COZEN O'CONNOR

COMMERCIAL DISPUTES OBSERVER

NEWS ON CONTEMPORARY ISSUES

Fall 2007

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MESSAGE FROM THE CHAIR

TO THE FRIENDS OF COZEN O'CONNOR:

Congratulations are due to our own Scott W. Reid, an associate in the General Litigation department of the Philadelphia office. The Barristers' Association of Philadelphia named Scott as its new president in a ceremony at City Hall on September 19th. Scott will lead this prestigious organization, which addresses the interests of African American attorneys as well as the surrounding community, and serves as a forum to discuss ethnic views. The Barristers' Association of Philadelphia has attracted more than 1,000 lawyers and jurists who serve in high ranking legal positions in both the public and private sectors.

The day following his appointment, Scott proved the Barrister's Association wisdom. Scott had three summary judgment motions granted after oral argument in the Burlington County Superior Court in a hotly contested consumer fraud action. The plaintiff purchased a used car and extended vehicle warranty from a used car dealership; however, the used car dealership's right to sell our client's extended warranties was terminated months before the plaintiff purchased her car. Five months after she purchased the car, the plaintiff attempted to file a warranty claim due to numerous mechanical issues only to find out that she never had an extended warranty with our clients in the first place. In addition to suing the dealership, the plaintiff also sued our clients: a warranty company; the company underwriting the warranty; and the broker who sold the original warranty package to the used car dealership under the New Jersey Consumer Fraud Act . Scott argued that under the Act, unlawful acts can only occur in one of three ways: affirmative misrepresentations, knowing omissions or statutory violations. The Court accepted his argument that unless the plaintiff could demonstrate our clients engaged in the sale of the warranty to the plaintiff and that their activity was unlawful. Kudos on a great month for Scott!

Sincerely,

Ann Thornton Field
Chair, Commercial Litigation Practice Group

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RECENT DEVELOPMENTS IN DISCOVERY DISPUTES

THE ILLINOIS SUPREME COURT INSTRUCTS THE TRIAL COURT TO CONSIDER ONLY THE ISSUES AT HAND WHEN FACING A REQUEST FOR AN EXTENSION OF TIME

In Vision Point of Sale, Inc. v. Haas, 2007 WL 2729322 (Ill., September 20, 2007), the Illinois Supreme Court reversed rulings by both the circuit and Appellate courts to narrow the scope of the circuit court's discretion in ruling on a request for extension of time. It directed the lower courts that the moving party must establish that good cause exists for the court be justified in granting an extension of time to file a pleading or do any act required by rules, but the court may not take into consideration facts and circumstances of record that go beyond the reason for noncompliance.

Vision Point sued Haas, its former employee, and her new employer (Legacy) for tortious interference with business relationships and violation of Illinois Trade Secrets Act; and sought a preliminary injunction against Haas/Legacy. Both Vision Point and Legacy engage in the sale and refurbishing of used point-of-sale equipment and are in direct competition for customers. According to Vision Point, Haas had access to plaintiff's confidential and proprietary information, including its customer lists and databases; and Haas resigned from plaintiff only to began employment immediately thereafter with Legacy -- taking plaintiff's confidential and propriety information with her. The circuit court entered a preliminary injunction against Haas/Legacy to maintain the *status quo* pending the outcome of the suit.

As the litigation progressed, the parties primary focus was on Haas/Legacy's failure to comply with the preliminary injunction. The circuit court held additional hearings and drafted another Order providing greater detail the method by which its preliminary injunction order was to be implemented. Thereafter, Hass/Legacy sent to Vision Point a set of 65 separate Requests to Admit pursuant to Illinois Supreme Court Rule 216. Vision Point filed a timely response; however, Haas/Legacy filed a Motion to Strike because the final page of the responses did not contain a signature of a Vision Point representative, only that of their attorney. At the hearing, the circuit court granted the motion to strike and denied Vision Point's oral motion for an extension of time to respond.

