LEGAL ISSUES FOR INVESTORS IN SOUTH CAROLINA

1997

SOUTH CAROLINA DEPARTMENT OF COMMERCE

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FOREWORD

This publication has been prepared by members of the International Law Committee of the South Carolina Bar as a service to the State of South Carolina and its citizens. The committee members are attorneys from private practice, private industry and government service who recognize the need of business to have a better understanding of the legal environment in South Carolina to make informed investment decisions. The publication will be updated annually as a community service.

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TAX INCENTIVES

BY:

GEORGE B. WOLFE, ESQ.

INTRODUCTION

South Carolina provides numerous tax-related benefits to potential investors in South Carolina. Such benefits are available for new or expanded manufacturing facilities, corporate headquarters, corporate office facilities, distribution facilities, and other commercial enterprises. The corporate income tax in South Carolina is 5%, the lowest in the Southeast United States and one of the lowest in the country. There is no unitary tax on world-wide profits. Because only the State has the authority to tax income, companies pay income tax based only on their South Carolina net income. There is no local income tax. Net operating losses may be carried forward for up to 15 years to be applied to reduce income tax on future earnings. Real and personal property used in the conduct of business is subject to property tax levied by local governments. Although such tax is collected locally, the State oversees collection of property taxes to ensure equitable and uniform assessment throughout the State. Only the State appraises manufacturing facilities. There is no state or local tax on intangibles or inventories.

The calculation of property taxes involves three elements:

- ✓ ***VALUATION*: Governmental determination of the value of the property.**
- ✓ ***ASSESSMENT RATIO:* The assessment ratio, which is established in the State Constitution to ensure stability, is 10.5% for manufacturing property and commercial personal property and 6% for commercial real property. This ratio is multiplied against the valuation determination to produce the "assessed value" of a particular piece of property. Taxes are levied based upon this "assessed value."**
- ✓ ***MILLAGE:* Each taxing jurisdiction determines annually the millage rate to apply to the total "assessed value" of property subject to taxation within its jurisdiction to collect the taxes needed to operate for the next year. The average millage rate is about 230 mills.**

Thus, for example, if a manufacturer owns a piece of property with a "valuation" of $100, and an "assessment ratio" of 10.5% (which would be the normal ratio for manufacturing property), the "assessed value" of that property would be $10.50 ($100 x 10.5%). If the taxing jurisdiction decided in a particular year to levy a tax of, say, 220 "mills," then the property tax liability of the owner would be $2.31 ($10.5 x .220).

There is a state sales and use tax of 5%. The sales tax applies to the retail sale, lease and rental of tangible personal property. The use tax applies to the storage, use or consumption of tangible personal property purchased at retail for such purposes. The seller of the property is liable for the tax and may collect the tax from the purchaser at the time of sale.

Presently there is no statewide local sales tax, although localities, by a voters' referendum, may levy an additional 1% sales tax. Any local sales tax must be accompanied by a reduction in the real property tax of the locality. It is essential to investigate the specific application of these taxes and incentives before making any investment decisions based on tax treatment. Many of the terms used in this Section -- for example "new job," "corporate headquarters," "distribution facility" -- are specifically defined under South Carolina law. Accordingly, any potential investor should obtain legal counsel or a ruling from the South Carolina Department of Revenue.

INCENTIVES

OVERVIEW

The following ***income tax incentives*** are significant:

- A corporate income tax credit for the creation of new jobs.
- A corporate income tax credit for the construction of corporate headquarters or corporate office facilities.
- Infrastructure corporate income tax credit.
- Retention of employer withholding taxes for corporate use.

The principal ***sales tax incentives*** are:

- An exemption for purchases of personal property used in the manufacturing process.
- An exemption for purchases of pollution control equipment.

Among the most important ***property tax incentives*** are the following:

- An exemption for a new or expanded manufacturing facility.
- An exemption for new corporate headquarters, corporate office facilities, distribution facilities, and additions thereto.
- Intangible property, manufacturers' inventories, and pollution control equipment.
- A fee-in-lieu of property taxes for companies making capital investments in excess of $5 million, by which a company may effectively reduce its property taxes by up to 43% for a period of up to 20 years.

INCOME TAX INCENTIVES

Businesses typically suffer net losses during their early years of operation. Thus, the 15 year carry-forward provided for net operating losses of South Carolina businesses may be very attractive to any investor involved in a start-up business.

■ JOBS TAX CREDIT

A tax credit against South Carolina income taxes is provided in return for the creation of manufacturing, processing, warehousing, distribution, research and development, and corporate office facilities jobs, and, where more than 250 jobs are created, service jobs. The 46 counties in South Carolina are divided into four categories of "least developed," "under developed," "moderately developed," and "developed" for purposes of determining the amount and the minimum number of jobs required to qualify for the credit. These categories are determined by the State annually based upon the counties' relative unemployment rates, average income figures and certain other factors.

A minimum of 10 new full-time jobs must be created in order to qualify for the credit. The per employee jobs tax credit which may be earned for five years is:

- *$4,500* **in** *least developed* **counties;**
- *$3,500* **in** *under developed* **counties;**
- *$2,500* **in** *moderately developed* **counties; and**
- *$1,500* **in** *developed* **counties.**

In each tier, the amount of the credit can be increased by an additional $1,000 per employee if the qualifying company is located in a multi-county industrial park.

Unused credits may be carried forward for up to 15 years from the year of job creation. Such credits may not be applied in any one year to offset more than one-half of the taxpayer's state income tax liability arising from the operation to which such jobs relate. The Department of Revenue will adjust the credit allowed each year for net new job fluctuations above the minimum number required. However, unless the minimum net new jobs requirement is maintained for each of the five years, no credit will be allowed for any year.

■ CORPORATE HEADQUARTERS CREDIT

A corporation establishing a corporate headquarters in South Carolina, or adding to an existing corporate headquarters, is entitled to a credit against corporate income taxes. That credit is equal to 20% of the

- **costs incurred in the design, preparation and development of either establishing or expanding a corporate headquarters, and**
- **direct construction or direct lease costs for the first five years of operations for that headquarters or expansion thereof.**

In order to qualify for the credit, such headquarters or expansion must result in the creation of at least 40 new jobs, 20 of which are executive, administrative or professional jobs. The credit applies only to facilities established for the direct use of the headquarters staff employees. Any unused portion of the credit may be carried forward 10 to 15 years depending upon the circumstances.

This credit applies to costs relating to the design, preparation, development and construction or lease of a corporate headquarters building or expansion. However, if the headquarters or expansion results in the creation of at least 75 (as opposed to 40) new jobs, the statute provides that the credit can also be applied to personal property used for corporation headquarters or research and development related purposes. "Corporate headquarters" means the location where corporate staff members or employees live and work and where the majority of the company's business functions are performed. A headquarters may be regional or national but must be the sole such headquarters within the region.

■ INFRASTRUCTURE CREDIT

A corporate taxpayer is allowed a credit against state income tax in an amount equal to 50% of its expenses in building or improving an infrastructure project. The total credit may not exceed $10,000. Any unused portion of the credit may be carried forward for three years. For purposes of this credit, an "infrastructure project" includes water lines, sewer lines, their related facilities, and roads. However, such projects:

- **cannot exclusively benefit the taxpayer;**
- **must be built in accordance with applicable construction standards; and**
- **must be dedicated to public use by giving the project to a local government or municipal water and sewer company.**

■ USE OF EMPLOYEE INCOME TAX WITHHOLDING FOR PROJECT EXPENDITURES

As described below, certain companies may qualify for a special incentive whereby the company may retain and spend on a new project or expansion an amount of employee income withholding tax of 1% to 5% of the total cash compensation paid to the new employees at such project or expansion. This job development fee incentive is available to companies which provide a benefits package, including health care, to full time employees, and which operate a manufacturing, processing, services, distribution, warehousing, research and development, corporate office or tourism facility, or a large (more than 250 jobs) service facility. Such businesses are eligible to enter into an agreement with the SC Coordinating Council for Economic Development, which approves and negotiates with qualifying businesses. The Coordinating Council also determines that the job development fee incentives offered to a qualifying business are appropriate for the proposed project.

The Coordinating Council may authorize a qualifying business to collect the "job development fee" by retaining anywhere from 1% to 5% of the gross wages of each new project employee for a period of up to 15 years. The percentage amount which may be retained depends upon the categorization of the county in which the jobs are created for jobs tax credit purposes and on the hourly cash compensation paid to the employee (the less developed the county and the higher paying the job, the greater percentage of cash compensation that an employer may retain). This authorization is accomplished through entering a "Revitalization Agreement" with the investor.

The business and employee are entitled to a dollar-for-dollar credit against income withholding tax liability owed to the state. For example, if a qualifying business pays its 100 new employees total annual cash compensation of $2 million, and the business were entitled to retain 4% of such compensation, it could retain $80,000 (4% of $2 million) in job development fees and take an offsetting withholding tax credit of $80,000. The qualifying business must hold the funds in an escrow account with a bank insured by the Federal Deposit Insurance Corporation and may use the funds for any eligible expenditures approved by the Coordinating Council incurred during the term of the revitalization agreement. This term may last up to 15 years. Eligible expenditures include training costs and facilities; acquisition of and improvements to real estate; improvements to public or private utility systems; fixed transportation facilities; and construction and improvements necessary to comply with environmental laws.

A qualifying business may also negotiate with the Coordinating Council (without entering into a revitalization agreement) and the State Board for Technical and Comprehensive Education to retain a job development "retraining" fee of up to $500 per year for up to 5 years (not to exceed a total of $2,000) from income withholding tax liability for each production employee. The funds must be expended for retraining purposes necessary for the business to remain competitive or to introduce new technologies. Any such retraining must be approved and performed by or through the local technical college or with an approved training contractor. The qualifying business is required to match the retraining funds.

PROPERTY TAX INCENTIVES

■ EXEMPTION FOR NEW OR EXPANDED MANUFACTURING ESTABLISHMENTS

All new manufacturing establishments, and any additions thereto, are partially exempt for the first five years of their operation from a portion of county property taxes. The exempted amount equals approximately 30% of the total county property tax. This exemption applies to buildings and to machinery and equipment installed in such buildings. The exemption is available only if the expansion costs of the facility or addition exceed $50,000. A purchaser may obtain this exemption for an existing facility acquired in an arms length transaction.

■ CORPORATE HEADQUARTERS / CORPORATE OFFICE FACILITIES / DISTRIBUTION FACILITIES EXEMPTION

New corporate headquarters, corporate office facilities, distribution facilities, and additions are also entitled to the five-year exemption from a portion of county property taxes. The costs of such facility or addition must exceed $50,000 and must involve the creation of at least 75 new full-time jobs.

■ OTHER EXEMPTIONS

Also exempt from property taxes are:

- **Intangible property.**
- **Inventories of manufactures, except manufactured articles which have been offered for sale at retail or which have been available for sale at retail.**
- **Pollution control equipment.**

■ FEES-IN-LIEU OF TAXES ("FILOT")

A special financial incentive is available to manufacturing facilities which make a capital investment of at least $5 million over a five-year period. This incentive permits a negotiated reduction of the property taxes of the investor and freezes at current rates the millage applicable to the investor. This effective reduction in property taxes can be as much as 43% of the usual property tax burden for up to 20 years or, in the case of total investments exceeding $400 million, for up to 30 years. This incentive is available to a company only if the county in which the company's proposed facility is to be located agrees to the incentive.

The method of obtaining this property tax reduction is relatively complex. First, the county in which the facility is to be located must consent to the fee-in-lieu transaction, including the amount of the property tax reduction (from a 10.5% assessment ratio down to as low as 6% or, in the case of total investments exceeding $400 million, 4%), and to the applicable millage rate and the FILOT term. Second, the county and the taxpayer must enter into a sale-leaseback arrangement whereby the taxpayer transfers title to the project to the county and leases back the project for a nominal amount.

Any company willing to consider making a substantial investment in South Carolina over a five-year period will receive guidance from the State and applicable county about qualification for this property tax reduction.

SALES/USE TAX INCENTIVES

■ MANUFACTURING MACHINERY

There is an exemption from sales and use tax of the proceeds of the sale of the machines used to process or manufacture tangible personal property.

■ OTHER EXEMPTIONS

There is a similar exemption from sales and use tax for

repair parts,

materials that will become an integral part of a finished product, and

industrial electricity and fuels.

■ RESEARCH AND DEVELOPMENT CAP

The maximum sales or use tax which may be applied to the sale or purchase of an item of machinery used for research and development is $300. This includes machinery used directly and exclusively in research and development in an experimental or laboratory application for new products, new uses for existing products, or for improving existing products. Eligible machinery must be located in a separate facility devoted exclusively to research and development. Machinery used in connection with efficiency surveys, management studies, consumer surveys, economic surveys, advertising, promotion or research in connection with library, historical or similar projects is not eligible for this benefit.

LABOR INCENTIVES

BY CO-AUTHORS:

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THE SOUTH CAROLINA RIGHT-TO-WORK LAW

Federal law gives employees the right to organize, to form, joint or assist labor unions, and to bargain collectively with their employer.[i] Further, federal law places upon unions the obligation to represent fairly all employees in the bargaining unit, whether or not the employees are dues-paying union members.[ii] Many states permit employers and unions to enter into "closed shop" agreements which require union membership as a condition of employment. South Carolina, however, is one of the seventeen "Right-to-Work" states. Our Right-to-Work law[iii] prohibits employers from requiring employees to join a union as a condition of employment. Further, the Right-to-Work law prohibits any person from interfering with another's right-to-work through force, intimidation, violence, threats, or violent or insulting language. Moreover, although picketing is not expressly prohibited, no one may picket by force, violence, or in such numbers or manner as to obstruct entrance to or exit from any workplace or interfere with the free use of public transportation, streets, roads, or highways. Any person who is the target of illegal conduct under this law may file an action in state court to enjoin the legal conduct and to recover money damages for the harm suffered. The statute provides for a jury trial.

South Carolina has the lowest incidence of organized labor as a percentage of the work force of any state. According to the South Carolina Chamber of Commerce, only 3.5% of South Carolina's work force is unionized. The 1988-1989 Annual Report of the South Carolina Department of Labor shows that only one work stoppage, which involved only 37 workers resulted from union activities in 1988. An average of only .0004% of working time was lost to labor unrest in 1988. This is the lowest percentage of any state in the United States.

ROLE OF THE SOUTH CAROLINA DEPARTMENT OF LABOR

The South Carolina Department of Labor (SCDL) enforces the state labor laws. The SCDL is supervised and directed by the Commissioner of Labor, who is appointed by the governor of the state. Two primary functions of the SCDL are administering the wage/hours laws under the Division of Employment Standards and enforcing child labor laws.

The South Carolina Payment of Wages Statute[iv] covers all compensation paid for labor, no matter how it is calculated, and includes bonuses, vacations, holiday, sick leave, and severance payments due to an employee under any employment policy or contract. The statute does not cover domestic workers in private homes of businesses that employ less than five employees at all times during the preceding 12 months.

The Payment of Wages law requires the employer to give written notice of certain information to its workers at the time they are hired. For example, the employee must be notified of: the hours and wages agreed upon; the time and place of payment; and of all deductions from wages, including payments to insurance programs. If the employer makes changes in any of these terms, it must give written notification to the employee at least seven days before the changes become effective. All wages must be paid in United States currency, check, or by electronic deposit into accounts located at approved financial institutions. When an employee ends his employment for any reason, the employer must pay him all wages due within 48 hours of the termination or at the next regular pay day, which time may not exceed 30 days after written notice of separation if given.

SCDL investigates all written employee wage complaints and tries to resolve them through mediation. Both the employer and employee may ask the Commissioner to hear and decide wage disputes and may allow or reject any wage deductions. In order to investigate the reported violations, the Commissioner has access to the employer's premises, records, and employees. Either party may appeal the Commissioner's decision to a court of law.

After the first unintentional violation of the Wage Payment law, employers are given a written warning from the Commissioner. Each additional violation will bring a civil penalty of $100. If the violation is willful, however, employers may be subject to criminal penalties of up to $5,000 in fines or imprisonment of not more than 90 days. As an alternative to requesting intervention by the Department of Labor, employees may file a civil lawsuit to recover up to three times the amount of unpaid wages, resulting from violations of the Wage Payment law, plus attorney's fees.

SCDL also enforces South Carolina's Child Labor laws,[v] which prohibit oppressive child labor. This statute authorizes the Commissioner to make any child labor regulations that are not stricter than similar federal laws. The federal law[vi] generally prohibits employment of children under 16, except that children between the ages of 10 and 16 years may work in certain specified occupations. In addition, federal laws will not allow children from 16 to 18 years to work in hazardous occupations.

In South Carolina, minors under the age of 18 may not work unless their parents or guardian consents. One exception to this general rule arises when the parents or guardians do not provide a home and support for the child; in those cases, the child is responsible for himself and does not need parental permission to work.

OTHER ACTIVITIES AND SERVICES OF THE SOUTH CAROLINA DEPARTMENT OF LABOR

The South Carolina Department of Labor provides extensive training and consulting services to businesses and industries concerning all aspects of South Carolina labor and employment law under its jurisdiction. This function is provided by the Division of Education, Training and Consulting.

The SCDL also has authority over migrant farm workers and seasonal farm workers. Such matters are delegated to the Migrant Labor Division. Under the Migrant Labor Division law,[vii] the Department assists in making regulations to safeguard the health, safety, education, and welfare of these farm workers.

Under the direction of the Commissioner, the SCDL also supplies various other services. One such service is to mediate labor and wage disputes between employers and employees.[viii] Also, SCDL, under the guidance of the Division of Apprenticeship and the Commissioner, works under the Voluntary Apprentice law[ix] to provide people the opportunity to obtain education and training under an apprenticeship program. The Division sets up conditions and training standards, oversees apprenticeship agreements, and provides on-the-job training for certain emergency and critical civilian needs. In addition, the Department enforces the elevator code for public buildings[x] and inspects and makes regulations for amusement rides in the state.[xi]

UNEMPLOYMENT RATES AND WAGE RATES

South Carolina continues to have wage and unemployment rates below the national average. South Carolina currently has a 5.5% (Feb 97) rate of unemployment, which places it 11th nationally. South Carolina placed 46th nationally in 12-month average weekly wages, paying workers an average of $425.29 per week in 1995. Also in that year, the average of hourly manufacturing wages in this state was $10.15 per hour, $2.20 per hour below the national average.

STATE VOCATIONAL EDUCATION

South Carolina has statewide network of 53 modern vocational education centers and 222 high schools that offer valuable basic skills training to the state's high school students.

South Carolina's post-high school technical education system enjoys a national reputation under the State Board of Technical and Comprehensive Education. The technical education system has 16 colleges with a total of 21 campuses through the state. The institutions offer upgrading opportunities for employees, and supervisory programs are available at the institutions or at a business or plant site. In 1988, almost 5,300 students were graduates in the Degree, Diploma, and

Certificate Programs. The Special Schools Program, a separate division of the Technical Education Systems, will design and implement tests and train workers for new and expanded businesses and industries, usually at no cost to the company. In 1988, Special Schools worked with 132 companies and trained over 9,000 students.

Higher education is provided through three public state universities and nine other public senior colleges. Additionally, there are also 21 private senior colleges, including seminaries, in South Carolina. More than 2,000 degrees were awarded last year in the state's public and private colleges and universities.

CONCLUSION

South Carolina offers lucrative labor incentives for employers moving into this state. The Right-to-Work law, which discourages union organizing and strikes is a primary reason for locating a business in South Carolina. The South Carolina Department of Labor works closely with businesses and workers to conciliate labor and wage disputes and provides consulting services over the entire range of its responsibilities. Further enhancing the educational and training opportunities in this state is the extensive post-high school educational system found here. For these reasons, employers enjoy a close, cooperative working relationship with state government and the labor force.

THE COURT SYSTEM IN SOUTH CAROLINA

BY CO-AUTHORS:

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INTRODUCTION

This article gives the reader an overview of the court system in South Carolina. It introduces the structure of the state and federal court systems, the jurisdiction of the various courts, and the quasi-judicial role of administrative agencies. It also discusses alternatives to resolution of disputes by court action through arbitration and mediation.

COURT STRUCTURE

South Carolina state and federal courts have three levels including a trial level, an intermediate appellate level, and a final appellate level.

STATE COURT

- ***TRIAL COURTS***. South Carolina trial courts are the Circuit Courts which have generally and original jurisdiction to decide in the first instance most types of legal disputes. South Carolina has sixteen judicial circuits each of which has one or more circuit judges who are elected by the State Legislature for terms of ten years. The losing party in a case before the Circuit Court has the right to appeal the matter to a higher court.

- ***INTERMEDIATE APPELLATE COURT***. The South Carolina intermediate appellate court is the Court of Appeals. It receives its cases by reference from the South Carolina Supreme Court and has general appellate jurisdiction in all but a few types of cases. As an appellate court, its principal role is to correct errors of law. Appellate courts do not re-try cases and rarely reevaluate or overturn findings of fact made at the trial level.

  The Court of Appeals is comprised of a chief judge and five associate judges who are elected by the State Legislature for terms of six years. Except in unusual cases, the Court of Appeals sits in panels of three judges. All three members of a panel must be present to constitute a quorum and a majority must concur to reverse the decision of the lower court. The decisions of the Court of Appeals usually are final and not subject to further appellate review. To obtain further appellate review, the losing litigant must successfully petition the South Carolina Supreme Court to hear its appeal.

- ***FINAL APPELLATE COURT***. The South Carolina Supreme Court is the State's final court of appellate review and has appellate jurisdiction in all cases, both civil and criminal. It is comprised of a chief justice and four associate justices who are elected for ten year terms by the State Legislature. The State Supreme Court sits as one panel, with three justices constituting a quorum. Three justices concur in order to reverse a decision of the lower court. Decisions of the State Supreme Court are final and not subject to further appellate review, except those which address federal U.S. Constitutional questions. When a federal or constitutional question is involved, a litigant may petition the United States Supreme Court to hear an appeal of the case.

- ***OTHER COURTS***. South Carolina has several other courts of limited jurisdiction including Probate Courts, Family Courts, and Magistrate's and Municipal Courts. Probate Courts have general power over the probate of wills and the administration of estates. Family Courts have exclusive jurisdiction to decide domestic and juvenile matters such as divorce proceedings and disputes over the custody of children. Magistrate's Courts provide a forum for small civil and criminal cases arising under state law. Municipal courts have the authority to try individuals for offenses against city ordinances.

FEDERAL COURTS

- ***TRIAL COURTS***. Federal trial courts are the United States District Courts. Small states, such as South Carolina have only one federal judicial district. Because of geographic size and population, larger states may have as many as four districts. As of this writing,, eleven judges serve in the District of South Carolina. All federal judges are appointed for life by the President, with the consent of the United States Senate. Appeals from the United States District Court usually go directly to the intermediate appellate court covering that federal judicial district.

- ***INTERMEDIATE APPELLATE COURTS***. There are thirteen intermediate appellate courts known as the United States Court of Appeals. Except for the Federal Circuit, each Court of Appeals covers a particular geographic area known as a Circuit. South Carolina is in the Fourth Judicial Circuit, which covers South Carolina, North Carolina, Virginia, West Virginia, and Maryland. The Federal Circuit hears appeals in special types of cases, such as patent disputes, from all of the United States District Courts in the country. Courts of Appeals sit in panels of three judges each and are governed by a majority. In important cases, however, all of the judges on a particular Court of Appeals may sit together "en banc."

- ***FINAL APPELLATE COURT***. The United States Supreme Court is the final appellate court in the federal system. It hears appeals from the United States Courts of Appeals, from the highest appellate courts of each state when a federal or U.S. constitutional question is involved, and directly from the United States District Courts. It also has original jurisdiction in certain limited cases and to act as a trial court.

  The United States Supreme Court is composed of a Chief Justice and eight Associate Justices. A majority vote of the Court will overturn a decision of the lower court. In most cases appellate review is discretionary and is granted only in a small number of the cases where broad policy issues are raised.

- ***OTHER FEDERAL COURTS***. Other important federal courts include the Bankruptcy Court, the Tax Court, the Court of Claims, and the Court of International Trade. For every federal judicial district, there is a Bankruptcy Court, which is concerned exclusively with administering bankruptcy proceedings. The Tax Court adjudicates disputes involving federal income, death, and gift taxes. The United States Court of Claims has jurisdiction over certain types of claims against the United States. The Court of International Trade has jurisdiction over customs and trade matters.

JURISDICTION

Every court does not have the jurisdiction or the authority to decide every controversy. Before a court can render a decision binding on the parties to a dispute it must have jurisdiction over the subject matter of the action, and personal jurisdiction over the defendant or property which is the subject of the dispute.

- ***SUBJECT MATTER JURISDICTION***. A court has jurisdiction over the subject matter of an action if the constitution and statutes under which it operates confers the power upon it to decide that type of case. Some courts have broad subject matter jurisdiction while the subject matter jurisdiction of other courts is very limited. For example, South Carolina Family Courts are courts with very limited subject matter jurisdiction. South Carolina Circuit Courts are courts of general jurisdiction with the power to hear a wide variety of disputes including disputes involving federal law. Some areas of federal law are within the exclusive jurisdiction of federal courts.

  The subject matter jurisdiction of the United States District Courts extends to many cases involving federal law. Their subject matter jurisdiction also extends to some cases that do not involve federal law but in which there is diversity of citizenship. Diversity of citizenship involves parties who are citizens of different states or citizens of a foreign country and the amount in controversy is over $50,000.00. Diversity jurisdiction is not exclusive and may be shared with state courts which have the power to hear these cases. If a plaintiff brings an action in state court that he could have originated in federal court, the foreign defendant may remove the case to the appropriate United States District Court.

- ***PERSONAL JURISDICTION***. For a court to have personal jurisdiction over a defendant, the defendant must have sufficient contacts within the state where the court is located. Generally, a defendant does not have sufficient minimum contacts with a state if it would be unfair to require him to defend against a suit brought in the state.

DISTINCTIONS BETWEEN THE AMERICAN AND OTHER JUDICIAL SYSTEMS

There are important differences between the American judicial system and the systems in most other countries. For instance, in America litigants in many civil case are entitled to a trial by jury which is not available in most countries. An American jury is typically composed of twelve lay men and women. In the federal court the juries often are made up of six or eight people. After being sworn to render a verdict, a jury will hear the evidence and arguments, receive the instructions of the court regarding the law relevant to the case, deliberate, and return a verdict on the issues submitted to them. In South Carolina, if a jury does not arrive at a unanimous verdict the case must be retried to another jury.

Another important difference between the judicial system in America compared to other systems is the right to thorough discovery of facts relevant to the case. In America, litigants can ask interrogatories, request the production of documents and things, and inspect the opposition's products and premises. In most cases litigants are free to take sworn testimony from the opposing party and other witnesses prior to the trial of the case. Other countries generally do not have the same thorough and open exchange of information before the trial of a dispute.

