session, with the International Law and Practice Section, presented "A United States and International Perspective on Electronic Marketplaces" and featured attorneys from the U.S., Europe and Mexico whose practice focuses on electronic commerce as well as the Director of the Office of Policy Planning from the Federal Trade Commission and the Corporate Counsel Section's former Chair, David Perlman, who was also our Section's Program Chair. This was followed by a joint luncheon with the International Law and Practice Section. In the afternoon, the Corporate Counsel Section teamed with the Commercial and Federal Litigation Section in presenting a panel discussion by practicing attorneys specializing in Internet law, as well as representatives of an Internet-related business, the New York State Attorney General's office, and a law professor on the topic of "Commercial Uses (and Misuses) of Information on the Web." Attendees at both programs received CLE credit.

(l-r) Lesley Friedman, Nancy Savitt and Linda Goldstein

(l-r) Guillermo Green and Tom Reed

(l-r) Kenneth Dreifach, David Bernard and Carey Ramos

Real Estate Transactions—Commercial Property

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Commercial real estate is a vast field, encompassing the selling, financing, and leasing of numerous types of properties, and involving a plethora of professionals including attorneys, real estate and mortgage brokers, accountants, tax lawyers, title insurance representatives and lenders. A new addition to the monograph series, *Real Estate Transactions—Commercial Property* provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions. Complete with practice guides and forms, this is an extremely useful resource.

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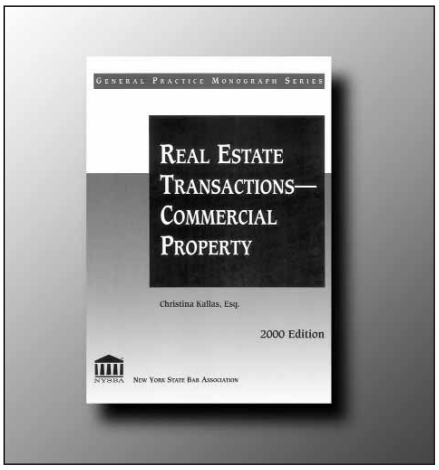

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ISSN 0736-0150

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