After the circuit court ruled on the Request To Admit issue, the litigation between the parties proceeded; although Haas/Legacy's continued failure to comply with the preliminary injunction resulted in several additional contested motions and hearings. During the course of one of these hearings, the circuit court's frustration with what it characterized as Haas/Legacy's "settled policy of recalcitrance" boiled over. The circuit court *sua sponte* reconsidered and vacated its prior ruling granting Haas/Legacy's request to admit and refusing to allow plaintiff an extension of time; and allowed Vision Point to file amended responses to the requests to admit. The circuit court stated that under the totality of circumstances in the case, good cause existed for the time extension.

On appeal by Haas/Legacy, the Appellate Court upheld the ruling stating that the circuit court "may consider any facts that help it strike a balance between diligence in litigation and the interests of justice" when deciding whether to grant an extension of time for filing a response to a request to admit facts. The Illinois Supreme Court disagreed with this reasoning, stating that the circuit court may not take into consideration facts and circumstances of record that go beyond the reason for noncompliance. The circuit court may receive evidence with respect to whether the party's

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original delinquency was caused by mistake, inadvertence, or attorney neglect as part of its determination as to whether good cause exists for extension of time to file a pleading or do any act required by rules. The burden of establishing good cause rests on the party seeking relief from any act required by rules. Consideration of prejudice to or the actions of the non-moving party are not part of the proper inquiry; and arguably shift the movant's burden. The court recognized that the lower courts must be allowed to exercise their sound discretion over the course and conduct of the pretrial discovery process, but consideration of circumstances beyond the reason for noncompliance provides the court discretion that is far more broad than the rules envision.

Edward M. Ordonez, a member of the Cozen O'Connor Chicago office, believes the *Vision Point* ruling may embolden attorneys who tend to engage in questionable gamesmanship during the discovery process. The Illinois Supreme Court's instruction means that the circuit court must look only at the trees and not the forest. He fears that that attorneys need no longer be as concerned with their actions during the course of a litigation, but only as to the motion at hand.

For more information, or to discuss the effect and impact of Vision Point of Sale, Inc. v. Haas, 2007 WL 2729322 (Ill., September 20, 2007), please call Ed Ordonez at (312) 382-3123.

RECENT SECURITIES LAW DEVELOPMENTS

DELAWARE CHANCERY COURT GRANTS INJUNCTION TO STALL PROPOSED MERGER OF TOPPS TRADING CARD COMPANY DUE TO THE BOARD OF DIRECTOR'S FAILURE TO DISCLOSE FAVORED BIDDER'S PROPOSAL TO RETAIN MANAGEMENT

In Re Topps Company Shareholder Litigation, 926 A.2d 58 (Del.Ch. 2007) addresses the strict duties owed by directors to act in the best interest of the shareholders when evaluating and recommending potential purchase offers. Dissident stockholders and a competing bidder, Upper Deck, brought breach of fiduciary duty action against the Board of Directors for Topps and a buyer lead by former Disney CEO and current private equity investor Michael Eisner. They also sought a preliminary injunction to halt the stockholder vote on proposed merger due to allegedly improprieties by the Board in evaluating Upper Deck's bid. The Delaware Chancery Court granted the preliminary injunction, noting that the Board's preference for the Eisner deal appeared to be substantially premised on Eisner's promise to retain the current Topps' management following the merger, a fact which was not disclosed to shareholders.

Since 2000, the financial performance of the Topps Company, best known for its baseball cards and bubble gum (Bazooka Joe), had been lagging. The Board of Directors had explored various strategic options, including the failed auction of its Confectionary Business. In 2005, however, former Disney CEO and current private equity investor Michael Eisner proposed terms to purchase the company that were approved by the Board. The Eisener's final merger proposal of $9.75 per share also contained a promise that he would retain the company's existing management team. This team includes Arthur Shorin, the son of Joseph Shorin, one of the founders of Topps and the inspiration for "Bazooka Joe," who serves as Chairman and Chief Executive Officer, as well as Shorin's son-in-law, Scott Silverstein, who serves as Topps' President and Chief Operating Officer. The acceptance of Eisner's proposal gave Topps the chance to shop the bid for 40 days and the right to accept a "Superior Proposal" after that, subject only to Eisner's receipt of a termination fee and a right to match those superior terms.