ILLUSTRATION OF COURT STRUCTURE

STATE COURT SYSTEM	**FEDERAL COURT SYSTEM**
South Carolina Supreme Court	United States Supreme Court
↓	↓
South Carolina Court of Appeals	United States Court of Appeals for the Fourth Circuit
↓	↓
South Carolina Circuit Court	United States District Court for the District of South Carolina

ADMINISTRATIVE AGENCIES

Administrative agencies regulate matters that affect the health, safety, and welfare of the public. These agencies perform an expanding role in the governing process exercising considerable power over individuals, businesses, and industries whose activities fall within the scope of their authority. On the federal level, such influential agencies include the Internal Revenue Service, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, the Securities and Exchange Commission, and the Immigration and Naturalization Service. Important state agencies include the Department of Health and Environmental Control, the Industrial Commission, and the Human Affairs commission. Top agency officials in the federal system are appointed by the President; top state agency officials are appointed by South Carolina's Governor.

Agencies make rules and regulations which have the force of law to perform their functions. The agency applies, enforces and interprets those rules through administrative hearings and decisions. In this way, administrative agencies act as quasi-judicial bodies. Agency decisions affect substantial personal and property rights, are binding on the parties, and are subject to judicial review.

ALTERNATIVES TO COURT ACTION: ARBITRATION AND MEDIATION

ARBITRATION

Arbitration is the submission of a dispute to one or more impartial individuals called arbitrators. Parties typically agree to submit their disputes to arbitration before a dispute arises by including an arbitration clause in their contract. A standard arbitration clause found in many commercial contracts provides that any controversy or claim arising out of or relating to a contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof.

Significantly, the United States Arbitration Act and South Carolina's Uniform Arbitration Act make such a provision enforceable in the state and federal courts. Courts will refuse to enforce arbitration clauses only in rare circumstances.

Some businesses prefer arbitration over court action for several reasons. Businesses generally like to have their disputes decided by individuals who have experience in their particular industries. Arbitrators, unlike judges, can be selected by the parties for their business expertise. Also, arbitration is typically less expensive, more private, and less formal than court actions.

Perhaps most importantly, a dispute can often be resolved sooner through arbitration than through court action. As an example, to prevent lengthy delays in the construction process, builders and contractors frequently agree to arbitrate their disputes over matters such as performance payments. Other frequent users of arbitration include the textile and apparel industries and businesses involved in international trade.

Despite the advantages of arbitration, the agreement to arbitrate is an important business decision that should not be entered into without careful consideration of the potential disadvantages. A party that agrees to arbitrate a dispute waives many rights it would have if the dispute were resolved by the courts, such as the right to broad discovery of the information pertinent to the case.

MEDIATION

Mediation is a non-binding process in which a neutral third party acts as a mediator to help the parties settle disputes without the need for arbitration or court action. Such mediator is usually experienced in the subject matter of the dispute. The American Arbitration Association adopted a set of rules for mediation and maintains a list of experienced mediators.

CONCLUSION

The two most distinctive features of the state and federal court systems in use in the United States are the right to trial by a jury of lay citizens and the right to broad discovery of facts and documents related to the subject matter of the case. However, the advantages of arbitration, expeditious resolution of disputes and minimized expense, may be outweighed by the expanded protections of the state or federal court system.

QUALIFICATION TO DO BUSINESS IN SOUTH CAROLINA

BY CO-AUTHORS:

WILLIAM L. BETHEA, JR., ESQ. *AND* ***JOHN A. HILL, ESQ.***

INTRODUCTION

South Carolina offers a variety of legal entities to the foreign investor. The following is a brief overview of the various options available. The tax characteristics of each entity should be discussed with a qualified certified public accountant or expert tax counsel before an entity is selected.

SOLE PROPRIETORSHIP

A sole proprietorship is a form of business in which one person owns all the assets of the business and is solely liable for all the debts of the business. The owner usually conducts the business in his own name and will obtain a local business license if applicable. If the owner does not conduct business in his own name, then the owner or proprietor of the business must register the business name with the Clerk of Court of the county where the proprietorship's principal place of business is located. The "registration" requires the filing of a document which provides the names of the owners of the proprietorship.

PARTNERSHIPS

GENERAL PARTNERSHIP

A general partnership is an unincorporated association of two or more persons who carry on as co-owners of a business for profit. South Carolina has adopted the Uniform Partnership Act. This Act outlines the partners' rights and responsibilities to each other and to third parties. All general partners are jointly and severally liable for the partnership debts and obligations to the extent they exceed partnership assets. Most partners outline the purpose of the partnership and the rights and responsibilities of the partners in a written partnership agreement. However, a written agreement is not necessary in order to form a partnership. A South Carolina General Partnership can own real property and personal property.

The individual partners, not the partnership, are subject to taxation on the business earnings. The various items of partnership income, gains and losses flow through to the individual partners and are reported on their personal income tax returns.

LIMITED PARTNERSHIP

A limited partnership is an unincorporated association of two or more persons who carry on a business for profit. A limited partnership has one or more general partners and one or more limited partners. A South Carolina limited partnership can only be formed by filing a Certificate of Limited Partnership with the South Carolina Secretary of State.

A limited partner's liability to third party creditors is limited to the amount invested by the limited partner in the partnership. Limited partners generally are not obligated for the obligations of a limited partnership. The general partners are personally liable for the debts and obligations of the partnership to the extent they exceed partnership assets and the general partners share in the profits and losses as provided in the limited partnership agreement.

Limited partners, by their acts, may incur liability as a general partner if they take an active part in the management of the limited partnership. Therefore, care must be taken to preserve the limited partner status. Similar to the general partnership, the partners are taxed individually. Partnership income, gains and losses are reported on their personal income tax returns.

LIMITED LIABILITY COMPANY

A limited liability company is an unincorporated association of one or more persons to carry on a business for profit. A limited liability company's essential characteristics combine the attributes of limited liability for its members, together with the attributes of partnership taxation as long as the limited liability is correctly formed for that purpose.

A limited liability company is formed in much the same manner as a corporation, by filing Articles of Organization with the South Carolina Secretary of State. It is possible for one person to be the organizer and the member of a limited liability company. In addition to the Articles of Organization, a limited liability company may adopt an operating agreement which will provide for its governance. If the operating agreement is not adopted, the provisions of the limited liability company statute stipulate the essential elements of governance.

Although the limited liability company is formed much like a corporation, its day-to-day governance is more like that of a partnership, with far less required formality and structure that required of a corporation. [A limited liability company can be managed by all of its members or it can be managed by certain members, typically referred to as managing members.]

The limited liability form of business organization is the newest and most flexible entity available in South Carolina in which to conduct business. Proper formation of the limited liability company

will insure the tax advantages of partnership taxation and the liability protection of a corporation. Because of the flexibility of the limited liability company form of organization, new businesses should give serious consideration to utilizing a limited liability company form of organization.

FOREIGN LIMITED PARTNERSHIPS

A foreign limited partnership may transact business in South Carolina. However, a foreign limited partnership must register with the South Carolina Secretary of State and provide certain information before it may transact business in this state.

JOINT VENTURE

A joint venture is a business enterprise undertaken by two or more parties to carry out a ***specific*** purpose. A joint venture is similar to and taxed like a partnership. A partnership operates an on-going business, but a joint venture is usually dissolved following completion of the specific enterprise. Typically, a foreign corporation will form a joint venture with a U.S. corporation to benefit from distribution channels, manufacturing facilities, technology, and related attributes of the U.S. partner.

The joint venture relationship is controlled by partnership law. In general, the joint venture partners have fiduciary duties and unlimited liability for the acts of the partnership.

Participation in a joint venture may subject the foreign corporation to U.S. taxation of the profit from U.S. sales, and to U.S. jurisdiction for legal liability. The foreign corporation should consider forming a U.S. subsidiary to act as the joint venture partner to minimize the likelihood that the foreign operations would be subject to U.S. taxation and liability.

Most joint venture partners execute a written agreement thoroughly setting forth the parties' understanding. The provisions of such an agreement should include: capital contribution, distribution of profits, dissolution of and withdrawal from the venture, arbitration, and the relationship of the parties.

DISTRIBUTORSHIP

A distributorship is a marketing tool whereby the distributor purchases goods from a supplier and re-sells them at the retail or wholesale level. The distributor acts wholly independent of the supplier. He places orders with the supplier, takes title to the goods, and re-sells the goods. The "mark-up" from the re-sale is the distributor's gross profit.

Under the typical arrangement, the distributor represents certain products of the supplier within an assigned geographic territory. If the distributorship grants exclusive rights to represent the products within the territory, the arrangement should be analyzed for antitrust considerations.

If a foreign supplier has no office in the U.S. to subject the foreign company to U.S. taxation, the foreign supplier may want to negotiate a distributorship arrangement where the contract is not made in the U.S. and title to the goods passes outside the U.S. Under such circumstances, the foreign supplier may be able to minimize U.S. tax consequences as to profits from the sale.

South Carolina does not have any dealer-protection statutes commonly found in foreign countries. The relationship and rights of the parties are determined by contract. Therefore, as with a joint venture, it is advisable to have a thorough, well-drafted written agreement. The agreement should address subjects like

the products;

territory;

exclusivity and non-competition provisions;

duration of the distributorship;

performance levels;

manner and currency of payment;

warranties;

governing law;

arbitration;

after-sales service;

promotion and similar matters.

AGENCY

Agency is the relationship in which one person or entity (the agent) acts for or represents another person or entity (the principal) with the principal's consent. The agent consents to act on behalf of the principal and subject to his control. However, it is not necessary that the agent have express consent of the principal in order for the principal to be held liable for the acts of the agent. A principal may be liable for conduct of the agent even though the agent is not acting with express permission.

A sales agency arrangement is similar to a distributorship in terms of the type of arrangement and advantages offered with several important distinctions. First, an agent usually does not take title

to the goods. Second, the agent is paid through commissions from the sale. The agent solicits and places orders for the foreign supplier's products, and the supplier fills the orders directly to the customer.

As with distributorships, a sales agency relationship should be governed by a written agreement. Important provisions include those set forth in a distributorship agreement. In addition, the sales agency agreement should:

stipulate the sales commission and how it is to be paid;

set forth that the agent has no authority to bind or accept orders without approval from the foreign supplier; and

express that the agent is an independent representative of the foreign supplier and not an employee.

Such an understanding may reduce the likelihood that the foreign supplier would be subject to U.S. taxation despite sales of its products in the United States.

CORPORATIONS

INCORPORATION OF DOMESTIC BUSINESS CORPORATIONS

A domestic business corporation is a separate legal entity formed in compliance with the provisions of the 1988 South Carolina Business Corporation Act. It is formed for transacting business of any lawful purpose, including practically every form of commercial or industrial activity for profit. Incorporation of a business corporation offers limited liability for the shareholder, free transferability of shareholders' interests and continuity of the business at the death of the owner.

The U.S. Internal Revenue Code divides corporations into two types, a regular or "C" Corporation and a "S" Corporation. The "C" Corporation is treated as a separate taxpayer and it pays its own federal and state income tax. The "S" Corporation does not pay its own federal and state income tax. The shareholders of the "S" Corporation report the Corporation's income on their personal income tax returns. "S" Corporations and their shareholders are taxed by the South Carolina Tax Commission in the same manner as the Internal Revenue Service assesses federal tax. The "S" Corporation tax status has many partnership tax features.

To incorporate a South Carolina corporation, the Articles of Incorporation must be prepared in duplicate and filed with the South Carolina Secretary of State. The Articles of Incorporation include information with respect to the name of the corporation, the initial registered agent and registered office, the authorized number of shares and the class of shares of stock, the beginning of the existence of the corporation, and the name, address and signature of the incorporator.

The corporation may need to prepare additional documentation including:

applications for taxpayer identification numbers;

workers' compensation application;

initial taxpayer report to the South Carolina Tax Commission;

social security and tax withholding forms; and

unemployment compensation applications.

Appropriate filing fees must also be paid. In addition, the corporation must maintain formal minutes of all of its major activities, including its annual shareholder's meetings and directors' meetings.

The investor should consult a South Carolina attorney to determine whether the shares of stock should be registered with the Securities Exchange Commission and the South Carolina Securities Commission.

QUALIFICATIONS OF FOREIGN CORPORATIONS TO TRANSACT BUSINESS IN SOUTH CAROLINA

Any foreign corporation, including a foreign non-profit corporation, may not transact business in South Carolina until it has qualified to do business by obtaining a Certificate of Authority from the Secretary of State. Activities exempt from the definition of transacting business which may involve the activities of a foreign corporation include maintaining a bank account, selling through independent contractors, soliciting orders which must be accepted outside the state to become binding, transacting business in interstate commerce and owning a subsidiary which is transacting business.

To qualify a foreign corporation to do business in South Carolina, the following procedure applies:

a Certificate of Authority Form must be completed in duplicate originals and filed with the Office of the South Carolina Secretary of State with the appropriate filing fee;

the Initial Annual Report of Corporations (a South Carolina Tax Commission form) must be completed and filed with the South Carolina Tax Commission;

a Certificate of Existence form must be obtained from the state or country where the foreign corporation was incorporated and the certificate must show that the business was incorporated and remains in good standing; and

if the corporation is a foreign professional corporation, certain additional information must be provided to the South Carolina Secretary of State's Office.

CORPORATE STRUCTURE

Shareholders, directors, and officers play a vital role in the conduct of business of South Carolina corporations. Shareholders own the shares of stock which represent ownership of the corporation. The chief function of the shareholders is to elect the directors of the corporation. Through this function, the shareholders have the ultimate control of the corporation's policies and management. Shareholders also have the power to remove directors, amend the articles of incorporation, amend the bylaws, and approve mergers, dissolutions and sales of all corporate assets. Shareholders must meet at least annually.

The directors are given authority over all corporate powers and authority to direct the management of the business and affairs of the corporation. South Carolina corporations are not required to have directors. The articles of incorporation or unanimous agreement of the shareholders may designate a different governing arrangement. Such arrangements must be disclosed on the share certificates and the articles of incorporation.

A board of directors consists of one or more individuals with the number specified in or fixed in accordance with the articles of incorporation or the bylaws. Directors are usually elected at annual shareholders meetings and serve for terms of one year. If the corporation has nine or more directors, the articles of incorporation may allow directors to serve staggered terms of greater than one year.

The board of directors has broad powers to bind the corporation, subject to certain limitations such as directors conflict of interest transactions, loans to directors, unlawful distributions to shareholders, approval procedures for fundamental corporate changes. The directors have fiduciary duties of loyalty and due care to the corporation and to the shareholders. This means that a director shall discharge his duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he reasonably believes to be in the best interest of the corporation and its shareholders.

South Carolina corporations are not required to have any specific officers as long as one officer performs the basic duties of a corporate secretary. A corporation's bylaws usually set forth the offices of a corporation. The bylaws also usually define the authority and duties of the persons filling such offices. The board of directors usually appoint and remove the officers, but the articles of incorporation, bylaws, or shareholders may designate otherwise.

By virtue of their position, the officers often have apparent and implied authority to act on behalf of the corporation and bind the corporation in the ordinary course of business. Like directors, the officers have a statutory fiduciary duty of loyalty and due care to the corporation and to its shareholders.

FORMATION OF DOMESTIC LIMITED LIABILITY COMPANIES

A domestic limited liability company is a separate legal entity formed in compliance with the provisions of the 1996 Limited Liability Company Act. It is formed for transacting business of any lawful purpose, including practically every form of commercial or industrial activity for profit. Formation of a limited liability company, if properly structured, offers limited liability for the members, the opportunity for continuity of the business on the death of the owner, and significant flexibility in the governance of the company.

The United States Internal Revenue Service Regulations were amended in December of 1996 to adopt "Check-the-Box" regulations which make it much easier for limited liability companies to qualify for partnership tax treatment. Provided proper care is taken in the formation of the limited liability company, a limited liability company's essential characteristics are comparable to those of a partnership whose partners have the benefit of partnership taxation treatment while at the same time having the limited liability benefits of a corporation. A limited liability company has "members" which are comparable to shareholders of a corporation and they are not, solely by reason of being members, liable for obligations of the limited liability company. Additionally, if the limited liability is correctly formed, the Internal Revenue Service will treat the limited liability company as a partnership for tax purposes. Further, the limited liability company does not have to conduct annual meetings and other typical corporate formalities in order to maintain its limited liability shield. This is an advantage for any small or closely held business organization which often has the tendency to neglect the maintenance of corporate formalities and could thereby inadvertently jeopardize the corporation's limited liability shield.

A limited liability company is formed in much the same manner as a corporation, by filing Articles of Organization, as opposed to Articles of Incorporation, with South Carolina's Secretary of State. As with the corporation, the existence of the limited liability company begins when the Articles of Organization are filed with the South Carolina Secretary of State. The individual or individuals responsible for filing the Articles of Organization are the "organizers," as opposed to the "incorporators" who are responsible for filing the Articles of Incorporation to form a corporation. [The organizer of a limited liability company need not be a member.] After filing of the Articles of Organization, it is necessary for the organizers to admit members to the limited liability company if this is not done in the operating agreement. If a limited liability company does not adopt an operating agreement, it will be governed by the default statutory provisions contained in the South Carolina Limited Liability Company Act.

Although a limited liability company is formed much like a corporation, its day-to-day governance is more like that of a partnership. The limited liability company's primary governance document is the operating agreement which is a contract executed by the limited liability company members which resembles in many ways a partnership agreement. When compared to corporate governance, the operating agreement is the substitute for the by-laws and the shareholders agreement. The limited liability company can be managed by all of its members, in which case, it more closely resembles a general partnership. Alternatively, it can be managed by certain members, typically referred to as managing members, with the remaining members referred to as

investor members. If the governance of the limited liability company is conducted by the managing members with passive investor member, the limited liability company more closely resembles a limited partnership, substituting the term "managing member" for "general partner" and "investor member" for "limited partner." A limited liability company may have only one member.

The limited liability company is the newest and most flexible entity available for the conduct of business in South Carolina. Flexibility is not only important when forming the company, but often assists in dealing with unforeseen problems and opportunities. Proper formation of a limited liability company will insure the tax advantages of partnership taxation and the liability protection of a corporation. Any new business considering organizing in South Carolina should seriously consider the limited liability company as its possible entity of choice.

ACQUISITION OF A U.S. MANUFACTURER

BY:
HENRY M. BURWELL, ESQ.

INTRODUCTION

The acquisition of a U.S. company by a foreign investor may be accomplished through purchase of its stock or assets. Depending upon

the size of the company acquired,

the method used, and

the industry of the acquired company, U.S. federal and state statutes may impose restrictions.

Such restrictions may limit the amount of foreign investment or require government approval because of the impact of the acquisition in the U.S. market.

Even with a minimum of government regulation or restriction, an acquisition of a U.S. company should be done carefully. A thorough plan of investigation and inspection must be followed to insure the investment will be successful. The beginning point of investment is to analyze the target company and industry.

INVESTIGATION

Certain phases of an acquisition review can be done by reviewing records and statements. Such investigation should be completed before inspection begins.

MARKET REVIEW

Industry and market data must be analyzed to review the environment in which the target company performs. The market share, distribution, pricing, advertising and product promotion must be examined. The ability of the company to distribute its product or service in a timely manner is an important factor to its ability to compete. Sales records of the company provides much of this information.

FINANCIAL REVIEW

The financial review of the net worth of the company may be done upon review of the company's financial statements. The establishment of a price for the company to reflect its value is a complicated analysis. Depending upon the size of the company and the industry, analysts from the investment banking industry or the accounting professions may need to be consulted.

Such analysts value companies based on many factors including:

- historical performance;
- projected earnings;
- industry growth;
- technology life cycles;
- industry competition; and
- buyer's financial resources.

The valuation process begins after a thorough examination of the financial statements including:

- profit and loss statements;
- balance sheets;
- cash flow statements;
- statement of changes of financial condition and similar financial data;
- projections and forecast.

Such examination includes evaluation of return on investment, return on assets, and return on equity to the shareholders.

The valuation process is completed after comparing the historical performance of the company to its potential performance in the future. Often it may require the analyst to use a valuation methodology such as discounted cash flow analysis.

LEGAL REVIEW

The legal review must be thorough to permit disclosure of potential liabilities and risks to the foreign buyer. The documentation which must be prepared and recorded that completes the acquisition is based on the legal review. The legal opinion given about the results of the legal review discloses such significant facts to the buyer.

Therefore, many aspects of a company's history must be researched to determine its legal character. Public records must be examined. The official records of the company must be examined. State and federal agencies must be consulted to determine compliance in such areas as tax, environmental control, safety, labor, immigration, antitrust, securities and trade.

The legal review begins with the investigation of the records and continues with the physical inspection of the company.

INSPECTION

PRODUCTION REVIEW

The main purpose of the production review is to inspect the company production facilities. Such inspection focuses on:

- technology;
- personnel qualifications;
- capacity to produce;
- quality control;
- labor environment;
- plant facilities; and
- company compliance with government regulations.

Within a few days after inspection, an experienced buyer can reach a conclusion as to production matters affecting efficiency and productivity. By having the knowledge from the documents investigation, the production review can concentrate on the manufacturing process.

ADMINISTRATION REVIEW

The inspection of the administration system of a company reveals its ability to be profitable. Effective administration controls waste and maintains efficiency.

The review of company practices and procedures for personnel indicates the philosophy of management. The results of such inspection can be used to analyze the attitude of its leadership towards compliance with U.S. and state law. Such results can be used to analyze the possibility that the company may become organized by a union.

FORMS OF ACQUISITION

An acquisition may take the form of a

- **statutory stock merger;**
- **asset acquisition; or**
- **stock acquisition.**

A statutory stock merger occurs under the state law pursuant to a written agreement between the acquiring company and the target company. Upon completion of the statutory formalities, all the assets and liabilities of the acquired company are transferred to the surviving company in consideration of payment to the shareholders of the former company. An asset acquisition is significantly different from the statutory stock merger because the acquiring company receives only specifically purchased assets from the selling company which remains in existence after the transaction. Thus, an asset acquisition involves the transfer of liabilities from the target company to the acquiring company only as may be agreed by the parties. In contrast, a stock acquisition occurs through the purchase of a majority of the shares of existing shareholders of the target company by the acquiring company. The principal distinction from the statutory stock merger is the elimination of statutory formalities of board of director approval by the acquiring and target companies.

LEGAL OPINION

The principal purpose of a legal opinion is to inform the parties of the legal character and effect of an acquisition. Thus, the opinion will summarize the legal review of statutes, regulations, corporate records, public records and documentation establishing the rights, obligations and legal relations among the parties.

The scope of the opinion may consider the validity and enforceability of the proposed transaction and the priority of the lien holders extending debt to the merged company surviving the merger. Thus, federal laws concerning securities, safety, environmental protection, labor, antitrust and trade regulation and taxation may be reviewed. Similarly, state laws on the same subjects are reviewed as well as statutory formalities of corporate law which must be observed to complete an acquisition.

The parties to the transaction will rely on a legal opinion regarding the rights and obligations of each party. Favorable and satisfactory opinions will have to be rendered only by duly registered attorneys licensed to render an opinion in the jurisdiction where enforcement may be sought.

U.S. LAWS AFFECTING MERGERS

HART-SCOTT-RODINO ACT

A pre-merger notification must be given by an acquiring person to the U.S. Department of Justice where the target company satisfies three conditions:

- **the acquisition or acquiring person must be engaged in U.S. commerce or an activity affecting U.S. commerce;**
- **one party has annual net sales or total assets of at least $100,000,000; and**
- **the other party has annual sales or total assets of at least $10,000,000.**

The "transaction test" is met if the acquiring person obtains assets or voting securities of the target that exceed $15,000,000 or 50 percent of more of the voting securities of an entity which has $25,000,000 in annual sales or total assets.

SECURITIES ACT OF 1933

All public offerings of securities in the U.S. must meet the requirements of filing a registration statement with the Securities and Exchange Commission (SEC). The registration statement is mainly the offering prospectus and the financial statements of the respective companies involved in the acquisition. Financial statements must be audited in accordance with generally accepted auditing standards of the U.S. or that of the foreign country of the issuer and the detailed regulations of the SEC.

INTERNAL REVENUE CODE

Acquisition of a U.S. business may be structured to be a taxable or non-taxable transaction. Several immediate considerations are whether

- **the stock or the assets of the target company will be acquired,**
- **the target is to be directly acquired by the foreign investor or through a domestic or foreign subsidiary, and**
- **the tax advantages of a tax free or taxable acquisition.**

SOUTH CAROLINA LAWS AFFECTING MERGERS

Some states require a public filing with the securities administrator where a publicly traded company is acquired. Where the board of directors of the target company has approved the purchase, the reporting requirements are usually inapplicable.

A merger or acquisition is authorized under South Carolina law if a plan of merger is authorized by the board of directors and shareholders of each company (SC Code § 33-11-101). A foreign company may merge or enter a share exchange with a domestic U.S. corporation if it is permitted by the laws of the foreign investor's country and the investor complies with such laws (SC Code § 33-11-107). Dissenting shareholders of the domestic company must be paid within 60 days (SC Code § 33-13-220).

A "control share acquisition" of an issuing public corporation domiciled in South Carolina may not be acquired in South Carolina by an investor unless there is compliance with the notice and dissenter's rights provisions of the statute. An acquisition of control shares is exempted if it is as a result of satisfaction of a pledge, security interest or merger or plan of share exchange (SC Code § 35-2-102).

A "business combination" may be a merger of a resident domestic South Carolina corporation with an affiliate or associate of an interested shareholder or with the interested shareholder. Such arrangement requires certain foreign corporations to announce its proposal for a business combination. Within two years after such business combination, a resident domestic corporation may not engage in any business combination with any interested shareholder (SC Code § 35-2-218).

Securities may not be sold in South Carolina unless registered with the State or exempt from registration (SC Code § 35-1-810). Exemptions include isolated nonissuer transactions and offerings limited to not more than 25 persons within 12 months (SC Code § 35-1-320).

INTELLECTUAL PROPERTY

BY:
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Intellectual property consists of patents, trademarks and service marks, copyrights and trade secrets. Intellectual property rights may be protected under federal and state statutes and common law through court decisions. The following discussion outlines the different types of intellectual property and identifies the sources of legal protection for intellectual property.

PATENTS

DEFINITION

A patent is intellectual property which is a statutory monopoly granted by the United States government which protects the owner from unauthorized duplication or use of the patented device or process. Patents are granted by the Patent and Trademark Office of the U.S. Department of Commerce. The grant of the exclusive right to use a device or process is based upon provisions in federal statutes enacted pursuant to the U.S. Constitution. Patent issuance and patent protection are within the exclusive domain of the federal government.

OBTAINING PROTECTION FOR INVENTIONS

The Patent and Trademark Office will grant a patent only after an examination ensuring that the statutory requirements are satisfied. The Patent and Trademark Office lists more than 300 classes and 95,000 subclasses of patents in its Manual of Classification. These classifications are for the purpose of determining the originality of inventions and processes sought to be patented.

