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BUSINESS LAW UPDATE

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DEALING WITH A TROUBLED CUSTOMER? GET ADEQUATE ASSURANCE OF FUTURE PERFORMANCE

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Extended credit terms (of 60 days or more) for long-term production agreements have become commonplace in industry. More usual, however, is the situation in which although the customer is still paying within terms (and therefore is not in breach of its obligations), all external signs indicate that it is going to have trouble satisfying even its short-term obligations as time goes on. What can be done when a customer is paying timely, but you are seeing consistent downgrades to its credit rating, hearing bankruptcy rumors, and observing union strife? Are you stuck providing this customer extended credit terms until it breaches its agreement by filing bankruptcy, potentially leaving you holding the bag on a substantial receivable? Not necessarily. In situations where there are reasonable grounds for insecurity concerning a customer's ability to timely satisfy its payment obligations, the Uniform Commercial Code (UCC) can often provide a seller of goods some relief.

Section 2-609 of the UCC, which applies to all sales of goods, provides that "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party (to a contract for sale of goods) the other may in writing demand adequate assurance of due performance." One form of adequate assurance of future performance is a letter of credit or other security that ensures prompt payment; other types of assurance may also be used, depending on the situation. If it's commercially reasonable, you, the seller, may also suspend performance or demand COD or CIA payment terms while awaiting that adequate assurance. If the other party does not provide adequate assurance within a reasonable time, the contracts are considered repudiated.

This is a very strong and useful tool for creditors. For example, it has been frequently used in the automotive industry to protect suppliers to many of the Tier I suppliers who have recently sought bankruptcy protection. Many of these proactive suppliers have been able to significantly reduce their exposure at the time of the bankruptcy filings.

Because of the UCC's general requirement that all actions (even adequate assurance demands) be commercially reasonable, you should consult with counsel prior to taking any action. If you have concerns about a customer's ability to pay, contact a member of Miller Johnson's Creditors'/Debtors' Rights Practice Group.

PROTECTING YOUR BUSINESS FROM LIMITS IMPOSED BY ENVIRONMENTAL RESTRICTIVE COVENANTS

by James P. Enright; enrightj@millerjohnson.com; 616.831.1770

James P. Enright

Businesses considering buying or leasing environmentally contaminated land may find that their intended use of the property would be limited or even barred by a "Declaration of Restrictive Covenant" filed with the county Register of Deeds as part of a prior owner's environmental cleanup. How can you learn if there is such a restrictive covenant? Can it be changed or cancelled?

BACKGROUND: Most environmental cleanups do not completely clean up the contamination - instead, the most serious contamination is removed, and some contamination is left in place along with legal safeguards to limit human contact with it. Often, the legal safeguard is a restrictive covenant that subjects the owner to enforcement action by the Michigan Department of Environmental Quality (MDEQ) for violating specified land-use limitations or requirements. Such covenants may limit how the land can be used, require pavement or some other land cover, prohibit groundwater use, limit movement of contaminated soil, or provide other protections. Because these restrictive covenants "run with the land," they automatically apply to every subsequent owner without having to be renewed or acknowledged when a property changes hands. Moreover, property owners are usually required to assure that their lessees comply with restrictive covenants.

HOW CAN A PROSPECTIVE BUYER OR LESSEE LEARN WHETHER THERE IS A RESTRICTIVE COVENANT AND DETERMINE ITS REQUIREMENTS?

There are several ways. Because the restrictive covenants are recorded with the county Registers of Deeds, they should come to light when title insurance or other title work is obtained. In addition, state law or the restrictive covenants themselves can require notifying a prospective buyer or lessee about a restrictive covenant and providing a copy. Further, some parcels have permanent markers placed on the land to provide notice of the restrictions. After obtaining a copy of the restrictive covenant, initially reviewing its provisions will be straightforward. Advice of counsel can be useful during that review.

CAN A RESTRICTIVE COVENANT BE CHANGED OR CANCELLED?

