

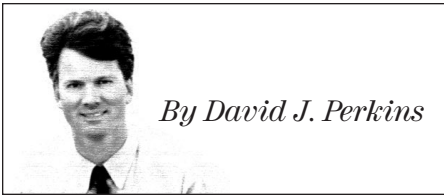
Business Update

The Legal Newsletter For Maine's Business Community

Fall 2002

PUBLISHED BY PERKINS OLSON, P.A. • 30 MILK ST., PORTLAND, ME • 871-7159 • 21 ELM ST • CAMDEN, MAINE • 236-7070 • www.perkinsolson.com

Act Early to Confront Financial Challenges



By David J. Perkins

This is a difficult and uncertain time for Maine businesses.

The macroeconomic cycle remains mired in an economy that is sluggishly low growth. Customers and investors are waiting for some positive news before they make new, substantial commitments for products, services and investments. The bear stock market and the drumbeat of disturbing news on the national and international economy add to the gloomy sense of caution.

Within the state, changes in technology continue to create tremendous changes. While "traditional" business like paper and fishing continue to decline, the new generators of wealth are much more difficult to identify or track. In place of industry, we now have a growing service economy of people with intellectual property. People have the ability to create Internet based applications, diagnostic equipment, food products, and insurance products (including many UNUM offshoots are on the rise). While a sense of growth/sprawl is readily felt in areas where the individuals with intellectual skills are willing to settle (Greater Portland and the mid-coast), the balance of the state is dangerously stagnant.

Changes in finance exert substantial impacts on the local economy. For established, profitable businesses, capital is

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The New Corporate Responsibility Act

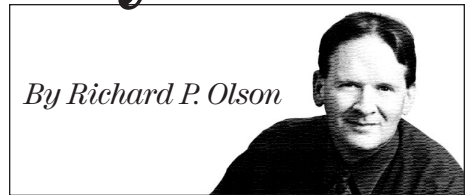
In the wake of the accounting scandals involving Enron and Worldcom and the collapse of investor confidence in publicly traded companies, Congress passed and the President signed the Sarbanes-Oxley Act of 2002, commonly known as the Accounting Reform and Corporate Governance Act or the Corporate Responsibility Act.

The Act's purpose is to provide a higher level of quality control over the accounting practices of publicly traded companies and a higher level of personal responsibility for truth telling among the officers, directors, accountant and attorneys serving those companies. While the Act will have little if any direct impact on privately held companies, its provisions and recent events are likely to set a standard for litigation by disgruntled shareholders or creditors of privately held companies. Practices which, in the past, may have seemed innocent or within the norm are likely to receive a higher degree of scrutiny and may be far less acceptable now than in the past.

In Summary the significant provisions of the Act are:

CEO/CFO Certification of Financial Reports and Reimbursements/Loans

The Act imposes ongoing requirements that CFOs and CEOs certify financial reports and it provides criminal penalties for knowing or willful violations. Under this provision it is not enough for a CEO or CFO to simply say that he or she relied on the accountants or the lawyers where the officer knew or should have known about financial irregularities that would render the financial statements



By Richard P. Olson

materially false.

CEOs and CFOs will be liable to their companies and by extension, their shareholder and creditors and the Act prohibits a wide range of loans to executives and directors.

Better Disclosure

The Act requires that the SEC adopt new regulations that should ensure the disclosure of events on a real-time basis, better disclosure of off-balance sheet transactions and related party transactions and similar matters.

Audit Committees

The act requires audit committees to establish procedures for handling complaints regarding a company's accounting, including complaints made anonymously.

Accountants and Attorneys

The Act establishes a new accounting oversight board for the accountants of public companies as well as a requirement for new regulations governing the actions to be taken by attorneys who become aware of security law violations and breaches of fiduciary duties. These regulations will include a rule requiring an attorney to report evidence of a material violation of securities law or a breach of fiduciary duty to the chief legal officer of the company or the chief executive officer and, if neither of them takes appropriate action, the attorney is then required to

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Bankruptcy Reform: Where Does It Stand and What Does It Mean?



