

By Michael E. Gerould



Michael Gerould is a business litigator who represents corporations, limited liability companies, and individuals in a variety of areas, including employment, contract, and shareholder disputes and commercial transactions. Michael believes that the most effective way to practice law is by providing his clients with the guidance and information necessary to avoid or limit potential liability. Michael can be reached at 612.877.5268 or GerouldM@moss-barnett.com.

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## A NEW WEAPON AGAINST FRAUD

The Federal False Claims Act ("Federal FCA"), a law enacted during the Civil War to aid in the prosecution of fraud against the government by unscrupulous government contractors, now has found its counterpart in Minnesota. The Federal FCA opened the door for private citizens to (1) sue any person who submits a fraudulent invoice or bill ("false claim") to the federal government, and (2) obtain a portion of whatever defrauded money is recovered.

Effective on July 1, 2010, Minnesota joined 22 other states, along with the District of Columbia, with its own version of the False Claims Act. Like its federal counterpart, the Minnesota False Claims Act ("Minnesota FCA") was enacted as a way to (1) deter potential fraud against the Minnesota government and (2) recover some of the taxpayer dollars that have been misappropriated through certain acts of fraud against the Minnesota government.

### **The Mechanics of the False Claims Act**

#### **Qui Tam Actions**

The Federal FCA and the Minnesota FCA both provide for the prosecution of claims by the government via direct actions. However, as has historically been the case with the Federal FCA, it is anticipated that the primary driving force behind the prosecution of false claims under the Minnesota FCA will be through its *qui tam* provisions. *Qui tam* is an abbreviation of a Latin phrase loosely translated to mean "he who brings a case on behalf of our lord the King, as well as for himself." This *qui tam* provision allows private citizens ("Relators") – acting as private attorneys general – to sue any person who defrauds the government (and, thereby, taxpayers) through the submission of false claims ("Claimants") to recover the amount of a fraud. Relators are often

employees of Claimants, or someone with firsthand knowledge of the false claim, including contractors, subcontractors, or agents. If a Relator is successful in recovering on a false claim, he or she may be able to share in the proceeds of the ultimate recovery.

Over the years, the Federal FCA has proven tremendously successful in both deterring fraudulent conduct and recovering defrauded taxpayer dollars. Without question, the *qui tam* component has been central to the success of the Federal FCA. Indeed, the Federal FCA has provided the basis for the recovery of more than \$25 billion in taxpayer dollars since 1986 – for false claims related to the spectrum of government spending programs – of which as much as 15% to 30% has been disbursed to Relators via *qui tam* lawsuits. The most common type of fraud that has been prosecuted in the past 24 years has been related to overcharging for goods or services provided to the government.

#### **Whistleblower Protections**

The Federal and Minnesota Acts both contain whistleblower protections for certain Relators. If certain conditions are met, these whistleblower protections make it illegal to retaliate against an individual for reporting fraudulent conduct pursuant to the Act. This is essential because Relators in *qui tam* actions are often employees of – or are otherwise susceptible to retaliation by – Claimants they are pursuing under the Act. Without such protections in place, there would be an often unacceptable risk for these Relators to come forward with the necessary information to successfully prosecute a false claim.

While historically the Federal FCA provided these whistleblower protections to only employees of Claimants, the Federal FCA was amended in 2009, by the Fraud Enforcement and Recovery Act, to



By David L. Biek



David Biek is an intellectual property (“IP”) attorney. He assists individuals and owners with their IP needs, including obtaining patents and trademark registrations; providing non-infringement and patentability opinions; negotiating and documenting licensing, research development, IP sale, and other business transactions; and litigation of patent, trade secret, trademark, and copyright issues. David can be reached at 612.877.5299 or BiekD@moss-barnett.com.

## MARK THESE WORDS

A United States patent provides valuable legal rights to its owner. Once issued, the owner can exclude others from manufacturing, using, marketing, or selling the claimed product, process, or end-use application until 20 years after the original application filing date. The claims appearing at the end of the patent document define the scope of the invention that the Patent Office determined was patentable and to which the patent owner can legally exclude others from using the invention.

The patent owner cannot recover any damages from infringers where the product was not marked with the associated patent number unless infringement occurs after the infringer is provided with actual notice of the patent. These “patent markings” are meant to provide fair warning to competitors and other third parties of the existence of the patent and its scope.

