

**IS IT LEGAL?
A STEP-BY-STEP PLAN FOR COUNSELING CLIENTS ON HOW TO
EVALUATE THE LEGAL RISKS OF A PROPOSED BUSINESS PLAN**

MBA'S LEGAL ISSUES AND REGULATORY COMPLIANCE CONFERENCE 2007

ENTERPRISE RISK MANAGEMENT

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I. Is A Law Implicated?

- A. What laws specifically apply?
- B. What laws generally may apply?
- C. Could the client be implicated as an accessory?
- D. Does the plan breach third party contracts?

II. Does The Plan Violate The Law?

- A. Substantive Analysis
 - 1. Are the legal terms objective or subjective?
 - 2. Are there "wobble room" qualifiers?
 - a. Intent
 - b. Pattern and Practice
 - c. Balancing Tests
 - d. Causation
 - e. "Safe Harbor"
 - 3. Could probability of adverse result change by restructuring the plan?
- B. Procedural Defenses
 - 1. Is a motion to dismiss realistic?
 - 2. How short is the statute of limitations?
 - 3. May the claim be brought as a class action, and, if so, could we defeat class certification?
 - 4. How messy will discovery likely be?

III. Is a claim likely to be asserted?

- A. Is there a private right of action?
- B. What government agencies have specific enforcement authority?
- C. How visible are the underlying facts?
- D. Would a competitor "tattle tale"?
- E. Are copycat claims likely?
- F. Is there assignee liability?

IV. What are the penalties?

- A. Are there criminal sanctions?
- B. Are the contracts enforceable?
- C. What types of monetary damages are available?
 - 1. Is it hard to prove actual damages?
 - 2. Are Statutory or Enhanced Damages available and, if so, how are they calculated and are they capped?
 - 3. How about Punitive Damages?
 - 4. Will an unfavorable decision result in material financial liability?

V. What Are The Possible “Spill Over” Effects Of A Claim?

- A. Will the company’s reputation be impaired?
- B. Will governmental licenses, permits or approvals be at risk?
- C. Could it lead to other third party claims?
- D. Could it cause a cross default or breach of covenants under material contracts?
- E. Could it impair the value or rating of Company’s debt or equity securities?
- F. Is it a reportable event for SEC purposes, and, if so, in what ways?

VI. Does The Practice Violate Company’s Code of Ethics?

VII. Is The Right Person Making The Decision?