The Patent and Trademark Office considers a number of factors in deciding whether to issue a patent. These factors include novelty, substantial utility and obviousness. Generally, the preparation of a patent application requires the specialized skills of a registered patent attorney. With rare exception, only persons registered with the Patent and Trademark Office may appear before the Office.

The first inventor who reduces an idea to actual practice earns the right to apply for a patent of the invention. Except in limited circumstances where established by treaty, an applicant may not establish priority by reference to knowledge or use of the invention in a foreign country. However, a previous filing in a foreign country may be given effect in the United States if application in the United States is timely made and certain reciprocity prerequisites are satisfied.

EXTENT OF PROTECTION

The owner of a patent has an intellectual property right which may be protected by filing an action in court. Relief may include damages and a preliminary injunction barring the manufacture or use and sale of the invention during the course of the lawsuit. In addition, the patent owner may obtain permanent injunctive relief for the life of the patent. In some cases, the successful claimant may recover costs and attorney's fees if there has been willful and deliberate infringement.

INTERNATIONAL PATENT APPLICATIONS

Under the Patent Cooperation Treaty of 1976, as amended, applications may be filed on the same invention in a number of countries simultaneously which are signatories to the treaty. Under the terms of the Treaty, the United States Patent and Trademark Office may act as a Receiving Office and as an International Searching Authority for international applications filed in that office. Information on this process may be obtained by writing the Commissioner of Patents and Trademarks, Box PCT, Washington, DC 20231.

TRADEMARKS AND SERVICE MARKS

DEFINITION

A "trademark" is a word, name, symbol, or device, or a combination of the foregoing, which is intellectual property used to identify goods, and distinguish them from the goods of others. Marks which are used in the sale or advertising of services, rather than goods, are known as "service marks." The statutory and case law protects both trademarks and service marks from unauthorized use. For ease of reference, this property interest will be referred to as a "mark."

OBTAINING PROTECTION FOR TRADEMARKS

REGISTRATION UNDER THE LANHAM ACT

The Lanham Act is a federal statute which affords protection to trademarks and service marks by giving the owner of a registered mark the right to bring a civil suit against infringement. Through this means, the mark owner can protect registered marks from interference and prevent the deceptive and misleading use of marks. In addition, the Act provides rights which are the subject of treaty between the U.S. and foreign countries.

The owner of a mark has an intellectual property right which he must register on the principal register in the Patent and Trademark Office to obtain the rights set forth in the Act. Failure to

register under the Act does not prevent protection of the owner's interest in the mark since an action may still be maintained under common law rights afforded by the state court system.

STATE STATUTES

In addition to registration under the Lanham Act, a mark owner may register under state statute and thereby obtain rights and remedies for infringement under state law. The procedures and remedies are similar to those provided by the Lanham Act but vary according to state.

COMMON LAW PROTECTION

In addition to the rights and remedies available from registration, the owner of a mark may assert a claim of unfair competition against an infringer. In unfair competition cases, the essence of the claim arises as a result of the conduct by a wrongdoer who creates a prospective confusion as to the source of goods or services. Additionally, the owner of a mark may base his action upon the violation of a contractual arrangement or an agency relationship.

EXTENT OF PROTECTION

The owner of a trademark may obtain a preliminary injunction prohibiting dissemination or use of the trademark during the course of the lawsuit. In addition, the owner may obtain money damages after a trial as well as permanent injunctive relief.

TRADE SECRETS

DEFINITION

A trade secret is intellectual property which has been defined as consisting of any formula, pattern, device or compilation of confidential information which is used in a proprietary manner in business which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is "know how" which gives a business an advantage in competition.

OBTAINING PROTECTION FOR TRADE SECRETS

Trade secrets may be protected under the federal or state statutory or common law of unfair competition. In many cases, these claims will be based upon state law unless a misappropriation or conversion of confidential information creates claims under a federal statute such as the Unfair Trade Practices Act.

EXTENT OF PROTECTION

The rights and remedies available for appropriation of trade secrets are essentially the same as the common law remedies discussed above at II.C.

COPYRIGHTS

DEFINITION

A copyright is an intellectual property right which affords an author protection for original written or recorded works such as literary, dramatic, musical, artistic and certain other intellectual works.

Similar to patents, copyright protection is based on federal statutes. Since 1978, federal law has preempted state laws pertaining to copyrights unless trade secrets are involved.

OBTAINING COPYRIGHT PROTECTION

Copyright protection arises at the time the author creates the work in fixed form and the work becomes the property of the author. Accordingly, the author of a work must be careful regarding the timing of when a work comes into "creation."

If an employee prepared a work in the scope of his or her employment ("work for hire"), the employer, not the employee, may be presumed to be the author of the work unless a contrary contractual arrangement exists. If agreed in writing, "work for hire" may also include work specially ordered or commissioned for use as a contribution to a collective work or as a part of an audio visual work or compilation. Authors of a joint work will generally be regarded as co-owners of the copyright.

Before the effective date of the Berne Convention Implementation Act of 1988 (March 1, 1989), a notice of copyright had to be placed on all publicly distributed copies of the work. A notice of copyright consists of a letter "C" in a circle or the word "Copyright" or the abbreviation "Copr." Furthermore, the year of first publication of the work had to appear in most cases along with the

name of the copyright owner. Copyright notice for phono-records or sound recordings had somewhat different requirements.

Since March 1, 1989, omission of the copyright notice from a work does not invalidate the copyright unless the publication of the work took place before March 1, 1989. An owner of a copyright may register the claim of copyright with the Copyright Office, but copyright protection does not depend on such registration. Of course, registration has the obvious advantage of informing the public that copyright protection is claimed for the work. In addition, the notice eliminates a possible claim of "innocent infringement" which could reduce damages in a legal action by the owner for copyright infringement.

To register a copyright, the owner must deposit copies of the work with the Copyright Office. After application, the Register of Copyrights determines whether the deposited material constitutes subject matter which may be copyrighted and whether the statutory prerequisites are satisfied. If the application is approved, the copyright registration becomes effective on the day on which an application, deposit and fee were submitted to the Copyright Office.

EXTENT OF PROTECTION

A copyright owner may obtain preliminary injunctive relief to prevent copying or distribution of duplications of the copyrighted material during the course of the lawsuit. In addition, the copyright owner may obtain a preliminary impoundment during the course of the lawsuit of the copies or means by which copies may be duplicated.

Certain exemptions from the protections noted above are available. For example, the Copyright Act authorizes "fair use" of the copyrighted work. Caution must be exercised that any claimed exemption meets statutory requirements.

Copyright protection gives the copyright owner the exclusive right:

- To reproduce the work;
- To prepare derivative works;
- To distribute duplicates of the work;
- To perform the work publicly; and
- To display the work publicly.

INTERNATIONAL COPYRIGHT PROTECTION

Copyright protection may be obtained for all unpublished works regardless of the nationality or domicile of the author. Copyright protection may be obtained for published works if:

On the date of the first publication, one or more of the authors is

- **a United States national or domiciliary or**
- **a national or domiciliary of a foreign state that is a signatory to certain copyright treaties;**

The work is first published in a foreign state that, on the date of first publication, is a signatory to the universal copyright convention; or

The work is first published on or after March 1, 1989 in a foreign state that is a party to the Berne Convention.

COMPUTER LAW

The fast-paced developments in telecommunications, software design, and data storage, processing and retrieval have contributed to a special area of intellectual property law known as "computer law." For example, an owner of computer software can use traditional copyright, trade secret and contract law to protect rights to the use of software. Moreover, patent law may also provide protection for certain aspects of computer programming.

Difficult issues can arise in determining the extent of copyright protection for the individual components of a program. For example, some code sequences may constitute standard techniques for solving common programming problems. One may generally conclude that the literal code as a whole is protected, but that protection for individual components remains subject to dispute.

Computer law continues to be a dynamic area because of rapid technological developments. The difficulty of applying traditional legal notions to areas of technological innovation requires careful planning to attain appropriate legal protection for proprietary information and concepts.

CONTRACTUAL PROTECTION

The owner of intellectual property, such as a trademark, may license another to use the property. Care must be taken, however, in structuring the transaction. For example, federal law provides that the license may be considered abandoned if the licensor does not maintain adequate control over use of the mark.

Alternatively, the owner of intellectual property may choose to assign the property to another. An absolute assignment typically transfers all rights of the assignor in the property. As in the case of a licensing agreement, it is important how the transaction is structured. For example, an assignment of a trademark without an assignment of the goodwill associated with the mark may be regarded as invalid and as an abandonment of the mark. The traditional elements of a full or partial transfer of right, title, and interest will have to be adequately addressed in such documentation to be legally effective.

Assignments may be registered with the United States Patent and Trademark Office. Among other things, the certificate of registration must be identified in the assignment and the application must be in English. Similarly, many states also permit the registration of an assignment.

Frequently the tax objectives of sellers and buyers of intellectual property conflict. To some extent, this conflict has been lessened by a reduction in the difference between the tax rate on capital gains and on ordinary income.

As a general rule, a sale of intellectual property may be treated as a sale which results in a capital gain to the seller. Pursuant to Internal Revenue Service regulations, the buyer will typically recover the cost of the property over its projected productive life. Accordingly, this capital gain will be taxed under capital gain tax rules. Assignments are generally treated as a sale or exchange transaction so long as certain requirements are met.

In contrast, licensing arrangements usually result in ordinary income to the licensor. Thus, the full amount of the net taxable income will be taxed under ordinary income rules instead of benefiting from a portion being excluded as occurs under capital gains tax rules. Subject to restrictions, the licensee may deduct payments made under the licensing agreement.

ADDITIONAL INFORMATION

Additional information about United States patent protection may be obtained by contacting:

The Commissioner of Patents and Trademarks
United States Department of Commerce
Patent and Trademark Office
Washington, DC 20231

Further information about United States trademark protection may be obtained by contacting:

The Commissioner of Patents and Trademarks
United States Department of Commerce
Patent and Trademark Office
Washington, DC 20231

Information concerning United States copyright protection may be obtained by contacting:

United States Copyright Office
Library of Congress
Washington, DC 20559

Further information concerning South Carolina statutory trademark protection may be obtained by contacting:

Mr. Jim Miles
Secretary of State
Wade Hampton Office Building
Box 11350
Columbia, South Carolina 29211

REPORTING AND DISCLOSURE REQUIREMENTS

BY:

JOHN C. WEST, JR., ESQ.

INTRODUCTION

South Carolina welcomes foreign investment and enjoys the presence of many international companies. An integral part of its attractive business climate is the lack of burdensome reporting and disclosure requirements placed upon the foreign investor by the State of South Carolina. The reporting requirements placed upon the overseas investor are generally similar to those required of South Carolina's own citizens.

The United States government's disclosure and reporting requirements are much more stringent. These federal regulations must be followed by the foreign investor. This articles summarizes those disclosure and reporting requirements which the investor may face when investing in South Carolina. The foreign investor in the United States should seek U.S. legal and tax counsel to assist him in complying with these requirements.

THE INTERNATIONAL INVESTMENT AND TRADE IN SERVICE SURVEY ACT OF 1976

OVERVIEW

This Act is the most significant disclosure and reporting law. The Act provides a system to monitor foreign investment in the United States and requires initial, annual, quarterly and five year reports from foreign investors. Every five (5) years the government conducts benchmark surveys, beginning in 1982, of direct and portfolio investment in the United States by foreign investors. The U.S. Department of Commerce's Bureau of Economic Analysis is the authority charged with receiving and analyzing reports from foreign investors.

Basically, all foreign investments in U.S. business enterprises in which a foreign person or entity owns a ten percent (10%) or more voting interest are subject to the reporting requirement. This requirement includes real estate unless it is for personal use. Failure to report may result in civil or criminal penalties. The required reporting can be categorized as follows:

The initial investment reports, representing establishment or acquisition of a U.S. affiliate (Forms BE-13 and BE-13c, exemption claim, BE-14 and BE-607);

Quarterly reports for qualifying reporters (Forms BE-605 and BE-606b);

Annual report for qualifying reporters (Form BE-15); and

Quinquennial reports in benchmark surveys (Form BE-12).

INITIAL REPORT FORM BE-13

The BE-13, Initial Report on a Foreign Person's Direct or Indirect Acquisition, Establishment, or Purchase of the Operating Assets, of a U.S. Business Enterprise, Including Real Estate, is required to be completed by a U.S. business enterprise when a foreign person establishes or acquires directly or indirectly through an existing U.S. affiliate a ten percent (10%) or more voting interest in that enterprise. This form must be filed no later than forty five (45) days after the transaction occurs. Form BE-13 collects identification type information and selected financial and operating data about the U.S. business enterprise including ultimate beneficial ownership and the cost of the investment. All of this information is deemed confidential by the Bureau of Economic Analysis. Section 5(c) of the Act states that information collected under the Act cannot be published or released in a manner so that the person who furnished the information can be specifically identified. Form BE-607, Industry Classification Questionnaire, is required to accompany Form BE-13.

A person is exempt from filing a Form BE-13 only as to the purchase of real estate that is exclusively held for personal use. Further, a partial exemption (filed on supplement C, exemption claim form BE-13 requiring only minimal information) applies where the newly acquired or established U.S. business enterprise has total assets of one million dollars or less and owns less than 200 acres of land. Also supplement C applies where an existing U.S. affiliate acquires and merges into its own operations a U.S. business or segment at a total cost of one million dollars or less provided the acquisition does not involve the purchase of 200 acres or more of land.

INITIAL REPORT FORM BE-14

Form BE-14, Report by a U.S. Person Who Assists or Intervenes in the Acquisition of a U.S. Business Enterprise by, or Who Enters Into a Joint Venture With a Foreign Person, is required to be completed by either a U.S. person assisting or intervening in the purchase or sale of a U.S. business enterprise to a foreign person, including the ownership of real estate for other than personal use, or by a U.S. person entering into a joint venture with a foreign person to create a U.S. business enterprise. This report is required from the U.S. person such as a real estate person, a CPA, or an attorney, who assists or intervenes in the transaction and is required to be reported

only when such foreign involvement is known. If a person knows that the Form BE-13 is being filed, then Form BE-14 will not be required.

QUARTERLY REPORT FORMS BE-605 AND BE-606

The purpose of quarterly report forms, Forms BE-605 and BE-606(B), is to report direct financial transactions and positions between the U.S. affiliate and each foreign partner. Form BE-605, Transaction of U.S. Affiliate, Except an Unincorporated Bank, With Foreign Parent, is required each quarter for every U.S. business enterprise in which the foreign person had a direct/indirect ownership of at least ten percent (10%) at any time during the quarter. These reports are required to be filed within thirty (30) days after the close of each calendar or fiscal quarter except the report for the fourth quarter which may be filed forty five (45) days after the end of that quarter. Generally, the U.S. affiliate is not required to report if the total assets, the annual sales or gross operating revenues, and the annual net income after provision for U.S. income taxes is twenty million dollars or less in each category.

ANNUAL REPORT FORM BE-15

Form BE-15, Annual Survey of Foreign Direct Investment in the United States, is required for each U.S. business enterprise in which a foreign person owns or controls directly or indirectly ten percent (10%) or more of the voting stock or the equivalent interest in an incorporated U.S. business enterprise at any time during the year. The U.S. affiliate is not required to report on this form if the total assets, annual sales, gross operating revenues, and annual net income after provision for U.S. income taxes of the U.S. enterprise is ten million dollars or less in each category. This form is required to be filed annually and is generally due on May 31.

QUINQUENNIAL REPORT FORM BE-12

Form BE-12, Benchmark Survey of Foreign Investment in the United States, is a comprehensive survey of such investment and is required to be filed once every five (5) years. The form or an exemption claim is required for each U.S. business enterprise in which the foreign person owned or controlled a ten percent (10%) or greater interest at the end of the business enterprise's fiscal year that represents the benchmark year. The benchmark years occur on years that end with a "2" or "7."

Failure to timely file any of the required forms is punishable by civil penalty not exceeding $10,000. Willful failure to file is punishable by a fine of not more than $10,000 and imprisonment for not more than one year or both. If the offender is a corporation, any officer, director, employee or agent of the corporation who participates in a violation may be punished by a like fine, imprisonment or both.

THE AGRICULTURAL FOREIGN INVESTMENT DISCLOSURE ACT OF 1978

OVERVIEW

This Act does not place any restrictions on the acquisition or ownership of U.S. farmland by foreigners but requires the disclosure and reporting of foreign ownership for statistical purposes.

REPORTING FORM ASCS-153

The U.S. Department of Agriculture collects and reports this data to Congress and the President. Form ASCS-153 must be filed by any foreign person who acquires or transfers any interest in U.S. agricultural land. This form requires information such as a legal description of the property, the name and address of the owner, and the purchase price.

Foreign persons who are holding security interests such as mortgages, leaseholds of less than ten (10) years, certain future interests, easements, or interest solely in mineral rights are exempt from filing these reports. Also, foreign owners of agricultural land of less than ten (10) acres on which there is produced income of less than $1,000 per year are also exempt. Reports are required to be filed within ninety (90) days after acquisition or transfer of the interest and are filed with the Agricultural Stabilization and Conservation Service (ASCS) office in the county where the property is located. Foreign interests owning agricultural property in several different locations may request that they be allowed to file their reports directly with the United States Department of Agriculture in Washington. Failure to file a report or falsifying information on a report is punishable by civil penalty of up to twenty five percent (25%) of the fair market value of the property.

THE HART, SCOTT, RODINO ANTITRUST IMPROVEMENT ACT OF 1976

This section of federal antitrust law is contained in the Clayton Act which deals with monopolies and restraints of trade. These laws preclude any person or entity, whether U.S. or foreign, from purchasing stock or assets in certain companies without advance notice to the Federal Trade Commission and the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice.

These laws apply when:

> **a company engaged in manufacturing with annual sales or total assets of ten million dollars or more is being acquired by a person or entity that has annual sales or assets of one hundred million dollars or more;**

a company not engaged in manufacturing with total assets of ten million dollars or more is being acquired by a person or entity which has total assets or annual sales of one hundred million dollars or more; or

a person or entity with net sales of one hundred million dollars or more being acquired by a person or entity with total assets or sales of ten million dollars or more. In order for the statute to apply, the result of the acquisition must be

- **the acquiring person holds 15 percent or more of the voting securities or assets of the acquired person, or**
- **the total amount of the voting securities and assets of the acquired person held by the acquirer is in excess of fifteen million dollars.**

The government has 30 days (15 days in the case of a tender offer) upon receipt of the notification in which to decide if the transaction when consummated will violate antitrust laws.

Types of transactions exempt from the requirements include:

Acquisitions of goods or realty transferred in the ordinary course of business;

Acquisitions of bonds, mortgages, deeds of trust or other similar obligations which are not voting securities;

Acquisitions of voting securities of an issuer if the purchaser already owns more than fifty percent (50%) of those voting securities before the purchase;

Acquisitions of securities solely for the purpose of investment, if the securities acquired do not exceed ten percent (10%) of the outstanding securities of the issuer;

Acquisitions of voting securities where the purchaser's share of outstanding voting securities of the issuer does not increase;

Acquisitions meeting specific requirements relating to banks, investment companies or insurance companies and transactions with the federal government or a component agency.

Several different categories of transactions may be exempt from the requirements of Hart, Scott, Rodino, and accordingly, the statute should be consulted.

UNITED STATES RESTRICTIONS AND DISCLOSURE REQUIREMENTS ON SPECIFIC INDUSTRIES

OVERVIEW

The United States government restricts investment or imposes disclosure requirements on the foreign ownership of or participation in certain industries. Generally, these are industries that traditionally have been considered to be essential to the national security interests of the United States. These restricted industries can be categorized into three main areas: transportation, communications, and natural resources.

REQUIREMENTS SPECIFIC TO TRANSPORTATION INDUSTRY

Foreign investment in United States airlines or operation by foreign owned airlines in the United States are regulated by the Federal Aviation Act of 1958. Foreign ownership of U.S. shipping is restricted by the Shipping Act of 1976, the Jones Act and the Merchant Marine Act of 1936.

REQUIREMENTS SPECIFIC TO COMMUNICATIONS INDUSTRY

Foreign investment in the United States communications industry is restricted by the Communications Act of 1934. For example, a radio station license may be granted to or held only by a U.S. citizen. In addition, a corporation in which foreign ownership exceeds twenty percent (20%) may not hold a license. Further, a director or officer of a corporation holding a license may not be a foreign national.

REQUIREMENTS SPECIFIC TO NATURAL RESOURCES

The Magnuson Fishery, Conservation and Management Act requires each commercial foreign fishing vessel fishing within 200 miles of the United States coastline to apply for a permit. Each such vessel must also submit periodic reports.

The Outer Continental Shelflands Act authorizes the Secretary of the Interior to issue oil and gas leases, and leases for other mineral resources on the submerged lands of the outer continental shelf. Under regulations established to administer this competitive lease program, mineral leases issued may be held only by citizens of the United States or a corporation organized under the laws of the United States.

The Exon Florio provision of the Omnibus Trade and Competitiveness Act of 1988 allows the President of the United States to monitor and restrict foreign investment if such investment might impair national security.

THE FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT OF 1980

This Act insures that gains realized by disposition of a real property interest by a foreign owner of U.S. real estate are taxed. A U.S. real property interest is defined as any interest (other than solely as a creditor) in real property located in the United States or the U.S. Virgin Islands. Section 6039C provides for reporting by foreign persons holding direct investments in U.S. real property. Implementing regulations have not been finalized as of March 1992. Additional requirements include withholding on purchases and sales by foreign owners of U.S. real estate.

SOUTH CAROLINA REPORTING AND DISCLOSURE REQUIREMENTS

The reporting and disclosure requirements of South Carolina law are minor. The reporting requirement most encountered by foreign interests is the requirement that a foreign corporation wishing to "transact business" in South Carolina must have a certificate of authority from the Secretary of State's office. This requirement applies only if the investor uses a corporation that is not domiciled in South Carolina as the vehicle for his investment. If the investor wishes to "transact business" via a partnership or on an individual basis, no certificate is required. Additionally, if the foreign investor is only carrying out activities in the state such as the ownership of real property, then he is "not transacting business" within the terms of the statute and no certificate is needed. South Carolina classifies "foreign corporations" as any corporation not domiciled in South Carolina.

The only South Carolina law pertaining solely to a foreign investor prohibits aliens or corporations controlled by aliens from owning more than 500,000 acres of land within the state.

TEMPORARY NONIMMIGRANT VISAS

BY:

JOHN A. HILL, ESQ.

INTRODUCTION

An alien entering the United States uses either an immigrant or a nonimmigrant visa or visa waiver. If the alien intends to stay permanently in the United States, he may receive an immigrant visa. If his stay is intended to be temporary, he may receive a nonimmigrant visa. An immigrant visa permits establishment of permanent residency, represented by the so-called "green card." A nonimmigrant visa permits a temporary stay which may be several years in duration.

The U.S. Immigration and Naturalization Service (INS) presumes that every alien entering the United States is an intending immigrant (i.e., permanent intent) unless he can establish his qualification for a nonimmigrant category. The nonimmigrant categories are identified by letters, which range from the "A" category to the "S" category with each of these categories having sub-categories. The nonimmigrant category appropriate for an alien depends upon the purpose of the visit to the United States.

The nonimmigrant categories most commonly used for business purposes are

- the "B-1" category, known as a Business Visitor;
- the "E-1" category, known as a Treaty Trader;
- the "E-2" category, known as a Treaty Investor;
- the "H-1B" category, known as Temporary Workers Performing Services in a Specialty Occupation;
- the "L-1" category, known as Intra-Company Transferee; and
- the "O-1" category, known as Aliens of Extraordinary Ability.

A distinction exists between the period of visa validity and the period of authorized stay in the U.S. Visas are granted by the U.S. Department of State through U.S. embassies and consulates abroad. Visas appear as an ink-stamp or a laminated page applied to one's passport. Visas are valid for a period of time during which the alien may enter the U.S. Visas may be valid for a single entry or multiple entries.

When an alien enters the U.S., he is granted a period of authorized stay in the U.S. The period of authorized stay is represented by a card (called an I-94) stapled into the passport. The period of stay is controlled by the U.S. Department of Justice through the U.S. Immigration and Naturalization Service (INS), which is a federal agency distinct from the State Department. The period of authorized stay does not necessarily coincide with the period of visa validity.

B-1 BUSINESS VISITOR VISA

B-1 visas are generally applicable where the alien is

making a temporary visit to the United States,

entering for business purposes, and

maintaining a foreign residence that he has no intention of abandoning.

B-1 visitors are not permitted to receive employment compensation from a U.S. source. B-1 visas are approved by the consulate or embassy abroad.

B-1 visas are usually obtained in a relatively short amount of time. The period of authorized stay granted upon entry to the U.S. may not exceed one year. Extensions of temporary stay may be granted in increments of up to six months.

Under the Visa Waiver Pilot Program visitors from certain countries may enter the U.S. without a visa for stays of 90 days or less. As of January 1, 1996, the countries that qualify for the Visa Waiver Pilot Program are: United Kingdom, Japan, France, Switzerland, Germany, Sweden, Italy, The Netherlands, Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, Spain and Brunei. Such visitors may not extend their stay, change nonimmigrant status to another nonimmigrant category, or adjust status to permanent residence. In addition, Ireland qualifies for the Visa Waiver Program in probationary status until September 30, 1998.

E-1 TREATY TRADER AND E-2 TREATY INVESTOR VISAS

Treaty Trader (E-1) and Treaty Investor (E-2) visas apply to persons coming to the U.S. to carry on substantial trade, (E-1), or to develop and direct the operations of an enterprise in which the alien has invested substantial capital (E-2). E-1 and E-2 visas have three common basic requirements:

a treaty of commerce and navigation between the U.S. and the foreign country must exist;

the company engaging in trade or investment in the U.S. must have the same nationality as the treaty country; and

the individuals seeking E visas must be of the same nationality as the treaty country through which the company qualifies.

As of April 1, 1996, qualifying treaties are in effect with 43 treaty trader countries and 56 treaty investor countries. (See Appendix A.)

For purposes of examining the nationality of the investing company or individuals, the INS reviews company and personal documents. The company's nationality is usually determined by the nationality of the shareholders who own at least 50% of the stock. The individual's nationality is usually determined by one's country of citizenship.

