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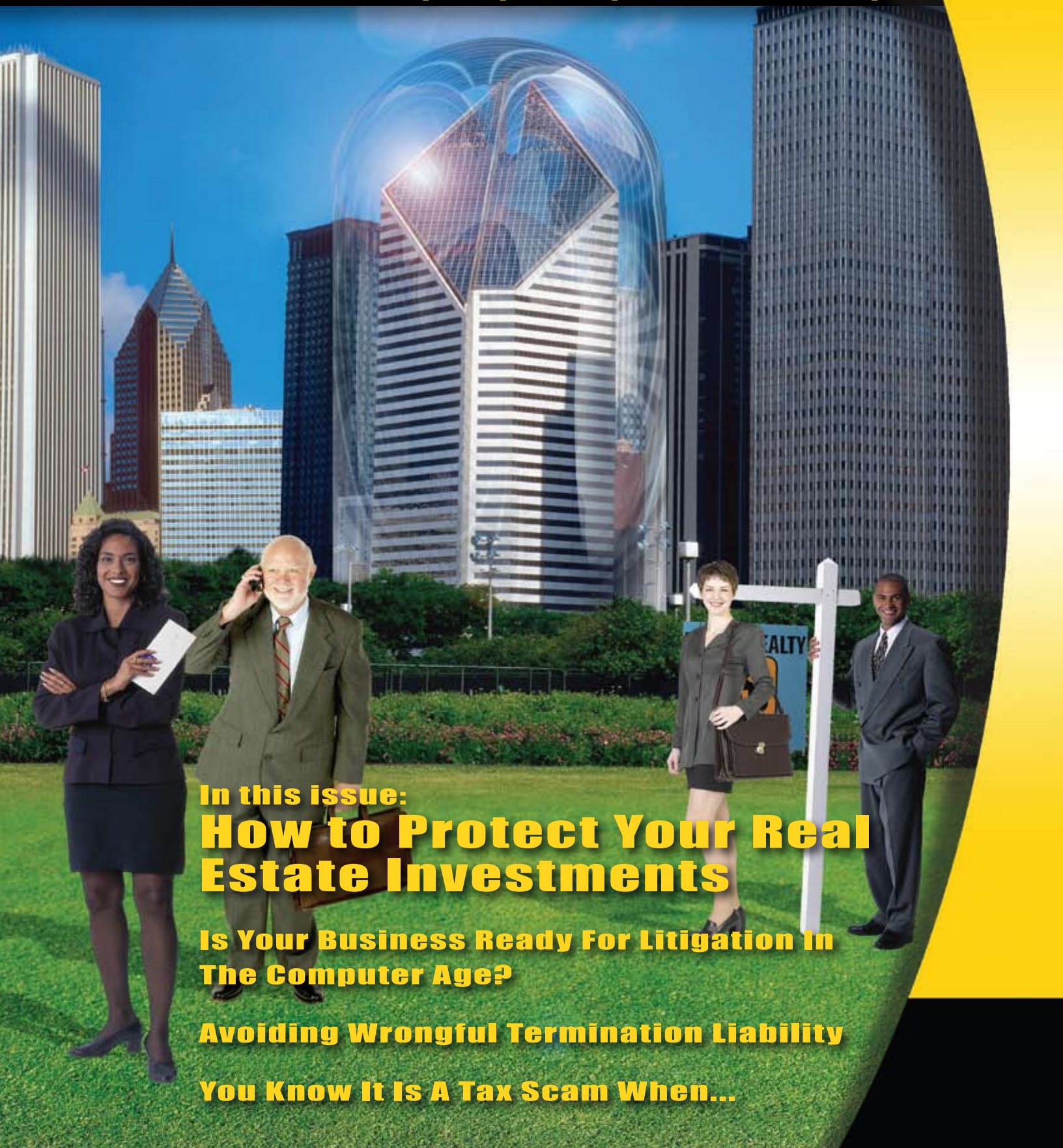

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Dear Friends and Colleagues:

Welcome to the 2008 edition of the 21st Century Law Magazine.

The downturn in our economy is a concern to many of us. The state of the financial markets, the mortgage crisis and the declining dollar have all created economic uncertainty. What the future holds remains to be seen, but during these uncertain times our team at RMKB is moving forward with a continued commitment to serving the needs of our clients.

