

message from partner in charge

In this issue, we present a mix of timely topics and interesting developments in Pepper's Princeton office.

As the economic recession improves but only slightly, Daniel Murray and William Quirk consider whether our banking clients should accept TARP funding, given the strings Congress attached to it, and report that some banks are getting positive press for forgoing Uncle Sam's help.

We then turn the spotlight on our Health Effects Litigation Practice Group's expansion into New Jersey, where big pharma is big industry, while a Peppercast features group member John Brenner discussing the FDA's preemption rule change that could alter pharma litigation forever.

And we offer kudos to our attorneys, for taking leading roles in the Mercer County Bar Association and for remaining bellwethers in continuing education.

We always welcome your comments, questions and suggestions about this newsletter.

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in this issue

- 1 **Rethinking Accepting TARP Capital Purchase Program Funds**
- 2 **Peppercast: Preemptive Rule - The End of Pharmaceutical Litigation As We Know It?**
- 3 **Princeton Attorneys Continue Involvement in Mercer County Bar Association**
- 3 **Speakers' Corner**
- 4 **Spotlight: Health Effects Litigation Group Adds Talent in Princeton**

Rethinking Accepting TARP Capital Purchase Program Funds

On January 12, 2009, in an effort to hold state nonmember banking institutions more accountable for their participation in the Troubled Assets Relief Program (TARP) Capital Purchase Program (CPP), the Federal Deposit Insurance Corporation (FDIC) issued a Financial Institution Letter (FIL-1-2009) recommending that its supervised institutions implement a process to monitor and document the use of their CPP funds, including the publication of such information in annual reports and financial statements. Specifically, the FDIC recommended that banks monitor and document the use of money received under (i) the \$250 billion CPP, (ii) the Federal Reserve Board's multiple liquidity programs, and (iii) the FDIC's guarantee of unsecured debt and zero-interest deposits. The FDIC wants to ensure that its supervised institutions are using these various programs to support prudent lending to creditworthy borrowers and/or assist borrowers with foreclosure prevention.

The FDIC's letter marks it as the first and only bank regulator to take action regarding the monitoring and documentation of CPP funds. Though the FDIC's actions will help to improve CPP fund transparency and accountability of its regulated banks, an immediately apparent issue is that many of the financial institutions receiving large amounts of funds under the CPP are not regulated by the FDIC and so are not affected by such recommendations. A more coordinated effort among all financial institution regulatory agencies and/or a legislative mandate requiring CPP fund monitoring is still possible, of course. In fact, on January 28, 2009, Sen. Max Baucus (D-Mont.) and Sen. Chuck Grassley (R-Iowa) introduced the Troubled Assets Relief Program Enhancement Act to enhance accountability and further restrict how funding can be used. If passed, this bill would give the U.S. Government Accountability Office access to the books and records of any company receiving funding, and would require all banks receiving funding to provide quarterly reports to Congress explaining exactly how the funds are being used to make credit available to consumers.

On the same day that the Troubled Assets Relief Program Enhancement Act was introduced, the U.S. Treasury announced that it will begin posting on its Web site all current and future TARP investment agreements to enable taxpayers to “see how their money is being spent and the terms these institutions must agree to before we invest taxpayer money.” Although confidential and proprietary information will be redacted from the publicly posted documents at the request of the individual institutions, banks can expect their agreements to be available to anyone interested in reviewing them.

When the CPP was first announced last fall, many of our bank clients sought advice about the pros and cons of applying to the CPP. After an initial review of the CPP, we determined that banks would suffer no real disadvantage in submitting applications to the CPP because that gave banks the option to then receive funding, if accepted. Many of our bank clients also sought advice because they were concerned about some of the conditions and restrictions associated with participation in the CPP. These included: (i) the cost of the capital, (ii) the restrictions on paying dividends on common stock, (iii) the redemption restrictions on the preferred stock issued to the U.S. Treasury, (iv) the restrictions on executive compensation, and (v) the unknown factors of how the bank regulators and/or U.S. Treasury would try to monitor and/or interfere with the operation of the bank.