Additional requirements apply distinctly to E-1 and E-2 visas. An E-1 applicant must also demonstrate that

- **the enterprise is trading or substantially prepared to trade in goods or services;**
- **the volume of trade is substantial;**
- **the trade is principally between the U.S. and the treaty country; and**
- **the individual seeking E-1 status will serve as an executive, supervisor, or in a capacity requiring "essential skills."**

Similarly, an E-2 applicant must also demonstrate that

- **the enterprise is an active investment, committing funds to a real operating enterprise productive of some service or commodity;**
- **the investment is substantial placing the investor's own funds at risk;**
- **job opportunities for U.S. workers are reasonably expected to be created by the investment; and**
- **the individual seeking E-2 status will serve as an executive, supervisor, in a capacity requiring essential skills, or will have the key role as developer or manager of the investment.**

Application to qualify for the visa is usually made to the U.S. embassy or consulate abroad. If granted, the visa is issued for a period of time that varies according to the particular treaty country. The visa usually may have an indefinite number of extensions. There is no requirement to maintain a foreign residence. Employment is authorized solely with regard to the treaty enterprise. The period of authorized stay granted upon initial entry to the U.S. may not exceed one year but may be extended in increments of up to two years.

H-1B SPECIALTY OCCUPATION TEMPORARY WORKERS

The H-1B visa may be granted to a person coming to the United States temporarily to perform services in a specialty occupation and for whom the Department of Labor has certified a labor condition application (LCA). The H-1B classification may apply to aliens other than those in a specialty occupation but this article will address H-1B rules only as they apply to specialty occupations.

A specialty occupation refers to an occupation that requires the theoretical and practical application of a body of highly specialized knowledge to perform fully the occupation and that requires the attainment of a bachelor's degree (or higher degree) in a specific specialty as a minimum for entry into the occupation in the United States. Specialty occupations exclude registered nurses, agricultural workers, and aliens of extraordinary ability or achievement in the sciences, education or business. In addition, the prospective employee must have attained the level of education and specialty required for filling the occupation. A person lacking the required educational degree may nonetheless qualify by virtue of a combination of education, specialized training, or experience.

The LCA requires the employer of a prospective H-1B employee to make various affirmative representations regarding wages, working conditions, the non-existence of labor disputes, notice, documentation and public access for document inspection purposes. These requirements include making a good faith determination of the area prevailing wage for the occupation, providing notice of the filing to similarly employed workers at the place of employment, and making documents supporting the LCA certification available for public examination. An employer may obtain the area prevailing wage determination from the state employment security agency or other source approved by INS regulations. An employer must exercise care when completing an LCA, particularly compliance with the wage tests, because violations may result in the employer being assessed back pay, civil money penalties, criminal penalties, or being required to raise the worker's salary.

The LCA must be approved prior to filing a petition with the INS. Approval of the LCA does not constitute a determination that the occupation in question is a specialty occupation.

The H-1B visa application procedure involves a two-step process:

a labor condition application is filed with the U.S. Department of Labor (DOL); and

an H-1B visa petition is filed with the INS.

If the petition is approved, the alien receives authorization to work in the U.S. solely for the petitioning company. If the alien is already in the U.S. at the time of approval, he may apply to change his nonimmigrant status in the U.S. However, once the alien leaves the U.S. he must go to a U.S. embassy or consulate and obtain an H-1B visa prior to re-entering the U.S.

During each fiscal year of the U.S. government, the total number of aliens who can be classified as H-1B nonimmigrants may not exceed 65,000. H-1B visas may be approved initially for a maximum period of three years, but can be extended in increments of up to three years until a total of six years is reached. After six years in H status the alien may not re-apply for H or L visa status unless the alien has resided outside the U.S. for the immediate prior year. If an H-1B visa holder is terminated by the employer from temporary employment prior to expiration of the visa, the employer may be liable for the reasonable costs of return transportation of the H-1B employee to his country of domicile.

L-1 INTRA-COMPANY TRANSFEREES

L-1 visas are used to transfer key personnel among related companies located abroad to companies located in the U.S. L-1 visas may be used where:

> **the alien has been employed abroad for at least one continuous year within the three years preceding entry to the U.S.;**
>
> **the employment abroad has been in an executive or managerial capacity or a capacity involving specialized knowledge;**
>
> **the alien is being transferred to the U.S. on a temporary basis;**
>
> **the U.S. business and the foreign employer are qualifying organizations related as branch offices of the same company, parent and subsidiary, or affiliated companies; and**
>
> **the services to be performed in the U.S. are of an executive or managerial nature or a capacity involving specialized knowledge.**

INS regulations include definitions that assist in determining whether the foregoing tests are met. These regulations should be reviewed regarding the capacity in which the alien has been and will be employed, the relationship between the foreign and U.S. companies, and the requirement that qualifying organizations continue doing business abroad.

To obtain an L-1 visa, a petition is submitted to the INS by the company seeking the alien's services. If the INS approves the petition, the alien is authorized to be employed in the U.S. only by the petitioner. If he is already legally in the U.S., the alien may apply to change his nonimmigrant status. Once he leaves the U.S., he must obtain a visa in his passport prior to re-entering the U.S.

L-1 visas may be approved initially for three years or less, with extensions possible for up to two years. The initial approval plus extensions have a maximum term of five years for persons employed in a capacity of specialized knowledge, and seven years for persons employed in a managerial or executive capacity. After the maximum term is reached, the alien may not re-apply for L or H status until he has resided outside the U.S. for the immediate prior year.

Special L-1 rules apply where the alien is being transferred to a "new office" in the U.S. A "new office" is one which has been doing business in the U.S. for less than one year. Under such circumstances, the L-1 petition requires additional information to demonstrate the intended purpose and financial condition of the new office, and the role of the alien. New office L-1 petitions can be approved for an initial period of only one year. Extensions in two-year increments are possible (subject to the term limitations discussed above), but the extension application requires certain information to demonstrate the accomplishments and growth of the new office.

For large multinational companies and companies that frequently use the L-1 category, the regulations permit the company to submit a single "blanket petition" that would apply to all managerial and executive transfers and transfers involving specialized knowledge professionals. "Blanket petitioners" must have been in business in the United States for at least one year. Blanket petitions can be approved for an initial period of three years, after which the petition may be extended indefinitely. Beneficiaries of "blanket petitions" are subject to the same limitations regarding period of stay and extension of stay as are beneficiaries of individual L-1 petitions.

O-1 ALIENS OF EXTRAORDINARY ABILITY

The O-1 visa classification applies to persons who

> **have extraordinary ability in the sciences, education, or business as demonstrated by sustained national or international acclaim;**
>
> **are coming to the U.S. on a temporary basis; and**
>
> **will continue work in the area of extraordinary ability.**

The O-1 category may also apply to certain artists, athletes, and persons in the motion picture or television industry but this article will not address those options. The INS defines extraordinary ability to be a level of expertise that indicates that the individual is one of the small percentage who have risen to the very top of the field of endeavor. A position that requires the services of a person of extraordinary ability generally involves services relating to a specific event, activity, or project of a critical nature, distinguished reputation, or high complexity.

To obtain an O-1 visa, the prospective employer submits a petition to the INS after consultation with an appropriate peer group or labor organization. If the petition is approved, the O-1 alien is authorized to be employed only by the petitioning employer. The total validity of the O-1 status is determined by the amount of time necessary to accomplish the event or activity for which the person was admitted, not to exceed three years. O-1 status may be extended in increments of up to one year to continue or complete the same event or activity for which the alien was admitted. If the O-1 employment terminates for reasons other than voluntary resignation, the O-1 employer is liable for the reasonable cost of return transportation of the alien abroad.

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

Temporary foreign workers in the United States should be aware of recent changes to the United States immigration law since violation of these provisions may have serious consequences. One such provision concerns overstaying the amount of time permitted upon entry to the United States which is indicated on the I-94. Penalties apply even if the overstay is inadvertent and even if it is only for one day. Under the 1996 amendments, overstays will lose whatever visa they hold; the visa is void. Further, the person may not be readmitted to the United States unless the person obtains another nonimmigrant visa in the country of the person's nationality. No exception is made for those who reside in countries other than that of nationality. No exception is made for circumstances beyond the person's control or unintentional acts. In addition, beginning April 1, 1997, depending upon the length of the overstay, the person may be barred upon returning to the United States for three years or ten years. Therefore, temporary foreign workers should closely monitor the expiration date of their permitted stay in the United States.

The 1996 amendments also increase the penalties for document fraud and expand document fraud to include providing false documents to the INS, false information on valid documents, or assisting a person in providing such information where the information is provided with knowledge that it is false or in reckless disregard that it is false.

CONCLUSION

When applying for nonimmigrant visa status, the foreign businessman should carefully show that the pre-requisites of that visa category are satisfied. Further, visa petitions require advance planning and should allow for delay in government processing by both the INS and the visa examiner at the office of the U.S. Consul.

APPENDIX A

U.S. STATE DEPARTMENT FOREIGN AFFAIRS MANUAL 41.51. EXHIBIT I AS OF APRIL 1996

COUNTRIES WITH TREATIES CONTAINING TREATY TRADER PROVISIONS

Argentina	Germany (FRG)*	Norway*
Australia	Greece	Oman
Austria	Honduras	Pakistan
Belgium	Iran	Paraguay
Bolivia	Ireland	The Philippines
Brunei	Israel	Spain*
Canada	Italy	Suriname
China (Taiwan)	Japan*	Sweden
Colombia	Korea	Switzerland
Costa Rica	Latvia	Thailand
Denmark*	Liberia	Togo
Estonia	Luxembourg	Turkey
Ethiopia	Mexico	United Kingdom*
Finland	The Netherlands*	Yugoslavia*
France*		

COUNTRIES WITH TREATIES CONTAINING TREATY INVESTOR PROVISIONS

Argentina	Grenada	Paraguay
Armenia	Honduras	The Philippines
Australia	Iran	Poland
Austria	Ireland	Romania
Bangladesh	Italy	Senegal
Belgium	Japan*	Slovak Republic*
Bulgaria	Kazakstan	Spain*
Cameroon	Korea	Sri Lanka
Canada	Kyrgyzstan	Suriname*
China (Taiwan)*	Liberia	Sweden
Colombia	Luxembourg	Switzerland
Congo	Mexico	Thailand
Costa Rica	Moldova	Togo
Czech Republic*	Morocco	Tunisia
Egypt	The Netherlands*	Turkey
Ethiopia	Norway*	United Kingdom
Finland	Oman	Yugoslavia*
France*	Pakistan	Zaire
Germany*	Panama	

*Denotes special restrictions or considerations in treaty. Alien should seek additional advice.
Note also: Other countries may be added to one or both lists in the near future.

INTERNATIONAL COMMERCIAL CONTRACTS

BY:

HENRY M. BURWELL, ESQ.

Negotiating a contract in the United States requires an understanding of United States contract law. Because the U.S. legal system is a common law jurisdiction, the law of contracts has been primarily developed by judicial decisions. However, most states, including South Carolina, have adopted a codified version of commercial contract law called the Uniform Commercial Code for sale of goods and equipment in the United States. For purchase or sale of goods and equipment outside the United States, the United Nations Convention on the International Sale of Goods (CISG) will apply when the transaction is with a signatory country. Otherwise, principles of international contract law may apply.

U.S. CONTRACT LAW

FORMATION OF CONTRACT

A contract is formed in the U.S. when an offer and acceptance of the offer reveals a mutual intent for the parties to be obligated to each other. The contract must be supported by consideration which confers a benefit on each party. Pre-contractual obligations occurring during negotiation do not arise in the manner in which they may occur in other civil and common law countries.

An offer must be accepted according to the material terms of the offer. A reply to an offer which varies a material term is usually a counter-offer and a rejection of the initial offer. Material terms may include description of the subject matter, quantity, price, terms of delivery and quality. The minimum terms required to form a contract are description of the subject matter and quantity. To form a contract, price need not be settled since it may be determined from the market or past practices or the parties.

A contract is established at the time the acceptance is transmitted to the person making the offer. Thus, under U.S. law, the person making the offer has a contract even before the answer is received. This practice contrasts with other common law and civil law countries which establishes a contract at time of receipt of the notice of acceptance.

CLARITY OF TERMS

The greatest difficulty companies encounter in negotiating contracts is reaching a clear understanding about rights and responsibilities. The need for careful negotiation begins before the formation of the contract. Failure to follow a careful course of communications can result in a contract which fails to include the desired terms.

Many companies identify negotiating strategies and procedures to obtain their business objectives. Such planning is advisable in order to maintain control of the negotiating process. The use of a negotiating checklist is helpful in keeping negotiations on a planned course. The general checklist below focuses on threshold issues a contract negotiation should address.

GENERAL CHECKLIST FOR SALES CONTRACTS

Parties _____
Subject Matter _____
Payment terms
- down payment _____
- letter of credit _____
- open account _____
- interest rate _____
- currency _____
- escrow _____
- closing procedures _____

Conditions Precedent
- insurance certification _____
- corporate authority _____
- cash deposit _____
- legal opinion _____

Force Majeure
- excusable delay _____
- period of delay _____
- suspension of duties _____
- termination of contract _____

Remedies
- specific performance _____
- damages _____
- substitute delivery _____
- reduction in price _____
- rescission _____
- exclusions _____

Terms of Delivery
- installments _____
- inspections _____
- F.O.B./C.I.F. _____
- carrier _____
- insurance _____
- acceptance _____
- warehousing _____
- customs _____
- freight _____

Warranties
- limitations _____
- exclusions _____
- period of time _____
- scope of coverage _____

Default
- events of default _____
- breach _____
- period for cure _____
- notice procedure _____

Miscellaneous
- choice of law _____
- choice of jurisdiction _____
- assignment _____
- modification _____
- renewal _____

INTERNATIONAL SALE OF GOODS

INTRODUCTION

In 1988, the United Nations Convention on Contracts for the International Sale of Goods (CISG) became the international law of the sale of goods of the United States and signatory countries. In 1980, 62 countries signed the convention at Vienna, Austria, which are expected to deposit instruments of ratification with the UN in the coming years. Presently, those countries which have ratified the CISG include Argentina, Australia, Austria, BeIarus, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Mexico, The Netherlands, Norway, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, USSR, Yugoslavia and Zambia.

The CISG codifies the international law of the sale of goods in a uniform scheme for signatory countries. The Convention applies to sales transactions unless the parties expressly exclude its application in writing. The CISG represents the culmination of over 50 years of effort of nations pursuing standardization of international rules governing the international sale of goods.

SCOPE OF APPLICATION - CISG

The CISG applies to a contact for the sale of goods between a buyer and seller located in signatory countries unless the parties exclude its application in writing. The parties may vary or supplement the CISG by written agreement.

The CISG does not apply to:

consumer sales;

securities transactions;

ship sales;

aircraft sales;

electricity sales;

sales where labor or services are the predominant part of the value of the goods; and

manufacturing contracts where the buyer supplies a predominant portion of the raw materials.

The CISG does not consider certain questions such as letters of credit and perfection of security interests. Thus, the parties to an international contract may need to supplement an agreement intended to be governed by the CISG. The Convention utilizes many principles of Anglo common law contained in the Uniform Commercial Code (UCC) used in most states of the United States. However, the CISG also incorporates concepts of civil law countries that differ significantly from rules to which American businesses have become accustomed.

The CISG contains 101 Articles in four parts. The parts are: Part I Sphere of Application, Part II Formation of the Contract, Part III Sales of Goods, and Part IV Final Provisions. Although there are many similarities to UCC provisions contained in the various states in the U.S., there are many significant differences. Those differences appear in the subject areas of:

scope of application;

formation of contract;

performance of contract;

warranty of goods;

remedies for nonperformance; and

damages.

SUMMARY COMPARISON OF SIGNIFICANT PROVISIONS OF CISG AND UCC

CONTRACT FORMATION - CISG

There are several terms in the CISG which are different from UCC provisions. Contract negotiators should be aware of these differences.

For example, contracts may be oral (Article 11). Offers must be directed to specific persons (Article 14). Acceptance of an offer is effective only after the offeror receives notice of the acceptance (Article 18). A reply to an offer with additional terms is a counteroffer unless the additional terms are insignificant (Article 19).

CONTRACT FORMATION - UCC

In contrast, contracts of sale for goods valued over $500 must be in writing signed by the party against whom enforcement is sought (UCC 2-201; 204). Acceptance of the offer occurs upon dispatch of the notice of acceptance to the offeror, failure to reject effectively, or commission of an act inconsistent with ownership (UCC 2-204, 205, 206, 606.) An acceptance may also occur with additional terms unless the offer is expressly conditioned to exclude additional terms (UCC 2-207).

PERFORMANCE OF CONTRACT - CISG

A breach of contract of sale must be fundamental to confer rights under CISG. A breach is fundamental if it results in substantial detriment to the other party to deprive him of what he is entitled to expect, unless:

the breaching party did not foresee such result; and

a reasonable person would not have foreseen such result (Article 25).

In order for the goods to conform to a contract, the goods must:

be fit for the purposes of ordinary use;

be as expressly represented;

possess the qualities of any sample or model used to induce the purchase of the goods; and

be contained or packaged in the manner usual or customary for such goods. However, a seller may not be held for nonconformity of goods where the buyer knew or should have known of the nonconformity at time of sale (Article 35).

Goods must be delivered free of industrial or intellectual property claims about which the seller knew or should have known at time of contract (Article 42).

A seller may supply specifications for manufacture of goods if the buyer neglects to provide them to the seller (Article 65).

A party may be exempt from liability for nonperformance due to impediments beyond his control which he could not be expected to take into account at the time of contract (Article 79).

PERFORMANCE OF CONTRACT - UCC

In contrast, a breach of contract of sale may be established if the goods or tender of delivery fails to conform to the contract (UCC 2-601). Similarly, a breach may occur if goods are wrongfully rejected or a buyer revokes acceptance (UCC 2-703).

A seller must put and hold conforming goods for disposition by buyer (UCC 2-503). Buyer must give notice of nonconforming tender (UCC 2-602). If the goods have been accepted, the buyer must give notice of claim of breach for nonconforming tender (UCC 2-607).

Express and implied warranties may be specifically excluded (UCC 2-316). The right of seller to exclude warranty of title or claims of infringement by a third person is also permitted (UCC 2-312).

Excuse by failure of presupposed conditions is limited. A seller may be permitted to delay in delivery of goods if:

> **a contingency occurs that was not expected at the time of contract; or**
>
> **allocation of production and deliveries to customers occurs as a result of such contingency or pursuant to government order.**

REMEDIES - CISG AND UCC

The remedies provided in the CISG and UCC differ only in concept.

For example, both systems provide for actual, incidental and consequential damages. Recovery under CISG is limited to loss foreseen or foreseeable at the time of contract as a possible consequence of the breach (Article 74). The UCC standard of foreseeability is limited to losses which could not have been prevented (UCC 2-715). These differences should be considered carefully at the time of negotiating a contract.

Similarly, the CISG uses the concept of avoidance of contract. The buyer and seller may avoid for fundamental breach (Articles 45, 64). Thus, standards of what the individual may be entitled to expect under the contract is limited by the foreseeability of those expectations by the other party through use of the concept of fundamental breach (Article 25). In contrast, rights of rejection, revocation of acceptance, or cancellation under the UCC are not limited by the parties' expectations and foreseeability (UCC 2-601, 602, 608, 703, 711). These rights are modified by concepts of good faith and substantial impairment of value (UCC 2-203, 608).

Finally, the CISG may require a buyer to take delivery as a remedy of specific performance. This requirement may be imposed if the local state law authorizes such a court order (Article 46, 62). In contrast, the UCC permits such specific performance only when damages are inadequate (UCC 2-709, 716).

SUMMARY OF CISG

Because of the mandatory application of the CISG to international contracts for the sale of goods between the U.S. and signatory countries, parties should consider its impact on international transactions. The CISG may even apply when the parties are not aware of its application. In some cases, it will be advisable to expressly exclude the CISG and provide in the contract that the UCC of a particular jurisdiction is the applicable law for the transaction.

INTERNATIONAL SALE OF GOODS CHECKLIST PER CISG

Parties		CISG Provisions	
seller	_____	applicability	_____
buyer	_____	reservations	_____
		acceptance notice	_____
Contract Type		fitness of goods	_____
P.O.	_____	express qualities	_____
sales agreement	_____	customary packaging	_____
conditional sale	_____	intellectual claims	_____
bill of sale	_____	buyer specs	_____
		seller specs	_____
Payment		fundamental breach	_____
letter of credit	_____	avoidance of contract	_____
collection documents	_____	foreseeable losses	_____
assignability	_____	substantial detriment	_____
partial draw	_____	substantial performance	_____
transshipment	_____	liquidated damages	_____
documents of title	_____		
banker's acceptance	_____		
sight draft	_____		

INTERNATIONAL AGENCY AND DISTRIBUTION AGREEMENTS

International agency and distribution agreements should clearly describe the rights and obligations of the parties. A close review of applicable U.S., international and foreign law and careful drafting of documents can help avoid future litigation.

Foreign legislation protecting agents and distributors is becoming more prevalent. Such legislation may impose special notice requirements and require substantial compensation for termination of an agent or distributor. An exporter can confront both monetary damages and a court challenge by a terminated agent to prevent registration of a replacement representative. Such actions can block future sales.

Any agreement should include provisions that submit disputes to a court of competent jurisdiction, and problems regarding choice of law and forum, notice requirements and reasons for termination, protection of intellectual property and confidentiality of the principal's business interests and operations. Additionally, most contracts for U.S. exporters should specify that the foreign agent or distributor is familiar with and agrees to comply with applicable U.S. laws, such as the Foreign Corrupt Practices Act and the anti-boycott provisions of the Export Administration Act and the Internal Revenue Code.

The minimum subjects which an exporter should negotiate include:

- territory;
- exclusivity;
- direct sales;
- additional representatives;
- products;
- accessories;
- technological improvements;
- compensation;
- manner of payment;
- authorization to accept orders;
- third-party shipments; and
- similar items.

TAX AND LABOR CONSIDERATIONS

The designation of the location of passage of title may determine whether the exporter has domestic or foreign source income for tax purposes. Similarly, the exporter should be aware that the vesting of contracting authority in a foreign agent could result in foreign tax liability by creating a "permanent establishment" under the provisions of a bilateral tax treaty.

If a representative is considered an "employee" under local labor law, an exporter could be responsible for local withholding taxes and social security benefits. Foreign courts have found indicia of employment status to include: set office hours, payment of salaries in lieu of commissions, and authority to contract or accept orders. A provision in the agreement establishing the independent status of the agent and requiring that sales contracts be referred to the principal for acceptance could minimize such risks.

TERMINATION

Generally, the longer the term of the contract or agency-distributor relationship, the more difficult it is to terminate the arrangement without a payment of compensation. Some foreign courts interpret automatic renewal provisions as reflecting indefinite or permanent terms of employment. In some countries, it may be best to provide for automatic termination with a new contract to be executed for the next period.

EXCLUSIVITY

The two primary types of exclusivity clauses prohibit the foreign representative from handling competing products or provide that the exporter will not appoint competing representatives in the same territory. U.S. antitrust and foreign competition laws may need to be consulted to ensure such clauses are enforceable. The Foreign Trade Antitrust Improvements Act of 1982 restricts the application of U.S. antitrust laws to cases whether there is an impact on U.S. export commerce. For example, prohibiting a foreign representative from handling competitive goods in a market with few qualified available agents could illegally restrain the ability of other U.S. companies to export to that market.

Foreign competition laws vary among countries. The most developed restrictions are found in the competition rules of the European Economic Community (EEC). The European Court of Justice has determined EEC distribution agreements are subject to Article 85(1) of the Treaty of Rome which prohibits restriction or distortion of competition. An agency agreement which incorporates features of a distributorship may be subject to these provisions.

CONCLUSION

The negotiation and drafting of an international agreement deserves careful scrutiny. U.S. and foreign laws, and international treaties and conventions should be taken into account in preparing an effective and commercially sound agreement.

GENERAL CHECKLIST FOR AGENCY AGREEMENTS

Parties
- capacity _____
- registration _____
- agency relation _____

Territory
- geographic area _____

Gross Sales _____

Products
- goods _____
- uses/improvements _____
- title/shipment _____

Customers
- classes _____
- credit _____

Sales by Principal
- pricing _____
- returns/allowances _____
- discounts _____
- payment terms _____
- warranty _____
- service/repair _____
- purchase orders _____
- expenses _____
- samples, models _____
- competition _____
- trade shows _____
- taxation _____

Performance of Agent
- commissions _____
- expenses _____
- licenses _____
- insurance _____
- consignment _____
- secrecy _____
- subagent _____
- payment to principal _____
- customer list _____
- minimum sales _____
- termination _____
- advertising

Miscellaneous
- letters of credit _____
- hedging _____
- drafts/acceptances _____
- contract renewal _____
- force majeure _____
- contract assignment _____
- contract amendment _____
- local law _____
- defaults _____
- remedies _____
- arbitration _____
- jurisdiction _____
- choice of law _____
- international law _____

SALES AND SECURED TRANSACTIONS

BY CO-AUTHORS:

KAREN E. MCCORMICK, ESQ. *AND* ***THOMAS D. SCRANTOM ESQ.***

INTRODUCTION

The United Nations Convention on Contracts for the International Sales of Goods (CISG) is the law of sales between a buyer and seller in signatory countries unless the parties expressly exclude its application in writing. If application of the CISG is excluded, written contracts for the sale of goods over $500.00 are covered by Article 2 of the Uniform Commercial Code (UCC). Goods are defined under the UCC as all things which are movable and includes all tangible personal property such as equipment, food, machinery and clothing.

FORMATION OF THE CONTRACT

MERCHANT STATUS

Article 2 of the UCC defines a merchant as one who deals regularly in goods of a type. Merchants are treated with a higher standard of responsibility under Article 2 than persons who make occasional sales.

Generally, a sales contract must be in writing and signed by party against whom enforcement is sought. A contract between merchants may be evidenced by writing received and not objected to within 10 days of receipt by one against whom enforcement is sought. Even if there is no writing, a contract may still be enforced if the goods are specifically manufactured for the buyer and are not suitable for sale to others, if the party against whom enforcement is sought admits the contract was entered, or if there has been partial performance. Sales contracts may be supplemented by course of dealing, usage of trade or course of performance, or by consistent additional terms unless the contract is intended to be exclusive and complete.[xii]

OFFER

A firm offer is irrevocable for up to three months if it is signed. Otherwise, an offer remains open for a commercially reasonable period of time unless it has an expiration date.[xiii]

ACCEPTANCE

Once an offer is made, any reasonable medium and manner of confirmation operate as an acceptance unless the offer indicates otherwise.[xiv] If the acceptance contains different or additional terms, it is an acceptance offer unless acceptance is made expressly conditional on agreement to the additional or different terms. Such additional terms are proposals for an addition to the contract. If the contract is between merchants, the terms become part of the contract unless they materially alter it or objection is given within a reasonable time, or the original offer expressly limits the acceptance to the terms of such offer.[xv]

Shipment or a promise to ship operates as acceptance of offer in the form of an order. When such performance operates as acceptance, it must happen within a reasonable time, or the buyer may be justified in treating the offer as having lapsed.[xvi]

WARRANTIES

EXPRESS WARRANTIES

Express warranties arise from an affirmation of fact or promise including those on containers or labels relating to the goods. In addition, any description of the goods, sample, or model which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description, sample, or model.[xvii]

IMPLIED WARRANTIES

Implied warranties accompanying a sale arise because the circumstances justify protection for a buyer. The two basic implied warranties are the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Other implied warranties may arise from course of dealing or usage of trades.[xviii] The implied warranty of merchantability applies only to merchants. The implied warranty of fitness for a particular purpose applies to all sellers as so long as the seller has reason to know the particular purpose for which the goods will be used and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.[xix]

WARRANTY DISCLAIMERS

United States federal law precludes a disclaimer of implied warranties by any seller of consumer goods who makes a written express warranty.