Suddenly, a little appreciated pitfall in 35 U.S.C. § 292(a) for the diligent patent owner who marks a product has caused a great deal of alarm:

Whoever marks upon, or affixes to, or uses in advertising in connection with any *unpatented* article the word “patent” or any word or number importing the same is patented, for the purpose of *deceiving the public*...shall be fined not more than \$500 for every such offense.

(Emphasis added.) Section 292(b) authorizes “any person” to file a suit for false patent marking, with the penalty award split 50-50 between the successful plaintiff and the U.S. government.

The public policy behind Section 292 is to prevent someone from chilling competition within an industry by fraudulently marking a product where no patent protection exists. In the case of a product manufacturer who never filed a patent application or abandoned its application in the face of strong opposition from the Patent Office, the basis for liability for marking the product with a fictitious patent is clear. But what about actual patent owners who are guilty more of inattentiveness than deceptive intent? Perhaps the patent expired, thereby making the product an “unpatented article.” This frequently occurs because manufacturers add the patent number to their product molds and are reluctant to replace the molds until they wear out. This problem is compounded when multiple patent numbers are used with varying expiration dates. The patent owner may sell products from a large inventory on hand bearing the marked patent number after the patent expires. Another possibility is that the patent owner may improve its product during the issued patent term to the point that it no longer falls within the scope of the patent. Yet, in all of these cases, Section 292 would suggest that the patent owner should immediately remove the patent number marking from the product that was legally required beforehand as soon as the patent expires or its product is no longer covered. Meet the cold, uncompromising glare of the law!

This provision of the law did not pose as much risk to patent holders before 2009, because most courts interpreted its statutory penalty to only apply to the *decision* that allowed the false patent marking to occur. Thus, a single \$500 fine was frequently imposed by courts for deciding to maintain a patent number marking after the patent owner became aware that the product was no longer protected by the patent. Such a relatively *de minimis* penalty discouraged potential third parties from bringing false marking claims under Section 292 in the absence of a larger issue to litigate against the patent owner. In 2009, however, the Federal Circuit Court of Appeals decided that Section 292’s statutory language, in fact, required the penalty to be applied to *each mismarked article*, although the penalty assessed

for each article did not need to be \$500. In the first quarter of 2010 alone, 132 false patent marking cases were filed against a host of patent holders, including Proctor & Gamble, 3M Company, Bayer Healthcare, Gillette, and S.C. Johnson, mostly for expired patent numbers that continued to be marked on products sold in the marketplace.

Who are the vigilantes eager to file these Section 292 suits? In many cases, they are opportunistic patent attorneys or special-purpose companies who focus their business plans on these types of suits. In one such example, a registered New Jersey patent attorney sued Brooks Brothers, Inc., for false patent marking because its bow ties had an embroidered label with patent numbers for the “Adjustolox” sliding metal band for adjusting tie length. These patents had expired more than 50 years ago, and the attorney requested an award of \$500 from Brooks Brothers for each such tie sold. The court ruled that ordinary consumers, in addition to competitors, can properly bring suit under Section 292. A claim by such an ordinary consumer is based on a *qui tam* theory, which authorizes the consumer to sue based on an injury to the government. (See “A New Weapon Against Fraud,” p. 1.) The consumer, therefore, must establish that the false patent marking somehow caused an injury to the U.S. government. The court concluded that vague allegations of “wrongfully quelled competition” were too conjectural to establish this necessary injury and dismissed the case.

A false patent marking suit was brought by another registered patent attorney against Solo Cup Company for the presence of two expired patent numbers on the lids of its drink cups. While the trial court in that case appears to have accepted a mere allegation of competitive injury caused by the improper patent marking as sufficient to satisfy the requirement for injury to the U.S. government, the claim still failed. The court determined that Solo Cup followed the advice of its counsel in formulating a corporate policy of replacing the molds bearing the expired patent numbers “as they wore out or were damaged” in order to “reduce costs and business disruption.” The business concern for the bottom line negated an inference of deceptive intent arising from Solo Cup’s acknowledged continued use of the expired patent numbers in its product patent markings. On June 10, 2010, the Federal Circuit Court of Appeals agreed with the trial court’s ruling. It concluded that the policy adopted by Solo Cup upon advice of counsel to wait until the molds wore out to remove the expired patent markings was reasonable.