By the end of the 40 day period, the Upper Deck Company had expressed a willingness to pay $10.75 per share in a friendly merger, subject to its receipt of additional due diligence and other conditions. In pursuing its additional due diligence, Upper Deck agreed to a Standstill that would prevent it from contacting Topps' shareholders without the consent of the

Topps' Board. The Board, however, refused to designate the bid from Upper Deck a "Superior Proposal" which would release Upper Deck from the Standstill. Topps did go public with a disclosure about Upper Deck's bid, but in a form that did not accurately represent that expression of interest and disparaged Upper Deck's seriousness. The Topps' Board refused Upper Deck's request for relief from the Standstill Agreement in order to allow Upper Deck to make a tender offer and to present its side of the negotiations to Topps's shareholders. Facing the pending shareholder vote on the Eisner proposal, as recommended by the Board, Upper Deck and the dissident shareholders filed suit.

The Chancery Court examined this case under the *Revlon* standard (*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc506 A.2d 173 (Del.1986))*, which dictates that when directors propose to sell a company for cash or engage in a change of control transaction, they must take reasonable measures to ensure that the stockholders receive the highest value reasonably attainable. The court recognized that there may be some subjective variables involved in determining what constitutes the highest reasonable value, such that the sheer comparison of price per share in the proposals is not prima facie evidence of the better deal for shareholders; however, it felt that the record clearly evidenced the Board's unwarranted reticence toward Upper Deck's bid. In particular, the court noted Shorin's comparatively greater enthusiasm for doing a deal with Eisner was premised on the promised continuity of management and involvement of the Shorin family in the firm's business going forward -- whereas Upper Deck likely did not need Shorin or his top managers.

The court ruled that the refusal of Topps' Board to grant Upper Deck's request for a release from the Standstill to make a tender offer on the terms it offered to Topps and to communicate with Topps' stockholders not only kept the stockholders from having the chance to accept a potentially more attractive higher priced deal, it kept them in the dark about Upper Deck's version of the bid's import. Moreover, the Board's foreclosing its shareholders from receiving the details of the offer from Upper Deck would likely be found to be a breach of fiduciary duty at trial. It granted the preliminary injunction enjoining the merger vote on the Eisner deal until after Topps granted a waiver of the Standstill to allow Upper Deck to communicate with Topps' shareholders and make an all shares non-coercive tender offer.

Aaron Krauss, a member in Cozen O'Connor's Philadelphia office who has represented directors and corporations in numerous securities cases sees this decision as another warning for directors to provide full and forthright disclosure to shareholders. He advises his corporate clients of the well settled rule that directors have a duty to provide the stockholders with the material facts relevant to making an informed decision; and that they must avoid making materially misleading disclosures, which could obscure material facts; *and,* under the *Revlon* standard, they must take all reasonable measures to ensure that the stockholders receive the highest value attainable when contemplating a merger or sale. He noted that the Chancery Court granted an injunction to stay a merger vote on similar grounds in a companion case, *In re Lear Corporation Shareholder Litigation,* 926 S.2d 94 (Del. Ch., 2007), this time due to the CEO's failure to disclose personal financial interest in cashing out via the proposed merger he negotiated.

For more information, or to discuss the effect and impact of In Re Topps Company Shareholder Litigation, 926 A.2d 58 (Del.Ch. 2007), please call Aaron Krauss at (215) 665-4181.

RECENT CONTRACT LAW DEVELOPMENTS

TEXAS COURT WON'T SUBJECT AFFILIATED COMPANIES TO ARBITRATION CLAUSE IN CONTRACT BETWEEN PLAINTIFF AND PARENT COMPANY

This August, the Texas Supreme Court held that the trial court abused its discretion in failing to compel a MerrillLynch agent into arbitration under an arbitration

agreement between plaintiff and MerrillLynch and refusing to stay the remaining action against a host of MerrillLynch affiliated companies. *In Re MerrillLynch Trust Company FSB, 2007* WL 2404845 (Tex. Aug. 24, 2007).