Assuming no written express warranty, a disclaimer of the implied warranty of merchantability must be part of the agreement of the parties, must mention merchantability and be in writing and conspicuous.[xx] Generally the conspicuousness requirement is met if the language is printed in larger, contrasting or different color print, e.g., all capitals or italics. Language to exclude the

implied warranty of merchantability or of fitness for a particular purpose must be specific. If the exclusionary language creates an ambiguity in the contract, it will be resolved against the seller.[xxi]

An example of an ambiguity was found by a South Carolina court when a seller attempted to disclaim an implied warranty under the caption "Terms of Warranty."[xxii] The court asserted that the caption suggested the granting of a warranty rather than a disclaimer and held the disclaimer ineffective.

Implied warranties can be excluded by specific language that calls attention to the exclusion of warranties and makes it plain that there is no implied warranty. If the buyer has inspected the goods before entering the contract, or refused to inspect, there is no implied warranty with regard to defects which such an examination ought to have revealed. An implied warranty can be disclaimed by prior course of dealings and course of performance, or between merchants by trade usage. If the buyer gives precise and complete specifications to a seller the implied warranties are excluded.[xxiii]

REMEDIES FOR BREACH OF SALES CONTRACT

BUYER

Absent contractual limitations, a buyer has several remedies available to him under the South Carolina Code for breach of a sales contract. If the goods fail to conform to the contract, a buyer may reject the goods.[xxiv] The buyer must be able to state a particular defect in connection with the rejection.[xxv] This right is subject to the seller's right to cure within the contract period or within a reasonable time thereafter if he had reasonable grounds to believe the nonconforming tender would be acceptable.[xxvi] The seller must reasonably notify the buyer of his intent to cure.[xxvii]

Rejection must occur within a reasonable time after delivery and is ineffective unless the buyer reasonably notifies the seller.[xxviii] A reasonable time includes a period of time necessary to enable the buyer to exercise his right to inspect the goods to determine if they conform to the contract.

On a rightful rejection, the buyer may cancel the contract, avoid liability on the purchase price, and recover so much of the purchase price as was paid before rejection. He also has a security interest in the rejected goods in his possession to secure the seller's obligation to refund the purchase price as well as to cover expenses reasonably incurred in the inspection, receipt, transportation, custody and care of the rejected goods. He may retain possession of the secured goods until the seller pays the amounts subject to the buyer's security interest.[xxix]

A rejecting buyer cannot exercise ownership over the goods.[xxx] If he is a merchant and has no security interest in the goods, he must follow the seller's reasonable instructions with respect to the goods. If the goods are perishable or threaten to decline in value quickly, the buyer must attempt to sell them for the seller's account without instructions. If the buyer receives no instructions within a reasonable time, he may store or sell the goods.[xxxi]

If a buyer accepts goods and then finds out about defects, he may still have a remedy. Even though a buyer may not reject accepted goods, he may revoke his acceptance, cancel the contract, and compel a refund of the purchase price if nonconformity substantially impairs the value of the goods to the buyer. If he knew of the nonconformity when he accepted the goods, he can revoke acceptance only if he can establish that he accepted the goods under the reasonable assumption that the nonconformity would be cured and it has not been. If the buyer did not know of the nonconformity when he accepted the goods, he can revoke acceptance only if his acceptance was reasonably induced either by the difficulty of discovering the defect before acceptance or by the seller's assurances.[xxxii]

The revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the defect and before any substantial change in the goods not caused by their own defects. The buyer must notify the seller of the revocation and this notice should be in writing.[xxxiii] The revoking buyer has the same rights and duties regarding the goods as if he had rejected them.

A buyer that rejects or revokes acceptance of goods may recover direct, incidental, and consequential damages for seller's breach. The buyer may purchase goods to substitute for those due from the seller and recover the excess cost to cover over the contract price.[xxxiv] If the buyer does not purchase substitute goods, or the substitute good are not comparable, the seller may recover the excess of market price over contract price.[xxxv]

In addition to actual damages, a buyer may be entitled to recover incidental damages including expenses for inspection, receipt, transportation, care and custody of the goods, and expenses incident to effecting cover. The buyer may also be entitled to recover lost profits and additional operating expenses if the buyer has done all he could to mitigate his damages and such expense were foreseeable at the time of contract.[xxxvi] Finally, a buyer may be entitled to punitive damages if the seller's breach was accompanied by a fraudulent act.[xxxvii]

If the buyer accepts the goods, he may recover the value of the goods as warranted less the value of the goods as accepted. Under special circumstances, however, damages may be determined in any manner which is reasonable. For example the value of a lost crop was held to be a reasonable measure of damages for herbicide which failed to perform as warranted.[xxxviii] In addition, the accepting buyer may recover incidental and consequential damages.[xxxix]

A six-year statute of limitations begins to run in breach of warranty actions when the buyer discovers or should have discovered the breach.[xl] The six year period cannot be reduced by contract.

SELLER

When a seller learns that a buyer is insolvent, he may stop delivery or refuse to deliver the goods unless he receives full payment in cash upon delivery. He may reclaim the goods if he discovers that the buyer received goods on credit while insolvent, so long as he demands return of the goods within ten days after buyer's receipt. If the buyer has legally transferred title to a person who purchases for value, in good faith, and without knowledge of any prior claim or interest in the goods, the seller cannot reclaim the goods from the innocent purchaser.[xli]

If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates the contracting another manner, the seller may either withhold or stop delivery of the goods. If the goods are in his possession or control, the seller may identify the goods to the contract and start an action for the price of payment in full or seek damages.[xlii]

If the goods are unfinished, the seller may complete the manufacture or cease manufacture and resell the goods for scrap or salvage value.[xliii] In either case, he must act in a commercially reasonable manner to avoid loss and recover the unpaid debt. If the resale is in good faith and a commercially reasonable manner, the seller is entitled to recover the difference between the sales prices and the contract price plus any incidental damages subtracting any expenses saved.[xliv]

Alternatively, the seller may recover the difference between the market price at the time and place for delivery and the unpaid contract price, less any expenses saved. If such damages are inadequate, the seller may recover the profit which he would have made from full performance by the buyer plus incidental damages, less payment or proceeds received from resale.[xlv]

Remedies under the Code are not exclusive and the Code does not preclude an aggrieved party from resorting to other remedies available to him through any applicable statute or the contract itself. The buyer and seller may contractually limit the remedies available. A contractual exclusion of remedies is enforceable unless unconscionable or unless the contractual remedy fails of its essential purpose.[xlvi]

SECURED TRANSACTIONS

Article 9 of the UCC[xlvii] sets forth the basic laws of secured transactions which interacts with other bodies of law including the South Carolina Consumer Protection Code, the U.S. Bankruptcy Code, and the Federal Tax Lien Act. A secured transaction is any transaction intended to create a security interest in collateral as security for the payment or performance of the obligations of a debtor to the secured party lender.

The requirements for obtaining a security interest which give the secured party priority rights over other creditors depend upon the type of property. A security interest arises in and attaches to property by virtue of the lender conveying value to the debtor in exchange for the interest. The perfection of that interest results in giving status to the lienholder as a secured party. The method and procedure of perfection is controlled by the UCC.[xlviii]

Collateral can be divided into five categories: goods, documentary collateral, accounts and general intangibles, proceeds, and after-acquired property. These classifications of collateral are important in determining which UCC rules govern regarding the requirements for establishing security interests and the resolution of priorities among competing security interests.

Goods generally include all tangible personal property. Goods are usually divided into the following categories:

> CONSUMER GOODS - **goods used or bought for use primarily for personal, family or household purposes;**
>
> EQUIPMENT - **goods bought for use primarily in business;**
>
> INVENTORY - **goods held for sale or lease or furnished under contracts of service or raw materials or work in process and goods which are materials used or consumed in a business; and**
>
> FIXTURES - **goods which have become so related to particular real estate that an interest arises under real estate law. Property cannot belong to more than one category.**[xlix]

Documentary collateral is divided into three categories:

1. *Instruments* - **checks, notes, draft, certificates of deposit and investment securities;**
2. *Documents* - **bills of lading, dock warrants, dock receipts, warehouse receipts or orders for the delivery of goods and any other document used in business and financing to show that its holder is entitled to the good it covers; and**
3. *Chattel paper* - **writings which evidence both a monetary obligation and a security interest in specific goods.**[l]

Intangibles fall into two classifications:

1. *Accounts* - **rights to payment arising when goods are sold or leased or services are rendered, and contract rights; and**
2. *General intangibles* - **any collateral which is not goods, accounts, contract rights, chattel paper, documents, instruments or money. General intangibles also include choices in actions, which is the right of a person to bring a legal action or other judicial proceeding to recover money; personal property; or payment on a debt not encompassed within the definition of accounts.**[li]

Proceeds are defined as whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Proceeds are further divided into

CASH - **money, checks and deposit accounts, and**

NON-CASH - **all other proceeds.**[lii]

After-acquired property is property acquired by the debtor after creation of the security interest.[liii]

Attachment of the interest to the collateral and perfection of security interest are required for the enforcement of the interest against the collateral. The attachment of a security interest is the process by which a security interest is created. Once the interest has attached the secured party can enforce his security and proceed against the collateral if the debtor defaults the Security Agreement. A party may also take steps to perfect his security interest so that it is enforceable against third party claims.[liv]

A security interest in collateral attaches when three requirements are met:

1. **an appropriate written Security Agreement creating or providing for the security interest and describing the collateral must be signed by the debtor (unless the collateral is in the possession of the secured party);**
2. **value must be given; and**
3. **the debtor must have rights in the collateral.**[lv]

Perfection establishes the secured party's priority of claim to the collateral as against other conflicting interests. Usually a secured party who perfects first has a superior claim to the collateral over any other secured party. Depending upon the type of collateral, there are essentially three methods of perfection. In some cases, automatic perfection may take place upon attachment of the security interest without any additional steps being required. The second method consists of the secured party taking possession of the collateral. The fact that a debtor is not in possession gives notice to third parties dealing with him that his interest or property may be subject to a lien. The third method of perfection applies to most kinds of collateral and is accomplished by filing a Financial Statement in the appropriate public office.[lvi]

The Financing Statement contains the names and addresses of both the debtor and the secured party, the signature of the debtor, and a description of the collateral by type of item. Any such description is sufficient if it reasonably identifies the collateral. A copy of the Security Agreement is sufficient as a Financing Statement if it contains the above information and is signed by the debtor. A Financing Statement may be filed before the security interest attaches; however, perfection does not occur until attachment. A filed Financing Statement is effective for a period of five years from the date of the filing. Before the expiration date of the filing, a continuation may be filed to extend the filing for another five years.[lvii]

A Financing Statement usually is not required when the secured party or his agent takes possession of the collateral. A security interest perfected by possession continues only so long as possession is retained. Automatic perfection may be available with respect to purchase money security interests in consumer goods and certain assignments of accounts. A purchase money security interest is one taken

by the seller of the collateral to secure all or part of its price, or by a person who lends money to the debtor to enable the debtor to acquire the collateral.[lviii]

An unperfected security interest has the lowest priority claim to the collateral. The unperfected security interest in the debtor's collateral will be subordinate to a perfected security interest, a lien creditor, a good faith bulk purchaser, a buyer, or a transferee of accounts. In certain cases involving fixtures and accessions, an unperfected security interest may have prior claim to goods affixed to real estate or other goods.[lix]

Generally, conflicting security interests rank in priority according to their respective time of filing or perfection. Priority exists from the time an interest is first perfected, provided there is no period when the interest is not perfected. Thus, priority is generally determined by a race of the creditors to the filing office. In some instances an unperfected security interest will take priority over the interest of a purchaser who has knowledge of the unperfected security interest. When a party holds a purchase money security interest, he may still have priority over competing interests in the same collateral, even though the interest of the purchase money secured party was perfected later than the competing interests.[lx]

The rights of the secured party in the collateral after the debtor's default are the essence of a secured transaction. Upon the occurrence of an event of default, the secured party has the right to take possession of the collateral. The method of taking possession will depend upon the circumstances and the type of collateral. The secured party may obtain possession of the collateral by judicial process, or he may also take possession of the collateral as long as it can be done without a beach of the peace. With respect to intangible collateral, the secured party is entitled to notify the account debtor or the obligor on an instrument, to make payment directly to the secured party rather than to the debtor.[lxi]

Once the secured party obtains possession of the collateral, he may either retain the collateral in satisfaction of the debt, or dispose of it and apply the disposition proceeds satisfaction of the debt. If the secured party wishes to retain the collateral, he must give notice of his proposal to do so to the debtor and to any other secured party from whom he has received written notice of a claimed interest in the collateral. The secured party is required to dispose of the collateral in a foreclosure sale. The secured party must then apply the disposition proceeds to satisfaction of the debt if he receives notice of objection to his proposal, or if the collateral is consumer goods and the debtor has paid 60 percent of the cash price or 60 percent of the loan secured by the goods. The UCC provides specific procedures for foreclosure sales, but, the disposition including the method, manner, time, place, and terms must be commercially reasonable. The commercial reasonableness of the sale is determined on the basis of whether the collateral is sold in conformity with commercial practices among dealers in the type of property sold. The fact that a better price could have been obtained by a sale at a different time or by a different method from that selected by the secured party is not sufficient to establish that the sale is not made in commercially reasonable manner.[lxii]

The proceeds must be applied to the expenses of repossession, the satisfaction of the debt, and the holder of any junior security interest in the same collateral. The secured party must account to the debtor for any surplus. The debtor is generally liable for any deficiency.[lxiii]

The debtor or any other secured party may redeem the collateral by tendering payment in full of all obligations secured by the collateral, plus related expenses. If the Security Agreement permits acceleration of the entire balance of the debtor's obligations to the secured party on default, such amount would have to be tendered for redemption. Once the amount due has been paid, the collateral is free of the security interest.[lxiv]

U.S. TAXATION OF FOREIGN PERSONS

BY:

THOMAS F. MORAN, ESQ.

INTRODUCTION

As a general rule, foreign persons are taxed depending on their income generating activity in the United States. U.S. taxation of foreign persons is divided into two regimes:

investment type income; and

income "effectively connected" with a U.S. trade or business.

These two regimes of taxation only apply to foreign persons. United States citizens, residents, and corporations are taxed on their total worldwide income.

FOREIGN PERSONS SUBJECT TO U.S. TAXATION

Non-resident aliens and foreign corporations ("foreign persons") are subject to the two regimes of foreign taxation. Foreign corporations are those incorporated outside of the United States.

If a foreign person desires to avoid residency status, the foreign person must keep an accurate account of the number of days present in the U.S. during the current year and the prior two years. Also, the timing of certain financial events may become important depending upon residency status from year-to-year.

For an individual to be classified as a non-resident alien, the individual:

must not be a U.S. citizen;

must not be a permanent resident under U.S. immigration law;

must not spend 183 days or more in the United States during the tax year;

must not have spent more than 31 days in the U.S. in the current year or a significant amount of time in the U.S in the prior two years.

If any of these tests are failed, with certain exceptions, an individual will be taxed on his worldwide income as a resident U.S. taxpayer. If an individual passes all of these tests, he is a foreign person subject to the two tax regimes outlined below.

INVESTMENT TYPE INCOME

Generally, foreign persons are taxed at a flat rate of 30 percent on all investment type income (called fixed or determinable annual or periodical type income, or "FDAP") attributed to sources in the United States. No deductions are available to a foreign person earning FDAP income; a 30 percent income tax is imposed on the amount received by the foreign person. Although there are several categories of FDAP income, the most common are interest, dividends, salaries, rents and royalties.

For example, a foreign person will be subject to the 30 percent taxation on such amounts received as:

- **Dividends on stock of a U.S. corporation.**
- **Gains from the sale of U.S. intellectual property such as patents, copyrights, and goodwill to the extent such gains are from payments contingent on use or productivity of such property.**
- **Royalties for the use of intellectual property located in the U.S.**
- **Rents received from property in the United States if the rental activity of the foreign person is the mere acceptance of rent payments.**
- **Alimony paid by a U.S. citizen or resident.**
- **Gambling winnings in the U.S.**
- **Wages and salaries earned in the U.S. if the foreign person is present in the U.S. less than 91 days and earns less than $3,001.**
- **The interest portion of a mortgage payment paid by a U.S. person.**

These rules are subject to many exceptions. The following three important exceptions should be noted:

1. **U.S. tax treaties with certain countries may override or modify these rules.**
2. **Interest earned by foreign persons on "qualified" bonds issued by U.S. persons is exempt from U.S. taxation.**
3. **Interest earned by foreign persons on funds held in U.S. banks, savings and loans, and insurance companies is exempt from U.S. taxation.**

The 30 percent income tax is required to be withheld by the U.S. payor. Thus, a tenant paying his foreign landlord, a borrower paying his foreign lender and a corporation paying its foreign shareholder must satisfy this withholding requirement. The payor is the U.S. "withholding agent," and is primarily liable for the tax due. The U.S. withholding agent should resolve withholding questions in favor of retention of taxes since the foreign payee can file a refund claim to obtain

amounts that should have been disbursed. If the U.S. withholding agent fails to withhold the proper amount of taxes, the agent may be held primarily liable for payment of the tax.

TRADE OR BUSINESS INCOME

A foreign person "engaged in a U.S. trade or business" is taxed as a U.S. citizen on all "effectively connected income" produced by such activities. Income that is not effectively connected to a U.S. trade or business is not taxable. This regime of taxation is separate and apart from the 30 percent on all FDAP income earned in the U.S. "Effectively connected income" is best illustrated by the following examples:

PERSONAL SERVICES

A foreign person's wages earned from the performance of personal services in the United States are taxed at regular U.S. tax rates as "effectively connected income" unless the foreign person is in the U.S. less than 91 days during the taxable year and the total compensation is less than $3,001.

SALES INCOME

Where the foreign person has employees in the U.S., makes sales in the U.S., or manufactures and sells in the U.S., the foreign person is engaged in a U.S. trade or business. The income generated from such activity is effectively connected to that trade or business and is taxed at regular U.S. rates. However, a foreign person is not engaged in a U.S. trade or business merely because he solicits business in the U.S. Also, mere purchasers in the U.S. to sell goods offshore does not constitute engaging in a U.S. trade or business. A foreign person who markets or sells goods though an agent in the U.S. is engaged in a U.S. trade or business producing effectively connected income.

TRADING OF SECURITIES

A foreign person who trades in U.S. stocks, securities, or commodities through a U.S. resident broker or other independent agent is not engaged in a U.S. trade or business if the foreign person has no U.S. office or fixed place of business through which such transactions are conducted.

MINERAL INVESTMENTS

A foreign person's ownership of a "working interest" in U.S. mineral deposits may be taxed as effectively connected income. In such cases the interest must include the right to enter and develop the properties a well as contribute to associated costs.

OWNERSHIP OF RENTAL REAL ESTATE IN U.S.

A foreign person who owns and rents U.S. real estate is engaged in a U.S. trade or business if the activities are more than mere rent collection. All U.S. rental agents' activities are imputed to the foreign owners. The safest course for a foreign landlord to avoid effectively connected income is to rent his or her U.S. real estate property on a net lease basis.

SALE OF U.S. REAL ESTATE BY A FOREIGN PERSON

Generally, capital gains realized by a foreign person not present in the U.S. more than 182 days are not taxable. However, foreign persons who realize gain on the sale of United States real property are taxed on the gain as if they were engaged in a "U.S. trade or business." Thus, gain from the sale of U.S. real estate by a foreign corporation is recognized and taxed at thirty four percent as if it were a corporation domiciled in the U.S.

Additionally, the sale by foreign persons of interests in business entities which own a certain amount of U.S. real property are treated as a sale of U.S. real estate by the foreign person. U.S. corporations are presumed to be U.S. real property holding corporations unless the taxpayer shows otherwise or that the stock of such corporation is traded on a public market. A corporation is a U.S. real property holding corporation if at any time during the last five years the corporation's percentage ownership of U.S. real estate exceeds 50 percent of the total fair market value of all of its assets.

Generally, the buyer of United States real estate or stock of a U.S. real property holding corporation from a foreign person must withhold the lesser of 10 percent of the purchase price or the tax payable by the foreign seller on his gain from the sale of the property. Exceptions to this withholding requirement include:

real estate that will serve as the buyer's personal residence if the purchase price is less than $300,000;

any sale for which the seller provides an affidavit that he is a U.S. person or is not a U.S. real property holding corporation; or

if the IRS provides a statement that the seller is exempt from the tax.

CONCLUSION

Both U.S. and foreign persons must be aware of the U.S. taxation of foreign persons and the withholding requirements thereunder. Foreign persons should compare the two regimes of taxation to obtain the most favorable treatment. Foreign persons should be aware of U.S. residency rules to avoid U.S. taxation on worldwide income. Furthermore, U.S. persons paying amounts to foreign persons should be aware of the withholding requirements to avoid being held primarily liable for the tax due.

TRADE LAWS GOVERNING BUSINESS PRACTICES

BY:

CHARLES L. DIBBLE, ESQ.

INTRODUCTION

Business practices in South Carolina, and in the United States as a whole, are relatively unrestricted. However, the laws that govern them are important, and should be considered by any foreign business entering the U.S. market. Most prominent among these laws are antitrust laws, which seek to ensure continued competition in the various markets for goods and services, and unfair trade laws, which cover a broad spectrum of bad faith business practices. Antitrust laws carry severe penalties, and can be traps for the unwary.

FEDERAL LAWS

The principal antitrust laws of the United States, the Sherman Antitrust Act, and the Clayton Act, are interrelated.[lxv] Two other significant antitrust measures, the Robinson-Patman Act, and the Hart-Scott-Rodino Act, are incorporated into the Clayton Act by amendment.[lxvi] Because of this interrelationship, a violation of one antitrust law will often constitute a violation of others. Therefore, antitrust laws should not be viewed individually, but should be seen as integral parts of an overall enforcement mechanism.

ANTITRUST LAWS

THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act outlaws intentional attempts to limit competition for goods and services.[lxvii] The Act has two principal sections. Section 1 applies to attempts to restrain trade or commerce; Section 2 specifically prohibits monopolies and attempts to establish them.[lxviii]

ANTI-COMPETITIVE PRACTICES

Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies "in restraint of trade or commerce."[lxix] A violation of Section 1 cannot be committed by a single person or business; violations involve "combinations," or contracts, in restraint of trade, and must be committed by two or more entities.[lxx]

Formal agreements can violate Section 1, but a conspiracy to restrain trade can also be implied from the mere behavior of a business that tries to restrain competition.[lxxi]

Anti-competitive practices such as boycotts, price fixing, agreements to divide markets, and "tying arrangements" are practices which have been commonly recognized to violate Section 1 of the Sherman Act.[lxxii] A tying arrangement takes place when a seller exploits his position as the supplier of a desired product to coerce buyers into the purchase of other unwanted products.[lxxiii]

Other practices may violate the Sherman Act if they unreasonably restrict competition in the marketplace.[lxxiv] Generally, the reasonableness of a restraint on competition is determined by the degree of its impact on competition in a particular market. The greater the impact of a restraint, the more likely it is to violate the Sherman Act.[lxxv]

MONOPOLIZATION

Attempts to monopolize markets are prohibited under Section 2 of the Sherman Act.[lxxvi] A business has a monopoly when it holds such a dominant position in a market that it is able to control the supply and price of goods or services.[lxxvii] It is not illegal merely to have a monopoly as a result of unique or superior product and service, but any attempt to exploit a monopoly, in order to exclude potential rivals from the marketplace, violates Section 2 of the Sherman Act.[lxxviii] Similarly, an attempt to monopolize a market by underpricing products, dividing territory with competitors, or other anti-competitive tactics violates the Sherman Act as well.[lxxix]

PENALTIES

Penalties for violating the Sherman Act are severe. Corporations can be fined up to $1 million per violation, and individuals face fines of up to $100,000 and three years in prison.[lxxx] Additionally, when a corporation has violated the Sherman Act, the directors and officers who authorized the violation may be fined up to $5,000, and sentenced to as long as one year in prison.[lxxxi] Private parties may also bring civil suits for violations of the Sherman Act and, if successful, they can recover three times their damages, plus legal expenses.[lxxxii]

THE CLAYTON ACT

The Clayton Act outlaws many of the same practices that are prohibited by the Sherman Act. However, its prohibitions are more specific. The Clayton Act regulates business practices in the sale of goods, mergers, and the interlocking of directorates among competitors.[lxxxiii]

DISCRIMINATORY PRICING

The Robinson-Patman Act, an amendment to Section 2 of the Clayton Act, outlaws discriminatory pricing in the sale of goods.[lxxxiv] A seller cannot sell the same goods to different purchasers at different prices, absent a valid justification for doing so. Price cutting, if engaged in to capture a market, or drive a competitor out of business, is also illegal under this law.[lxxxv] However, the law does explicitly allow price discrimination if a lower price reflects a seller's savings in dealing with a particular buyer, if market conditions allow the seller to lower prices, or if a seller lowers prices to meet competition.[lxxxvi]

SALES PRACTICES

Section 3 of the Clayton Act prohibits pricing and marketing practices in the sale of goods that reduce competition or tend to create monopolies.[lxxxvii] For instance, tying arrangements, also outlawed by the Sherman Act, are prohibited by Section 3 of the Clayton Act.[lxxxviii] Because of their frequent use of exclusive dealing arrangements, franchisors and distributors are often subject to lawsuits under Section 3.[lxxxix]

Exclusive dealing arrangements and requirements contracts violate Section 3 if they unreasonably restrain competition.[xc] Under these contracts, a buyer agrees to fill all of his needs from a single seller. In many cases, however, the arrangements are justifiable as the most efficient way for a buyer to ensure a steady supply of goods.[xci] The legality of these arrangements is ultimately determined by their coercive effect on buyers and their impact on competition.[xcii]

To determine whether an exclusive dealing agreement unreasonably restrains competition, the courts generally look to the size of the contract, its duration, the relative position of the parties, and the agreement's effect on the marketplace.[xciii] If these factors indicate that competitors are being driven out of the market, or that competition is substantially inhibited, a violation of the Clayton Act is likely to be found.[xciv]

MERGERS AND CONSOLIDATIONS

The Clayton Act also prohibits business mergers and consolidations that could have the effect of substantially reducing competition, or of creating monopolies. Section 7A of the Clayton Act, also known as the Hart-Scott-Rodino Act, requires that large companies planning a merger obtain approval from the Federal Trade Commission and the U.S. Justice Department's Antitrust Division 30 days before concluding the transaction.[xcv] If the agencies determine that a merger could have a harmful effect on competition, or that it risks creating a monopoly, they can seek a court order prohibiting the companies from concluding the deal.[xcvi]

INTERLOCKING DIRECTORATES

Section 8 of the Clayton Act prohibits the establishment of "interlocking directorates" between competing companies.[xcvii] A person cannot serve on the board of directors of two companies if the companies are competitors, and either of the companies has more than one million dollars in assets.[xcviii] Banks that belong to the Federal Reserve System are prohibited from sharing directors, officers, or employees altogether.[xcix]

PENALTIES

Violations of the Clayton Act carry stiff civil penalties.[c] Private parties who suffer damages as a result of Clayton Act violations are entitled to recover three times their damages plus their legal expenses.[ci] The courts can also issue injunctions against illegal behavior if a business is in immediate danger of being harmed by a competitor's illegal practices.[cii]

Federal Trade Commission Act. Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and "deceptive acts or practices in or affecting commerce."[ciii] Generally, the Federal Trade Commission Act is aimed at bad faith business practices that adversely affect the public interest.[civ] The law gives the Federal Trade Commission exclusive jurisdiction to enforce the Act, and it has the authority to enjoin companies from engaging in practices that violate the law.[cv] Working with the United States Justice Department, the agency may also pursue criminal penalties in cases that involve false advertising in the sale of good, drugs or cosmetics.[cvi]

STATE LAWS

SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

REGULATED PRACTICES

The South Carolina Unfair Trade Practices Act is often referred to as the "little F.T.C." because it also prohibits unfair and deceptive acts in trade or commerce.[cvii] Furthermore, the South Carolina Unfair Trade Practices Act explicitly refers to the Federal Trade Commission Act for interpretation.[cviii] Unlike its federal counterpart, however, the South Carolina law allows private parties to bring suits if they have been injured by unfair trade practices.[cix] If successful, injured parties can recover three times their damages, plus legal fees and expenses.[cx]

OTHER STATE LAWS

LAWS GOVERNING SPECIFIC MARKET SECTORS

Several South Carolina laws govern specific business sectors. Alcoholic beverages, agricultural products, and motor vehicle sales, for instance, are governed by specific statutes and regulations. Local counsel can advise companies if their businesses are subject to particular laws or regulations.

