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Inside this Issue



Protecting Business Identity
PG. 2



CONGRESS ADDS TEETH TO THE SCRA
PG. 4



Dodd-Frank Act Continued
PG. 5



Banking Practice Group
PG. 6

The Federal Government's Response to the Financial Crisis: *The Dodd-Frank Act*



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Overview

Last summer the Dodd-Frank Act was passed with an effective date of July 22, 2010. The Dodd-Frank Act encompasses over 2,300 pages containing fifteen separate chapters. The chapters

include: Too Big to Fail, Executive Compensation, Insurance, Hedge Funds, Consumer Financial Protection, Mortgage Reform, Orderly Liquidation, Wall Street Transparency and Accountability, Payment, Clearing and Settlement Supervision, among others.

While the Act has an effective date of July 22, 2010, the biggest impact of the legislation will not be felt until adoption of the regulations directed to be issued pursuant to the Act's provisions. Many of the regulations will not be issued for one to two years or longer. As of January 3, 2011, there have been over 1,000 pages of

new regulations issued, 360 pages of final rules, 33 notices of proposed rulemaking, 2 interim rules, 1 order, and 2 requests for comment. By some estimates there will be over 5,000 pages of rules eventually issued pursuant to the Act. With such a volume of legislation and rulemaking, there will likely be books written about the Dodd-Frank Act. A comprehensive discussion is not possible in a newsletter forum, but some recent developments are set forth below.

Bureau of Consumer Financial Protection ("CFPB")

Title 10 of the Dodd-Frank Act transfers primary oversight of consumer protection laws to the CFPB on July 21, 2011. Some of the laws it will oversee include: Truth-in-Lending, Real Estate Settlement Practices Act, the Equal Credit Opportunity Act, Truth-in-Savings, Electronic Fund Transfer Act, Fair Credit Reporting, and the privacy provisions of Gramm-Leach-Bliley, among others. The CFPB is directed to review every consumer protection law at least once every five years and allow public comment on the law during that time period.

Continued on pg. 5

Protecting Business Identity:

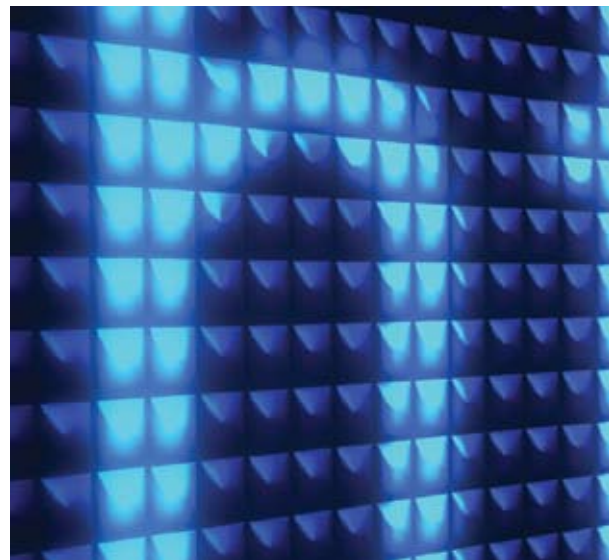
IP categories for better understanding your exposure



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For many business enterprises and entrepreneurs, public recognition of several factors surrounding their products and businesses make up their overall business identity. These factors include (1) their business or trade names; (2) trademarks or service marks associated with their products; (3) patents covering their technologies; (4) trade secrets regarding business operation, technologies, and know-how; (5) their domain names; and (6) their presence in social media. In this new era of openness and connection through six-hundred-million Facebook membership and WikiLeaks, what is your particular strategy to protect your business identity and trade secret from being infringed upon or otherwise usurped? One step further, have you come up with a sustainable business plan to allow your active participation in the changing norms and values, whether economic or otherwise? Understanding a couple of fundamentals playing key roles would be at least a good starting point.

1. Business / Trade Names. In Minnesota, no person may conduct or transact a commercial business under any designation, name, or style, which does not set forth the true name of every person interested in such business unless such person has filed in the Office of the Secretary of State, a Certificate of Assumed Name, setting forth the business name under which the business is conducted or transacted. However, filing a Certificate of Assumed Name does not provide a user with exclusive rights to that name and the Secretary of State is required to accept for filing all Certificates of Assumed Name so long as they are accompanied by the filing fees, notwithstanding the fact that the assumed name applied for may not be distinguishable from one or more other assumed names already filed with the Secretary of State. This does not mean that a person may use or file a Certificate of Assumed Name with an assumed name that is similar to or likely to confuse consumers with respect to (i) names of corporations, limited liability companies, limited liability partnerships, cooperatives, or limited partnerships used or reserved in Minnesota by another person; or (ii) trademarks or service marks registered with the Secretary of State. A few noticeable caveats include:



(a) names of incorporated or registered business entities are protected by both sets of statutes: one governing their charter (i.e., Minn. Stat. Ch. 302A for Minnesota Business Corporations), and the other governing the assumed names, unfair competitions, or unfair practices; (b) incorporated or registered business entities should not conduct or transact businesses in Minnesota under a trade name without registration if such trade name is not the chartered name or indistinguishable from the names of other incorporated or registered business entities; and (c) it is recommended to regularly check with the Office of the Secretary of State to monitor or screen infringement of your trade name.

