

message from partner in charge

As the third quarter draws to a turbulent end, you'll want to take time with this issue, packed with useful, relevant information for you and your clients.

First, Joseph Preis took part in a history-making case that may change federal law. Preis, a former U.S. Marine, was part of a "Marine Dream Team" that won the acquittal of former Marine Sergeant Jose Nazario, who faced charges of wrongful death due to events during the Battle of Fallujah, Iraq.

Mr. Ames' article discusses middle-market transactions and investors' increasing interest in them due to the tightening of the credit markets. He illustrates three regulatory factors driving the deals and four issues that make them unique. Mr. Ames' article is a must-read in these changing economic times.

We also look to Pepper in cyberspace, for two timely online-only events. A webinar looks forward to what a McCain or an Obama administration can mean to the financial services industry. And Francis Lawall is featured in a Peppercast about the importance of thoroughness regarding Section 328 success fees.

Thanks for reading. Please tell us your comments or suggestions.

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Acquittal of Former Marine in Landmark Case Expected to Cause Change in Legislation, Says Defense Team

Orange County Pepper Hamilton attorney serves on "Marine Dream Team" that obtains historic acquittal on behalf of pro bono client

The recent landmark case of *United States of America vs. Jose Luis Nazario, Jr.* tested the power and scope of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), and the swift acquittal underscores flaws in the law that could lead to legislative changes to the act, said the team of lawyers who represented the former Marine.

Mr. Nazario's defense team, dubbed the "Marine Dream Team" because it included former and retired Marines, consisted of retired Major Kevin McDermott, retired Colonel Douglas Applegate, former Sergeant Joseph Preis and civilian Vincent LaBarbera.

The four attorneys represented Nazario in the first case in which a former member of the U.S. Armed Forces was tried in a civilian criminal court, as opposed to a military court martial, for allegedly committing a crime during combat operations.

A jury in the U.S. District Court for the Central District of California acquitted Nazario of all charges on August 28, 2008, after less than six hours of deliberations.

"Although the war is finally over for Mr. Nazario, the government's ability to impanel 12 civilians to sit in judgment over the actions of a Marine in combat is unconscionable and must be reevaluated by Congress," said Marine Dream Team member Joseph M. Preis, an attorney in the Orange County office of Pepper Hamilton LLP.

"In addition to playing Monday morning quarterback, MEJA prosecutions in general, and the Nazario case in

particular, present insurmountable challenges to successful prosecutions,” according to Kevin McDermott, lead counsel for the Marine Dream Team. “Removing military aspects completely from the Nazario case, the U.S. government sought to convict a man of killing another human being without producing a body, the alleged victims’ I.D., any eyewitness testimony or a shred of physical evidence. The Constitutional implications were and continue to be enormous, as long as MEJA remains on the books.”

MEJA was designed to permit the prosecution, in U.S. district court, of Department of Defense contractors, subcontractors, and the civilian dependants of active-duty military personnel who commit crimes on foreign soil. It also provides for the prosecution of former military members no longer subject to the Uniform Code of Military Justice (UCMJ), like Nazario, although there is no pre-bill mention of former service members in the Congressional record.

“Even one of MEJA’s authors, Sen. Jeff Sessions (R – AL), has been quoted as saying that this type of prosecution was not the motivation behind MEJA,” said Preis. “While we are clearly thrilled with the ‘not guilty’ verdict, and we look forward to helping Mr. Nazario restore his life, we also are intent on encouraging Congress to change MEJA.”

The allegations against Nazario stemmed from the Battle of Fallujah in Iraq in November 2004. According to the indictment and trial testimony, Nazario’s squad began to attack through Fallujah on the morning of November 9, 2004. Several hours into the fight, the squad began taking fire from the house in question, killing one of Nazario’s squad members. The Marines assaulted into the house and found four military-aged males, at least three AK-47s with hot barrels, spent casings and the smell of gun powder. Shots were fired and the four insurgents were allegedly killed. The government did not have any eyewitness testimony or evidence as to what took place. The allegations were that Nazario killed, or caused others to kill, the insurgents.

“At the end of the day, this jury of civilians simply wasn’t willing to second-guess a Marine and resented being placed in a position of having to do so,” said Marine Dream Team member Douglas Applegate. “Fallujah was the most brutal and bloody house-to-house fighting that the Corps has experienced since the Battle of Hue City in 1968.”

Applegate spent a significant amount of time in Iraq prior to his retirement, and provided the defense team with invaluable insight into the rules of engagement and the environment on the ground in Iraq.

The Marine Dream Team’s only non-Marine, Vincent LaBarbera, commented post-trial that this case “was purely politically driven to support some still-unknown government agenda — most probably, the appeasement of anti-American Iraqi factions. Unfortunately, this young hero [Nazario] was the government’s guinea pig.”

Of particular interest, in prosecuting Nazario, the government chose to focus on an honorably discharged Marine who was decorated for valor in combat.

The flawed structure and composition of the Military Extraterritorial Jurisdiction Act contributed to the aggressive prosecution of this case, said the defense team.

“We believe the Uniform Code of Military Justice should be expanded beyond its standard limit, so that former military personnel can be tried only by the military,” said Preis. “Currently, the typical enlistment provides the UCMJ with jurisdiction for eight years, which often includes four years of active service and four years of inactive reserve service. In the latter four years, military personnel can be recalled to active duty and then prosecuted under the UCMJ. However, after eight years of service, the military no longer has jurisdiction over former service members.”