By Kevan Rinehart

As we go to press the sweeping Bankruptcy Reform Act remains in limbo with bills passed by both houses and compromise bill having emerged from conference which is stalled in both houses. The delay results from a controversy related to whether abortion clinic protesters who have incurred fines or judgments as a result of their actions could avoid the same by filing for bankruptcy.

Part of the current Bankruptcy Code prohibits debtors from receiving a discharge of their debts if they were incurred by fraud, in the commission of a crime or, for example, as a result of drunk driving. Some Congressional leaders are also fighting to prevent debtors from discharging debts incurred in the protest of abortion clinics.

Proponents argue it is a way to curtail violence at abortion clinics; opponents of the legislation argue the language is too broad, could penalize peaceful protesters, and is unnecessary because the current law already prevents debtors from receiving a discharge for debts stemming from willful and malicious acts.

The political controversy is deepened because supporters of the language prohibiting the discharge debts arising from the protest of abortion clinics are using the issue as a condition of their support of changes proposed by their more conservative colleagues for the benefit of financial services companies. In other words, Democrats are trading on the Republican interest in pleasing their financial services corporate constituency—specifically by lowering the amount of credit card debt an individual filer can discharge in bankruptcy—in order to garner support for the language

that will please their abortion rights constituency. The language that would benefit corporations would create a presumption that a debtor's liability for any charges for luxury goods or services to a single creditor (ie., a credit card company) totaling \$500.00 or more within the 90 days prior to filing for bankruptcy could no longer be removed through bankruptcy proceedings. This change could favor the average corporate creditor, as would other changes that would make it easier for certain creditors holding mortgages to continue proceedings like foreclosures against a debtor who is unable to continue making mortgage payments, notwithstanding the "stay" that filing for bankruptcy protection usually imposes on such actions.

Also of note is the emphasis on forcing debtors with higher incomes to file plans to repay their debts in Chapter 13, rather

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Financial Challenges, continued from page 1

cheap and readily available. For startups, particularly those in the technology area, capital is still very difficult to access.

At the same time, the coastal commercial real estate market shows signs of the peaking of the remarkable run-up in prices. While owners are still reluctant to sell, the leasing market is softening and banks are likely to follow with tougher commercial lending practices.

On the residential side of the real estate market, the run of demand for high priced houses will logically reach its peak now or in the very near future.

It's not a pretty picture, but there are some critical steps that will enhance your business's prospects for survival and growth.

These steps include:

Engage your bank to lower interest rates, extend terms or to address

debt payment problems. The control of information with your bank is critical. If you see problems on the horizon, prepare and implement a strategy now for encouraging your lender to stay committed to the lending relationship;

Review and strengthen all critical contracts. With a worsening economy, relationships with customers and suppliers are likely to be challenged. A tool for avoiding disputes is to document precisely and carefully the terms of the business relationship. Provide that interest and attorneys fees will be due if payment is not made within agreed upon terms.

Ensure that key employees have signed non-compete and confidentiality agreements. As times get more difficult and wages are raised more slowly (if at all), employ-

ees with detailed knowledge of your business may join competitors or go into competition with you, unless your business has protected itself;

Protect your wealth. Consider asset protection techniques, like holding assets in the name of your spouse, use of trusts, or use of 401K/IRA savings plans, which are exempt from claims of creditors.

Reorganize. The business cycle will turn more positive. If your business needs to be reorganized (either in or outside of bankruptcy proceedings), act now to resolve problems that will cause your business to miss out on more positive economic times.

Perkins Olson is highly skilled in devising and implementing an appropriate strategy for you and your business that will allow you to survive these difficult times and to prosper.

Navigating the Maine Human Rights Act

By Patrick Mellor



With the recent down turn of our economy, businesses large and small are faced with the sometimes daunting task of terminating employees. Aside from the obvious difficulties that such a task poses on a personal level, there are additional concerns an employer should be aware of from a legal perspective.