Based on the kinds of matters we are handling, trends we are seeing in the business environment, and issues relevant to the current legal landscape, this edition of the 21st Century Law Magazine addresses a number of timely topics. As you read the following pages, you will notice a prevailing theme, which is that of safeguarding your business. No matter the type of business, you may be confronted with any one of the complex legal issues featured within. The cover story by Todd Wenzel and Jesshill Love delves into the importance of protecting real estate investments while Rob Andris' article navigates the litigation issues in an ever evolving technological world. Tom Clarke's piece provides an insightful look into detecting tax scams and Andy Wolfe addresses the issue of how employers can protect themselves against wrongful termination liability claims.

Additionally, we have highlighted a few things we've been up to as a law firm based on the current business climate. The featured "In-Box" columns showcase some of our firm's unique capabilities.

Finally, it is our hope that we have provided you with a resource that is valuable to you and your business. Although the future is uncertain, we here at RMKB look to forward to the challenges and opportunities it will present.

Sincerely,

Richard Wilson
Managing Partner
rwilson@rmkb.com

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AVOIDING WRONGFUL TERMINATION LIABILITY

By Andrew M. Wolfe

Employee terminations are, far and away, the Number One cause of lawsuits against employers. In California, it often seems like it's open season on employers. Why are there so many wrongful termination lawsuits? As soon as an employee gets fired, whatever loyalty that employee (we'll call him Joe) once had to his former employer will probably evaporate. Joe will almost always feel that the decision to fire him was unfair. He probably has bills to pay and mouths to feed. Angry, or afraid, or both, he recalls media stories about all the other ex-employees who filed lawsuits against their employers and got big money. He picks up the phone and starts looking for one of those lawyers who take wrongful termination cases on a contingency basis. There's a good chance his search will be successful.

Once he gets an attorney, Joe probably won't have much trouble coming up with a viable basis for bringing a wrongful termination lawsuit. Please note my use of the word "viable," rather than "valid." Joe's claims don't have to be true, just plausible enough to make it difficult and expensive for his employer to defeat.

What kind of claim can Joe and his attorney assert? Maybe "discrimination" - more than a dozen different forms of discrimination are now illegal, with the result that most employees are in at least one legally protected category. Maybe "retaliation" - if Joe exercised any one of a multitude of his legally protected employee rights shortly before getting fired (if, for example, he filed a workers compensation claim), he might plausibly claim that his employer fired him in retaliation for exercising that right. (The ease with which retaliation claims can be conjured up makes them particularly popular these days.) Maybe "whistle-blowing"- if Joe said anything before being fired that could be construed as a contention that his employer was acting illegally, he may claim that he's being punished for telling truth to power. And these are only some of the many claims that a skilled lawyer can craft in an effort to establish a viable basis for Joe's wrongful termination lawsuit.

All too often, my first contact with a client is a call from an employer who fired Joe for reasons that looked completely unassailable, who never expected to hear from him again, and who is now shocked to find itself the target of lawsuit in which Joe seeks astronomical sums of money for back pay, future economic losses, emotional distress and punitive damages.

Another familiar type of client is the employer who knows that keeping Joe on the job has damaged team performance and morale, but also knows that firing Joe might result in a lawsuit and will be an unpleasant experience the employer would very much like to avoid. Typically, this employer has been procrastinating about that deteriorating situation for a long time.

Simply stated, the solution is this:

Fortunately, there is an alternative to firing an employee who must be let go, one that greatly reduces the risk of liability and greatly reduces the stress on employer and employee alike. Simply stated, the solution is this: instead of just going ahead and firing Joe, negotiate a separation agreement with him. From the employer's perspective, the essential feature of the settlement agreements I recommend to many clients, and draft for them, is that Joe releases all of the claims that

he would otherwise have been free to assert in a lawsuit.

To obtain such a release, the employer engages in a negotiation with him, one that has been carefully planned to maximize the opportunity for a mutually agreeable outcome. As in all negotiations, the employer will usually need to give Joe an incentive to come to an agreement, and the size of that incentive will depend on the facts of the case. If Joe is someone who has been caught red-handed engaging in willful misconduct, he might be willing to sign such an agreement in exchange simply for allowing him to resign rather than getting fired for cause. On the other hand, if Joe has served the employer for a long time and isn't being terminated for unsatisfactory performance, a substantial severance payment may be warranted. Depending on the situation, there are many "bargaining chips" the employer may be able to use effectively in these negotiations and not all of them are monetary. Such bargaining chips may include, for example, a letter

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Ninth Circuit Limits Scope of California's Identity Theft Law

The United States Court of Appeals for the Ninth Circuit recently interpreted California's Identity Theft Law in *Satey v. JPMorgan Chase & Company*. The Court determined that the statute did not apply to an entity that no longer owns the debt alleged to have arisen from identity theft.