Pepper Hamilton handled the Nazario case as part of its pro bono and public service program. “Pepper afforded this case tremendous resources,” said Preis. “We tapped the expertise of litigators in several offices, in particular, Jared Klein, Dave Foberg and fellow veteran Jonathan Kane, and our pro bono program provided significant support. The successful outcome was truly a joint effort.”

Middle-Market Memo on M&A

This article first appeared in The Deal on August 5, 2008. It is reprinted here with permission.

The tightening of the credit markets and the resulting sharp decline in high-leverage megadeals has generated strong interest in middle-market transactions — a trend that is expected to continue at least throughout 2008.

Middle-market transactions are projected to remain in focus because they do not depend on syndicated debt, according to PricewaterhouseCoopers' transaction services group's midyear mergers and acquisitions forecast for 2008.

In addition, according to the forecast, three regulatory factors may drive an increase in middle-market deals — and possibly all deals — before year's end:

- the possible increase in the capital gains tax, which may motivate private equity firms to cash out wholly or in part by fourth quarter
- the new business combination accounting standard, FAS 141(R) — Business Combinations, which will no longer allow certain transaction costs to be capitalized into the purchase price, instead requiring them to be expensed
- changes in how companies account for noncontrolling interests or minority investments, FAS 160 — noncontrolling interests in consolidated financial statements, which may cause firms to take control of their minority interests before being required to record them in equity and lose gain and loss recognition for transactions with a parent.

As private equity firms deploy more capital in the midmarket, and because middle-market deals are unique, getting the right fit and the right experience can be critical to success. Four basic issues make these deals unique.

Social issues. Midmarket deals frequently involve founders or family operators who are key to a private equity target's success and growth. It's important to match the financial expertise of the investor with the operating expertise of the owner-operator with sensitivity, whether it involves the introduction of a new finance officer, the addition of debt to the target's balance sheet or the creation of incentive-based compensation plans where there were none.

Changes in senior management also require a sensitive touch. These changes are often characteristic of the mid-market deal, and implementing any of them suddenly and without a clear understanding of the benefits could spell disaster.

Structure issues. Middle-market targets may be organized in a way that is not tax-efficient for investors. Therefore, understanding the use of creative and flexible flow-through structures for making an investment, such as LLCs, is important. Experience matters when it comes to understanding the alternatives these structures offer for the allocation of profits, losses and distributions to target owners and investors alike, and for creating critical incentives for management to drive growth.



Peppercast: Success Fees Under Section 328; Be Reasonable and Be Specific

In complex business reorganizations, debtors and other major parties-in-interest, such as trustees, examiners and creditors' committees, will typically retain a small army of professionals – attorneys, financial advisors, accountants – to assist in the case. Not surprisingly, these professionals are entitled to compensation from the bankruptcy estate.

This podcast with **Francis J. Lawall**, a partner in Pepper's Corporate Restructuring and Bankruptcy Practice Group, discusses the importance of thoroughness regarding Section 328 success fees and the Northwest Airlines case.

Listen today by visiting the Corporate Restructuring and Bankruptcy section of Pepper's podcenter at www.pepperpodcasts.com.

Special skill also is required to address and balance the economic and tax concerns of the target owner's rollover equity — such as maintaining a single-level of tax and maximizing capital gains — and the investor's goals — such as qualifying for consolidated return filing, or a step-up in tax basis and amortization of the investment.

Capitalization issues. Growth through add-on transactions often drives returns in midmarket investments, while high leverage drives the megadeals. In fact, many midmarket deals are initially funded entirely with equity, sometimes later refinanced.

The result is that the post-money capitalization of a mid-market target follows its own pattern, and creates its own dynamic — all with a profound effect on valuations and returns — and all requiring a different approach to financial modeling.

Most important, because add-on transactions are so crucial in the middle market, the ability to complete them quickly and in a cost-efficient manner with positive effects on the target's balance sheet and P&L statement takes deft handling.

Supporting players. The accounting firms, lenders, investment bankers, lawyers and others that source midmarket opportunities for investors are all cast from a special group focused on the middle market. Dealing with any one of these advisers will put all the necessary experience and resources of the other advisers within the reach of investors, enabling them to close the deal quickly. This special group also is best suited to stay ahead of market trends and solutions that can create commercial efficiencies.

It is worth noting that this “fit” is as important to cost control as it is to overall success. Successful midmarket deals demand advisers who staff their deals with lean-and-mean teams, and provide the same partner and team from deal to deal.

So getting the right fit and the right experience can make the difference between closing the deal and losing it.

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Obama and McCain: What Would They Do For (Or To) You Webinar

Whatever choice the voters make in November, it's likely that the current federal regulatory approach to the financial services industry will change, perhaps dramatically. We've all heard the campaign rhetoric, but few have probed deeply into the specifics of both candidates' positions on matters affecting the financial services business.

What would Sen. Barack Obama's proposal for a foreclosure prevention fund mean for mortgage lenders already struggling for survival? What would Sen. John McCain do to address the financial issues at Fannie Mae and Freddie Mac, or other aspects of the ongoing credit crisis?

Listen as we examine the policies of both candidates regarding financial services regulation and related issues.

Visit Pepper's webinar section at www.pepperlaw.com to view the webinar recording and download the PowerPoint slides from this online event.

Pepper Hamilton LLP Attorneys at Law

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