With the economy's down turn, it is a safe bet that more and more employers will find themselves defending employment discrimination claims before the Maine Human Rights Commission (the "MHRC"). The MHRC is the state agency charged with the responsibility of enforcing Maine's anti-discrimination laws. The federal equivalent of the MHRC is the Equal Employment Opportunity Commission (the "EEOC"). The MHRC investigates complaints of unlawful discrimination in employment, housing, education, access to public accommodations, extension of credit, and other instances in which discrimination harms individuals'

rights. The MHRC investigates allegations of discrimination and attempts to resolve such complaints to the mutual satisfaction of the parties involved. The Maine Human Rights Act, 5 M.R.S.A. § 4551 et seq. (the "Act"), authorizes the MHRC to pursue remedies for unlawful discrimination in court when necessary to enforce the Act.

The overwhelming majority of claims under the Act involve various forms of employment discrimination. A large percentage of employment-related charges relate to claims of disability and sexual discrimination.

It costs nothing for an employee to file a complaint with either the MHRC or the EEOC. The employee does not need to have an attorney in order to file such a claim and the charge will be investigated by a field investigator that is highly trained in the area of employment discrimination.

I. The charge of discrimination

The MHRC begins its investigation after it has received a signed charge of discrimination. After receiving the letter from the employee, the employer is provided with a copy of the charge, as well as a document request from the MHRC. Generally, the

employer has six weeks to respond to the employee's allegations.

Soon after the employer responds to the charge of discrimination, an investigator is assigned to the case. Any further communication between the parties and the MHRC should be through the assigned investigator. The investigator will review the employee's file and notify both parties as to how the investigation will proceed. The investigator may submit requests for written information, a tour of the work site, and/or a fact-finding conference—whatever the investigator deems appropriate. The employer should cooperate fully and answer all questions thoroughly so as to give the investigator an accurate record of the employer's position.

II. The fact-finding conference

Often times, the investigator does require a fact-finding conference. Such a conference is extremely informal and typically involves the parties sitting around a table with the investigator asking questions of both sides. Each investigator has his or her own style and may establish his or her own rules. For example, some investigators allow numerous witnesses while others limit the witnesses to only one or

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Welcoming Kevan Lee Rinehart



Kevan Lee Rinehart works primarily with commercial, intellectual property, and land use issues. Kevan also uses her recent experience as the clerk to United States Bankruptcy Judge Louis H. Kornreich to work on a wide range of bankruptcy and business reorganization issues. Kevan earned a A.B. degree in 1995 from Bowdoin College and a law degree from the University of Maine School of Law in 2001. In law school, she was the Executive Editor of the Maine Law Review, and received the Wernick Prize for Legal Writing.

Perkins Olson Startup Capital Services

Perkins Olson PA regularly helps clients with raising capital for both startup and established businesses. With both private sources of investor funds and publicly funded programs, we can assist your firm to attract the capital that is most appropriate for your firm's growth and prosperity.

two. Both sides will usually be allowed to question the other side's witnesses, although the questions may first have to be directed through the investigator.

It is very important for witnesses to a fact-finding conference to be thoroughly prepared despite the informal nature of the conference. This is because the record of the witnesses' statements can be used at any subsequent court proceedings. In most instances, it is prudent for an employer to be represented by counsel, especially if the employee is represented by an attorney.

III. Mediation

Aside from determining whether or not there are reasonable grounds to believe that discrimination has occurred, the MHRC also is charged with the task of mediating and trying to settle any disputes that may come before it. In fact, a large percentage of cases are settled through the MHRC's mediation efforts, without the MHRC having to make any findings.

As with other judicial proceedings, settlement discussions are off the record. If the case is settled, the MHRC will issue its standard form of release, which is limited to the release of the discrimination charge alone. Obviously, as part of the settlement, an employer may want to submit its own form of release. For a number of reasons, not the least of which is the state's budget crisis, the MHRC strongly encourages both sides to settle a case informally.