2. Trademarks / Service Marks. Both Minnesota law and federal Trademark Act provide for separate grounds for creating and protecting trademarks and service marks associated with your goods and services. The common elements under both Minnesota law and federal law for trademark include that: (i) use, but not the registration, of a mark creates legal rights to the mark; (ii) first in time is first in right; (iii) the owner of a mark registered under the central register system may sue for statutory injunctive relief; and (iv) the owner of a mark registered under the central register system may recover (A) the infringer's profit; (B) actual damages; (C) treble damages; and (D) attorneys' fees. The primary distinction



between protection under Minnesota law and the federal Trademark Act lies in the scope of geographic protection. A trademark registration with the United States Patent and Trademark Office creates national rights and the registrant obtains priority throughout the entire United States upon registration. For instance, any other person who began his or her use of the same mark in Iowa and Wisconsin after such registration by the registrant is barred from using the mark when the registrant commences business in Iowa and Wisconsin even if the registrant's first use was solely in Minnesota and started using the mark later than the third party infringer in Iowa and Wisconsin. Subject matter or format of trademark or service mark protection may include: (1) letters, words, and numbers; (2) letters, words, and numbers with graphic, color, or design elements; (3) color alone; (4) sounds; (5) scents; (6) touch; and (7) trade dress. Trade dress covers the appearance of products, appearance of product packaging, and overall impression presented to the public by a business and is one of the fast evolving areas in trademark law.

3. Trade Secrets vs. Patents. Minnesota has

adopted the Uniform Trade Secrets Act under which actual or threatened misappropriation may be enjoined by an injunctive relief and the aggrieved party may be granted actual damages, unjust enrichment caused by misappropriation, punitive damages, and attorney's fees. To constitute a trade secret, the information (i) must derive independent economic value from not being generally known to other persons who can obtain economic value from its disclosure and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. In other words, the Minnesota law does not protect your information regardless of its confidential value if you have not been exercising reasonable efforts to maintain its secrecy. It is noteworthy that any invention with respect to which a non-provisional federal patent application is filed fails to satisfy the second prong of the Minnesota definition for a trade secret. It is not an uncommonly tricky question to entrepreneurs whether to keep certain know-how under trade secret protection which is a permanent protection, at least in theory, or to cover the same under a patent issued by the United States Patent and Trademark Office, which then lasts for 20-years subject to certain exceptions. In addition, any patent application which ends

up being rejected by the examiner will not be suitable for protection under the Uniform Trade Secret Act.

4. Domain Names. Someone's domain names may invoke others' trademarks or service marks. On the other hand, in certain industry areas, especially retail distribution or service sectors, domain names may be used in a source identifying manner and may represent or constitute service marks eligible for protection under Minnesota state trademark law and federal Trademark Act. Domain name disputes have been resolved on the grounds of (i) general statutory provisions and common-law theories including likelihood of confusion and dilution; and (ii) special provisions under the federal Trademark Act mainly designed to root out bad faith attempts to register domain names using others' pre-existing tradenames or trademarks. Under the domain name provisions of the Trademark Act, a person will be liable for registering or using a domain name that is identical or confusingly similar to a pre-existing trademark or service mark of another person and such person has a bad faith intent to profit from such mark.



CONGRESS ADDS TEETH TO THE SCRA



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Foreclosures on properties owned by service members have always been difficult, both from a legal and public relations perspective. However, in reaction to some egregious cases by major lenders, the Legislature has increased protections for service members and made the consequences for an unwary lender more severe.

The Servicemembers Civil Relief Act (SCRA) has long held that a foreclosure or sale made during a servicemember's military service, or 90 days thereafter, is simply invalid. (50 U.S.C. App 533.) What was less than clear, was what happens if such a foreclosure or sale takes place in violation of that rule. Banks have typically argued, with mixed success, that the SCRA did not create a private right of action. In other words, while the law has been violated, the mortgagor/servicemember had no recourse.

The controversy came to a rather public head in the case of Hurley v. Deutsche Bank Trust Company Americas, in the Western District of Michigan (Case No. 1:08-CV0361) Deutsche Bank foreclosed on Sergeant James Hurley's house in violation of the SCRA. Hurley's National Guard unit has been mobilized and deployed to Iraq for over a year. Meanwhile his home was foreclosed on and sold by the Deutsche Bank Trust Company Americas after the expiration of the 180 day redemption period. Hurley came home to find his wife and children evicted; his home sold and himself subject to deficiency judgment. (Legislative hearing before the House Committee on Veterans Affairs, September 23, 2009.)