Therefore, it seems that judges are recognizing fraudulent patent marking claims under Section 292, but then searching for grounds to exonerate the patent owners because the penalty would greatly exceed the actual harm. However, patent owners need to fear the federal judge who will not be nearly so accommodating. The Federal Circuit Court of Appeals may create a clearer rule stating the extent and timing of a patent owner’s obligation to remove expired or no longer relevant patent numbers from a product marking. Congress also has responded to this controversy by considering a bill to limit Section 292 plaintiffs to individuals who have suffered a competitive injury themselves, as opposed to relying upon theoretical injuries to the U.S. government. The legislation also would limit damage recoveries under Section 292 to an amount “adequate to compensate for the injury.”

In the meantime, patent owners should protect themselves by taking several simple steps to avoid false patent marking liability:

1. Review periodically the patent numbers marked on a product to ensure that they are not expired. This should be done at least at the time that a mold or label is to be replaced or changed. The patent owner also should calendar a specific review date based on patent expiration dates or on an annual or more frequent basis.
2. Do not use conditional language for patent markings like: “This product may be subject to U.S. Patent No. X” or “This product may be subject to one or more of the following patents: U.S. Patent No. A; U.S. Patent No. B; U.S. Patent No. C.” Under current case law, these kinds of conditional patent markings will be deemed deceptive.
3. If multiple patent numbers are listed in a patent marking, make sure that each patent actually applies and is active.
4. Consult patent counsel periodically to ensure that the improvements made to the product have not evolved the product outside the scope of the listed patents.
5. Be careful to document in writing the reason why a particular patent number is added to a patent marking to rebut an allegation made later by a Section 292 suit plaintiff of deceptive intent.

Properly done, a patent marking will preserve the patent owner’s right to recover damages in a patent infringement suit while minimizing the chances of unexpected liability for false patent marking.





## MOSS & BARNETT NEWS



▲ **MSBA Fifth Annual Senior Counselor Recognition Dinner (April 29, 2010)**  
*Back Row (from left to right): Attorneys Jim Rubenstein and Paul Zisla*  
*Front Row (from left to right): Andrea Rubenstein (spouse of Jim Rubenstein), CEO Tom Shroyer, Receptionist Kathy Hughes, Attorney Tom Keller, Legal Assistant Suzi Stasson, Steve Stasson (spouse of Suzi Stasson), Victoria Keller (spouse of Tom Keller), and Marketing Coordinator Debbie Weinstock*

### **Moss & Barnett Salutes Tom Keller**

Moss & Barnett salutes Thomas A. Keller III for his 50 years of service to the legal profession. Tom recently was honored by the Minnesota State Bar Association at its Fifth Annual Senior Counselor Recognition Dinner, held on April 29, 2010. In addition to heralding Tom for his impressive legal career, Moss & Barnett applauds his many selfless and dedicated contributions to our community.



*Thomas A. Keller III*

***Congratulations, Tom, and thank you for your service!***



▲ **29th Annual Law Day Testimonial Dinner (April 22, 2010)**  
*Back Row (from left to right): Attorney Sarah Doerr, Dennis Olsen (fiancé of Sarah Doerr), JoAnne Parsons (spouse of Chuck Parsons), and Attorney Chuck Parsons*  
*Front Row (from left to right): Attorneys Susan Rhode, Kim Bonuomo, and Jim Rubenstein, Andrea Rubenstein (spouse of Jim Rubenstein), Elizabeth Lambrecht (Commercial Banking Relationship Manager, U.S. Bank), and Attorney Terese West*

### **Moss & Barnett Is Proud to Support The Fund for the Legal Aid Society**

Moss & Barnett was proud to be a Premier Partner of the 29th Annual Law Day Testimonial Dinner, held on April 22, 2010, to benefit The Fund for the Legal Aid Society. The Fund raises money to support the programs of the Legal Aid Society of Minneapolis. The Society provides free or low-cost legal services to poor and disadvantaged persons and to persons with disabilities in areas such as housing, family law, health, and issues faced by seniors and persons with physical and mental disabilities. Tom Shroyer, Moss & Barnett President and CEO, currently serves on the board of the Fund, and Jim Rubenstein, a member of Moss & Barnett's bankruptcy practice area, currently serves on the board of the Society.



