SULLIVAN WARD
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POINT OF LAW

SUMMERFALL 2008

Sullivan Ward Expands with New Office in Chicago

Sullivan, Ward, Asher & Patton, has officially opened a new office in Chicago to strategically meet the needs of its Illinois clients, with the goal of expanding its client base in a number of practice and industry areas.

The new office will be located at 70 West Madison Street, Three First National Plaza, Suite 1400 in the city and will serve area clients who are now utilizing the firm's expertise in product and construction liability claims, insurance coverage claims, professional liability and negligence, premises liability, and malpractice claims against architects and engineers as well as representation of construction companies and business owners in connection with project contract cost and schedule impact claims.

The Chicago office will be lead by Sullivan, Ward, Asher & Patton partners Lee C. Patton and Kevin J. Gleeson as well as attorneys Cornelius C. Hare, Jr., Christopher B. McMahon and Ted Peters and opened earlier this year.

The new Windy City office can be reached by calling 312.214-3175.

Firm Welcomes Three New Attorneys

Sullivan, Ward, Asher & Patton, P.C. announces the arrival of three new attorneys, Kenneth J. Clarkson, James W. Low and Douglas M. Lash.

Clarkson joins Sullivan Ward's Corporate Practice Group, specializing in real estate law, including complex real estate transactions and financing.

Low joins Sullivan Ward as a member of the Specialty Litigation Practice Group. He concentrates his practice in professional liability litigation, including the defense of doctors and lawyers.

Lash provides employee benefit, labor and employment law advice to multi-employer fringe benefit funds, associations and other businesses.

Alternative Investments: A New Staple For Retirement Systems

By Michael J. Asher masher@swappc.com

So called "Alternative Investments" have moved from being merely fashionable to a staple of many public retirement systems. Plans which have not yet adopted these strategies will likely confront repeated opportunities to do so in the near future.

The unique complexity and risk of Alternative Investments often causes one of the following opposite knee jerk reactions: (1) rejection of the strategy altogether; or (2) adoption of the strategy without full knowledge of its nature or consequences. Fiduciary obligations are left unfulfilled in either case.

Either result can be avoided by observing the basic tenets of due diligence, with an emphasis on obtaining clear, complete, and understandable information regarding the proposed Alternative Investment.

Alternative Investments: Definition

The term "Alternative Investments" is used to describe asset classes other than traditionally managed stock and bond portfolios. These classes normally refer to private equity, hedge funds (including fund of funds), and managed futures or commodities.

Distinct Legal and Practical Characteristics of Alternative Investments

The primary legal and practical differences between traditional and alternative investments can be generally summarized as follows:

- Lack of regulation. Alternatives often involve investment in entities or securities that are not publicly traded, not subject to direct Securities and Exchange Commission ("SEC") regulation, and thus operate with minimal or no federal regulatory oversight.
- No delegation to registered investment manager. Alternatives often do not involve retention of a registered investment manager who assumes fiduciary responsibility for the investment activity.
- Structure of investment. Many alternatives are structured as private limited partnerships. The general partner is the sponsoring entity and the investors are limited partners.
- Liquidity. Often, the ability to withdraw funds is limited.
- Transparency. The actual securities, holdings, or detailed strategies within the portfolio are often not fully available to investors.
- Investment agreement. Investors are required to execute a complicated set of documents which the sponsoring entity seeks to impose uniformly on all investors. Thus, flexibility in negotiating these agreements is far more limited than in the traditional setting.
- Fees. The fees associated with alternatives are often significantly higher than traditional investments.

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Truck Companies and Driver Training: *Quality Sometimes Trumps Quantity*

By Christopher B. McMahon cmcmahon@swappc.com

There were 4,503 non-fatal accidents in 2007 involving large trucks and the numbers are on the rise. Hiring skilled drivers and providing the proper safety training is more essential today than at any time in history.

The American Transportation Research Institute (ATRI) has identified "driver shortage" as a primary concern for the trucking industry. All expect an influx of "new" driver applicants, considering the current state of the economy and the career shifts being made by many displaced workers.

The ATRI recently released a research study which determined that there is no causal link between the length of training and a driver's safety performance. However, there is no question that the "quality" of the training is critical.

So what do we do when one of our drivers, new or experienced, has been involved in a personal injury accident with our vehicle? It is common practice to immediately suspend the driver pending investigation. Consultation with legal counsel regarding this decision is also key. When negligence is an issue, more often than not, the truck driver had little experience and, often, insufficient training.

From a legal and business perspective, it may be strongly advisable to terminate the driver from the company. Some considerations should be made for any possibility of a wrongful termination claim and whether the driver is employed at-will. The decision to either retain or terminate that driver could also have long-lasting financial and legal effects on the entire company. Bottom line; the earlier legal advice is obtained, the more likely a positive outcome for the company is achieved.