The Plaintiff, Juan Alaniz, had recovered more than $2 million in a personal injury settlement following a refinery fire and in 1993 retained MerrillLynch and its employee Henry Medina as financial advisors. This included opening a series of cash and investment accounts with MerrillLynch. For each account, the contract with MerrillLynch contained a arbitration agreement as to any dispute. Upon the advice of Medina, Alaniz also set up a trust account naming the MerrillLynch Trust Company as trustee. The sole asset of the trust is a variable life policy bought from MerrillLynch Life Insurance Company. Both ML Trust and ML Life are affiliates of MerrillLynch; and both had their own contracts with Pereyra -- although neither of those contracts contained an arbitration clause. Alaniz transferred more than $200,000 from the MerrillLynch accounts to ML Trust to pay premiums to ML Life. ML Life paid a commission on the sale to MerrillLynch, which then paid Medina, a licensed agent for ML Life and other insurers. In 2003, the Alaniz sued ML Trust, ML Life, and Medina, but not MerrillLynch, alleging a dozen causes of action related to the insurance trust and the financial services he received. The defendants moved to stay the litigation and compel arbitration, which the trial court denied.

The Texas Supreme Court, interpreting the Federal Arbitration Act, held that when contracting parties agree to arbitrate all disputes "under or with respect to" a contract, this includes disputes about their agents' actions reasoning that, "[a]s a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." The court was not swayed by plaintiff's argument that the arbitration agreement with MerrillLynch was illusory and did not apply to Medina, who was running his own brokerage/advisor company, because MerrillLynch could modify or rescind that agreement at any time and Medina was not a signatory. The court discounted the plaintiff's testimony that he failed to read the arbitration provisions until this dispute arose -- stating firmly that this was not a valid ground for setting aside the signed agreements. Still, the court did recognize that employees cannot always invoke an employer's arbitration agreement, for instance when the employee's actions are outside the course of employment and cannot be attributed to the employer.

The court went on to deny the motions of ML Trust and ML Life to piggyback Medina into the arbitration. A corporate relationship is generally not enough to bind a non-signatory to an arbitration agreement because corporate affiliates are generally created to separate the businesses and liabilities. Thus, a contract with one corporation is generally not a contract with any other corporate affiliates. The court noted two exceptions to this rule. The first, where the corporations are merely alter-egos. The second, as argued by ML Life and ML Trust, an affiliate company could invoke arbitration agreements through an estoppel theory premised on concerted misconduct. The United States Supreme Court has never explicitly construed the Federal Arbitration Act to go this far; rather it has emphasized that arbitration "is a matter of consent, not coercion." Further, Texas law had never recognized a rule binding non-parties though concerted misconduct – "while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements."

The court ruled that the claim against Medina must be submitted to arbitration, but denied the motions of ML Life and ML Trust to be included in that process. The Federal Arbitration Act generally requires the arbitration to go forward first; arbitration "should be given priority to the extent it is likely to resolve issues material to this lawsuit" when an issue is pending in both arbitration and litigation.

Tim D. Haggard, a member in Cozen O'Connor's Dallas office, considers *In Re MerrillLynch Trust Company FSB* a significant ruling with respect to the application of alternate dispute agreements in multi-party relationships. Tim, who has represented numerous companies in alternate dispute forums ranging from mandatory arbitration to voluntary non-binding mediation, continues to

advise his corporate clients that they must be explicit when drafting contract language with the intent of providing an alternate dispute mechanism. It is essential to understand to full scope of the company's business model to make certain all the necessary affiliates and subsidiary companies are properly covered.

For more information, or to discuss the effect and impact of In Re MerrillLynch Trust Company FSB, 2007 WL 2404845 (Tex. Aug. 24, 2007), please call Tim Haggard at (214) 462-3018.

RECENT PRODUCT LIABILITY LAW DEVELOPMENTS

ILLINOIS SUPREME COURT EXTENDS STATUTE OF LIMITATIONS ON WARRANTY TO REPAIR TO USED-CAR PURCHASER, BUT DENIES HER STANDING TO REVOKE ACCEPTANCE

In *Mydlach v. Daimlerchrysler Corporation,* 2007 WL 2729268 (Ill. Sept. 20, 2007), the Illinois Supreme Court held that that statute of limitations for breach of a warranty to repair starts to run from the date the repair effort fails, not the date the product is tendered to the consumer. It also held that a purchaser cannot seek revocation of acceptance against a non-selling manufacturer due to lack of privity.

