PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.

Reminder: Minimum Wage Increase for 2011

Effective January 1, 2011, the San Francisco Minimum Wage increased from $9.79/hour to $9.92/hour.

Pursuant to Chapter 12R of the San Francisco Administrative Code, employers must provide employees who work within the geographic boundaries of the City and County of San Francisco no less than the Minimum Wage as set forth in the code. This applies to all employers, regardless of where they are located, who have employees who work in San Francisco. The code provides for automatic adjustments to the Minimum Wage by an amount corresponding to the prior year's increase, if any, in the Consumer Price Index for urban wage earners and clerical workers for the San Francisco-Oakland-San Jose, CA metropolitan statistical area.

Please contact Denis Kenny at dsk@sfcounsel.com for more information.

- Written by Denis Kenny

CID Law's Revision on Tap

Each of our Common Interest Development ("CID") clients is keenly aware of the Davis Stirling Act (California Civil Code §§ 1950, *et seq.*) (the "Act"), the substantive law that governs CIDs throughout California. CIDs can generally be described as a form of real estate where each owner holds exclusive rights to a portion of the property normally called a "unit" or "lot," and shared rights to other portions of real estate, typically called "common area." Common forms of CIDs are condominiums, planned developments, and stock cooperatives.

Since its enactment in 1985, the Act has been repeatedly appended, amended and modified, obscuring its intent and complicating its interpretation. Depending on your perspective, the current Act is either a complicated but effective law, or a Frankenstein's monster of add-ons, substitutions, and populist sentiment. As a result of these serial modifications, the California Law Revision Commission (the "Commission") determined in 2005 to clarify and simplify the Act by re-writing it. The Commission assists the California Legislature and Governor by examining California law and recommending needed reforms. This rewrite has far-reaching implications, as there are over 41,000 CIDs in California, ranging in size from three to 27,000 units each.

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Partner Notes

Brandon Smith

Happy New Year and welcome to the first edition of *Perspectives* in 2011! After taking some well-deserved time off over the holidays to spend time with our families and reconnect with friends, everyone here at the firm is back to work and looking forward to a great year.

One topic that continues to be on our clients' minds is

It is important to note that the new law is not intended to substantively change the Act, but merely to clarify and simplify it. In no particular order the proposed law is intended to do the following:

(1) Related provisions would be grouped together in logical order;
(2) Where there is significant overlap between the California Corporations Code and the Act, the substance of the Corporations Code would be added to the Act and the Corporations Code would be made expressly inapplicable;
(3) Sections that are excessively long or complex would be restated in simpler, shorter sections;
(4) Consistent terminology would be used throughout;
(5) Some governance procedures would be standardized so as to simplify routine matters; and
(6) Various minor substantive improvements would be made.

The history of the revision has had its ups and downs. Between 2005 and 2007 the Commission went on a fact-finding mission to determine the interests and needs of the individuals who were impacted by the Act. Hearings were held, and in 2007 the Commission approved a final recommendation, which was introduced as a bill in the California State Assembly in 2008.

Unfortunately, after the revision was introduced, further amendments were made, legal arguments in opposition were submitted, and the net result was the failure of the bill to gain traction after its initial approval in the Assembly. So the bill was withdrawn from consideration, and the hearing and comment process began anew. In early 2010, the Commission issued its revised tentative recommendation for replacing the Act. Public comment ended on July 1, 2010, and the Commission is currently in the process of holding hearings and finalizing the version of the tentative recommendations, which will be sent to the Legislature in early 2011.

Assuming that this additional comment process is properly carried out and yields an acceptable rewrite of the Act, the new bill should be introduced sometime in the next few months and after passage will be signed in 2012, with an effective date of January 1, 2013. What then?

Upon its enactment, the entire Act will be completely renumbered, revised, and re-ordered. The benefit to our CID clients will be their ability to more easily review and understand their obligations and duties under the new Act without requiring as much legal analysis. In a state in which allegations of overregulation and ineptitude are rampant, it is good to know that many people are working hard to simplify and make the Act more understandable.

For more information about this Act, please contact Bill Scherer at wms@sfcounsel.com.

- Written by Bill Scherer

CA Employers Face New Employee Costs

California employers face increased litigation exposure as a result of a recent State Supreme Court decision involving former Bank of America employees whose final wages were not paid in a timely manner upon termination or resignation. (See, *Pineda v. Bank of America, N.A.*). The *Pineda* Court found that the "waiting time" penalties recoverable under Section 203 of the California Labor Code are subject to a three-year statute of limitations rather than a one-year statutory period, irrespective of whether the employee seeks to recover unpaid wages along with the penalties.