The plaintiff sued Chase for violations of the Fair Credit Reporting Act (FCRA), California's Identity Theft Law, the federal Fair Debt Collections Practices Act (FDCPA) and California's Fair Debt Collection Practices Act relating to a disputed credit card charge. The plaintiff reported to Chase that someone stole his credit card and made a charge without his knowledge. After investigation of the charge with the merchant, Chase deemed the charge legitimate. The plaintiff refused to pay the disputed charge, and the account became delinquent. Chase charged it off and subsequently sold the debt to Trilogy Capital Management. The debt was then purchased by Great Seneca Financial Corporation, which attempted to collect the debt from the plaintiff.

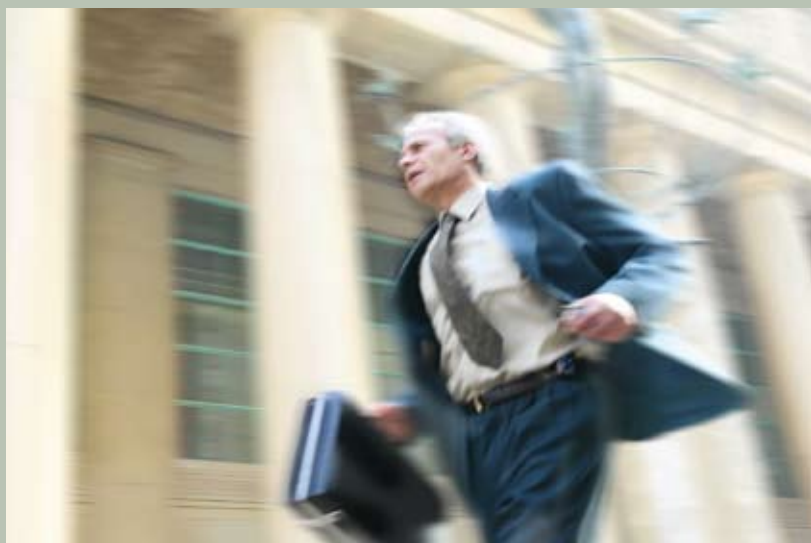
After Chase moved for summary judgment, the plaintiff abandoned his FCRA and FDCPA claims. The alleged bases for the plaintiff's claim under California's Identity Theft Law included improper credit reporting, improper investigation and improper sale of the disputed account by Chase. Chase argued that the plaintiff's claim under the identity theft law failed because it was preempted by the federal FCRA and that Chase was not a "claimant" under California's Identity Theft Law since it sold the debt prior to the lawsuit. "Claimant" is defined in the statute as a "person who has or purports to have a claim" that arose through identity theft. The U.S. District Court dismissed the claim under the California statute on the ground that it was preempted by the FCRA. The Court of Appeals affirmed, but on the ground that Chase was not a claimant under the statute.

According to George Weickhardt, a partner in the firm's San Francisco office who represented the defendant, "The court's ruling holds that claims under California's identity theft law can only be asserted against entities that presently own and assert a claim arising out of identity theft. Once a credit card issuer or other creditor has sold a debt, they can not be liable under the statute.

If you would like more information on this case, contact George Weickhardt at 415.972.6370 or via email at gweickhardt@rmkb.com.

Court of Appeal Rules on Insurance Liability Coverage Issue

The Court of Appeal of the State of California, Second Appellate District, Division Three ruled on an insurance liability coverage issue in *Fire Insurance Exchange, et. al. v. Giovanni Brambilla*. The trial court granted summary judgment in favor of FIE and concluded the insurer was entitled to reimbursement of all amounts it had paid to defend and to settle an underlying lawsuit filed against its insured Brambilla, who had been accused of molesting a neighbor's child, despite the fact that the minor had also accused Brambilla of "wrongful imprisonment" - a covered "personal injury" offense under the FIE policy.



In its declaratory relief action, FIE argued that 1) claims of sexual molestation are never covered under liability policies and 2) the minor's "wrongful imprisonment" claim did not trigger a defense obligation because said claim was inextricably linked and inseparable from the alleged molestation.

Brambilla appealed and contended that FIE was not entitled to reimbursement because he had never sought a defense under the FIE policy; FIE had acted with "unclean hands" when it had "colluded" with the minor's counsel while engaged in settlement negotiations; and FIE had settled the minor's lawsuit without his consent and as a "volunteer." The Court of Appeal disagreed and affirmed the trial court's decision by .concluding that FIE had met the requirements of the Blue Ridge decision and stated: (FIE) provided a defense at Giovanni's behest. It also fully, forthrightly, and repeatedly asserted its reservation of rights and offered Giovanni the chance to reject the settlement. Giovanni's consent to the settlement is irrelevant to the analysis and so his failure to consent is not evidence of unclean hands. This case represents a paradigmatic example of what an insurer should do when faced with a potentially mixed coverage case.