◀ **29th Annual Law Day Testimonial Dinner (April 22, 2010)**  
*Back Row (from left to right): Attorneys Curt Smith and Kristin Heebner and Grant Smith (son of Curt Smith)*  
*Front Row (from left to right): CEO Tom Shroyer, Paralegal Tinzing Artmann, Marketing Coordinator Debbie Weinstock, Attorneys Richelle Wahi, Michael Gerould, and Caroline Bussey*

## VARIOUS ACCOLADES

### *Moss & Barnett is pleased to recognize the following attorneys:*

**Ben Henschel**, a member of our family law practice area, was recently selected as a Fellow in the American Academy of Matrimonial Lawyers (AAML). The AAML was founded in 1962, and its purpose is to “provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law.” Academy Fellows are highly skilled negotiators and litigators who represent individuals in all facets of family law, including divorce, annulment, prenuptial agreements, postnuptial agreements, marital settlement agreements, child custody and visitation, business valuations, property valuations and division, alimony, child support, and other family law issues. AAML Fellows are generally recognized by judges and other attorneys as preeminent family law practitioners with a high level of knowledge, skill, and integrity. Ben joins the ranks of our other Moss & Barnett AAML Fellows: **Ed Winer**, **Susan Rhode**, and **Kim Bonuomo**.



*Ben Henschel*

**Mathew Meyer**, a member of our litigation practice area, was recently recognized for his work as a volunteer ombudsman with the Department of Defense Employer Support of Guard and Reserve (ESGR) program. At a recent ESGR ceremony, Assistant Secretary of Defense for Reserve Affairs, Dennis McCarthy, presented Mathew with the President’s Volunteer Service Award and the Minnesota ESGR Military Outreach Volunteer of the Year Award. Mathew’s volunteer ombudsman work includes mediating disputes under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), presenting Patriot Awards to employers who have demonstrated outstanding support for their service member employees, conducting employer outreach to encourage support for service-member employees, and conducting pre-mobilization and post-mobilization briefings to service members to explain their rights under USERRA. Mathew is also the ESGR military liaison to the United States Marine Corps Reserve units in Minnesota.



*Mathew Meyer*

**Chuck Parsons**, a member of our real estate practice area, was recognized as a “Leader in His Field” for the fourth consecutive year by *Chambers USA*. Chambers is a London-based publisher that, since 1999, has been identifying the leading U.S. lawyers and law firms through interviews with thousands of lawyers and their clients. The research is in-depth and client-focused, and the guide is read by industry-leading companies and organizations throughout the United States and worldwide. Chambers publishes an annual directory entitled, *America’s Leading Lawyers for Business: The Client’s Guide*.



*Chuck Parsons*

## SERVICE TO THE GREATER LEGAL COMMUNITY

Moss & Barnett encourages not only service to our clients, but also service to the greater legal community. Members of the Moss & Barnett team provide leadership and make significant contributions to our county and state bar associations. Here are some examples:

**Brian T. Grogan** - *Chair (2009-2010)*, Communications Law Section, Minnesota State Bar Association

**Joseph G. Maternowski** - *Chair (2009-2010)*, Environmental, Natural Resources and Energy Law Section, Minnesota State Bar Association

**Christopher D. Stall** - *Chair (2010-2011)*, Publications Committee, Minnesota State Bar Association

**James J. Vedder** - *Executive Committee Member (2009-2011)*, Family Law Section, Hennepin County Bar Association

**Cass S. Weil** - *Member (2008-Present)*, Rules of Professional Conduct Committee and Professionalism Committee, Minnesota State Bar Association





By *Mathew M. Meyer*



*Mathew Meyer is a shareholder in Moss & Barnett's commercial litigation department. His practice areas include assisting clients with matters involving residential and commercial real estate litigation, construction law, and general business litigation. He is admitted to practice in state and federal courts in Minnesota, South Dakota, and Wisconsin. Mathew also volunteers as an ombudsman for the Department of Defense Employer Support of Guard and Reserve program. Mathew can be reached at 612.877.5411 or MeyerM@moss-barnett.com.*

## GOVERNMENT IN TOYLAND: REGULATING CHILDREN'S PRODUCTS UNDER THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 (the "Act") was signed into law, amending the Consumer Product Safety Act and substantially increasing the power of the Consumer Product Safety Commission (the "Commission") to regulate the sale of children's products. Since then, the Commission has vigorously enforced many of the Act's provisions and is preparing final regulations for full implementation.