With these recent announcements by the FDIC and Treasury, some of these unknown concerns are beginning to materialize and could cause approved banks, already hesitant about the CPP, to decline to participate in it.

In fact, based on information publicly available, many approved banks are ultimately declining to accept CPP funding and instead are issuing press releases announcing that they are opting not to participate. Of the various reasons for not participating, many banks have stated the CPP’s multiple restrictions as a key factor. These banks, however, have been able to turn their decisions not to participate into positive press as they simultaneously announce that they are healthy enough to meet the criteria to receive CPP funding, but at the same time have sufficient capital to meet the needs of their customers without the CPP’s help.

As bank regulators and the Treasury continue to release supplemental TARP guidance and information, banks that have applied and been accepted to the CPP must again evaluate the pros and cons of accepting funding. While it was prudent for banks to submit an initial application to the CPP, approved banks must now rethink whether accepting funding is truly necessary or even sensible, given the CPP’s growing restrictions and the likelihood of increased oversight from bank regulators and/or congressional action.

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Peppercast: Preemptive Rule - The End of Pharmaceutical Litigation As We Know It?

Listen to Pepper partner **John F. Brenner** discuss the Food and Drug Administration’s preemption rule change. Mr. Brenner was the first defense lawyer to take advantage of a FDA rule change related to drug labeling regulations that just might change the way pharmaceutical litigation is handled by the courts.

Listen today by visiting the Health Effects Litigation section of Pepper’s podcenter at www.pepperpodcasts.com.

Princeton Attorneys Continue Involvement in Mercer County Bar Association

Several attorneys in Pepper's Princeton office are continuing a tradition of being actively involved in bar association activities. These attorneys include **Angelo A. Stio III**, a partner in the Commercial Litigation Practice Group, **Stephanie L. Jonaitis**, an associate in the Construction Practice Group, and **Marissa L. Quigley**, an associate in the Commercial Litigation Practice Group.

Angelo A. Stio III was recently elected to serve a three-year term as a member of the Mercer County Bar Association (MCBA) Board of Trustees. Angelo's term began on February 1, 2009. As a trustee, he will serve on a board that oversees activities for more than 1,200 lawyers who live and/or practice law in Mercer County, New Jersey.

Stephanie L. Jonaitis currently serves as a trustee for the Mercer County Bar Foundation, the charitable arm of the MCBA. The foundation awards grants to schools and organizations and a scholarship to a law student who has ties to Mercer County. Stephanie not only serves as a trustee, but also has been actively involved with planning and chairing fundraisers for the foundation for the past several years.

Marissa L. Quigley was selected to serve as co-chair of the MCBA's Young Lawyers Committee. Marissa's selection as co-chair of the committee comes as no surprise. Over the past two years, Marissa has dedicated many hours of hard work organizing and chairing the Young Lawyers Committee fall fundraisers. These fundraisers have raised money for local charities that serve the Mercer County community.

speakers' corner

- On March 3, **Michael J. Mann** participated as a panelist discussing "Legal Space Dynamics" at a program hosted by the *New Jersey Law Journal*.
- **Steven D. Bortnick** moderated a panel discussing "Middle Market Leveraged Buyouts" at the Stern Private Equity Conference at New York University on March 6.
- On March 11, Mr. Bortnick participated in the webinar "Tax Considerations for Distress Debt Investments" hosted by Financial Research Associates.
- **M. Peter Adler, Jeffrey A. Carr** and **Travis P. Nelson** spoke on March 24 at a New Jersey Bankers Association program regarding document retention.
- On March 26, Mr. Bortnick presented "Investing in Bank Debt" to the New York Chapter of the Private Equity Chief Financial Officer Association.
- On April 2, **Angelo A. Stio, III** presented "How In-House Counsel Can Get a Grip on the Litigation Hold," at the Symposium on e-Discovery and its Impact on Corporate Governance and Litigation at Rutgers University School of Law.
- **Audrey D. Wisotsky** will speak at the 2009 Consumer Finance Regulatory Forum: Residential Mortgage Regulation on May 20, at the New Jersey Law Center in New Brunswick, NJ. For more information and to register, visit www.njicle.com.
- Mr. Nelson will speak on federal legislative and regulatory issues on June 4 at the New Jersey Bankers Association Compliance University. For more information, visit www.njbankers.com.
- On June 15-17, Mr. Bortnick will lead a panel on "Basics of Private Equity Tax Practices" at the 8th Annual Private Equity Tax Practices Conference in Boston. For more information and to register, visit www.iirusa.com/petax.