According to Marta Arriandiaga, a partner in the firm's Los Angeles office who represented FIE: "The court's decision underscores an insurer's right to settle an underlying case and then seek reimbursement of defense and settlement costs as attributable to non-covered claims."

If you would like more information on this case, contact Marta Arriandiaga at 213.312.2025 or via email at marriandiaga@rmkb.com.

Court Rules on First Known Case Regarding Infringement Through Use of Google AdWords

The United States District Court for the Northern District of California recently issued a ruling a trademark case arising out of internet-based advertising. *In Storus Corp. v. Aroa Marketing, Inc.*, District Court Judge Maxine M. Chesney ruled that the defendant, Aroa Marketing, infringed on Storus' trademark when it was used as a keyword for a sponsored link in the Google AdWords program. The plaintiff, Storus Corp., sells money clips with the registered mark SMART MONEY CLIP. Aroa Marketing also sells money clips and it purchased a Google AdWord that triggered an Aroa advertisement whenever a Google user searched under the key words, "smart money clip." Evidence showed that the advertisement was displayed more than 36,000 times and attracted approximately 1,400 clicks by Google users.

According to Rob Andris, a partner in the firm's Redwood City office who represented the plaintiff, "The Storus opinion is a logical extension of existing law in the Internet-based arena of trademark law known as initial interest confusion infringement. The doctrine was pioneered by the 9th Circuit Court of Appeals in a case dealing with the use of a competitor's meta-tags to attract higher search engine rankings and traffic to the infringer's web site. It has since been applied to domain names but has never been applied in the context of Google's AdWords program. This is a lucrative program for Google and one used by many small businesses."

If you would like more information on this case, contact Rob Andris at 650.780.1634 or via email at randris@rmkb.com.

Is Your Business Ready For Litigation In The Computer Age?

By Robert P. Andris

It is estimated that 90 to 95 percent of the information created and maintained by businesses today is done so on an electronic medium. In the face of this shift from paper records to electronic records, federal and state lawmakers have amended the rules of civil discovery to make it clear that information stored on computers must be preserved and made to be produced when it is potentially relevant in a lawsuit.

The lawmakers who drafted these new rules, fully understood that Electronically Stored Information ("ESI") differs in several major respects from paper documents. ESI comes in an intangible form which is both transient and persistent at the same time. Further, while paper documents could typically be located and confined to discreet areas within a business, ESI is typically found in several locations on and off the business's brick and mortar location. Further, while paper documents will typically only be destroyed by a deliberate act of the custodian of those documents, ESI is routinely the subject of automated deletions built into the computer system itself.

All Of The Information On Your Computer Is Now Discoverable In Litigation

The recent amendments to the Federal Rules of Civil Procedure specifically provide that all forms of electronically stored information are now discoverable. This includes any "... data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form ..." (FRCP, Rule 34(a).) Similar definitions are now in effect in Idaho, Indiana, Minnesota, Montana, New Hampshire and New Jersey. California, Illinois, Maryland, Nebraska, Ohio and Tennessee have similar rule changes in the works.

According to the new rules, not only are all forms of ESI discoverable, business owners are required to maintain and produce copies of that information found on individual employee's desktops, the company mainframes, and backup tapes, as well as that information found on employee's laptops, PDA's, home computers, and flash memory devices. Similarly, the rules specifically provide that both the visible and invisible data found on computers is subject to discovery. This includes not only the business related data found on a company's IT Systems, but also the invisible or "metadata" found on those systems.

From an etymological standpoint, the word "metadata" means "data about data". In the context of a camera, where the data is the photographic image itself, metadata would typically include the date of the photograph and details of the camera settings. In the context of an information system, where the data is the content of various computer files, metadata about an individual data item would typically include the name of the field and its links.

Early Assessment of IT Systems And Litigation Holds

Most companies produce an overwhelming number of emails and other electronic data on a daily or weekly basis. In the event of litigation, all of that ESI is potentially subject to discovery. In order to avoid breaching their duty to preserve electronic evidence, businesses should give serious consideration to developing a records retention policy before litigation begins. A records retention policy can be implemented to regularly, systematically eliminate information that is no longer useful or necessary.