LABOR LAWS

BY:

STEVEN WYNKOOP, ESQ.

SOUTH CAROLINA COMMON LAW

South Carolina follows the employment-at-will doctrine. Under this doctrine, an employee agrees to work for an indefinite duration in return for the payment of wages. This arrangement may be terminated at any time by either party for any lawful reason -- even an arbitrary or irrational reason. Although employment at will is the general rule in this state, three primary exceptions exist:

- **when South Carolina public policy is violation;**
- **when an employee handbook states otherwise; and**
- **when certain retaliatory discharges occur.**

The first exception to employment at will is the public policy exception, which is limited to situations when an employer requires an at-will worker, as a condition of retaining employment, to violate the law. The public policy exception thus far has been limited to situations when an employee has to choose between retaining employment and violating a law that imposes criminal sanctions. The South Carolina Supreme Court first recognized this exception in the 1985 case, Ludwick v. This Minute of Carolina, Inc.[cxi] In this case, the at-will employee was a seamstress who was served with legal documents requiring her to appear before a South Carolina Employment Commission hearing. Under the laws of this state, she would have faced criminal penalty if she had failed to attend the hearing. The plant managers advised her not to attend and fired her when she appeared at the hearing against their wishes. The court, however, stated that the employee was wrongfully discharged and thus was entitled to sue for damages in this situation. The public policy exception, as set forth by the court, is to protect employees who should not have to choose between their jobs and obeying the law.

The second exception to the at-will employment doctrine occurs when an employer uses employee handbooks or other published personnel policy statements that modify this doctrine. In a landmark South Carolina Supreme Court case, Small v. Springs Industries, Inc.,[cxii] the company had issued to all employees an employment handbook and a bulletin, which set forth a four-step termination procedure. An employee as discharged after only two steps in the procedure had been followed, and she sued for wrongful discharge. The court held that although a company is not required to issue such policies, manuals or bulletins, once it does so, the company must follow them. A company may be able to avoid the consequences of this rule and yet still issue

handbooks, if the company inserts a conspicuous disclaimer or provision into the written document that advises the employee that the publications are purely advisory statements and that the company desires to continue under the at-will doctrine.

The final major exception to the doctrine arises when an employer terminates or demotes an employee in retaliation for bringing certain claims to enforce statutory rights. The first of these exceptions prevents an employer from terminating or demoting an employee who had, in good faith, instituted or caused to be instituted, any proceeding under the South Carolina Workers' Compensation law, or who has testified or is about the testify in such a proceedings.[cxiii] The employer may terminate such an employee if it can prove certain things, such as the employee's habitual tardiness or absence from work, or his malingering, or his being intoxicated or disorderly while at work.[cxiv]

The second retaliatory discharge statute prevents an employer from discharging or in any manner discriminating against an employee who has instituted or caused to be instituted any proceeding pursuant to the statutes, laws and regulations relating to occupational safety and health.[cxv] This statute also prevents an employer from discharging or discriminating against an employee who has testified or is about to testify in such a proceeding.

THE SOUTH CAROLINA BILL OF RIGHTS FOR HANDICAPPED PERSONS

The Bill of Rights for Handicapped Persons[cxvi] prohibits employment discrimination on the basis of a handicap. "Handicapped" persons, under state law, include those who have a substantial physical or mental impairment that is

either congenital or by accident, injury, or disease;

verified by medical findings;

reasonably certain to last a lifetime without substantial improvement; and

unrelated to the employee's ability to engage in a particular occupation.

Not included under this definition are substance abusers such as alcoholics and drug users. Additionally, "mental impairment" does not include mental illness.

South Carolina's Handicapped Statute is considerably broader than corresponding statues found in most other states since it allows an employer to discriminate against such individuals if the handicap interferes with their work performance. The employer may consider the safety, efficiency, and costs of hiring a handicapped person when making this determination and need not make reasonable accommodations for such employees.

THE SOUTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH ACT

The South Carolina Occupational Safety and Health Act (OSHA)[cxvii] requires employers to furnish a safe place free from recognized hazards what are likely to cause death or serious harm to employees. Additionally, the employer must inform workers of their rights under this Act by notices or other means.

OSHA requires businesses to monitor and measure employees' exposure to potentially toxic materials or harmful physical agents. Moreover, they must keep records, which employees may inspect, and must furnish medical exams for employees to determine any adverse effect of exposure in appropriate circumstances.

The Commissioner of Labor has broad inspection, investigative, and enforcement authority under South Carolina law. If the employer's violation of the rules or regulations is unintentional, it first receives a citation and will be given a reasonable time to eliminate the violation. If the employer willfully or repeatedly violates the rules and regulations, it will be subject to civil and criminal penalties of up to $20,000 and/or imprisonment of up to one year.

THE SOUTH CAROLINA HUMAN AFFAIRS LAW

The South Carolina Human Affairs Law[cxviii] prohibits employment discrimination on the basis of race, religion, color, sex, age or national origin. Further, an employer may not segregate or otherwise adversely affect one's status as an employee based on those factors. Notices and advertisements related to jobs and job availability may not indicate any preference as to race, religion, sex, or national origin, unless one of these facts is truly necessary to the normal operation of that business.

The provisions of the State Human Affairs law are similar to those of the Federal Employment Discrimination Law, Title VII of the Civil Rights Act of 1964,[cxix] and the Age Discrimination in Employment Act[cxx] which are administered by the Equal Employment Opportunity Commission (EEOC). EEOC defers investigative and conciliation decisions to the State Human Affairs Commission (SHAC) on all matters except those in which a conflict of interest arises from SHAC or in which EEOC has a special interest.

To initiate an employment discrimination investigation, an employee first must file a claim with SHAC. The Commission has broad investigatory and administrative authority under law and may call a public hearing to inquire into allegations of discriminatory conduct of a public concern. SHAC must resolve this through negotiations between the employer and the employee. In the absence of a successful resolution through these means, SHAC may authorize the employee to file a lawsuit to enforce the Act.

CONCLUSION

South Carolina employment law remains favorable to employers. Generally, South Carolina adheres to the employment-at-will doctrine, with very few exceptions. In addition, there is no state statute requiring the employer to provide reasonable accommodations to handicapped employee or applicants. Employers moving into this state will find a favorable environment with regard to the laws governing the rights of a company to manage its business.

PERMANENT RESIDENCY UNDER IMMIGRATION LAW

BY:
JEFFREY M. NELSON, ESQ.

INTRODUCTION

Obtaining permanent resident status, symbolized by the so-called "green card,"[cxxi] gives a foreign national the right to live and work in the United States without any time limitation. A permanent resident has many of the same rights and obligations which a United States citizen has, such as the right to engage in any lawful employment and the obligation to pay taxes. Although there are numerous methods for obtaining permanent residency, the two most common are through a close family relationship to a United States citizen or permanent resident, and through an offer of permanent employment by an employer in the United States.

The process for obtaining permanent residency is by no means automatic. A foreign national must be able to qualify for one of the categories created by a complex system of laws and regulations. Additionally, the individual must be prepared to go through an often lengthy application process, travel restrictions during this process, and a period of waiting after the petition is approved before the immigrant visa is actually issued. This waiting period is due to a numerical limitation on the number of each type of visa which can be issued each year.

It is impossible to even begin the process of applying for an immigrant visa without the cooperation of the sponsoring employer or family member. It may be necessary for the alien to enter the United States on a temporary non-immigrant visa to reestablish ties with a relative or commence a working relationship with a prospective employer.

After permanent residency is obtained, the individual must follow certain guidelines to maintain his permanent residency and to qualify for naturalization as a United States citizen. Permanent residency can be abandoned if the alien remains outside the United States for an extended period of time or is convicted of certain crimes. The Alien Registration "green card" can only be used as an entry document if the alien has been outside the United States for less than one year.

THE IMMIGRANT VISA PETITION PROCESS

A petition for a permanent resident (immigrant) visa can be made while the beneficiary alien is in the United States, on a nonimmigrant visa, or overseas. If the alien is overseas when the visa petition is approved the approval notice is forwarded to the United States Consulate where the alien is residing. The United States Consulates are an arm of the United States Department of State and not a part of the Department of Justice, which oversees the activities of the Immigration and Naturalization Service ("INS"). Therefore, there are sometimes delays in the forwarding of approved petitions due to miscommunication between the two bureaucracies.

The United States Consulate will issue the beneficiary of the petition a "Packet III" which consists of a biographic information form and a list of documents which the alien will be required to provide. The final step in the process is a formal interview conducted at the consulate. The interview will only be scheduled once the applicant has notified the consulate that he is in possession of all the required documents; the consulate has received a visa number for the applicant (based on the quota for that type of visa and the date of the applicants petition); and the consulate has completed all of its administrative processing of the file. An immigrant visa which is valid for entry into the United States within four months of its issuance may be issued to an applicant the same day that the interview is held. When the alien enters the United States he must present himself to a United States Immigration Inspector. Once admitted by an Inspection Officer the alien has acquired permanent resident status.

If the applicant is present in the United States, as either a lawful nonimmigrant or the immediate relative of a United States citizen, and a visa number is immediately available, the applicant may be able to file a petition to "adjust status" to that of a permanent resident while remaining in the United States. In this situation the applicant will be interviewed at an office of the INS by an officer of the Immigration Service. In certain situations, such as the legitimate marriage to a United States citizen or cases of political asylum, the visa petition and an application to adjust status may be filed at the same time.[cxxii]

The selection system, which determines when a visa number is available to allow an alien with an approved immigrant visa petition to enter the United States, is a confusing process which uses numerical and percentage limitations established by law.[cxxiii] The preference categories, quotas and limitations were recently changed by the Immigration Act of 1990 which went into effect October 1, 1991. In general the waiting periods for employment based petitions will be much shorter than in years past due to a doubling in the number of visas available each year for these categories. Meanwhile, the period between application and issuance of a visa for family based petitions should remain about the same. Currently, visas are immediately available for multinational executives or managers, outstanding professors or researchers and aliens of "extraordinary ability."

Special percentage allocations apply to certain countries which have large numbers of people immigrating to the United States each year.[cxxiv] Additionally, certain percentage limitations exist for each of the immigrant preference categories worldwide.

IMMIGRANT VISAS BASED ON JOB OFFERS

The preference categories based on offers of permanent employment were established to allow United States employers to resort to foreign labor when they cannot find qualified workers to fill available jobs. The employment based preference categories also provide the opportunity to foreign nationals who do not have family relations in the United States to immigrate.

CHANGES UNDER THE IMMIGRATION ACT OF 1990

Under the 1990 Act several preference categories for employment based immigration have been replaced by new preference categories. The use of the new system of categories became effective on October 1, 1991. The first of these new employment based categories is for those described as Priority Workers and includes aliens with "extraordinary ability," Outstanding Professors and Researchers, and, most significantly, certain multinational executives and managers. This change in the law will allow certain business managers and executives to immigrate much more easily and quickly to the United States. This category is allotted 40,000 visas annually.

The second new employment-based category includes aliens who are members of professions holding advanced degrees or aliens of "exceptional abilities" in the arts, sciences or business. There are 40,000 visas annually for this category as well.

The third category is allotted 40,000 visas annually plus any visas unused from the first two employment based preferences. Under this category there are three distinct sub-groups:

professionals with bachelors degrees;

skilled workers (defined as workers in fields requiring at least two years experience); and

other, or unskilled workers.

Unskilled workers may receive no more than 10,000 of this category's 40,000 visa allotment. It is anticipated that a waiting list for visa availability for unskilled workers will soon exceed the four year waiting period which they encountered under their old sixth preference category. In short, more visas are available, and therefore there is a shorter waiting period, for all prospective immigrant employees under the new system except unskilled workers.

Like the pre-1990 Act categories, it will be advantageous if an alien and the position can qualify under the "priority workers" or professional categories since these should have a shorter waiting period between approval of the petition and issuance of the visa. Additionally, there is no need to obtain United States Department of Labor "certification" for the job that a priority worker is hired to fill. Labor certification, an often lengthy and expensive process, is required for all other employment based immigrant visa petitions. Based on the number of petitions filed each year before October 1, 1991, there should be enough visas in the priority workers' categories to bring

them current, meaning that visas will be immediately for those with approve petitions, by late 1993.

Those foreign nationals who have Sixth Preference petitions which were approved before October 1, 1991 must file a new petition for classification under the new category system before October 1, 1993. Reclassification should be applied for as soon as possible for those executives and managers holding an approved sixth preference petition who qualify under the new "Priority Worker" category.

THE OFFER OF EMPLOYMENT

There are several requirements which must be met to qualify under any of the employment based categories. First, the offer of employment must be for a full time permanent job and it must come from a United States based employer. The employer who files the petition does not need to be a United States corporation owned but must, at a minimum, be the United State branch office or subsidiary of a foreign owned corporation. To qualify as a full time permanent job the position cannot be seasonal and should require 40 hours per week.

Second, the United States Department of Labor ("DOL") must certify that no qualified United States workers are available to fill the job being offered. This requires the employer apply to the DOL for certification that qualified United States workers were recruited and none are available.[cxxv] In cases involving certain types of positions, such as some professionals and high level corporate executives, recruitment is considered unnecessary and the position "pre-certified."

Finally, the job offer must be legitimate. This means that the alien must meet the minimum requirements for the job, the employer must show that it is able to pay the alien's salary, and the employer and alien must both intend for the alien to work at the job which is being offered. In meeting the minimum requirements, the employer must make sure that the alien's education and experience meet the requirements of the job being offered. When certifying the job, the DOL will look at whether the stated minimum requirements are reasonable or whether they appear to be tailored to the alien's qualifications. In the case of small or family run businesses, the INS may require documentation, such as tax returns, to establish that the company is capable of paying the alien's salary.

PROFESSIONALS AND "EXCEPTIONAL ABILITY"

In addition to these requirements, to qualify for an immigrant work related visa as a professional or person of "exceptional ability" under the second employment based preference category, the employer must be offering a position that requires a person with the professional qualifications or "exceptional ability" that the alien is proven to have. The general rule for a professional is that the position must be one requiring a person with an advanced degree. To qualify as a person of "exceptional ability" requires a showing of international renown or great achievement in the arts or sciences. If either the job offer or the alien's qualifications do not meet the INS standard of a

professional or person of "exceptional ability" they will almost certainly fit within the first sub-group of the third employment based preference category.

ENTREPRENEURS AND "SPECIAL IMMIGRANTS"

Under the 1990 Immigration Act there is a new category for employment based immigrant based on certain investments. This "entrepreneur" category is limited to ten-thousand visas per year. Additionally, the law pertaining to those admitted as "special immigrants" has been changed. Certain workers for religious organizations (non-clergy and limited to 5,000 visas per year), aliens employed by the United States mission in Hong Kong, and juveniles under the protection of a court in the United States qualify as "special immigrants".[cxxvi] Those qualifying under this category are not subject to the numerical restrictions applicable to other immigrants.

The new category created for foreign entrepreneurs[cxxvii] is intended to encourage foreign investment in the United States. To qualify under this category an alien must make an investment in the United States of between Five Hundred Thousand and Three Million Dollars, depending on the economic conditions in the location where the investment will be made, which will create at least ten jobs for American workers.

Aliens entering the United States in the entrepreneur category are initially granted conditional permanent residency for two years;[cxxviii] like those admitted as the spouse of a recent marriage to an American citizen. Much like a divorce can lead to the revocation of permanent residency based on a marriage, it is probably that a foreign investors conditional residency can be revoked if less than ten workers are employed by the foreign investor at the end of the two-year period. The exact letter of the law must be followed when applying for immigrant status in this category as the law which created it also provides for the criminal prosecution of anyone who fraudulently attempts to use it to immigrate to the United States.

DEPARTMENT OF LABOR CERTIFICATION

The most time consuming part of preparing a job based immigrant visa petition is the preparation of labor certification. The forms required to obtain labor certification must first go through a State Employment Security Commission Job Services office before being forwarded to the DOL. At any step the application may be rejected or returned for further documentation. The entire process can take as long as one year.

There are certain exceptions to the labor certification requirement. As previously discussed, there is no need to obtain labor certification for aliens of extraordinary ability; those qualifying under the first employment based preference category. Additionally, the DOL lists certain occupations each year that are considered "pre-certified." This list is subject to change annually and lists those occupations which are considered a shortage occupation in the United States. Pre-certification also applies to aliens of "exceptional ability" in the sciences or arts.

An additional change to labor certification under the 1990 Act is the requirement that an employer filing a labor certification for a position notify any union or bargaining representative of his

employees of its petition. This was a trade off in Congress of the increase in the number of employment based visas under the new law.

IMMIGRANT VISAS BASED ON FAMILY RELATIONSHIPS

IMMEDIATE RELATIVES

Immediate relatives of United States citizens are the most highly favored candidate for permanent residence and are not included in any preference category. There is no limit on the number of immediate relatives that can become permanent residents each year. This means that visas for immediate relatives are always available. Those considered to be immediate relatives of United States citizens include spouses[cxxix], unmarried children under the age of 21[cxxx], and parents (if the United States citizen is over 21 years old).[cxxxi]

OTHER FAMILY MEMBERS

Other family members of United States citizens are also eligible for permanent residency but are subject to numerical limitations. The preference categories are established by Congress and visas are allocated on a priority basis to each group. For example, the first preference category consisting of unmarried children of United States citizens over the age of 21 is given priority in the number of visas allotted each year over married sons and daughters of citizens, immediate relatives of permanent residents, and brothers and sisters of citizens.

MARRIAGE FRAUD AND CONDITIONAL RESIDENCY

For those attempting to obtain a immigrant visa through marriage to a United States citizen that the marriage must have been valid when it was entered, it must still be in existence, and it must not have been entered for immigration purposes.[cxxxii] These first two points are easily proven and therefore the questions of whether the marriage was entered "for immigrant purposes" receives the most scrutiny. The INS is likely to investigate the intentions of a couple if the couple has not known each other for very long, only saw each other a few times prior to getting married, or do not reside together. Additionally, if the marriage was entered after the alien became subject to deportation proceedings by the INS, the alien is not eligible to receive an immigrant visa until he or she has lived outside of the United States for two years after the couple are married.[cxxxiii]

The Immigration Marriage Fraud Amendments of 1986[cxxxiv] created a conditional resident status for aliens who apply for status as the spouse, son or daughter of a United States citizen based on a marriage entered into less than two years before the application is made. After two years the alien must apply to the INS to have this conditional status lifted. An alien who make an

application based on a marriage more than two years old when he acquires permanent residency is not subject to this restriction and is granted permanent residency unconditionally.

The Marriage Fraud Amendments also impose a criminal penalty for marriage fraud[cxxxv] and provide that an alien granted preference status based on a marriage later found to be a "sham" cannot ever be the recipient of a later approved visa petition.[cxxxvi] The INS presumes that a marriage is a "sham" if it was entered into less than two years before the alien enters the United Sates as an immigrant and the couple is then divorced less than two years after his entry as an immigrant.[cxxxvii] If the marriage is dissolved before two years have passed since the alien was granted his immigrant visa, then the INS will require him to show proof that the marriage was not a "sham."

IMMIGRANT VISAS BASED ON DIVERSITY

Beginning on October 1, 1994 there will another broad category of immigrant visas. In addition to the job offer and family relation categories, 55,000 visas per year will be available for "diversity" immigrants and their families.[cxxxviii] To qualify as a diversity immigrant under the 1990 Immigration Act, an alien must come from a "low-admission" country, must have at least a high-school diploma or its equivalent and must have worked at least two years in an occupation that requires two years of training or experience.[cxxxix]

CONCLUSION

There are two general categories of immigrant visa, those based on offers of employment and those based on a family member that is a United States citizen or permanent resident. While a few categories of immigrant visa petitions are current, with a waiting period, the wait in certain categories can be as long as eight years. Immigrant visas are immediately available for the immediate relatives of United States citizens and the previously mentioned First preference category of workers. Unless the alien seeking permanent residency in the United States is either an immediate relative of a United States citizen or meets the qualifications of the First preference category, he or she should plan on a lengthy wait between the time a petition is filed and a green card issued.

PRODUCTS LIABILITY

BY:

ANGUS M. LAWTON, ESQ.

THEORIES OF LIABILITY

NEGLIGENCE

The three negligence concepts used in a products liability case are negligent design, negligent manufacture, and negligent marketing. Negligence is the lack of due care on the part of a manufacturer or seller to properly design, manufacture or market the product. Once such a lack of care has been shown, an injured person must demonstrate that the lack of care was the primary cause of his injuries.

There are four different legal theories used in the products liability field:

- negligence;
- breach of warranty;
- misrepresentation; and
- strict liability.

BREACH OF WARRANTY

A warranty is a statement or representation made by a seller of goods regarding the character, quality, or title of goods, by which the seller promises that the goods are as he represents them.[cxl] A product may be subject to various express or implied warranties. The types of warranties are:

express warranty;

implied warranty of merchantability; and

implied warranty of fitness for a particular purpose.

A seller's breach of any of the warranties will subject him to liability to the consumer. The warranties are addressed in detail in the Sales and Secured Transactions Section of this publication.

TORTIOUS MISREPRESENTATION

A seller may also be liable where a fraudulent misrepresentation is made concerning the product. In order for the consumer to prove fraud, the following must be shown:

a representation;

its falsity;

its materiality;

the customer's knowledge of its falsity or a reckless disregard of its truth or falsity;

the seller's intent that his representation be acted upon;

the customer's ignorance of its falsity;

the customer's reliance on its truth;

the customer's right to rely thereon; and

the customer's consequent injury.[cxli]

Punitive damages are allowed when the nine elements of fraud are proven.

NEGLIGENT MISREPRESENTATION

In addition, a seller who makes a misrepresentation concerning the character or quality of an item is liable for physical harm to a person caused by reliance upon the misrepresentation.[cxlii] Liability exists even if the misrepresentation is not fraudulently made.[cxliii] The rule applies to any one selling any type of goods.

STRICT LIABILITY IN TORT

Finally, a seller may be liable based on strict tort liability. In this situation, if the product is defective so that it is "unreasonably dangerous," the seller is liable regardless of his knowledge of the product's danger.[cxliv] Unreasonably dangerous means dangerous beyond the expectations of the ordinary consumer.[cxlv] Two types of products may be viewed as unreasonably dangerous:

- **products with a defective design; and**
- **products that are manufactured improperly.**

A seller of an unreasonably dangerous product is liable for physical harm caused to a user or for property damage.[cxlvi] If a plaintiff's claim is based solely on strict liability, he cannot recover punitive damages.[cxlvii] To establish liability a Plaintiff must show that:

- **the seller is engaged in the business of selling the particular product; and**
- **the product reached the consumer without substantial change in the condition in which it was sold.[cxlviii]**

The liability will exist even if the seller has exercised due care in the preparation of the product and even if the user is not a party to the sale.[cxlix]

POSSIBLE DEFENSES

There are several defenses that a seller may use to negate or lessen his liability to the consumer.

CONTRIBUTORY OR COMPARATIVE NEGLIGENCE

Contributory or comparative negligence refers to the lack of ordinary care on the part of the injured party which helped cause the injury. Merely failing to discover a product's defect normally will not amount to contributory negligence. This defense will not ordinarily defeat a strict liability claim, but it can be a defense to the negligence causes of action.

ASSUMPTION OF THE RISK

Assumption of the risk describes conduct where the person has knowledge of the risk of injury but continues to act, knowing that some injury may follow. The two important elements are the person's knowledge of the danger and his acquiescence in it.[cl] This defense is often the most useful in products liability actions.

INSUFFICIENT PROXIMATE CAUSE

The seller may claim that the user's injury is too remote and that the injury is too far removed from the product's use. For example, there may be too many acts or actors involved between the product and the injured party. The chain of liability must end somewhere.

DISCLAIMERS

The seller may choose to limit, modify or exclude the various warranties. There are technicalities involved in disclaiming warranties in South Carolina, and it is recommended that a South Carolina attorney be contacted if issues in this area arise.

EXPIRATION OF THE STATUTE OF LIMITATIONS

A seller may claim that the statute of limitations has expired. A statute of limitations declares that a suit must be brought within a specified period of time after the incident occurred or it is forever barred.[cli] If the statute of limitations has expired, then the consumer has no cause of action. In South Carolina, the statute of limitations period is either three or six years, depending on the cause of action and the time that the incident occurred.[clii]

PREVENTION

Generally speaking, any manufacturer locating anywhere in the world should focus on preventing product liability suits. Safety of the consumer should be the foremost concern. Before beginning operations, a manufacturer should examine and review all applicable statutes. Industry safety standards may also provide minimum requirements for certain products. Each manufacturer should review the applicable standards and make sure that its operation complies with the guidelines. While compliance with these guidelines is not a defense to a strict liability suit, compliance with the applicable provisions can help prevent potential problems.

