

# Business Law

## REPORTER

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### HIGHLIGHTS

<b>Corporations Commissioner Actions</b> .....	145
Keith McBride	
The Commissioner has revised California's recordkeeping requirements for securities broker-dealers so they correspond with SEC requirements. The Commissioner has also adopted regulations relating to the 2006 Nontraditional Mortgage Products Guidance.	
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Howard Foss	
In <i>Nationwide Transportation Finance v Cass Information Systems, Inc.</i> , the Ninth Circuit held that an agent of an account debtor does not have the same obligations as an account debtor under either UCC or agency law.	
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Jonathan A. Shapiro	
<i>Miller v Thane International, Inc.</i> may encourage federal district courts to resolve falsity, materiality, and other mixed questions of fact and law on pretrial motions. If so, it likely will be most helpful to defendants in shareholder class actions—an ironic result, given that the outcome of this case was a major victory for the plaintiffs.	
<b>Federal Taxation</b> .....	152
Marilyn Barrett	
The U.S. Supreme Court's decision in <i>Clintwood Elkhorn Mining Co.</i> illustrates the importance of filing protective refund claims as soon as a taxpayer becomes aware of a challenge to the validity of a tax. The Court's decision in <i>Meadwestvaco Corp. v Illinois Department of Revenue</i> was a victory for multistate businesses.	
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Robert M. Cassel	
In <i>Jones v The Lodge at Torrey Pines</i> , the California Supreme Court held that a supervisory employee cannot be held personally liable for alleged acts of retaliation against another employee. Mr. Cassel predicts that we will see a legislative response to this decision. In <i>Lonicki v Sutter Health Central</i> , the California Supreme Court dealt with an unusual issue arising under the California Family Rights Act.	
<b>Competitive Business Practices</b> .....	165
William J. "Zak" Taylor	
After <i>Williams v Gerber Prods. Co.</i> , plaintiffs' counsel may consider filing more Bus & P C §17200 misleading advertising cases in federal court when that option exists.	

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## Federal Taxation

Marilyn Barrett

### Refunds

**Plain language of 26 USC §§6511 and 7422(a) requires a taxpayer seeking a refund for a tax assessed in violation of the export clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the government.**

*U.S. v Clintwood Elkhorn Mining Co.* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 392, 128 S Ct 1511

In 1978, Congress levied a tax on coal exports under 26 USC §4221(a). In 1998, a group of companies challenged the tax in the district court in Virginia, contending that it violated the export clause of the United States Constitution. The district court ruled that the tax was unconstitutional in *Ranger Fuel Corp. v U.S.* (ED Va 1998) 33 F Supp 2d 466. The government did not appeal, and in 2000 the Internal Revenue Service acquiesced in the district court's holding. See IRS Notice 2000-28, 2000-1 Cum Bull 1116.

The taxpayer in *Clintwood Elkhorn Mining Co.* had paid the coal export tax since 1978. When the tax was held unconstitutional, the taxpayer filed timely refund claims for 1997, 1998, and 1999. The Internal Revenue Service refunded the coal export taxes paid for these years, with interest.

The taxpayer also filed suit in the Court of Federal Claims, seeking refunds of the coal export tax paid in 1994 through 1996, even though it had not timely filed refund claims for those years under IRC §6511. Section 6511 requires that refund claims be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever period expires later. The taxpayer asserted that the general 6-year statute provided under the Tucker Act (28 USC §1491) permitted refund claims for those years. The Court of Federal Claims and the court of appeals allowed the taxpayer to pursue its lawsuit directly under the export clause, but not to collect interest against the government.

The U.S. Supreme Court reversed. It held that unconstitutional taxes are treated no differently from other taxes when taxpayers seek refunds. The taxpayer must pay the tax and file timely claims for refunds under IRC §6511. The Court stated that Congress has enacted (170 L Ed 2d at 402):

[a] detailed refund scheme that subjects complaining taxpayers to various requirements before they can bring suit. This scheme is designed "to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue." ... Even when the constitutionality of a tax is challenged, taxing authorities do in fact have an "exceedingly strong interest in financial stability." ... We do not see why invo-

cation of the Export Clause would deprive Congress of the power to protect this "exceedingly strong interest."

While this factor did not appear to play a significant role in the Supreme Court's decision, the Court noted that because the taxpayer conceded that, at a minimum, the 6-year statute of limitations under the Tucker Act applied, the question did not turn on whether invoking the export clause as the basis for a refund permitted refunds beyond the §6511 limits; the taxpayer's concession limited the question to which statute of limitations applied: the 6-year statute of limitations under the Tucker Act or the 3-year statute of limitations under §6511.

**COMMENT:** This case illustrates the importance of filing protective refund claims as soon as the taxpayer becomes aware of a challenge to the validity of a tax. If the taxpayer in *Clintwood Elkhorn Mining Co.* had filed protective refund claims in 1998, when the case challenging the constitutionality of the coal export tax was initiated, the taxpayer would have timely filed refund claims for the prior years under §6511. Accordingly, any time a taxpayer challenges a tax or becomes aware of a third party's challenge of a tax that also affects the taxpayer, the taxpayer should consider filing protective refund claims for all open years. This will enable the taxpayer to pursue a refund for years that would otherwise be barred years later when the case is finally decided.—M.B.

### Trade or Business

**Illinois courts erred in considering whether sold-off business division served an operational purpose in the seller-company's business after determining that the company and division were not unitary.**

*Meadwestvaco Corp. v Illinois Dep't of Revenue* (2008) \_\_\_ US \_\_\_, 170 L Ed 2d 404, 128 S Ct 1498

This case dealt with the question of whether the State of Illinois could impose tax on Mead Corporation, a corporation with headquarters in Ohio, on the gain it realized in 1994 on the sale of its subsidiary, Lexis/Nexis, a corporation headquartered in Illinois. Mead was in the business of producing and selling paper, packaging, and school and office supplies. Lexis operated an electronic research service. Mead treated Lexis as a unitary business in its consolidated Illinois tax returns for 1988 through 1994, but only at the insistence of the State of Illinois and to avoid litigation. When Mead sold Lexis, it took the position that the gain qualified as nonbusiness income that, under the Illinois Income Tax Act (Ill Comp Stat, ch 35, §5/303(a)), should be allocated solely to Mead's domiciliary state of Ohio.

The Circuit Court of Cook County held that Lexis and Mead were not unitary because they were not functionally integrated, were not centrally managed, and enjoyed no economies of scale. Although Lexis was subject to Mead's oversight, Mead did not manage Lexis's day-to-day operations; Lexis was managed by a separate management team located in Illinois. Neither business was required to purchase goods or services from the other and neither received discounts on goods and services pur-