The Act was urgently enacted by Congress after the death of a four-year-old boy in Minneapolis from lead poisoning after swallowing a charm that was attached to a pair of Reebok tennis shoes. The charm was later found to be composed of 99% lead. Reebok was subsequently fined \$1 million – the largest fine in the Commission's history at the time.

Following this tragic death, there were a number of well-publicized recalls of children's products containing lead. The public outrage over the death and the recalls prompted Congress to act to ensure that children are not exposed to the dangers of hazardous substances, including lead and phthalates (a family of chemical compounds used in toys and many other products to soften plastics). Only after the Act became law did many realize the direct and indirect costs imposed upon retailers, manufacturers, and even consumers, as well as the uncertainty of how the Act was to be enforced.

### ***The Commission's Increased Enforcement Authority***

Believing that the Minneapolis boy's death and the subsequent lead-related recalls were the result of lax enforcement, Congress greatly increased the authority of the Commission to enforce consumer protection laws. It substantially increased the Commission's annual budget and staff so it could more aggressively regulate the production, sale, and resale of not only children's products, but also any Commission-regulated products. As the new Commission Chairman observed, "We are a new commission that has new powers – and we are not afraid to use them."

Congress also substantially increased the civil and criminal penalties under the Act, including authorizing criminal penalties for selling recalled products. Civil fines were increased from \$8,000 to \$100,000 per violation, and the maximum penalty for a related series of violations was increased from \$1.8 million to \$15 million. The Commission's aggressive enforcement under this Act is already apparent. So far this fiscal year, the Commission has assessed civil penalties of almost \$4 million for lead-related violations involving children's products, including a record \$2,050,000 fine.

The Commission also has increased its scrutiny of online auction sites. According to one report, the Commission maintains an Internet surveillance team that monitors online auctions and sales sites such as eBay and Craigslist for recalled products. Earlier this year, an enforcement proceeding based on an Internet sale of a non-compliant product resulted in a stipulated settlement of \$200,000. This online monitoring may well expand to include children's products subject to the lead and phthalates regulations and other Commission-regulated products.

Another new feature designed to aid enforcement is a publicly accessible database scheduled to be operational by March 11, 2011. Anonymous complaints will be accepted, and there are no mechanisms to verify the accuracy of the reported information, causing concern among manufacturers and retailers. Another concern is that the information may be used to encourage or facilitate product liability litigation.

Finally, the Act provides another layer of enforcement by authorizing the attorneys general of each state to enforce federal consumer product safety statutes. Therefore, even if the Commission decides not to pursue an enforcement action against a seller, an individual state attorney general could pursue the claim.

### ***The Expanding Scope of the Commission's Regulatory Power***

The extremely broad regulatory scope of the Act has sparked much confusion and concern among small business owners, resellers, and even individuals who make crafts part time. The Act imposes third-party testing and certification requirements upon "manufacturers" and importers. Although one would assume "manufacturer" means businesses engaged in manufacturing toys or children's products, the Act extends its regulatory control to part-time "crafters" and "small-batch manufacturers." For instance, a guide published by the Commission states that something as simple as adding ribbons to hair clips, knitting hats, or stringing beads into necklaces for sale or donation makes one a "manufacturer." Many hobbyists and crafters are likely unaware of their testing and certification obligations under the Act.

The term "children's products" is defined as "a consumer product designed or intended primarily for children 12 years of age or younger." If circumstances suggest, however, that a product originally intended primarily for use by a child is being sold or marketed as a collectible for adults, such as an antique, it is not subject to the Act. Conversely, even if the essential nature of a product suggests that it is not primarily intended for use by a child, it may nevertheless be considered a children's product because of its decorative features. For example, a ballpoint pen would not typically be considered primarily intended for a child, but if the same pen is adorned with cartoon figures or other decoration appealing to a child, it will likely be deemed a children's product.

Manufacturer statements as to the intended age of the product's users, including age recommendations displayed on product packaging, are considered in determining whether a product is primarily intended for use by a child 12 years old or younger. Even so, if the "product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger," it may still be considered a children's product notwithstanding any product labeling or manufacturer statements to the contrary.

