

Resolving Deadlock in Privately Held Businesses

Many privately held businesses are owned in equal shares between two owners who operate without a shareholder agreement. This arrangement is fine so long as the owners agree about everything. When owners disagree about a material issue facing the business, they face the disruptive and potentially ruinous effect of shareholder or owner deadlock. A well drafted shareholder agreement or operating agreement ("Agreement") is a means of avoiding deadlock and resolving ownership issues without litigation.

Any Agreement should provide a management structure to avoid deadlock before it can occur. For example, there can be an uneven number of board of directors with an independent director casting the deciding vote. A limited liability company ("LLC") can achieve the same result with an uneven number of LLC managers. If this is not practical, the Agreement, in tandem with a voting trust agreement can concentrate voting control with one person on significant issues. If the arrangement is not too disruptive and each owner possesses equivalent knowledge and ability to manage the business, the

voting control can be alternated each year or every other year.

Disputes may nonetheless occur even if the parties thought they contemplated everything. Any Agreement should provide direction about the manner of resolving disputes.

For example, mediation may be conducted by managers in the business with adequate knowledge about the source of the dispute.

Alternatively, arbitration, with specific criteria about the manner in which the arbitration will be conducted (AAA for

example) and the affect of the arbitrator's decision (whether binding or non-binding) may help resolve a dispute.

Another option might be a mandatory buyout provision if the owners are not able to work together going forward. Finally, the Agreement may provide an option compelling the other party to buy an interest – or, alternatively, a push-pull option giving the other party the right to buy but requiring them to sell if the offer is not accepted.

*by Kenneth W. Clingen and
Deven S. Kane*

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A Decision to Watch: *Credit Suisse v. Billing*

A group of investors has sued the world's most prominent and powerful underwriting firms — including Goldman Sachs, Morgan Stanley, and JP Morgan Chase — or violating federal antitrust laws by artificially inflating the share prices of initial public offerings (IPOs) in the late 1990's. The case, *Credit Suisse v. Billing*, is now before the U.S. Supreme Court and could have far-reaching implications for any business or employee in the United States who owns equities.

The plaintiffs in *Credit Suisse v. Billing* are investors of technology related IPOs in the late 1990's. They contend that the underwriting firms conspired to artificially inflate prices for the IPO shares by demanding various tie-in arrangements from initial purchasers. For example, an underwriter might agree to sell an IPO to a purchaser at a low price. However, in order to purchase shares at that low price, investors must also agree to purchase additional shares at a vastly inflated price. This technique, called “laddering,” is used to ramp up the price of an IPO in the open market.

The plaintiffs claim to have purchased aftermarket securities at prices inflated by the underwriter's illegal manipulations. As a result, they lost millions when the artificial stock prices fell to a corrected level. They have sued the underwriters alleging that laddering and other tie-in arrangements violate the Sherman Act and the Robinson-Patman Act.

The underwriting firms argue that they have “implied immunity” from claims under these federal antitrust laws.

According to underwriters, Congress gave the SEC the sole power to enforce the laws against illegal laddering. They note that the SEC balances the interest of competition with the interests of investor protection and capital formation.

The outcome of *Credit Suisse v. Billing* could have monumental implications for the underwriting industry and the stock

market. A ruling in favor of the plaintiffs could expose Wall Street underwriting firms to massive legal damages from those who have suffered financial losses. CC&M will continue to monitor this significant decision due to the dramatic impact it could have on the United States' financial markets.

by Gregory P. Adamo

FIRM HIGHLIGHTS

The highly regarded *Illinois Bar Journal* will publish an article by **Kenneth J. Vanko** on liquidated damages in May 2007. Look for Ken's article in a separate mailing from CC&M.

CC&M welcomes **Gregory P. Adamo** as its newest attorney. Greg concentrates his practice in complex commercial litigation, corporate law and real estate law. Check out Greg's article on the U.S. Supreme Court case *Credit Suisse v. Billing* in this edition of the newsletter.

Colleen M. Healy with the help of paralegals **Jean Erhardt** and **Virginia Wilkinson** closed the following transactions: the sale of a \$5.4 million dollar commercial building located in Aurora, IL and the sale of two parcels totaling \$600,000 in Granville, Illinois. Further, with the help of **Deanna M. Quinn-McCollian**, Colleen closed a \$12 million dollar refinance for 16 commercial properties located in several states.