Once a company has received notice that a lawsuit has been filed against it, the company is not required to perform a thorough assessment of its IT systems in order to identify where discoverable information might be and then develop a plan to work with its IT professionals and other employees to preserve that data until needed in the lawsuit. These attempts to identify potentially discoverable information or "Litigation Holds" are important because the rules provide:

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. (FRCP, Rule 37(f).)

Early assessment of one's IT systems also allows a business to identify information which it considers to be "not reasonably accessible." More specifically, the new federal rules provide that a party is not obligated to provide ESI from sources that the party identifies, early in the litigation, as being "not reasonably accessible because of undue burden or cost...". (FRCP Rule 26(b)(2).) In order to make such a showing, a business owner should be ready to explain: what type of data is found in the source in question (e.g., backup tapes), where that same data might be found in a more accessible location (emails archives specifically for the lawsuit in question) and the burden or cost of producing the data in question.

Bear in mind that a records retention policy, including specific provisions for handling ESI, must be grounded in both legal and defensible business-related considerations. A records retention policy also works to limit allegations of intentional destruction, alteration or concealment of evidence (i.e., spoliation of evidence). If routine destruction of data is effected pursuant to a pre-existing and reasonable retention policy, the destruction will probably not be considered spoliation. However, if a lawsuit is pending or threatened, strict adherence to a retention policy is not a defense if that

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policy would result in the destruction of discoverable information.

A records retention policy should be communicated to all relevant employees and compliance should be monitored and enforced with regular audits. Selective or inconsistent enforcement of a policy brings its own risks and has exposed organizations to substantial sanctions.

It is also important to note that, when considering the creation of a records retention policy, a company's policy should be regularly reviewed and updated. As most businesses are well aware, significant changes in technology can occur within short periods of time. A periodic review of a records retention policy will prevent both overloading a company's IT systems and the inadvertent loss of ESI that was not considered at the time the policy was initially drafted.

The burdens imposed by these new rules of civil discovery are simply a reflection of the laws' need to keep up with the complexities of today's technologies. As our society continues to expand its technological capabilities, businesses and other litigants must also evolve and adapt their record keeping and retention policies to make sure that critical information can be located and preserved in the face of litigation. At bottom, so long as businesses are aware of their obligations and make a reasonable attempt to balance the demands of the market place against the demands of litigation, they will be ready and able to respond when necessary to those demands.

Robert P. Andris is an intellectual property, trade secrets, product liability and complex business litigator, who is a partner in the firm's Redwood City office. He can be reached at 650.780.1634 or randris@rmkb.com.

Avoiding Unlimited Termination Liability (Cont. from pg 7)

of reference for Joe, a commitment not to contest his unemployment insurance claim, a continuation of his insurance benefits, or allowing him to keep designated company property (such as his laptop, company car or cell phone).

The separation agreement should also be carefully drafted to resolve other important aspects of ending the employment relationship, like protecting the employer's trade secrets and deciding whether the agreement is to be kept confidential.

Seeking such an agreement isn't appropriate in every case. Sometimes the employer will conclude it's better to fire Joe in order to vindicate an important principle - for example, to "make an example" of Joe for engaging in willful misconduct. And, of course, terminating Joe by means of a negotiated separation agreement is apt to take more time and cost more than firing him ... in the short run.

But in many cases there are substantial benefits in the long run. A negotiated separation agreement usually is less stressful to achieve, minimizes the risk of future litigation, and is much less expensive than litigation. (Even if Joe loses his lawsuit, the employer's defense costs if the case goes to trial will usually be far in excess of $100,000.)

In deciding whether or not to terminate an employee by negotiated agreement, a critical factor to assess is the risk of litigation. In most cases, that risk will increase with the status of employee who's being let go. If Joe is a high-level executive, he'll be much more likely than an entry-level employee to react to being fired by bringing a lawsuit, and he'll be able to claim much larger economic damages.

When offered an opportunity to leave his job by negotiated agreement rather than by getting fired, Joe rarely passes up the opportunity and rarely negotiates so unreasonably that an agreement cannot be reached. Employers are often surprised when I tell them this, but there are sound reasons why it is so. Joe almost always wants to avoid getting fired. Leaving his job pursuant to an agreement allows him to leave with his dignity (and his resume) intact. And negotiating that agreement gives him some say in how the termination will occur. Indeed, such negotiations often produce "Win-Win" outcomes - ones that are much more beneficial to Joe than being fired and that allow his employer to reduce its workforce in an optimally considerate and effective manner.