Ms. Mydlach purchased a used 1996 Dodge Neon, manufactured by DaimlerChrysler, from an Illinois dealership in June of 1998. Approximately one-year/10,000-miles remained on the car's original three-year/36,000-mile limited warranty. Less than a month after her purchase, the car began to suffer variety of problems, including a recurring fluid leak, which required repeated trips back to the dealership for repair. Eventually the dealership proved unable to repair the car and as a result it was unusable. Ms. Mydlach ultimately filed suit on in May of 2001 under the Magnuson-Moss Act against the dealership and the manufacturer, DaimlerChrysler, alleging breach of written warranty, breach of the implied warranty of merchantability, and seeking revocation of acceptance.

The trial court granted DaimlerChrysler's motion for summary judgment on its argument that the breach of warranty claims were subject to the four-year statute of limitations found in section 2-725 of the Uniform Commercial Code; and commenced upon "tender of delivery" of the vehicle to its original purchaser in June of 1996. The Appellate Court reversed the ruling as to the claim for breach of written warranty stating that the "right to bring a breach of written warranty action based on the promise to repair accrued when defendant allegedly failed to successfully repair her car after a reasonable number of attempts and that the four-year statute of limitations did not begin to run until that time." The Appellate Court further held that Ms. Mydlach could properly pursue revocation of acceptance as an equitable remedy under the Magnuson-Moss Act in the event her breach of warranty claim was successful.

While the Magnuson-Moss Act provides a private right of action for breach of a written warranty, the Act does not contain a limitations provision for such a cause of action. Where a federal statute fails to specify a limitations period for suits brought under its provisions, "courts apply the most closely analogous statute of limitations under state law." Thus, the Illinois Supreme Court focused its analysis on the language of article 2-725(2) of the UCC, which states that "[a] breach of warranty occurs when tender of delivery is made." It noted that while DaimlerChrysler's warranty qualifies as a "written warranty" under the Act, it is not an "express warranty" under the UCC. The court concluded that when a repair warranty is not a UCC express warranty, and it is not subject to the tender-of-delivery rule

The court dismissed DaimlerChrysler's argument reasoning that DaimlerChrysler need only consider the logic of its own vehicles that carry a five-year/50,000 mile repair warranty. If the four-year limitations period commenced at "tender of delivery," the limitations period for a breach of the repair promise occurring in year five of DaimlerChrysler's warranty would expire before the repair is even necessary, thus rendering the repair warranty unenforceable and worthless during its final year. Common sense dictates that the statute of limitations for a claim for breach of warranty to repair can only begin to

run when the failure to repair occurs. The court was wary of the position that it did not intend to not create a limitless warranty period, rather, the consumer's right to seek repair remains limited to the stated warranty period, in this case, the three years/30,000 provided at the original sale.

The Supreme Court went on to reverse the ruling of the Appellate Court and deny Ms. Mydlach's claim for equitable relief under the Magnuson-Moss Act. Section 2310(d) of the Act states that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under * * * a written warranty * * * may bring suit for damages and other legal and equitable relief." Revocation of acceptance is a form of equitable relief, but the court held that this form of relief is not available against a non-selling manufacturer due to a lack of privity. While the Act may permit an action for equitable relief, the relationship between the parties remains controlling. Basic contract law dictates that revocation of acceptance is "conceptually inapplicable" to a non-seller because manufacturers do not tender goods to consumers; consumers do not accept (or reject) goods tendered by manufacturers, therefore there is never any acceptance to revoke.

Christopher Murphy, a member of the Cozen O'Connor Chicago office, has counsels his manufacturing clients in drafting warranty language. He was encouraged by the Illinois Supreme Court's clarification on the commencement of the statute of limitations on repair warranties as it applies to his defense of product liability cases. His clients prefer greater certainty in projecting timelines for potential expense and liability when drafting warranty language. Chris also believed his clients who deal with a large number of independent suppliers and retailers would benefit from the elimination of the potential cause of action for revocation of acceptance against a non-selling manufacturer.

For more information, or to discuss the effect and impact of Mydlach v. Daimlerchrysler Corporation, 2007 WL 2729268 (Ill. Sept. 20, 2007), please call Chris Murphy at (312) 382-3155.