An inexpensive yet effective way to reduce accidents is to provide explicit directions for the consumer. All such directions and manuals should be clearly worded and comprehensive. The more dangerous a product, the more necessary directions become. Warnings on products are also recommended. These warnings should be in the instruction package and placed on the product itself where there is a risk of serious danger.

Adequate quality control should also be maintained at the manufacturing facility. Trained inspectors help assure the quality of the products and can help prevent expensive lawsuits.

If any defects become apparent after the sale of a product, the manufacturer should be prepared to notify all consumers of corrections which are needed in the product to insure its safe use. Call backs and recalls may avoid the imposition of punitive damages.

Finally, there are insurance policies available which provide coverage for product liability actions. Before operating any manufacturing facility, the owners should ascertain what type of insurance is recommended and/or available.

SALE OF A BUSINESS

BY:

CHARLES L. DIBBLE, ESQ.

INTRODUCTION

The laws governing the sale of a business in South Carolina vary, depending on the nature and organization of the business being sold. For instance, the laws that apply to the sale of a corporation differ somewhat from those that govern the sale of partnership interests. Other statutes, such as the Bulk Sales Act, and the various securities laws, must be considered in all transactions.

SALE OF A SOUTH CAROLINA CORPORATION

There are three principal ways to transfer ownership of a corporation or its property:

- sale of a controlling interest in the corporation;
- merger; or
- purchase of assets.

SALE OF CONTROLLING INTEREST

RELEVANT PROVISIONS

A corporation is generally sold by the transfer of a controlling interest in its stock by its individual shareholders. A controlling interest is usually thought of as the ownership of a sufficient amount of stock, or voting rights, to entitle the owner to elect a majority of the corporation's Board of Directors. There are few statutory restrictions on the sale of a controlling interest by an individual shareholder in a South Carolina corporation. However, most corporations will make extensive arrangements for the event in their bylaws or shareholders' agreements.

PROTECTION OF MINORITY SHAREHOLDERS

A number of protective devices are common in corporate bylaws and shareholders agreements.[cliii] Often, minority shareholders will have special rights in the event of a sale of controlling interest. They may also have the power to prevent a purchaser from assuming control of the company, or to delay the election of his chosen candidates from the Board of Directors, or to sell their stock to the company at fair market value.[cliv]

For these reasons, anyone planning the purchase of a South Carolina corporation should pay special attention to the rights of all shareholders, and their potential effect on the transaction. Similarly, the purchaser of a minority interest in a corporation should carefully evaluate the extent of his protection as a minority shareholder.

CORPORATE ACTION

If a corporation, itself, rather than its individual shareholders, elects to transfer control to a third party, a dissenting shareholder often has specific rights under the law. A dissenting shareholder, who votes against a corporation's decision to merge, exchange shares, or sell the corporation's assets to a purchaser, has the right to make the company purchase his stock at fair market value, if he so desires.[clv]

PUBLICLY HELD COMPANIES

Special provisions apply to the sale of a controlling interest in larger South Carolina corporations that are publicly held.[clvi] The law requires a purchaser to give advance formal notice of its intent to acquire a controlling interest in a corporation, and give minority shareholders special voting rights after the purchase takes place.[clvii] Unless the corporation's articles and bylaws provide otherwise, minority shareholders are also entitled to sell their stock back to the company at fair market value.[clviii]

MERGERS

South Carolina's laws governing mergers are similar to those governing the sale of a controlling interest in a corporation. In the case of a merger, however, the approval of the Boards of Directors and the shareholders of the selling corporation, as well as the purchasing corporation, is generally required.[clix] Dissenting shareholders, who vote against the merger, may be entitled to have the company purchase their stock at fair market value.[clx]

SALE OF ASSETS

RELEVANT PROVISIONS

Rather than buying stock in a corporation, a purchaser may choose to buy only its assets. When a South Carolina corporation sells all, or substantially all, of its assets, the South Carolina law requires that specific procedures be followed.[clxi] Failure to observe these requirements can result in the transaction being invalidated, and liability for all parties involved.[clxii]

REQUIRED APPROVAL

South Carolina law requires that a corporation's Board of Directors obtain the approval of those shareholders who hold voting stock before entering a contract to sell all, or substantially all, of a corporation's assets.[clxiii] In case of a conflict, the Board may simply present the proposed sale to the shareholders without recommendation.[clxiv] However, the Board is not obligated to present all offers to the shareholders; if it does not believe that an offer is in the corporation's best interest, it

may reject it on its own authority.[clxv] The sale of a corporation's assets must be approved by the holders of at least two-thirds of the corporation's voting stock, unless a lower margin is set in the corporation's articles of incorporation.[clxvi] The margin of approval can never be less than one-half of the voting stock, however.[clxvii]

VALUATION

ASPECTS OF THE SALE OF A CONTROLLING INTEREST OR MERGER

One of the key aspects of any transaction involving the sale or exchange of corporate stock is fixing its correct value. Valuation is especially important, because minority shareholders are so frequently entitled to redeem their stock at fair market value. In case of disagreement over the measure of the fair market value, dissatisfied shareholders can often require a formal accounting of the corporation's assets and a special proceeding to value the stock.[clxviii] These procedures can be costly, and can also result in adverse tax consequences for both the corporation and the individual stockholders.

ASPECTS OF A SALE OF ASSETS

GENERAL. The valuation of a company's assets if usually simpler than the valuation of its stock. The principal issues involved are the value of the assets being purchased, and the purchaser's financing. However, there is a need for consensus on the value of the assets being sold, because a dissenting shareholder may be able to force an appraisal if there is a disagreement over the sale price.

GOODWILL. It is important to remember that the sale of a business' assets does not, on its face, involve the transfer of the goodwill that it enjoys with its client base. If goodwill is not important to the buyer, a sale of asset may be the most efficient way to structure the transaction. However, if the purchaser wants to acquire goodwill, but does not want stock in the company, it may wish to consider negotiating collateral agreements with the seller. For instance, an agreement not to compete with the purchaser, or to sell the company's name with its assets, may effectively allow the purchaser to assume the seller's market position.

SALE OF PARTNERSHIPS AND LIMITED PARTNERSHIPS

Fewer laws restrict the sale of partnerships. However, fundamental rule of partnership law usually ensure that a reasonable consensus must precede a partnership's significant decisions.

GENERAL PARTNERSHIPS

Partners who disagree with a decision to sell a business, or its assets, have various rights to protect their interest. As partners, they can demand an accounting of the partnership assets, so as to arrive at an accurate valuation of their ownership interests. [clxix] They also can force a dissolution and liquidation of the partnership by withdrawal.[clxx]

PARTNERSHIP AGREEMENTS

Partners are ordinarily entitled to vote on the admission of new members to a partnership.[clxxi] As in corporations, partnership agreements that provide methods for resolving disputes are also common. Such agreements may set specific procedures for the admission of new partners, or for the purchase of the interests of those members that wish to leave the partnership upon admission of the new member. In all case, the purchaser should take precautions to ensure that the rights of minority partners do not adversely effect the transaction.

LIMITED PARTNERSHIP

Limited partnerships operate under many of the same rules as general partnerships. However, a few key differences worth noting.

DISSOLUTION

The dissolution of a limited partnership is not as easy to bring about as the dissolution of a general partnership. The withdrawal of a limited partner does not dissolve a limited partnership; neither does the withdrawal of a general partner, as long as at least one general partner remains in the limited partnership.[clxxii] It is often easier to deal with dissension in a limited partnership, because the withdrawal of a partner does not necessarily threaten the viability of the business.

MERGER

South Carolina law allows the merger of limited partnership.[clxxiii] Two limited partnerships may combine their assets, and the members may otherwise exchange ownership interest by whatever means are convenient, and then continue business under the name of one of the merging partnership.[clxxiv]

TAX CONSIDERATIONS

Favorable tax considerations drive many investors to chose limited partnerships as investment vehicles. The limited partnership often gives investors a viable alternative to a corporation that elects tax treatment under Sub-chapter S of the Internal Revenue Code.[clxxv] So called "S Corporations," operate under many restrictions; among these are prohibitions against such corporation having corporate shareholders, and nonresident aliens.[clxxvi] Investing in a limited partnership carries similar tax consequences, but comparable restrictions on membership do not exist. However, anyone considering investing in a limited partnership should consult with tax counsel, as the regulations governing these businesses can be extremely complex.

OTHER CONSIDERATIONS IN THE SALE OF A BUSINESS

THE BULK SALES ACT

COVERAGE

The sale of a business' assets will be governed by South Carolina's Bulk Sales Act.[clxxvii] A bulk sale is the transfer of a major portion of the materials, supplies, or other inventory of a business made in the ordinary course of business.[clxxviii] However, the bulk sales law only governs manufacturers and retailers who stock and deal in goods, and does not apply to service sector businesses.[clxxix]

REQUIREMENTS

The Bulk Sale Act requires a purchaser that is about to take possession of a business' inventory to give notice to the creditors of that business.[clxxx] After receiving the purchaser's notice, the creditors have six months to assert their claims on the inventory.[clxxxi] Once this six-period has expired, their liens are no longer valid.[clxxxii] Compliance with the bulk sales law is important because failure to observe its requirements can result in the seizure of the purchased goods by a creditor.[clxxxiii]

SECURITIES LAWS

APPLICABLE LAWS

The two principal securities laws are the Securities Act of 1933, and the Securities Exchange Act of 1934.[clxxxiv] In addition, South Carolina regulates securities through the South Carolina Uniform Securities Act.[clxxxv] A detailed discussion of these statutes is beyond the scope of this publication, but investors need a general awareness of these laws, so as to be able to spot situations which may call for the advice of securities counsel.

COVERAGE

State and federal securities laws apply to a wide range of transactions, and should always be considered in the sale of a business, or in any other substantial investment. It is important to understand that the securities laws apply to a wide range of investments, and are not restricted to corporate transactions. The sale of limited partnership interests, for instance, often falls within the scope of security laws, even though partnership interests are not commonly thought of as securities.

REQUIREMENTS

Generally, securities laws impose registration requirements on businesses that are offered for sale, and impose liability for misrepresentations made in connection with sales. The nature and extent of the regulation varies according to the size of the business involved in a particular transaction and the manner in which investors are approached.

REGISTRATION. An offer to sell securities must be registered with the Securities and Exchange Commission (a federal agency), and the South Carolina Securities Commission, unless it falls within one of the categories of transactions that are exempted from registration by law.[clxxxvi] These laws granting exemptions are complex, and counsel should always be consulted to determine whether a particular sale or issue of securities is exempted from registration requirements.

LIABILITY FOR MISREPRESENTATIONS. Both state and federal securities laws impose civil and criminal liability for false or misleading statements made in conjunction with the sale of any security, whether registered or not.[clxxxvii] Therefore, it is especially important that statements made in connection with the sale of securities be scrupulously accurate. All written materials relating to a sale should be reviewed by legal counsel.

BANKRUPTCY IN SOUTH CAROLINA

BY:

L. SHOWELL BLADES, IV, ESQ.

INTRODUCTION

The U.S. Code allows for parties to protect themselves from their creditors by filing for bankruptcy protection in the federal courts. They may do this when they are insolvent. An example of insolvency is when a debtor's monthly income does not exceed his expenses. However, there is no strict formula for determining the point at which one may file for protection as a result of insolvency.

Title 11 of the U.S. Code governs bankruptcy law in South Carolina. It describes types of bankruptcy and determines the responsibility of the creditors and of the debtors. Those chapters are described below.

PARTIES TO A BANKRUPTCY

PRINCIPALS

There are several key parties to a bankruptcy proceeding. The primary party is the debtor who files bankruptcy to protect himself from creditor parties. Chapter 7 and 13 bankruptcy cases are managed by another key party who is the interim Trustee. Finally, a U.S. Bankruptcy Court judge decides disputes in such cases and approves actions taken by the parties.

RULE OF A TRUSTEE

The Trustee is appointed by the U.S. Trustee's office. He reviews documents, ensures that no fraud is being committed, manages and sells assets so creditors can be paid, and reports to the U.S. Trustee's office. Trustees are not necessarily appointed in Chapter 7 and 11 proceedings cases. Debtors and creditors both may request appointment of a Trustee if it appears that the managing entity is not helping the company. Such an appointed Trustee may operate the debtor's business in Chapter 7 and 11 cases. If no Trustee has been appointed, then an examiner may be appointed to investigate and report to the Court.

TYPES OF BANKRUPTCY

Bankruptcy under Chapter 7 involves the liquidation, or selling off, of a debtor's assets to pay his debts. Individuals and corporations may file under Chapter 7. Chapter 9 governs cities as debtors. Chapter 11 governs individual or corporate debtors' restructuring debt repayment. Chapter 12 is like Chapter 11 except it is for family farmers. Chapter 13 is like Chapter 11 except it is for individuals and has limitations on how much debt one may owe. A Chapter 13 proceeding is always managed by a Trustee.

AUTOMATIC STAY PROTECTION FOR THE DEBTOR

No matter under which Chapter a case is filed, Section 362 of the Code is essential. This section establishes an "automatic stay" that prohibits creditors from interfering with the debtor or his assets once he has filed bankruptcy. Creditors must have the Judge's permission to "lift" the stay to allow creditors to contact the debtor, foreclose or take other actions with respect to the debtor.

LIQUIDATION UNDER CHAPTER 7

BENEFIT TO DEBTOR

Chapter 7 debtors may be either individuals or corporations. These debtors are able to avoid paying their debts incurred before the filing date, except those which are for goods they wish to keep or which are of a statutorily specified type. Being able to avoid a debt is called "discharging" that debt.

REQUIREMENTS TO BE A DEBTOR

Certain requirements must be met to be a Chapter 7 debtor. Only persons or corporations that reside or have a domicile, a place of business, or property in the United States, or a municipality, may be a debtor.

A person may be a debtor under Chapter 7 only if he is not a railroad, or a domestic or foreign insurance company, bank, savings bank, cooperative bank, savings and loan, building and loan, homestead association, or credit union. The same parties, plus railroads, may file under Chapter 11. The debtor must have been a resident of South Carolina for the greater part of the 180 days preceding the filing in order to file in the District of South Carolina.

PROCESSING OF CASE

THE PETITION

GENERAL. A bankruptcy case is systematically processed. First, all bankruptcy actions are started by the filing of a petition in bankruptcy with schedules detailing the debtor's finances. Such petition is filed with the Clerk of the Bankruptcy Court in Columbia. At this point a Trustee will be assigned and notices are sent to creditors.

VOLUNTARY VS. INVOLUNTARY PETITIONS. A Chapter 7 debtor most often files his own petition. This is called a voluntary petition. However, a person or company also may become a Chapter 7 debtor if three of his creditors file a petition for that debtor. This is an involuntary petition, which the debtor may oppose in Court.

EXEMPTIONS

With the filing an individual debtor may claim exemptions. These are dollar amounts of certain items which no one may take from a debtor; not even the Trustee. However, they do not apply to the IRS. These are federal protections in amounts determined by South Carolina law, but the debtor must ask for them. Examples of the categories are: $1,200 worth of motor vehicles; $5,000 equity in a home or $1,000 cash; and $500 in jewelry.

341 HEARING (MEETING OF CREDITORS)

Approximately 30 days after the filing date a hearing is held where the Trustee and the creditors are free to ask the debtor questions when he is under oath. The Trustee determines whether the debtor has too much monthly income to qualify and whether there are any assets to sell.

LIQUIDATION OF ASSETS

If a debtor has equity in assets over his exemptions then a Chapter 7 Trustee declares the case to be an "asset case." Excess assets may be sold to the highest bidder at a later date. Proceeds from these sales go to the expenses of the sale, the Trustee's commission, and the creditors. When all eligible assets are sold, the debtor is discharged from all listed debts, except the ones he wishes to or has to repay. Very few cases are “asset cases.”

REORGANIZATION UNDER CHAPTER 11

CREDITOR COMMITTEES

As soon as possible after filing, a meeting of creditors is held and a representative from the U.S. Trustee's office presides. A creditors' committee may be appointed by the interim U.S. Trustee composed of the seven largest unsecured claimants.

There may be separate creditor committees for secured creditors and for unsecured creditors. These committees may investigate claims, request the appointment of a Trustee, and hire professionals to assist them.

THE PLAN OF REORGANIZATION

PURPOSE

The purpose of Chapter 11 is to permit debtors to reorganize their debt structure and dispose of assets to allow the debtor to function on its own under careful scrutiny. If the U.S. Trustee's office or the creditors believe a debtor cannot reorganize, then a Trustee may be appointed to manage the debtor. This reorganization is done pursuant to a plan which amortizes old debts on a schedule and provisions for payment of future obligations.

The plan restructures the debtor's obligations into categories based upon their characteristics. One such category is the distinction between secured and unsecured debts. Flexibility exists to implement the plan. As examples, leases may be assumed or rejected, property may be abandoned, businesses may be merged, and defaults in debt payments may be waived.

WHO MAY FILE A PLAN

Ordinarily, only the debtor may submit a plan during the first 120 days after filing the petition. If a Trustee has been appointed, the debtor has not proposed a plan before the end of the first 120 days, or the plan has not been accepted by all impaired classes of creditors during the first 180 days, then the creditor committee may impose a plan. These deadlines are shortened to 100 and 160 days, respectively, if the debtor elects to be treated as a small business and is a small business.

CONFIRMATION OF A PLAN

If the creditors accept a plan, then it may be approved by confirmation by the Court. Once a plan is confirmed the Chapter 11 debtor may be discharged of its debts and obligations scheduled in the plan upon completion of performance of the plan provisions.

PLAN PROBLEMS

Confirmation of the plan does not mean that a Chapter 11 debtor is free of any obligations. If a creditor fraudulently obtains confirmation, then the plan could be revoked. If a debtor does not comply with a plan, then the Trustee or creditors could have the case dismissed or converted to a Chapter 7 liquidation. If the plan is revoked or dismissed, then the automatic stay is lifted and creditors may approach the debtor.

CREDITOR'S ROLE

INITIAL ROLE

A creditor's role in a bankruptcy case may be active or passive. The first task for a creditor is to document its claim. This documentation is through presenting a proof of claim form with the Court. If a proof of claim is not filed properly then the creditor may not be paid.

SUBSEQUENT ISSUES FOR CREDITORS

SECURED VS. UNSECURED STATUS

Creditors need to determine whether they have secured or unsecured status. This determination is usually based upon the character of the debt obligation and the type of documentation used when credit was extended to the debtor. If a creditor is secured, it should ensure the debt collateral is protected or is returned by the debtor. If a Chapter 7 case is declared a "no-asset" case, unsecured creditors will not likely receive any payment.

DEALING WITH PROBLEMS

Creditors have some recourse if they have valid complaints against a debtor. If the creditor objects to some action or inaction of the debtor, then he may file motions or objections to obtain hearings on those matters. Also, if the debtor has engaged in some wrongdoing or has not notified the creditor of the filing, the creditor may object to discharge of his debt.

Otherwise, if the debtor has not done anything wrong except fail to pay his bills, and notified the creditor of the filing, then a creditor may be limited to filing his proof of claim and monitoring proceedings.

If a creditor decides to participate in a case, there are a number of procedural devices available. Creditors may gather information by attending the meeting of creditors and through the use of Rule 2004 examinations. Such examinations may be used to question debtors and other related persons under oath about their actions. Such testimony is recorded and may be used in Court proceedings.

CHAPTER 11 CREDITORS

Chapter 11 creditors differ only in that they may have more control over their treatment. Since a plan of reorganization must be proposed and accepted by the creditors, the creditor could take an active role in the preparation of the plan. As with a Chapter 7 creditor the Chapter 11 creditor must weigh the benefits of active participation. Chapter 11 proceedings are cumbersome and expensive cases which may last for years. In South Carolina only a small percentage are successful. The remainder are dismissed or are converted to Chapter 7 cases.

ADVERSARY PROCEEDINGS

Several types of disputes in a bankruptcy must be resolved by a party filing a lawsuit within the bankruptcy. These suits are adversary proceedings governed by the Bankruptcy Rules. The trial occurs before the Bankruptcy Judge. All hearings on motions, objections or trials occur in Charleston, Columbia or Spartanburg, depending upon where the debtor's residence or place of business is located.

APPEALS

An appeal from the decision of the Bankruptcy Judge must be heard in the United Sates District Court for the District of South Carolina. The burden of appealing in on the party desiring to be heard. An appeal may be taken from an adverse ruling on any final decision.

WINDING UP, SALE OF A BUSINESS, LIQUIDATION AND DISSOLUTION

BY CO-AUTHORS:

GARY W. MORRIS, ESQ. *AND* ***BOYD B. NICHOLSON, JR., ESQ.***

WAYS IN WHICH A BUSINESS CAN BE SOLD

SALE OF ASSETS

STATUTES CONTROL

The South Carolina Code governs the sale of all or substantially all of a corporation's assets in Section 33-12-102, which essentially provides that:

- **Board of Directors must recommend the transaction, or under certain circumstances the Board may submit the proposal to the shareholders without recommendation; and**
- **Shareholders must approve the transaction by**

  2/3 vote, or

  margin set in Board of Directors' recommendation or

  different margin set in Articles but at least one-half.
- **In some cases, goods will be subject of the sale as an asset. In such event, strict accounting procedures must be followed.**

SALE OF CONTROL SHARE

SC Code 35-2-101 through 35-2-111 governs the sale of a control share of a corporation. Notice requirements for acquisition of a control share in certain corporations is set forth in detail in the statute. Furthermore, dissenting stockholders may dissent from the sale of the control shares by invoking a stock valuation procedure to sell their shares at fair value to a "control share" acquisition to redeem their shares at "fair market value."

MERGERS AND CONSOLIDATIONS

RELEVANT PROVISIONS

The SC Code governs mergers in Section 33-11-101 through 33-11-108. These provisions are very similar to those governing the sale of assets except that in certain cases the approval of the shareholders of the serving corporation will be needed.

SALE OF GOOD WILL

Merger may offer a way to obtain value for the sale of good will.

DISSENTER'S RIGHTS

Shareholder may be able to obtain fair market value of his shares in the event of consummation of:

merger plan

share exchange

sale of all or substantially all of the property of the corporation in other than the regular course of business

altering of certain of his basic rights as a shareholder

approval of a control share acquisition

other instances specified by the Board of Directors.

SECURITIES LAWS

Federal securities laws and state securities laws may be involved in the sale of dissolution of a business particularly where the pricing of shares to be sold to majority and minority shareholders may be different, where a merger is involved or one of the entities is a registered or public entity.

TAX CONSIDERATIONS

Tax considerations may arise by virtue of the manner in which assets are sold, valued or distributed. Certain mergers, reorganizations and dissolutions may have known tax consequences as a result of careful planning of the realization and recognition of gain or income arising from a transaction. However, competent and experienced tax professionals must be consulted to advise on the expected tax treatment.

OTHER LEGAL CONSIDERATIONS -- BULK SALES

GENERALLY

A bulk sale is any transfer, that is not in the ordinary course of business and that involves a major part of the materials supplies or other inventory of a business.[clxxxviii]

Businesses subject to this Act

Any business where principal business is the sale of merchandise from stock, including those who manufacture what they sell.[clxxxix]

Courts exclude business which are principally engaged in the sale of services, such as a printing company.

Purpose: to prevent a type of fraud whereby a merchant, owing debts, sells his business, keeps the proceeds and disappears without paying his creditors.

EXEMPTIONS

Several types of transactions are specifically exempted from the requirement of the Bulk Transfers Act. They are:

security transfers;

general assignments for the benefit of all creditors;

transfers in settlement of a lien or other security interest;

sales by executors, trustees in bankruptcy or other judicial officers;

sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation;

transfers to persons maintaining a known place of business who becomes bound to pay the debts of the transferor; and

transfers that simply reflect a change in the structure or form of the enterprise.

REQUIREMENTS FOR COMPLIANCE

The transferor (or one who is selling his business) must furnish a list of existing creditors to be transferee (buyer).[cxc]

The list should include all those who could assert a claim, even if disputed.

Responsibility for the accuracy of the list is on the seller.

Both buyer and seller are responsible for compiling a list of the property that is being sold.

If the list omits some of the property to be sold, there is noncompliance and the sale is ineffective.[cxci]

The list must be a detailed description of the property that is being sold. In a recent case, the South Carolina Court of Appeals deemed a transfer of property between two parties invalid under the Bulk Transfer Act because the general description of the property contained in the list was not sufficient to identify it.[cxcii]

The list of creditors of the seller and the list of property sold must be maintained by the buyer for six months following the sale.

The buyer may keep the lists and allow inspection and copying by others or

The buyer may file the documents in the office of the Clerk of Court or the Register of Mesne Conveyances in the county where the property was located at the time of the sale.

The buyer must give a notice of the sale to the creditors of the seller.

The creditors to be notified include all those contained in the list provided by the seller and any others known to the buyer.

The notice must be personally delivered or sent by registered mail to the creditors 10 days prior to the buyer taking possession of the goods or paying for the goods, whichever happens first.[cxciii]

NONCOMPLIANCE

If the parties to a bulk sale fail to comply with the requirements of the Act as adopted in South Carolina, the seller's creditors may levy on the property after the buyer has taken possession of it, even if the buyer had no knowledge of the creditor's claim.

> Note, however, that no action can be brought by a creditor more than six months after the sale, unless the sale was concealed.[cxciv]

DISSOLUTION AND LIQUIDATION

Dissolution and liquidation of a business may be done formally by filing articles of dissolution with the Secretary of State of South Carolina. Provision must be made for satisfaction of taxes, creditors and shareholders. Formal tax filings must be made with appropriate state and federal agencies. A business which fails to pay its annual franchise fee may be involuntarily dissolved by the State. If the dissolution occurs in the context of a receivership or bankruptcy, state and federal law will apply in the distribution of assets after claimants have asserted their interests.

CIVIL REMEDIES IN THE SOUTH CAROLINA COURTS

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INTRODUCTION

The federal district courts of South Carolina, and the South Carolina state courts are empowered to grant different types of remedies to persons injured by the wrongdoing of another person or entity. Important remedies are available to the foreign investor as a result of laws governing sales contracts, business torts, and collection of monies/debts. This section will provide an overview of the principal remedies in these areas.

SALES CONTRACTS

Article 2 of the South Carolina Uniform Commercial Code "SCUCC"), and court established law ("common law") govern the law of contracts in South Carolina. Article 2 of the SCUCC deals with the buying and selling of goods. The common law has a broader application and deals with all types of sales contracts such as contracts for the sale of real estate and services. When a sales contract is breached, South Carolina common law and Article 2 of the SCUCC each provide several remedies for the injured party.