### ***Regulations Relating to Phthalates and Lead in Children's Products***

While the focus of Congress was to regulate lead and phthalates in children's products, the Commission is granted authority to regulate other substances deemed to be hazardous, such as cadmium. The Act reduced the acceptable level of phthalates to 0.1% and established a schedule for lowering the acceptable levels of lead in surface coating (lead in paint) and component parts (lead content) over the coming years. The Act lowered the acceptable level of lead in paint from 600 ppm to 90 ppm, effective August 14, 2009. The most contentious issue regarding the lead limits relates to the gradual lowering of the acceptable lead content level from 600 ppm to 300 ppm, effective August 14, 2009, with further reduction to 100 ppm, if technologically feasible, effective August 14, 2011. These new levels are to be applied retroactively, resulting in potential liability based on a sale of a product manufactured prior to the effective date. This has caused significant concern as it relates to the 100 ppm standard scheduled to go into effect in August 2011, since many current products would not comply with this strict standard.

Although many issues have been raised regarding the Act's application, two specific types of products merit mentioning. The first involves youth all-terrain vehicles. The lead content portion of the Act has resulted in substantial uncertainty for the youth ATV industry. In fact, no sooner was the law passed than the Commission established special rules allowing certain manufacturers to continue selling these products, despite their non-compliance, for a limited period that expires May 1, 2011. Whether the issues involving these products will be resolved by then is uncertain.

The second type of product that has caused concern is children's books. The Act's lead content testing and certification requirements apply to children's books published after August 14, 2009, even though modern printing methods and materials do not generally involve lead use. Testing and certification requirements do not apply to older books, but resellers, schools, and libraries can be held liable under certain circumstances for selling a book with a non-compliant lead content. The Commission has taken the position, at least in the interim, that resellers, schools, and libraries can assume, absent information to the contrary, that books printed *after* 1985 are compliant and, conversely, that older books are non-compliant.





### Third-Party Testing and Certification Requirements

One of the most contentious provisions in the Act for small businesses is the third-party testing and certification requirements. Children's products must be tested by a third-party testing facility that has been specifically authorized by the Commission to perform such testing. If the children's product is compliant with the lead and phthalates regulations, a compliance certificate will be issued. This certificate must "accompany" the product in the distribution chain so that anybody can confirm that the product has been tested and is compliant. The Act requires that each product be retested if there is any manufacturing process or material change. Furthermore, each product must be retested periodically to ensure that it remains compliant. These testing and certification requirements apply to all children's products, except those where "all accessible parts" are made of "natural materials," such as gemstones, wood, cotton, and wool, known not to contain unacceptable levels of lead or phthalates. However, if such product has any surface coating or incorporates nonexempt and accessible component parts such as buttons, hinges, or fasteners, it must comply with the third-party testing requirements.

Enforcement of the testing and certification provisions has been stayed until February 10, 2011. One concern leading to the stay is the cost for third-party testing in the United States, which can range from \$500 to \$2,000 per product, substantially more than the cost for such testing in China or other foreign countries. The net effect is that the third-party testing requirements impose substantially higher costs on domestic "small-batch manufacturers" as compared to large manufacturers who can take advantage of lower costs overseas and spread the testing and certification costs out over a larger volume of products. Due to these burdens, many small retailers and manufacturers have closed their businesses, and some foreign manufacturers of small-batch toys, specifically in Germany and other European Union countries, have refused to export to the United States.

### Trying to Add Certainty to An Uncertain Statute

The Commission recently published a number of final and proposed rules implementing various sections of the Act. These regulations have tried to add certainty to many of the issues now facing manufacturers, retailers, and resellers. Even the Commission recognizes that certainty is difficult, if not impossible, to accomplish. Consequently, the Congressional Energy and Commerce Committee is currently in the process of drafting a new bill, referred to as the Consumer Product Safety Enhancement Act ("CPSEA"), designed to ameliorate some of the burdens and uncertainty of the Act. Although the draft CPSEA attempts to deal with small-batch manufacturers' concerns, it may not go far enough. The final chapter has yet to be written regarding the Act and its regulations.

### Conclusion

Manufacturers, retailers, and resellers should be aware of their obligations if they sell children's products. They should prepare for the full enforcement of the testing and certification requirements currently scheduled to begin on February 10, 2011, and assess their regulatory exposure by inventorying what, if any, children's products they sell. If a business sells any children's products, it should establish clear compliance procedures, including, at a minimum, a thorough review of its purchasing procedures. This includes (1) confirming that its manufacturers and/or importers comply with the third-party testing and certification requirements; (2) a review of any distributor, importer, or manufacturer agreements to provide appropriate assurances in the event of noncompliance; and (3) a review of any insurance coverage for liability relating to non-compliance with consumer protection statutes. Resellers should establish clear procedures for evaluating products accepted for resale to ensure compliance with the Act and identifying and rejecting products that have been recalled.