Spotlight: Health Effects Litigation Group Adds Talent in Princeton

Pepper Hamilton's Health Effects Litigation Practice Group is expanding into the firm's Princeton office, with four Pepper attorneys now close to the hub of the pharmaceutical industry in central and northern New Jersey, supplementing the group's already strong presence in Pepper's nearby Philadelphia headquarters.

Pepper partner **Noël Ix** recently transferred to Princeton from the Philadelphia office. She continues to be actively involved in pharmaceutical and medical device litigation matters, along with Pepper's Princeton partners **John Brenner** and **Nicholas ("Nick") Kouletsis** and local associate **Melissa Chuderewicz**.

"I'm fortunate to be working with such a solid group," says Noël. "In addition to our national practice, we're focused on serving our many New Jersey-based pharmaceutical clients. The fact that we work together so well enhances our capabilities." While Noël concentrates her practice on pharmaceutical and medical device litigation, she also has worked on many commercial litigation matters. She has spent her entire career at Pepper, beginning as a summer associate in 1992.

Nick has been with the firm for more than 27 years. His practice encompasses commercial litigation, product liability, toxic tort and environmental matters. John joined the Princeton office in 2007 from McCarter & English, bringing with him a wealth of experience that includes being a part of national counsel teams managing litigation for major pharmaceutical companies. Melissa has been with Pepper for more than four years. She quickly became a part of the Pepper team after working for a small civil litigation firm in Princeton.

The group also works on matters with Pepper's attorneys in other practices, such as our Corporate and Securities, Real Estate, Commercial Litigation, Construction, Environmental Law, Health Care Services, and Intellectual Property practice groups. These other attorneys include **Michael Mann**, who is currently working on all aspects of a major medical campus acquisition and development project; **Mark Solomon**, who is handling land use matters for a major pharmaceutical company and its subsidiary; and **Michael Weiner**, who provides general corporate and commercial counseling to biotech, pharmaceutical and companies servicing the life sciences marketplace.

Nina M. Gussack, chair of Pepper's Health Effects Litigation Practice Group and of the firm's Executive Committee, notes that Pepper seeks to continue expanding the Health Effects Litigation Practice Group's presence in New Jersey. "Noël is a valuable addition to Pepper's on-the-ground team in Princeton," Gussack said. "Continuing to enhance the capabilities of Pepper's Princeton office in health effects litigation will be an asset to our pharmaceutical clients in New Jersey, and will enhance our opportunities to serve additional clients in a variety of matters."

Pepper's Health Effects Litigation Practice Group counsels clients and handles litigation in matters involving medical devices, radiation, chemicals, consumer goods, commercial products, environmental substances, industrial equipment, vaccines, defense of professional malpractice claims, and claimed adverse health effects from ingestion of or exposure to pharmaceuticals. Members of the group also focus on substantive and procedural reform, and have counseled a large number of pharmaceutical and medical device companies, biotech firms and contract research organizations regarding the agreements attendant with clinical research. Pepper's Health Effects attorneys also have served as supervisory and coordinating counsel in mass tort and product liability litigation.

Pepper Hamilton LLP

Attorneys at Law

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