Restrictive covenants clearly can be cancelled, according to both the main state law on environmental cleanup (usually called "Part 201") and the law on cleaning up leaking underground tanks ("Part 213"). As to changes, the Part 213 program provides written directions for making changes, such as "replacing a current restriction with another restriction." The Part 201 program does not provide such guidance. Until guidance is developed, persons who wish to change or cancel Part 201 restrictive covenants should carefully consider their plans in conjunction with counsel, and then contact the MDEQ. In any event, changing or canceling a restrictive covenant requires MDEQ's approval or, in some circumstances, might occur through a court's decision. Finally, a caution for prospective buyers and lessees: if changing or canceling a restrictive covenant is crucial, then, before closing the deal, be sure that the change or cancellation will be approved.

If you have any questions or want to discuss this subject, please contact the author.

MILLER JOHNSON'S UPCOMING WORKSHOPS

MAY Avoiding Litigation Disaster: Effectively Managing Your Electronic Documents

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For more details, visit our web site at www.millerjohnson.com/resource/workshops.asp or contact Linda Pobocik: 616.831.1886 or pobocikl@millerjohnson.com

IBM'S "VENTURES IN COLLABORATION" PROGRAM

by Frank M. Scutch III; scutchf@millerjohnson.com; 616.831.1777

Frank M. Scutch III

IBM has been the number one U.S. patent holder for more than 10 years. In order to utilize its patented technology more effectively, IBM has recently launched a program giving startup companies access to more than 40,000 of its patents. IBM calls this new licensing program "Ventures in Collaboration." It allows startups to work with IBM investors for access to the technology behind the patents and is designed to be simple and affordable.

The Ventures in Collaboration program offers two types of cross-licensing agreements in order to use IBM-patented technology. The first is designed for beginning companies generating less than $10 million in revenue while the other is for later-stage, venture-backed companies with more than $10 million in revenue. This new program is designed to encourage creative uses for IBM patents and reflects IBM's partner-focused business model.

Miller Johnson can help you investigate uses for these patents or work with IBM selected venture capital groups to assist in administering these programs. If interested, please contact Frank Scutch or John Sommerdyke in Miller Johnson's business section for additional information.

ANNOUNCING NEW MEMBERS

James P. Enright, an environmental lawyer who has practiced for more than 17 years, has joined the firm as a member. He will practice from the firm's Grand Rapids office and be an integral part of the Environmental and Energy practice group. Mr. Enright chairs the Environmental Law Section of the Grand Rapids Bar Association.

Also, four associates have been elected to firm membership. **Richard E. Hillary II** and **Mark P. Hunting** will continue their litigation practice, while **Michael E. Stroster** and **Sarah K. Willey** are in the employment and labor law section.

MILLER JOHNSON IN THE NEWS

- **JEFFREY S. AMMON** serves on The Right Place board as of January 1, 2006.
- **NICHOLAS J. COUTSOS** spoke to a MBA class at Grand Valley State University on business entity formation and related business startup issues.
- **CAROLINE DELLENBUSCH** was elected as a board member of Citizens for Better Care, a statewide nonprofit information and advocacy organization for long-term care consumers.
- **JAMES P. ENRIGHT** spoke on "Demystifying the Consent Order/ Settlement Process" at the spring conference of the West Michigan Chapter of the Air and Waste Management Association on March 23.
- **CRAIG H. LUBBEN** was reelected board president for Family and Children Services, Inc., one of the largest nonprofit social services agencies in Southwest Michigan.
- **JAMES R. PETERSON** was reappointed to the Pine Rest Foundation board.
- **BRENT D. RECTOR** will present at the Michigan Chamber of Commerce's "Making Your Safety Program Work for MIOSHA and You" on May 24. He presented "Pre-Hire Interviews – The Dos and Don'ts" at The Institute of Continuing Legal Education's Labor and Employment Law Institute in April.
- **JOHN M. SOMMERDYKE** was elected to the board of Salamander Technologies, Inc., a Traverse City - based company in which the Grand Angels invested. They provide systems for tracking all responders, volunteers and victims at an incident.

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Miller Johnson is a member of Meritas, an association of independent law firms worldwide.

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Any of the lawyers listed can also put you in contact with Miller Johnson attorneys who practice in the areas of Banking, Construction, Economic Development, Environmental Law, Government Relations, Health Care, Health Professionals, Immigration and Small Business.

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