Under section 203, if an employer willfully fails to timely pay final wages to an employee after termination (wages are immediately due) or resignation (wages are due within 72 hours), the employee is entitled to a penalty (commonly referred to as a "waiting time penalty") in the amount of a day's wages for each day the wages remain unpaid, to a maximum of 30 days. Following a review of the statutory language, legislative history, and public policy underlying section 203, the Supreme Court expressly rejected

whether the economy is recovering. As general counsel to a large number of medium and emerging companies, across a broad range of industries, I believe we are in a unique position to watch for signs of the economy improving. We regularly help clients form and start new businesses, including corporations and limited liability companies. Back in 2000/2001 (during the bursting of Internet "bubble"), the number of people who started new companies plummeted, compared to the immediately preceding years. As the economy began to improve in the following years, we noticed that new startups began to emerge, which to us, meant people were willing to take chances again, they believed customers would be able to purchase their goods and services and they would be able to get financing, whether it was debt or equity. During this recovery we also saw an increase in discretionary spending relating to trademarks, employment audits, and other corporate transactions.

As we enter into 2011, we are beginning to see many of the same signs that we saw in 2002 and 2003. We have helped a much higher number of companies, corporations and limited liability companies, form at the beginning of this year than in previous years. We have also been seeing deals where the sellers once again have some leverage in the deal,

contrary appellate court authority (including *McCoy v. Superior Court* (2007) 157 Cal.App.4th 225, 229-230) and ruled that all section 203 penalties are subject to a three-year statute of limitations.

In our experience, it is not uncommon for employers to process a departing employee's final paycheck on the next payroll run or to mail the check at a later date. *Pineda* highlights the importance of diligently following the requirements for issuing final paychecks (which, of course, must also include all accrued, unused vacation or PTO). *Pineda* also increases the potential for wage and hour class-actions seeking section 203 penalties alone, as such cases can now clearly be brought as much as three years after the alleged failure to timely pay final wages. As a result, in addition to other requirements, employers must pay even greater attention to properly and timely processing employee terminations.

Please contact Denis Kenny at dsk@sfcounsel.com for more information about this issue.

- Written by Denis Kenny

Trademark Act Fulfilling Promise to Small-Business Owners

Attention trademark owners! As a follow-up to our article in the April, 2010, edition of *Perspectives*, we are happy to report that the Trademark Law Technical and Confirming Amendments Act (the "Act") appears to be fulfilling its promise to small businesses.

If you recall, the Act, which went into effect on March 17, 2010, was designed for the purpose of helping small businesses protect their trademarks against large, bullying companies who leverage greater legal and financial resources to overreach the bounds of their trademark rights and force small local brands operating in unrelated marketing channels to abandon their marks. Of specific importance, the Secretary of Commerce is required to conduct a study on the matter, and report the extent to which small businesses may be harmed by litigation tactics employed by corporations to attempt to enforce their trademark rights beyond a reasonable scope.

True to its word, the United States Patent and Trademark Office ("USPTO") is currently soliciting feedback from trademark owners, practitioners, and others regarding their experiences with bullying trademark litigation tactics, and is eliciting suggestions to curb the problem. The deadline for interested parties to provide their feedback is February 7, 2011.

All interested parties are being asked, among other things, to provide their first-hand knowledge of big-business litigation tactics, and to provide an opinion on whether the USPTO or other government agency has a responsibility to do something to discourage or prevent aggressive trademark litigation tactics. Ultimately, the public feedback will inform and influence the Secretary's policy recommendations to counter such behavior, which could result in further legislation in this arena.

If you feel strongly about this issue, or would like to provide your personal input to the USPTO, please contact Brandon Smith at bds@sfcounsel.com or Heather Sapp at hgs@sfcounsel.com for more information.

- Written by Heather Sapp

Areas of Practice

Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

rather than just selling their company at fire-sale prices. While litigation remains strong for the third year in a row, clients are once again electing strategies that are not just driven by the lowest-cost alternative. We are also seeing a surge in trademark work, which indicates clients have both the funds to protect their brands and are optimistic about their business's chances to succeed. In sum, the economic indicators that we observed after the previous downtown are returning, which is a great sign that we are heading back in the right direction.

These observations back up my partner Bill's comments in our October 2010 issue of *Perspectives*, where he stated that he was beginning to see some positive signs of a recovering economy. He found clients to be more optimistic and lighthearted and that the size and number of deals and financings were increasing.

We hope you are also seeing signs of economic recovery, whether that is reflected in more business booked, more customers and sales or improved employee morale (or best, all four). We welcome your insights about how things are going in your world and invite you to send us an email or give us a call to let us know what you are seeing.