For these reasons, when the time comes to terminate employees, employers would do well to consider the option of negotiating separation agreements.

Andrew M. Wolfe, a partner in RMKB's San Francisco office. For many years he has been advising employers concerning safe employment termination practices and defending employers in wrongful termination litigation. He can be reached at (415)972-6352 or awolfe@rmkb.com.

RMKB IN BOX

RMKB's Real Estate Group Poised to Handle Mortgage Foreclosure Litigation

The fallout from the mortgage crisis is expanding beyond just the sub-prime sector as home prices decline and bank lending standards become more stringent. According to RMKB Partner Richard Charnley, "The focus thus far has been on the sub-prime sector. However, the more perplexing problem is the rise in prime delinquencies. We are watching this looming legal front as borrowers, brokers and investors may all be caught up in the litigation frenzy." RMKB's team of real estate attorneys have extensive experience in representing real estate, mortgage and appraisal professionals in the defense of matters involving misrepresentation, negligent loan practices, breach of fiduciary duty, fraud and other issues. The firm's expertise in this arena spans across all of its offices, including Boston, Los Angeles, New York, Redwood City, San Francisco and San Jose.
For more information, contact Richard Charnley at:
rcharnley@rmkb.com

How to Protect Your Real Estate Investments

By Jesshill E. Love, III, Esq. and Todd J. Wenzel, Esq.

The real estate market continues to attract people to invest in various types of properties, from single-family homes to commercial real estate. Keep in mind that once a property has been purchased, there is still work to do.

Although real estate investors may make substantial profits from rental income and gains when the properties are sold, these opportunities can be dashed by exposure to liability. This article discusses how to set up a real estate investment team, details about the preferred business entity to use to purchase and mange your investment, and devices to protect your real property investment.

Things to do before you buy:

First and foremost, a real estate investor must have the right mindset from the beginning. Like buying a business, real estate investing is "hands on" endeavor. As an investor, you are putting a lot of eggs into one basket and you should keep a close eye on that basket at all times.

Next, make sure that you have the right team in place before you buy. Your team is comprised of your real estate agent (or broker), the lender, the title company, the property inspector, a real estate attorney, insurance agent, and possibly a property manager. Any chain is only as strong as the weakest link, so make sure that all of the members of your team are experienced with real estate investment transactions.

Every investment deal is different and needs to be analyzed carefully. Make yourself accountable to review everything about the deal from top to bottom and from start to finish. Your team members can help you here. For instance, a certified inspector must be retained to inspect every property you buy. You should not rely upon the inspections or representations of others.

Any chain is only as strong as the weakest link, so make sure that all of the members of your team are experienced with real estate investment transactions.

Read everything yourself and ask your questions. This includes but is not limited to the disclosure package comprised of the Seller's Transfer Disclosure Statements ("TDS"), Seller's Agent disclosure, all reports, tenancy estoppel certificates, and loan documentation.

Procure proper insurance. Although tempting, do not "skimp" on insurance for your properties. Investment property brings liability. Attributes such as parking lots, laundry rooms, staircases, and tenants all bring with them their respective liabilities. Adequate insurance coverage is an absolute must! Your insurance professional team member can further protect your hard earned assets.

Set up a business entity to protect your investment:

Before or even after you have purchased your investment property, the real estate investor should consider forming a business entity to own and operate the property. The law provides several options on real estate investment entities. A corporation can offer you personal liability protection, but it will not necessarily give you any tax advantage. A partnership may offer tax advantages, but will not protect you from personal liability.

A limited liability company, or LLC, is presently the favored asset protection vehicle for most real estate investors. An LLC combines the best attributes

of a corporation and a partnership. With an LLC, the investors' personal assets, including the primary residence, are generally protected from claims by creditors of the LLC. The investors gain personal liability protection, tax advantages, and other benefits.

Setting up an LLC is a relatively simple task. While the common layman can fill in and file all the necessary forms, it is recommended that an experienced attorney be retained to perform this important undertaking. Be wary of on-line sites that offer LLC incorporation for a flat low fee. Although these sites provide a seemingly economical option, they fail to provide the requisite level of personal attention needed to properly prepare the LLC Operating Agreement. The Operating Agreement is the written document that controls the operations of the LLC, and the LLC is only as good as its Operating Agreement. The proper expertise in drafting the Operating Agreement will pay dividends down the road when it comes time to "buy out" a member of the LLC, dissolve the corporation, distribute profits, or appraise individual member's shares for sale or transfer. The amount saved on future litigation expense and headache is well earned by retaining an attorney for this task.