RECENT PROFESSIONAL LIABILITY LAW DEVELOPMENTS

CALIFORNIA SUPREME COURT ADDRESSES DISPARATE LOWER COURT RULINGS TO HOLD THAT STATUTE OF LIMITATIONS TO BRING MALPRACTICE CLAIM AGAINST LAW FIRM IS NOT TOLLED AFTER ATTORNEY LEAVES FIRM AND TAKES CLIENT WITH HIM

In *BealBank v. Arter & Hadden, LLP,* 2007 WL 2791816 (Cal. September 27, 2007, BealBank sued, among others, the law firm that had initially represented it in a debt collection matter. The Supreme Court of California dismissed the claim, deeming that the statute of limitations on the claim for malpractice against the firm began to run when the client allowed an attorney at the firm to take the matter to his new practice.

BealBank retained Arter & Hadden to handle its collection efforts against a troublesome debtor in March of 1997. The collection did not go smoothly. particularly after counsel for the debtors transferred the collateral for the outstanding loans to an entity they controlled and filed for bankruptcy protection the following day. Steven Gubner, an associate at Arter & Hadden was assigned to represent BealBank in the bankruptcy action. He filed a motion for summary judgment in the bankruptcy court, arguing that BealBank was entitled to recover the default interest on the loan to the debtor. The bankruptcy court ruled against BealBank and entered its final order on May 28, 1998. On December 31, 1998, Gubner left Arter & Hadden and formed his own firm, which took over representation of BealBank in the debt collection matter. In April 1999, the district court affirmed the bankruptcy court's ruling, and in 2001, the Ninth Circuit issued an opinion affirming the rulings of both lower courts.

On September 24, 2002, BealBank filed a legal malpractice action against all the attorneys who had represented it in the unsuccessful litigation: Gubner; Gubner & Associates; and Arter & Hadden. It alleged defendants had failed to conduct any legal research, advise BealBank that its position was unlikely to prevail, or inform it of the risks involved in continuing to maintain its position. As a

result, BealBank incurred unnecessary legal fees, was deprived of an opportunity to settle with the debtors on favorable terms, and was forced to defend a breach of contract action brought by the debtors. Arter & Hadden demurred, arguing that BealBank suffered a recognizable injury on May 28, 1998, the date the bankruptcy court entered an adverse ruling against it -- which commenced the running of the one-year statute of limitations on BealBank's malpractice claim under California Code of Civil Procedure section 340.6. Arter & Hadden argued further that the statute of limitations was tolled as to them only until December 31, 1998, when Gubner left Arter & Hadden, taking BealBank with him as a client -- accordingly, the one-year limitations period expired on December 31, 1999. BealBank argued that the statute of limitations was tolled during the entire time Gubner continued to represent BealBank, countering that under California law, the statute of limitations on legal malpractice claims is tolled so long as "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred."

In granting Arter & Hadden motion to dismiss, the California Supreme Court recognized that lower court decisions were mixed in their interpretation of this law to such circumstances. It stated that the text of the code implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm. Rather, when a lawyer leaves a firm and takes a client with him, the firm's representation of the client ceases. There is no risk that the firm will attempt to run out the clock on the statute of limitations by offering reassurances and blandishments about the state of the case. Conversely, the firm loses all ability to mitigate any damage to the client. Nor is there any ongoing firm-client relationship to disrupt.

Michael Partos, a member of the Cozen O'Connor Los Angeles office, believes the California Supreme Court was well served in cleaning up the conflicting case law regarding the statute of limitations on malpractice claims. Recent trends indicate an increase in lateral migration of attorney's from firm to firm and, as the costs of malpractice insurance for may professionals continue to rise, it is essential for firms to assess the limits on potential liability. Similarly, having served as coordinating corporate counsel for clients whose interests require the retention of various counsel across the globe and can often entail the transfer of files as preferred counsel change firms, Mike's clients must also be aware of how limitation periods apply to that representation.

For more information, or to discuss the effect and impact of BealBank v. Arter & Hadden, LLP, 2007 WL 2791816 (Cal. September 27, 2007), please call Mike Partos at (213) 892-7936.

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