For the second time this year **Paul Fullerton** and **Steve Marderosian** were victorious in the Illinois Appellate Court, Second District. The case involved the validity and priority of a mortgage lien against real property as well as the legal doctrines of conventional and equitable subrogation. In this instance, Paul and Steve won the case at the trial level, on summary judgment no less, and then had their victory affirmed on appeal.

Steve Marderosian obtained a \$40,000 judgment on behalf of a firm client in connection with a dispute surrounding the breach of an insurance producer's agreement.

See **HIGHLIGHTS**, page 3

Illinois Doctors Take Their Medicine

Restrictive Covenants in Doctors' Employment Contracts are Enforceable

Many of our clients ask us whether restrictive covenants in an employment contract such as a non-solicitation agreement or a non-competition agreement are actually enforceable in an Illinois court. The Illinois Supreme Court recently answered that question with a resounding "Yes" and upheld the enforceability of restrictive covenants in employment contracts for doctors. See *Mohanty v. St. John Heart Clinic, S.C.*, 2006 Ill. LEXIS 1689 (2006). The *Mohanty* court rejected the doctors' claim that restrictive covenants in physician employment contracts are void as against public policy.

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Although the *Mohanty* court recognized that restrictive covenants in attorney employment contracts are void as against public policy because enforcing them would conflict directly with an Illinois Rule of Professional Conduct for lawyers, the Court was unwilling to grant the same deference to an American Medical Association opinion that discouraged restrictive covenants.

The *Mohanty* decision reaffirms that restrictive covenants in non-attorney employment contracts will be enforced if they are: 1) supported by consideration; 2) ancillary to a lawful contract; 3) reasonable in durational and geographic scope; 4) not broader than necessary to protect the employer's interests; and 5) not contrary to a specific public policy established by a constitutional provision, a statute, or a particular Illinois judicial decision.

The *Mohanty* case reiterates that durational and geographic reasonableness, as well as what is not broader than necessary to protect an employer's interests, will depend on the particular employment situations and industries involved. This case also confirms that, as with all contracts, an employer's material breach of an employment contract may be sufficient to discharge an employee's obligation to comply with a particular restrictive covenant.

Clingen Callow & McLean, LLC routinely drafts valid and enforceable restrictive covenant agreements for clients in all sectors of the U.S. economy. The five criteria set forth in *Mohanty* are always front and center in our agreements. CC&M has broad experience litigating restrictive covenants in courts throughout metropolitan Chicago.

by Steven A. Marderosian

HIGHLIGHTS

(continued from page 2)

CC&M assisted an investor in his investment in a financially distressed corporation. This multimillion dollar stock purchase and financing transaction involved attorneys **Ken Clingen** and **Deven Kane** and corporate paralegal **Jean Erhardt**.

CC&M represented an automobile repair business and its subsidiaries in its multimillion dollar refinancing of its debt. This transaction involved attorneys **Ken Clingen** and **Deven Kane** and corporate paralegal **Jean Erhardt**.

CC&M represented a local insurance company and its subsidiaries in its multimillion dollar refinancing of its debt. This transaction involved attorneys **Ken Clingen** and **Deven Kane** and corporate paralegal **Jean Erhardt**.

Colleen M. Healy with the help of **Deven Kane** prepared loan documentation to close for a prominent local bank in connection with a \$12 million dollar commercial multi-property land acquisition, a \$4.5 million dollar asset purchase of an ongoing commercial business, and a \$5.5 million dollar loan modification for a corporate entity to allow for construction financing.

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Illinois Doctors Take Their Medicine: Restrictive Covenants in Doctors' Employment Contracts are Enforceable



Steven A. Marderosian, a senior associate at CC&M, concentrates his practice in

commercial litigation, corporate law and employment law.

WHAT'S INSIDE? Articles & Contributors

Resolving Deadlock in Privately Held Businesses



Kenneth W. Clingen, a partner in the firm, practices in the area of corporate law, mergers and acquisitions and estate and succession planning for business owners.

Deven S. Kane, an associate at CC&M, concentrates his practice in corporate, banking and securities transactional work. Mr. Kane's practice involves the representation of corporations, limited liability companies and their owners.



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Gregory P. Adamo, an associate at CC&M, concentrates his practice in complex commercial litigation, corporate law and real estate law.