Congratulations to Idealswork.com

We take this opportunity to congratulate our client Idealswork.com on the launch of its web site. Idealswork.com is a web site that makes it easy for business and consumers to put their ideals into practice when making purchasing decisions for products ranging from office computers to paper towels. Using their site, you can compare brands based on how they stack up on the issues you care about. By shopping through the site you

can allocate a percentage of your purchase to the non-profit organization of your choice. We have provided the company with general legal advice regarding a variety of issues including licensing, intellectual property rights, data sharing, distribution agreements and capital raising.

If you have questions about starting up or jump starting your internet based business contact Richard Olson or David Perkins.

IV The investigator's report

If settlement does not take place and the complaint is not withdrawn, the investigator will submit a report containing a summary of the facts as submitted by both parties. At the end of the report, the investigator will make a recommendation to the MHRC as to whether there are reasonable grounds to believe there was unlawful discrimination. There are five commissioners who will then vote on the case at a scheduled MHRC meeting, which is open to the public.

V Right-to-sue letter

Due to the growing number of cases and the reduced number of investigators, there has been a significant delay in processing cases brought before the MHRC. Therefore, if an employee wants to file a civil action directly in Superior Court and not have the MHRC investigate the charge, he or she may request a right-to-sue letter if more than 180 days has passed since the initial charge of discrimination. The

MHRC will then issue the letter and will immediately stop investigating the case. At that point, the MHRC is no longer involved, and it is strictly a matter for either the Superior Court of Maine or the United States District Court to resolve.

VI. Practical Considerations

The following are practical considerations that should be on an employer's radar screen when dealing with discrimination charges:

Mediation. There are instances in which the facts of a case are "ugly," and mediation may provide an inexpensive way to dispose of the case and keep the facts from becoming public. Additionally, mediation may make sense depending upon the relationship between the parties. If the parties have an ongoing relationship, then mediation may resolve the dispute with less conflict.

Statute of limitations. An employee may pursue a violation of the Act in Maine Superior Court by bringing a claim within two years of the last date of discrimination. However, if the employee does not proceed through the MHRC within six months of the most recent date of discrimination, the employee will not be entitled to an award of attorneys' fees or punitive damages should he or she prevail.

Prepare and submit responses to the MHRC carefully. When preparing a response to a charge of discrimination, an employer must realize that any materials filed with the MHRC may become part of the public record. An employer may choose, therefore, to refuse to disclose certain privileged information or, preferably, to enter into an agreement with the investigator that the information may be

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Bankruptcy continued from page 2

than to liquidate and distribute their assets to their creditors pro rata in exchange for being absolved of liability under Chapter 7. The proposed amendments would accomplish this by creating a higher standard whereby debtors with a demonstrated ability to repay their total debt would be forced to convert to a repayment plan or be barred from receiving protection in bankruptcy altogether.

Certain proposed reforms would, however, create some positive changes for debtors. Creditors, for example, who refused to accept negotiated repayment schedules offered by an approved credit counselor on behalf of a debtor within the 60 days prior to the latter filing for bankruptcy could be forced to reduce their claims by 20%. In addition, debtors would be allowed to retain specified annuities and IRAs set up for

retirement purposes as assets outside the bankruptcy estate, which is comprised of assets that are eventually distributed to creditors. Finally, creditors failing to abide by laws designed to protect consumers from usurious rates and other dishonest repayment terms would be barred from asserting claims demanding to be repaid.

In addition to other proposed changes and by creating what some have termed a more “needs-based” Bankruptcy Code, the new Code would, in some cases, make it more difficult for higher income debtors to rid themselves of debt where they possess an ability to repay their creditors. In turn, however, debtors would be accorded greater protection regarding their rights as consumers. Overall, the proposed reforms would mandate greater personal responsibility, be it individual or corporate.

Corporate Responsibility, continued from page 1

report the violation to the audit committee or to a committee of outside directors or the board itself if there is no outside director committee.

These provisions should provide a host of opportunities for carefully and creatively crafted memos and e-mails from attorneys to their public company clients. Look for a major expansion of the definitions of words like “fiduciary”, “duty” and “material” as well as expansion in the cottage industry of attorneys who sue the accountants and attorneys of failed businesses.