Separate LLCs should be used for each investment property purchased. This helps to ensure that liability against one property becomes self-contained. While there are separate maintenance fees to be paid to keep each LLC in "good standing," savvy investors gladly pay such fees for each LLC in order to contain liability relative to each investment.

Remember Estate Planning

Equity in your real property investments can be drained during probate if proper steps are not taken in advance. Various trust vehicles are available to lessen tax implications and other fees that encumber the transfer of property upon the death of an owner. Consult an estate planning specialist to establish the appropriate mechanisms to avoid lengthy probate actions and transfer costs.

By taking appropriate steps in the context of asset protection, the real estate investor can enjoy the longtime benefits of owning investment property. There is an old adage in the context of real estate investing: work hard to buy and take care of your properties and, in time, your properties will take care of you.

Todd J. Wenzel and Jesshill E. Love, III are partners in the Real Estate Practice Group of RMKB. Mr. Wenzel is based in the firm's San Francisco office and his practice focuses on real estate litigation and transactions, including landlord-tenant disputes, construction litigation and business transactions and disputes. Mr. Love resides in RMKB's Redwood City office and his practice focuses on commercial litigation with a wide range of experience litigating real property issues in both State and Federal Courts. Mr. Wenzel can be reached at 415.972.6316 and Mr. Love at 650.780.1611.

RMKB IN BOX

GOT LEGAL BILLS?

Legal fees can significantly impact a company's bottom line. How do you know if you got what you paid for? Our firm's expertise in this area is spearheaded by Gerry Knapton, who is recognized as one of the preeminent experts in legal fee disputes. For more than 15 years, Gerry has reviewed bills and work product, now exceeding two billion dollars representing both opponents and proponents -- in separate matters. He has qualified and testified in more than 35 cases relating to allocations, hourly rates and the reasonableness and necessity of legal fees. Gerry was previously the chair of the California State Bar Committee of Mandatory Fee Arbitration and was a principal drafter of the new State Bar Retainer Agreements. He has authored a number of articles on the legal fees and was most recently published in California Lawyer on the topic of obtaining interim fees.

For more information or to obtain a copy of Gerry's article, please contact him at gknapton@rmkb.com.

YOU KNOW IT IS A TAX SCAM WHEN ...

By Thomas H. Clarke, Jr.

Tax scam artists and "tax protestors" preach that federal income taxes do not have to be paid because the 16th Amendment to the Constitution (authorizing the income tax) has not been properly ratified, the Internal Revenue Code was never properly enacted by Congress, or the Internal Revenue Service was never properly constituted by either Congress or the Department of the Treasury and is therefore operating as an "illegal" entity. They should be so lucky. In truth, prison sentences are frequently the only benefit that flows from their "creative thinking."

In recent years, much more sophisticated strategies have been advocated, for example Son of BOSS, and sold for very lucrative fees to wealthy victims. The siren songs of tax avoidance are hard to resist. Because these tunes have come from those bearing the aura of respectability — major accounting firms, banks, investment advisors, charitable organizations, and law firms — even very sophisticated business people has been fooled into believing these tempting yarns.

While most professionals are not only hard working but also honest and ethical, a few bad apples definitely can spoil the barrel.

How to tell the rank from the real? Keeping safe does not require delving into the esoteric minutiae of the tax code and its mind-numbing regulations.

Many recently discovered schemes have similar warning signs and features of flimflam, such as those described below. Here are characteristics to heed and some questions you should ask before "taking advantage" of a tax avoidance strategy, device or product being advocated or sold by your professional:

· Your accountant's fee is tied to a percentage of the tax savings generated by the strategy, device, or product that is being recommended. [And you thought contingency fees were only for personal injury lawyers representing economically challenged clients.] As the knights were wont to say in 'Monty Python & the Quest for the Holy Grail': Run away. Such fee arrangements are often illegal or unethical, or both.

Ask the professional to guarantee that the strategy, device, or product is legitimate, to wit, they will refund their fees plus pay any interest and penalty charges incurred by you if the IRS disallows the strategy, device, or product.

· The strategy, device, or product recommended to you generates losses that just happen to the match the gain or income you would like to shelter. Miracles hap pen in the Bible, but not in the tax code. Again, run away.

· The lawyer's opinion letter contains phrases like "more likely than not" when describing the Internal Revenue Service's response to the strategy, device, or product, for example, this approach, more likely than not, will not be deemed an abusive tax shelter under the Code. Yes, that is really comforting. Opinion letters should describe why the strategy, device, or product meets legal requirements, and what are the possible risks based on statutes, regulations, and court opinions. Civil evidentiary standards (more likely than not) are what you need to worry about when you are being sued by the IRS.