Michigan Supreme Court Decision Could Change the Way Professionals Set up Shop

By Maria L. Meldrum mmeldrum@swappc.com

The long-awaited Michigan Supreme Court decision on *Miller v Allstate Insurance Co.* could have big implications for businesses providing professional services.

The issue in *Miller* is whether a provider of professional services must be incorporated as a Professional Corporation (PC), under the Professional Services Corporation Act (PSCA) in order to lawfully render services and collect on those services.

Miller, Allstate's insured, was injured in an automobile accident and received physical therapy services from PT Works by qualified and licensed employees. PT Works, is incorporated under the Michigan Business Corporations Act (MBCA). Allstate contends PT Works is unlawfully incorporated because it is not a Professional Corporation, and doesn't have to provide $29,150 for services rendered.

This isn't just a case of adding "insult to injury," but one that could lead to potentially complex and expensive business re-organization (in all fields employing licensed professionals). Should the Michigan Supreme Court rule in favor of Allstate, Michigan will have its own unique, mandatory requirement of professional businesses to organize either as a PC or as a Professional Limited Liability Company (PLC), entirely owned by licensed professionals.

Should corporations or LLC's that provide professional services change their existing structures in Michigan now? At this time, no. It would make sense to wait for the decision of the Michigan Supreme Court before incurring accounting, printing, and other business expenses.

Remember too that each state legislature adopts its own business statutes. When practicing across state lines, make sure you compare and distinguish each state statute to learn what may or may not be allowed.

Alternative Investments

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- Time horizon. The investment horizon may be quite long compared to traditional investing. The partnership term may last 10 or more years. During this period, the general partner is paid its annual management fee even though the vehicle may post negative returns to limited partners.
- Skill and expertise of manager. These investments are not publicly traded and thus not within the common knowledge of traditional money managers, let alone traditional investors.

Specifics of Private Equity, Hedge Funds, and Managed Futures/Commodities

Private equity describes various strategies for investing in non-public securities. The major categories are venture capital and buyouts. Whether venture capital or buyout, the earnings, if any, on these investments may not materialize for a significant period. Investments are generally made by the general partner during the first 5 to 7 years, during which time capital is called from the limited partners as needed.

The term ***"hedge fund"*** derives from a style of investment which "hedges" against overall stock market movement: a combined portfolio of undervalued stocks expected to increase in price along with overvalued stocks expected to decline.

Managed Futures/Commodities

This strategy remains fairly new to many institutional funds. Commodities are raw materials: assets that are tangible such as energy, grains, industrial metals, and livestock. As their prices tend to have a high correlation to changes in expected inflation and a low correlation to stocks and bonds, they may be attractive from a diversification standpoint.

Conclusion

The same skills which trustees apply to traditional investing can be – with heightened vigilance – successfully adapted to evaluating Alternative Investments. Persistent focus on the central characteristics of such investments and insistence on clear answers to the above inquiries are essential. Regardless of the final decision, the trustees will have demonstrated their prudency, a necessary component of any investment decision, particularly when neither long term results nor incidence of liability are fully known.

Non-competition Agreements

By Sheri B. Cataldo scataldo@swappc.com
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In today's business environment, smart business practices will not only safeguard your business in the event of litigation, but create an environment allowing you to grow and succeed. This is the first in a series of smart business practices.

Although ***non-competition agreements*** (non-competes) were once disfavored by the courts, they have become common in today's competitive business environment and are regularly enforced. Under the Michigan Anti-Trust Reform Act (MARA), an employer and employee are free to enter into an agreement to protect the employer's "reasonable competitive business interests." They are commonly used to prevent former employees from unfairly competing with their previous employers once they have moved on. Often, they serve as companions to confidentiality agreements which seek to protect proprietary information, such as trade secrets, pricing and customer information. These types of agreements are enforceable whether termination was voluntary, mutual or involuntary.

The key to an enforceable non-competition agreement is that it is reasonable, meaning the terms of the agreement must not preclude the ability of the former employee to earn a living in his or her given occupation. This balance is achieved by setting reasonable limitations in three key areas, notably (1) the duration of the agreement, (2) the geographical scope, and (3) the type of activity restrained. MARA specifically provides courts with the ability to limit unreasonable non-competition agreements and will enforce them only if they are reasonable.

Although reasonableness can be a somewhat subjective measurement, litigation has engendered some guidelines for writing enforceable agreements. Investing in a well-drafted non-competition agreement will not only protect your reasonable competitive business interests, but prevent misunderstandings which can lead to disputes between the owner and former employees when it is time to part ways.