LAWSUIT FOR DAMAGES

ACTUAL DAMAGES

Where one party breaches a sales contract, the non-breaching party may sue the breaching party for actual damages. This lawsuit would be brought in either a South Carolina Circuit Court or in a Federal District Court in this State if the parties were from different states or countries. The measure of actual damages is the total loss suffered as a result of the breach.[cxcv] Actual damages may include profits that have been prevented or lost as a natural consequence of a breach of contract. In addition, consequential or special damages may also be recovered if within the contemplation of the parties at the time of contract.[cxcvi]

PUNITIVE DAMAGES

Punitive damages are not recoverable for a mere breach of contract but may be recovered if the breach is accompanied by a fraudulent act.[cxcvii] South Carolina courts have defined a fraudulent act as "any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design."[cxcviii] A determination of whether the plaintiff is entitled to punitive damages and, if so, the amount to which the plaintiff is entitled, will be made by a jury in a jury trial, or the trial judge in a non-jury trial. In a non-jury trial, the trial judge alone acts as the fact finder.

SPECIFIC PERFORMANCE

Specific performance of a contract occurs when a court forces a party to perform a contract. The specific performance remedy is a matter of discretion with the trial judge and is not a jury consideration.[cxcix] A court will grant specific performance only when no other remedy, such as damages, would be adequate and specific enforcement of the contract is fair as between the parties.[cc] For example, a court may order a party to sell land according to a sales contract because it is unique to the buyer.[cci]

RESCISSION

A party may seek rescission of the contract and return of the price paid for the contract if the contract was induced by fraud, entered into under duress, a result of a mutual mistake by the parties or the breaching party breaches a material part of the contract.[ccii] The party seeking rescission must return any property received from the breaching party to achieve the status quo existing before the contract.

LIQUIDATED DAMAGES

A contract may provide for a forfeiture of a specified amount of money if a party fails to perform the contract. The courts usually uphold these provisions when the parties intend for the liquidated damages not to serve as a penalty, but as a substitute measure for actual damages. In such cases, actual damages may be difficult to calculate, so the parties agree upon an estimated amount at the time of contract. As an example, a real estate contract may provide for forfeiture of a money deposit as liquidated damages. A party may obtain interest on a liquidated damages claim beginning from the time of breach of the contract.[cciii]

BUSINESS TORTS

A business tort is a wrongdoing which injure another person's business. Remedies for business torts compensate the injured party for loss, and seek to punish the wrongdoer.

FRAUD AND FRAUDULENT CONCEALMENT[cciv]

A party injured by fraud may sue for damages for his monetary loss to place him in the same position he occupied before being defrauded.[ccv] The amount of such damage may depend upon the circumstances surrounding the injury.

ACTUAL DAMAGES

"Out-of-pocket" damages may be measured by the difference in value between what was paid and what was received plus expenses which could have been foreseen at the time of the fraud.[ccvi] Alternatively, "benefit-of-the-bargain" damages are the difference between what was promised and what was received at the time of the fraud. The injured party may choose between either the out-of-pocket standard or the benefit-of-the-bargain standard to provide actual damages.[ccvii]

PUNITIVE DAMAGES

An injured party may also recover punitive damages for a wrongdoer's fraudulent actions,[ccviii] provided the necessary intent may be shown. In South Carolina it requires a showing of reckless, wanton or willful conduct.

INTERFERENCE WITH CONTRACT AND PROSPECTIVE ECONOMIC ADVANTAGE

If a person interferes with the contractual relations or prospective economic advance of another, the injured party may recover damages. Actual damages (including any lost profits) are recoverable for losses suffered and punitive damages may also be available to punish the wrongdoer.[ccix] Punitive damages may be awarded if the interference with contractual rights was "aggravated" and "unjustified."[ccx]

BUSINESS OPPORTUNITY SALES ACT

The Business Opportunity Sales Act[ccxi] creates rights and obligations regarding sales of certain business opportunities. If a seller breaches this Act, the purchase may:

void the contract within one year;

sue for damages and attorneys' fees; or

obtain an injunction to stop the violations.

UNFAIR TRADE PRACTICES ACT

The use of any unfair or deceptive method or act which causes a loss to a person or entity may be unlawful under the South Carolina Unfair Trade Practices Act.[ccxii] If the conduct was a willful or knowing violation, a court may order an award three times the actual damages plus reasonable attorneys' fees and costs.[ccxiii] In some instances, a violation of the Business Opportunity Sales Act or the perpetration of a civil conspiracy may also be considered a violation of the Unfair Trade Practices Act.

CIVIL CONSPIRACY

Civil conspiracy is a tort which involves:

a combination of two or more persons;

for the purpose of harming the injured party;

which causes the injured party special damage.[ccxiv]

If a conspiracy exists, each co-conspirator is jointly and severally liable for injuries.[ccxv]

BREACH OF FIDUCIARY DUTY

South Carolina statutes and common law establish a fiduciary duty for various persons such as officers and directors of a corporation and partners in a partnership. A breach of this duty may equate to a breach of trust, of good faith, of loyalty or some similar standard for which the wrongdoer may be held personally liable. For example, a partner must account to a partnership for any personal benefit he receives and holds as trustee any profits derived from appropriating a business opportunity on his own (i.e., hiding the business opportunity from his partner or partners).[ccxvi] Likewise, a director or officer of a corporation may not appropriate a business opportunity which belongs to the corporation.

COLLECTION OF DEBTS

The South Carolina statutory law and common law provide several ways for a creditor to obtain money owed to him by a debtor. These methods include mortgage foreclosure, execution against property, claim and delivery, and enforcement of a foreign judgment.

MORTGAGE FORECLOSURE

If a mortgagor defaults on a mortgage debt, the general remedy for the mortgagee is foreclosure of the mortgage by a sale of the mortgaged premises.[ccxvii] The mortgagee also has the option to bring an action against the mortgagor for the underlying debt without foreclosing on the mortgage.[ccxviii]

If proceeds from a foreclosure sale are insufficient to satisfy the debt, the mortgagee may obtain a personal judgment against the mortgagor for the amount still owed plus costs and reasonable attorneys' fees, unless the mortgagee has expressly waived the right to a deficiency judgment or if the right is prohibited by statute.[ccxix] The deficiency judgment may be obtained during the foreclosure action.

EXECUTIONS AGAINST PROPERTY

A party may obtain a writ of execution from a court to enforce a judgment against a debtor within ten years after the judgment has been entered.[ccxx] A court may order that any property of the debtor be applied to satisfy the judgment, with the exception of exempt property such as personal earnings.[ccxxi] If the execution is returned unsatisfied, the judgment creditor may require the judgment debtor to appear in court to identify non-exempt property to be sold to apply towards satisfaction of the judgment.

CLAIM AND DELIVERY OF PERSONAL PROPERTY

A plaintiff who sues to recover possession of personal property may claim immediate delivery of such property.[ccxxii] Such preliminary relief may be obtained when the plaintiff posts a bond to secure the defendant, in the event the action results in a judgment for the defendant after plaintiff has obtained possession. A defendant may be prevented from damaging, concealing or removing the property. A plaintiff may recover possession or value of the property when delivery is not available and, also, may recover actual and punitive damages for the defendant's wrongful detention of the property.[ccxxiii]

ENFORCEMENT OF FOREIGN JUDGMENT

Before a foreign judgment may be enforced in South Carolina, it must be recognized by a South Carolina court. Normally, recognition is accomplished by bringing suit in South Carolina and pleading the foreign judgment as the cause of action.[ccxxiv] An action to enforce a foreign judgment must be brought within ten years of the rendering of the judgment in a foreign court.[ccxxv]

ENDNOTES

"LABOR INCENTIVES"

i. 29 USC Sec. 157.

ii. 29 USC Sec. 159.

iii. SC Code Secs. 41-7-10 to -90.

iv. SC Code Secs. 41-10-10 to -110.

v. SC Code Secs. 41-13-5 to -60.

vi. 29 U.SC Secs. 212-213.

vii. SC Code Secs. 41-3-50 to -540.

viii. Id. Secs. 41-17-10 to -70.

ix. Id. Secs. 41-21-10 to -100.

x. Id. Secs. 41-16-10 to -180.

xi. Id. Secs. 41-18-10 to -150.

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xii. SC Code Ann. §36-2-202 (1976).

xiii. SC Code Ann. §36-2-205 (1976).

xiv. SC Code Ann. §36-2-206 (1976).

xv. SC Code Ann. §36-2-207 (1976).

xvi. SC Code Ann. §36-2-207 (1976).

xvii. SC Code Ann. §36-2-313 (1976).

xviii. SC Code Ann. §36-2-314 (1976).

xix. SC Code Ann. §36-2-315 (1976).

xx. SC Code Ann. §36-2-316 (1976).

xxi. SC Code Ann. §36-2-316 (1976).

xxii. Hartman v. Jensen's, Inc., 277 SC 501, 289 S.E.2d 648 (1982).

xxiii. SC Code Ann. §36-2-316 (1976).

xxiv. SC Code Ann. §36-2-601 (1976).

xxv. SC Code Ann. §36-2-605 (1976).

xxvi. SC Code Ann. §36-2-508 (1976).

xxvii. T&S Brass and Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098 (4th Cir. 1986).

xxviii. SC Code Ann. §36-2-602 (1976).

xxix. SC Code Ann. §36-2-711 (1976).

xxx. SC Code Ann. §36-2-606 (1976).

xxxi. SC Code Ann. §36-2-604 (1976).

xxxii. SC Code Ann. §36-2-608 (1976).

xxxiii. Southeastern Steel Co. Inc. v. Burton Block & Concrete Co., Inc., 273 SC 634, 258 SC2d 888 (1979).

xxxiv. SC Code Ann. §36-2-712 (1976).

xxxv. SC Code Ann. §36-2-713 (1976).

xxxvi. SC Code Ann. §36-2-715 (1976).

xxxvii. Floyd v. Country Squire Mobile Homes, Inc., 287 SC 51, 336 S.E.2d 502 (SC App. 1985).

xxxviii. Hill v. BASF Wyandatte Corp., 280 SC 174, 311 S.E.2d 734 (1984).

xxxix. SC Code Ann. §36-2-714 (1976).

xl. SC Code Ann. §36-2-725 (1976).

xli. SC Code Ann. §36-2-702 (1976).

xlii. SC Code Ann. §36-2-703 (1976).

xliii. SC Code Ann. §36-2-704 (1976).

xliv. SC Code Ann. §36-2-706 (1976).

xlv. SC Code Ann. §36-2-708 (1976).

xlvi. SC Code Ann. §36-2-719 (1976).

xlvii. Embodied in Title 36 of the South Carolina Code Annotated.

xlviii. SC Code Ann. §36-9-102 (1976).

xlix. SC Code Ann. §36-9-109 (1976).

l. SC Code Ann. §36-9-105 (1976).

li. SC Code Ann. §36-9-106 (1976).

lii. SC Code Ann. §36-9-306 (1976).

liii. SC Code Ann. §36-9-108 (1976).

liv. SC Code Ann. §§36-9-301, et seq. (1976).

lv. SC Code Ann. §36-9-204 (1976).

lvi. SC Code Ann. §§36-9-302, et seq. (1976).

lvii. SC Code Ann. §§36-9-402, 403 (1976).

lviii. SC Code Ann. §36-9-107 (1976).

lix. SC Code Ann. §36-9-313 (1976).

lx. SC Code Ann. §36-9-312 (1976).

lxi. SC Code Ann. §§36-9-501, 503 (1976).

lxii. SC Code Ann. §§36-9-504, 505 (1976).

lxiii. SC Code Ann. §36-9-504 (1976).

lxiv. SC Code Ann. §36-9-506 (1976).

"TRADE LAWS GOVERNING BUSINESS PRACTICES"

lxv. The Sherman Antitrust Act, 15 U.SC§1 *et seq*.; The Clayton Act, 15 U.SC §12 *et seq.*

lxvi. The Robinson-Patman Act, 15 U.SC §13; The Hart-Scott-Rodino Act, 15 U.SC §19.

lxvii. 15 USC §1, *et seq.*

lxviii. 15 USC §§1, 2.

lxix. 15 USC §1.

lxx. U.S. v. American Column & Lumber Co. 263 F. 147, (6th Cir. 1920) affirmed 257 U.S. 379, 42 S.Ct. 114, 66 L.Ed. 284.

lxxi. Von Kalinowski, Antitrust Law and Trade Regulation, §3.02 [2] citing Matsushita Electric Corp. v. Zenith Radio Corp. 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

lxxii. Northern Pacific Ry. v. United States 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

lxxiii. Metrix Warehouse Inc. v. Daimler Benz *Kg.* 828 F2d 1033, certiorari denied U.S., 103 S.Ct. 1753, 100 L.Ed.2d 215 (4th Cir. 1987).

lxxiv. United States v. Standard Oil Co. 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 2d 619 (1911).

lxxv. Clamp-All Corp. v. East Iron Soil Pipe Institute 851 F2d 478, certiorari denied U.S., 109 S.Ct. 789, 102 L.Ed.2d 780 (1st Cir. 1988).

lxxvi. 15 U.SC §2.

lxxvii. United States v. Griffith 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed.2d 1236 (1948).

lxxviii. Byers v. Bluff City News Co., Inc. 609 F2d 843 (6th Cir. Tenn. 1979).

lxxix. Von Kalinowski, §3.03 [2].

lxxx. 15 U.SC §§1, 2, 3.

lxxxi. 15 U.SC §24.

lxxxii. 15 U.SC §15.

lxxxiii. 15 U.SC §12, *et seq.*

lxxxiv. 15 U.SC§§13(a), 13(b), 21(a).

lxxxv. Airweld Inc. v. Airco Inc. 576 F.Sup. 676 (Dist. Or. 1983) affirmed, 742 F2d 1184, cert. denied 469 U.S. 1213, 108 S.Ct. 1184, 84 L.Ed.2d 331.

lxxxvi. 15 U.SC §§13(a), 13(b).

lxxxvii. 15 U.SC §14.

lxxxviii. Von Kalinowski, Antitrust Laws and Trade Regulations, §4.02[1].

lxxxix. See Tampa Electric Co. v. Nashville Coal Co. 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961) on remand 214 F Supp 647 ( ).

xc. Von Kalinowski, §4.02 [3].

xci. Tampa Electric Co. v. Nashville Coal Co. 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961) on remand 214 F Supp 647 ( ).

xcii. Taggart v. Rutledge 657 F.Supp. 1420, (Dist Mont. 1987) affirmed 852 F2d 1290.

xciii. Id.

xciv. *In re* Apollo Air Passenger Computer Reservation System, 720 F Supp 1068 (S.D.N.Y. 1989).

xcv. 15 U.SC §19.

xcvi. Id.

xcvii. 15 U.SC §19.

xcviii. Id.

xcix. Id.

c. 15 U.SC §15.

ci. 15 U.SC §15(a).

cii. 15 U.SC §26.

ciii. 15 U.S.C §45(a).

civ. Federal Trade Commission v. Cinderella Career & Finishing Schools, Inc., 404 F2d 1308, 131 U.S. App. DC 31 (DC Cir. 1968).

cv. 15 U.SC §45(b).

cvi. The South Carolina Unfair Trade Practices Act, SC Code Ann. §39-5-10 *et seq.*

cvii. SC Code Ann. §39-5-20(b).

cviii. SC Code Ann. §39-5-140.

cix. Id.

cx. Id.

"LABOR LAWS"

cxi. 287 SC 219, 337 S.E.2d 213 (1985).

cxii. 292 SC 481, 357 S.E.2d 452 (1987).

cxiii. SC Code Ann. §41-1-80 (Law. Co-op. Supp. 1989).

cxiv. Section 41-1-80 states:
Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer's property; failure to meet established employer work standards; and malingering; embezzlement or larceny of the employer's property; violating specific written company policy for which the action is a stated remedy of the violation.

Id.

cxv. SC Code Ann. § 41-15-510 (Law. Co-op. 1976).

cxvi. Id. §§ 43-33-510 to -580.

cxvii. Id. §§ 41-15-10 to -640.

cxviii. Id. §§1-13-10 to -110, (Law. Co-op. 1986).

cxix. USC §§ 2000(e) - (h) (1982).

cxx. USC §§ 621 to 634 (1986).

"PERMANENT RESIDENCY UNDER IMMIGRATION LAW"

cxxi. Form I-551 and prior versions I-151, AR-3 and AR-103

cxxii. 8 USC Section 1101(a)(27).

cxxiii. 8 USC Sections 1151-59, Immigration and Nationality Act of 1990 (INA) Sections 201-209.

cxxiv. 8 USC Section 1152 specifies that no foreign state may use more than 20,000 visas in any one fiscal year with each dependency limited to 5,000 visas each year.

cxxv. See INA Section 212(a).

cxxvi. INA Sections 151-153.

cxxvii. INA Section 216A.

cxxviii. 8 U.S.C. Section 1325(c), INA Section 275(c).

cxxix. 8 U.S.C. Section 1151(b), INA Section 201(b).

cxxx. 8 U.S.C. Section 1101(b)(1), INA Section 101(b)(1).

cxxxi. 8 U.S.C. Section 1101(b)(2), INA Section 101(b)(2).

cxxxii. 8 U.S.C Section 1151(b), INA Section 201(b).

cxxxiii. Immigration Marriage Fraud Act of November 1986, Section 5.

cxxxiv. 8 U.S.C. Section 1325, INA Section 275.

cxxxv. 8 U.S.C. Section 1325(b), INA Section 275(b).

cxxxvi. 8 U.S.C. Section 1154(c), INA Section 204(c).

cxxxvii. INA Section 241(c).

cxxxviii. INA Sections 131 and 132.

cxxxix. Id.

"PRODUCTS LIABILITY"

cxl. Black's Law Dictionary, 5th Ed., 1979.

cxli. Florentine Corporation, Inc. v. Peda I, Inc., 287 SC 382, 385, 339 S.E.2d 112 (1985); O'Shields v. Southern Fountain Mobile Homes, Inc., 262 SC 276, 204 S.E.2d 50 (1974).

cxlii. Restatement (Second) of Torts, §402(b). While, technically speaking, there is no statute to this effect in South Carolina, the Restatement is persuasive authority.

cxliii. Id.

cxliv. SC Code Ann. §15-73-10 (1976).

cxlv. Comment (i), Restatement (Second) of Torts §402(a). Comments to §402 of the Restatement of Torts, Second have been adopted as the legislative intent of the strict liability statute in South Carolina. SC Code Ann. §15-73-30 (1976).

cxlvi. SC Code Ann. §15-73-10 (1976).

cxlvii. Barnwell v. Barber Coleman Company, 393 S.E.2d 162 (1989)

cxlviii. Id.

cxlix. Id.

cl. Senn v. Sun Printing Company, et al., 295 SC 169, 367 S.E.2d 456 (1988); SC Code Ann. §15-73-20 (1976).

cli. Black's Law Dictionary, 5th Ed., 1979.

clii. SC Code Ann. §§ 36-2-725 (1976), 15-3-530 (1976, as amended).

"SALE OF A BUSINESS"

cliii. See O'Neal, O'Neal's Close Corporations, §5.01 *et seq.*

cliv. O'Neal, §5.02.

clv. SC Code Ann. §33-13-103.

clvi. SC Code Ann. §35-2-101, *et seq.*

clvii. SC Code Ann. §35-2-109.

clviii. SC Code Ann. §35-2-111.

clix. SC Code Ann. §33-11-103.

clx. SC Code Ann. §33-13-102.

clxi. SC Code Ann. §33-1-101, *et seq.*

clxii. Masonic Temple, Inc. v. Ehert, 199 SC 5, 18 S.E.2d 584 (1942).

clxiii. SC Code Ann. §33-12-102.

clxiv. Id.

clxv. SC Code Ann. §33-12-102(a).

clxvi. SC Code Ann. §33-12-102(e).

clxvii. SC Code Ann. §33-12-102(e).

clxviii. SC Code Ann. §33-13-300.

clxix. Cherry v. Thomason, 276 S.C. 524, 280 S.E.2d 541 (1981).

clxx. Weeks v. McMillan, 291 S.C. 287, 333 S.E.2d 289 (Ct. App. 1987).

clxxi. Bulkin v. Strickland, 280 S.C. 343, 312 S.E.2d 579 (Ct. App. 1984).

clxxii. S.C. Code Ann. §33-42-1410.

clxxiii. S.C. Code Ann. §33-42-320.

clxxiv. Id.

clxxv. I.R.C §1361.

clxxvi. I.R.C. §§1361(b)(1)(B); 1361(b)(1(C).

clxxvii. The South Carolina Bulk Sales Act, S.C. Code Ann. §36-6-101, *et seq.*

clxxviii. SC Code Ann. §36-6-102(1).

clxxix. SC Code Ann. §§36-6-102(3), (4).

clxxx. SC Code Ann. §36-6-105.

clxxxi. SC Code Ann. §36-6-111.

clxxxii. Id.

clxxxiii. Thompson v. Shaw Motor Co., 128 S.C 171, 122 S.E.2d 669 (1923).

clxxxiv. The Securities Act of 1933, 15 U.S.C. §77a *et seq.*; the Securities Exchange Act of 1934, 15 U.S.C. §77b *et seq.*

clxxxv. The South Carolina Uniform Securities Act, S.C. Code Ann. §35-1-10 *et seq.*

clxxxvi. Cleveland, Burkhard, Adams & McWilliams, South Carolina Corporate Practice Manual, §21.08.

clxxxvii. Cleveland, *et al*. 21.20, 21.21.

"WINDING UP, SALE OF A BUSINESS, LIQUIDATION AND DISSOLUTION"

clxxxviii. SC Code Ann. §36-6-102(1).

clxxxix. SC Code Ann. §36-6-102(3).

cxc. SC Code Ann. §36-6-104.

cxci. White & Summers.

cxcii. Nichols.

cxciii. For a detail of what goes on in Notice . . .

cxciv. SC Code Ann. §36-6-111.

"CIVIL REMEDIES IN THE SOUTH CAROLINA COURTS"

cxcv. South Carolina Finance Corp. v. Westside Finance, 113 S.E.2d 329 (S.C. 1960).

cxcvi. Goodwin v. Hilton Head, 259 S.C.2d 611 (S.C. 1979); Windham v. Honeycutt, 348 S.C.2d 185 (S.C. Ct. App. 1986).

cxcvii. Roberts v. Fore, 98 S.E.2d 766 (S.C. 1957); Floyd v. Country Squire Mobile Homes, Inc., 336 S.E.2d 502 (S.C. Ct. App. 1985).

cxcviii. Harper v. Ethridge, 348 S.E.2d 374, 378 (S.C. Ct. App. 1986) (quoting Sullivan v. Calhoun, 108 S.E.2d 189 (S.C. 1921).

cxcix. Wages v. Cunningham, 366 S.E.2d 35 (S.C. Ct. App. 1988); Dorrell v. Florence District No. One, 341 S.E.2d 797 (S.C. Ct. App. 1986).

cc. King v. Oxford, 318 S.E.2d 125 (S.C. Ct. App. 1984).

cci. Belin v. Stikeleather, 101 S.E.2d 185 (S.C. 1957).

ccii. Baeza v. Robert E. Lee Chrysler, 309 S.E.2d 763 (S.C. Ct. App. 1983); Rogers v. Salisbury Brick Corp., 382 S.E.2d 915 (S.C. 1989); Santee Portland Cement v. Mid-State Ready-Mix Concrete, 260 S.E.2d 178 (S.C. 1979); Metropolitan Life Insurance v. Stuckey, 10 S.E.2d 3 (S.C. 1940); L-J, Inc. v. South Carolina State Highway Department, 242 S.E.2d 656 (S.C. 1978); King v. Oxford, 318 S.E.2d 125 (S.C. Ct. App. 1984).

cciii. Robert E. Lee & Co. v. Commission of Public Works, 149 S.E.2d 59 (S.C. 1966).

cciv. Fraud is defined as "an intentional perversion of the truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." Black's Law Dictionary 594 (5th ed. 1979). In South Carolina, in order to recover in an action based on misrepresentation, the injured party must show by clear evidence that all of the following elements exist:

1. a representation was made;
2. it was false;
3. it was material (meaning it pertained to an important fact);
4. the wrongdoer knew the representation was false or recklessly disregarded its truth or falsity;
5. the wrongdoer intended that the false representation be acted upon;
6. the injured party did not know the representation was false;
7. the injured party relied on its truth;
8. the injured party had a right to rely on the representation; and
9. the injured party suffered harm because of the false representation.

Kahn Construction Co. v. South Carolina Nat'l Bank of Charleston, 271 S.E.2d 414 (S.C. 1980).

ccv. Gilbert v. Mid-South Machinery Company, 227 S.E.2d 189 (S.C. 1976).

ccvi. Lawson v. C&S Bank, 180 S.E.2d 206 (S.C. 1971); Bowen v. Johnson, 166 S.E.2d 766 (S.C. 1969); Carrigg v. Blue, 323 S.E.2d 787 (S.C. Ct. App. 1984).

ccvii. Culbreath v. Investors Syndicate, 26 S.E.2d 809 (S.C. 1943).

ccviii. Dunsil v. E.M. Jones Chevrolet Co., Inc., 233 S.E.2d 101 (S.C. 1977).

ccix. Barry L. Johnson, Interference with Contract and Interference with Prospective Advantage in Business Torts: A Continuing Legal Education Seminar, at 65, 86 (S.C. Bar -- C.L.E. Division ed. 1991); Collins Music Company v. Ingram, 357 S.E.2d 484 (S.C. Ct. App., 1987); Todd v. South Carolina Farm Bureau Mutual Insurance Company, 278 S.E.2d 607 (S.C. 1981).

ccx. Todd v. South Carolina Farm Bureau Mutual Insurance Company, 270 S.E.2d 607 (S.C. 1981).

ccxi. SC Code Ann. §39-57-10 *et seq.*

ccxii. SC Code Ann. §39-5-10 *et seq.*

ccxiii. Id. §39-5-140(a).

ccxiv. Lee v. Chesterfield General Hospital, Inc., 344 S.E.2d 379 (S.C. Ct. App. 1986).

ccxv. Charles v. Texas Company, 18 S.E.2d 719 (S.C. 1942); Hubbard and Felix, South Carolina Law of Torts, 317 (1990).

ccxvi. SC Code Ann. 31-41-50; Beck v. Clarkson, 387 S.E.2d 681 (S.C. Ct. App. 1989).

[ccxvii] Perpetual Building and Loan Association v. Braun, 242 S.E.2d 407 (S.C. 1978).

[ccxviii] Id. at 408.

[ccxix] Id.

[ccxx] SC Code Ann. 15-39-20.

[ccxxi] Id. § 15-39-410.

[ccxxii] SC Code Ann. § 15-69-10.

[ccxxiii] Id. § 15-69-210.

[ccxxiv] Mitchell v. Mitchell, 222 S.E.2d 499 (S.C. 1976).

[ccxxv] Payne v. Claffey, 315 S.E.2d 814 (S.C. Ct. App. 1984).

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