· Ask if the strategy, device or product is always "blessed" by an opinion letter from the same law firm. If so, be very suspicious. You are probably getting a canned opinion full of boilerplate phrases, and not an independent evaluation tailored to your unique financial circumstances. Run away.

· Ask if any other law firm, beside the usual one, has given its blessing to the same strategy, device or product, and obtain a copy of both opinion letters. Compare them. There should be differences in their analysis because the types of tax avoidance schemes being advocated are usually pushing the envelope; intelligent minds should differ. If there are no differences, be very suspicious.

· Ask a second accounting firm if they agree that the strategy, device, or product is legitimate. If they have doubts, be sure and run away.

· If serious money is involved (you wouldn't be reading this column if it were not), ask the professional if they use the strategy, device, or product themselves, and to prove it to you by providing certified financials or copies of their tax returns. If they are not willing to put their money where their mouth is, run away. They may also be incredibly stupid or believe their own propaganda; after all, some professional firms have separate sales units. You are frequently not talking to the "genius"

that dreamed this one up. So do not rely on this approach alone. Look for the other danger signs also.

· Ask the professional to guarantee that the strategy, device, or product is legitimate, to wit, they will refund their fees plus pay any interest and penalty charges incurred by you if the IRS disallows the strategy, device, or product. If they are not willing to stand by their recommendations, be very suspicious. Even if they are, get it in writing and make sure that the professionals have errors and omissions insurance in satisfactory amounts. Have your own lawyer draft the guarantee so that it is as all-encompassing as possible; include personal guarantees from the professional as well as guarantees from his/her business entity/employer. Serious money (yours, of course) and serious fees (what they charge) demand serious guarantees, especially given the express or wink-wink implied assurance that substantial taxes will be avoided. Remember, in the worst of all worlds, you are risking a felony. And your new prison buddy Bubba can be a lot more of a pain than the loss of a few dollars to the Treasury.

· Since you got burned on the last strategy, device or product that was sold to you because the IRS classified it as an abusive tax shelter, your professional wants you to try the new and improved model this year. Come on, even children learn not to get burned playing with matches. If you want to play the sucker, buy some phony pills from an Internet spammer.

· Phrases are tossed your way harken back to the baloney of the tax protestors, such as "so sophisticated the IRS is not aware of it", "too new for most accountants to be cognizant of", and "the product of our in-house geniuses in (pick a City)". Run very fast.

While it is easy to laugh, or cry, about the never-ending tax avoidance schemes foisted on the successful and fortunate, the rules of thumb described above reflect very real warnings and red flags. Applying them can help you steer clear of abusive tax shelters and their promoters, such as those that have been documented in court cases and Congressional and IRS investigations in the recent past. With the federal deficit looming ever larger, the IRS is evermore vigilant about abusive tax shelters; the risks to taxpayers are also huge, as the very substantial penalties in the Son of BOSS schemes recently have demonstrated.

The key is to avoid being burned. Get second opinions. Keep in mind the old saying that if it sounds too good to be true, it probably is. But, if you are burned, do not let embarrassment or shame deter you from seeking recompense for the incompetence and often outright fraud to which you have been subjected. Promoters count on your feelings of shame to hide their ill gotten gains. Like all forms of abuse, such conduct is best addressed by seeking compensation.

Thomas H. Clarke, Jr., is a partner with RMKB, and represents individuals and businesses in civil and criminal litigation involving fraud, unfair business practices, false advertising, pollution, toxic torts, business and real estate contracts and transactions, Sarbanes Oxley compliance, data privacy, and the rights of uniformed military personnel. He can be reached directly at tclarke@rmkb.com and 415-972-6387.

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Boston

RMKB is proud to announce the opening of our newest East Coast office

The beginning of 2008 marked not just a new year but also the opening of the firm's Boston office. Headed by native Bostonian Lita M. Verrier, a partner specializing in complex business and high technology litigation, this office is RMKB's second East Coast location, and a testament to the firm's focus on expanding in strategic geographic markets. According to Managing Partner Rick Wilson, "Boston is a leader in the technology and biomedical industries, second only to the Silicon Valley, and key practice areas for our firm. Lita's extensive experience in these markets coupled with her deep ties to the local business community creates the ideal growth opportunity." The Boston office is located at 60 State Street, Suite 700, Boston, Massachusetts. For more information, contact Lita Verrier at lverrier@rmkb.com.

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