Naturally, it wasn't long before Hurley found a lawyer specializing in such cases and sued Deutsche Bank. Deutsche bank successfully moved to dismiss, based on the argument that SCRA created no private right of action.

In 2010, a divided Congress was able to come together to close that loophole. The SCRA now makes it clear that "any person aggrieved" by a violation of the SCRA has a private right of action and may obtain equitable or declaratory relief including monetary damages, punitive damages, and reasonable attorney fees. (50 U.S.C. App. 597a.)

At the same time, congress authorized the Attorney General to enforce the SCRA in federal court in cases involving a pattern or practice of violations or incases that raise an issue of significant public importance. Civil penalties include fines up to \$55,000.00 for a first violation and \$110,000.00 for any subsequent violations. (50 U.S.C. App. 597b.) Given recent vilification of foreclosure tactics, and politician's tendencies to rally around servicemembers, we may see the Attorney General taking on such cases.

Fortunately, avoiding SCRA pitfalls is not as complicated as it may seem. The Department of Defense maintains a web site which allows the public to determine the service status on any borrower, so long as you've got a full name and birth date to social security number. You can find the site here: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.

Dodd-Frank Act Continued

The CFPB implementation team has been put in place to set up the agency. Presently the agency has 342 employees, but is expected to increase that number to 1,255 employees by 2012. Its budget is expected to increase from \$134 million in 2011 to \$329 million in 2012. It has signed a Memorandum of Understanding with the Conference of State Bank Supervisors to establish a foundation of state and federal coordination and cooperation for supervision of providers of consumer financial products and services. The goal of the memorandum is to promote consistent examination procedures and minimize the regulatory burdens on financial institutions.

The CFPB will enforce consumer financial protection laws with respect to insured depository institutions with more than \$10 billion in assets. Below that level community banks will be subject to CFPB's rules, but enforcement will remain with the primary federal regulator for those community banks.

The CFPB while still in its organization planning phase has launched a website: www.ConsumerFinance.gov. The site includes information regarding the organization of the CFPB as currently proposed. It is expected to contain additional information concerning the CFPB as it becomes available in the future.

FDIC Assessment Issues

The Dodd-Frank Act mandates the FDIC to define "assessment base" for purposes of FDIC premium payment purposes. In early February, 2011, the FDIC Board approved a final rule that changes the assessment base adopting a new large-bank pricing assessment scheme and setting a target size for the deposit insurance fund ("DIF"). The final rule combines proposals which were issued in November with an October proposal on the DIF. The changes go into effect at the beginning of the second quarter and will be payable at the end of September. The DIF target size is 2% of insured deposits. In lieu of dividends, a lower assessment rate schedule will be implemented as the fund reaches certain thresholds.

The assessment base is changed from adjusted domestic deposits to a bank's average consolidated total assets minus average tangible equity. Tangible equity is defined as tier one capital. The rule lowers the overall assessment rates in order to generate the same approximate amount of revenue under the new larger base. The rule is intended to be revenue neutral from an overall perspective, but is expected to increase the share of assessments paid by large institutions which was the intent of Congress as mandated in the Dodd-Frank Act. Based on third quarter 2010 data, the FDIC expects the share of overall dollar assessments paid to the FDIC to increase from 70% to 79% for banks over 10 billion and from 48% to 57% for banks over 100 billion. Only 84 banks with less than 10 billion in assets are expected to pay higher assessments.

services, governmental entities, government sponsored entities and the Federal Home Loan Bank. A proposal from the FDIC on implementing its liquidation authority has recently been issued.

Transfer of Office of Thrift Supervision Authority

Also in early February, the OCC, OTS, FDIC and Federal Reserve issued four joint proposals that create one universal system of regulatory reporting for all insured depository institutions. The first proposal discontinues the use of the Thrift Financial Report. Beginning with the March 31, 2012, reporting, universal use of the call report is proposed. A second proposal requires savings associations to file data through the FDIC's summary of deposits beginning with the end of second quarter 2011 report date. This proposal would eliminate the OTS'



Orderly Liquidation Authority

One of the sections of the Dodd-Frank Act deals with orderly liquidation of failed institutions. The Dodd-Frank Act permits the FDIC to liquidate covered financial companies including bank holding companies, non-bank financial companies supervised by the Fed, and those entities predominantly engaged in activities supervised by the Fed. Excluded from the liquidating authority are farm credit

branch office survey. Another proposal requires savings and loan holding companies to file to the Federal Reserve the same report as bank holding companies beginning with the end of the first quarter 2012 report date. This may lead to the reporting of savings and loan holding company information which was not previously available. The fourth proposal eliminates the collection of monthly median cost of funds data from savings associations as of the end of 2011.



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