Code of Ethics for Financial Officers

The SEC will issue rules requiring issuers of publicly traded securities to disclose whether they have adopted codes of ethics for senior financial officers and if the companies have not adopted such codes to disclose why they have not. These “codes of ethics” should also provide substantially more work for people who specialize in slicing translucent baloney and assisting with angelic dancing on the heads of pins. Nevertheless, in my view these codes will evolve towards some standardization among public companies and ultimately those standards will trickle

down to establish standards for behavior in non-public companies upon which shareholders and creditors may someday seek to impose liability.

Expanded Statutes of Limitations

The statutes of limitation for stockholders to bring suit for securities violations is expanded to the earlier of two years after discovery or five years after occurrence of the violations.

Protection of Whistleblowers

The act contains provisions that prevent public companies and their employees, contractors, subcontractors and other agents from discriminating against employees who provide information or assist in investigations of securities law violations or who file, testify or participate in proceedings involving alleged violations of securities law violations. This is another area where the law is likely to create some additional awkward situations between and among public companies and the professionals that service them. For example, Associate Slack at XYZ Law Firm or ABC Accounting does not like the way publicly traded BigCo makes its disclosures (or perhaps Slack is just generally disgruntled) and Slack files a charge

Card of Thanks



We want to thank all of our friends for their sympathy and support, as well as for the memories they have shared with us since Don's death.

Donald W. Perkins
October 2, 1933 - April 23, 2002

with the SEC. Neither ABC nor XYZ can now fire Slack for the disclosure, or as a practical matter, almost anything else since it will seem retaliatory. Meanwhile, BigCo appears to be free to drop ABC or XYZ.

No Discharge in Bankruptcy

Debts arising from violations of securities laws will not be discharged in bankruptcy under the act. The bankruptcy code already prevents discharge of debts where the corporate officer or insider intentionally provides a creditor with a financial statement, which is materially false and upon which the creditor reasonably relies. The new provision provides additional teeth for creditors where the corporate officer seeks to obtain a bankruptcy discharge.

Conclusion

As I noted above, most of the Acts provisions will have little direct impact on most Maine businesses, but they will provide additional protections for investors and the tone and standards they set are likely to have a substantial impact on how judges and juries view the conduct of the officers of non-public companies as well as the professionals who serve them.

reviewed for MHRC purposes but will not be made part of the public record. Additionally, if the investigator requires information about other employees, the employer may be exposing itself to liability for invasion of privacy if the information that is disclosed shines a negative light upon the employees.

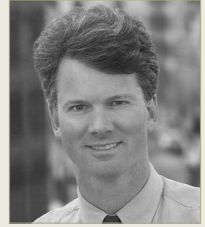
In short, be sure you are fully aware of what the claim is and what members of the employer company are involved. If there is any uncertainty, be sure to request from the MHRC a revocation of the issues at hand.

VII. Rightful Termination

Because an employee is disabled or otherwise a member of a protected group, does not limit an employer's right to terminate the employee or take other actions that may be adverse to an employee's interests if the employer has a legitimate reason to take such action. It is essential that the employer treat its employees evenhandedly and that the employer has a consistent approach to its dealings with employees so that it may put forward a sound defense to a charge of discrimination.

The National Business Institutes Text Titled Maine Labor and Employment Law was used as a resource in writing this article.

We at Perkins Olson, P. A. want to provide you with high quality, reasonably priced legal services that will add value to your business. With this depth of talent we can help your firm prosper as well as resolve any difficulties that you may encounter.



Clients turn to Dave Perkins for expertise in starting up or financing businesses, reorganizing distressed businesses, litigating business and environmental disputes, and solving problems that arise in almost any commercial or real estate venture. Knowledge and experience help Richard



Olson move quickly on questions involving a wide variety of business reorganizations and bankruptcies—from traditional manufacturing firms and real estate concerns to high tech companies. Patrick Mellor specializes in business law, civil litigation, maritime law,



and appellate work. He is a former University of Maine Law School writing instructor and a former law clerk. Kevan Rinehart deals in commercial, intellectual property, and land use issues and works on a wide range of bankruptcy and business reorganization issues.



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