Hopefully, the uncertainties inherent in the Act will be resolved by the CPSEA and the final regulations. In the meantime, businesses should take steps to ensure compliance.



## A NEW WEAPON AGAINST FRAUD CONTINUED FROM PAGE 1

afford like protection to certain contractors and agents of Claimants. The Minnesota FCA provides these same broadened whistleblower protections.

### **Penalties and Attorney Fees**

The Minnesota FCA has the same penalty and attorney fee provisions as its federal counterpart. Both Acts provide for fixed penalties ranging from \$5,500 to \$11,000 per false claim, plus trebling of the amount of actual damage incurred by the government. Moreover, under both Acts, the successful plaintiff – whether it is the government initiating suit on its own behalf or Relators initiating suit on behalf of the respective government body – may be entitled to recover reasonable costs and attorney fees. Under the Federal FCA, this has proven to be a significant incentive for those without the resources required to initiate and prosecute a lawsuit.

### **NOTABLE DIFFERENCES BETWEEN THE TWO ACTS**

Despite the vast similarities between the Federal and Minnesota Acts, it is their differences that have been the primary source of commentary. Some believe these differences will result in the Minnesota FCA having a lesser impact on the prosecution of fraud than the Federal FCA has had, while others believe these differences provide Claimants with a necessary opportunity to prevent or remedy a fraudulent claim prior to being prosecuted. Some of the differences between the two Acts may prove significant and are worth noting.

#### **No Liability for Mere Negligence**

The first notable difference between the two Acts comes into play where the alleged false claim stems from “mere negligence, inadvertence, or mistake.” Under the Minnesota FCA, a person will not be liable for a false claim stemming from “mere negligence, inadvertence, or mistake.” The Federal FCA does not contain a similar explicit exception to liability, but it has been interpreted by some to contain a parallel implicit exception. Given the interpretation of the Federal FCA, it is unclear whether the explicit exception under Minnesota law will lead to different results.

#### **Right to Cure**

Another notable difference between the two Acts is the “safe harbor” or “right to cure” provision found in the Minnesota FCA that is not provided in its federal counterpart. Specifically, the Minnesota FCA provides that if the Claimant lacks fraudulent intent and is informed of the allegations of fraud by someone with firsthand knowledge of the information, the Claimant will not be liable if it repays the total amount of the fraud within 45 days of receiving the information.

As the Minnesota FCA does not itself require Relators to inform Claimants of false claims prior to initiating a lawsuit, it will be up to the respective Claimants to ensure that sufficient internal compliance programs are in place to provide people with the necessary incentives to report potential false claims internally.

#### **No Liability for the Conduct of Nonmanagerial Employees**

The Minnesota FCA contains a specific exception for nonmanagerial employees: an employer will not be liable for the fraudulent claims of nonmanagerial employees unless the employer “had knowledge of the act, ratified the act, or was reckless in the hiring or supervision of the employee.” This exception is not found in the Federal FCA. Under the Federal FCA, an employer will be found liable unconditionally, regardless of the source of the respective violation. Consequently, employers who may otherwise be subject to liability under the Federal FCA may not be found liable under the Minnesota FCA if the violations are committed by nonmanagerial employees. Whether this difference will prove material is yet to be seen.

#### **Government’s Duty to Investigate**

The last notable difference between the two Acts is that the Minnesota FCA does not impose a duty upon the government to investigate *all* potentially fraudulent claims. So, while the federal government has an affirmative duty to investigate *all* claims that may potentially be fraudulent, under the Minnesota FCA the Minnesota government may be more selective in the claims it chooses to investigate and pursue. It is unclear whether the Minnesota FCA will prove as successful as the Federal FCA in uncovering fraud without the use of government resources in investigating *all* potential claims. This will likely depend on the scope and strength of the government’s pre-investigation screening process.

### **CONCLUSION**

The Minnesota FCA became effective on July 1, 2010. Like its federal counterpart, the Minnesota FCA should prove to be a valuable piece of legislation in both deterring potential fraud on the government and in recouping some of the resulting losses. The Minnesota FCA mirrors the Federal FCA in its stated intents and purposes, but the divergence of the Minnesota FCA may result in different, less effective outcomes.

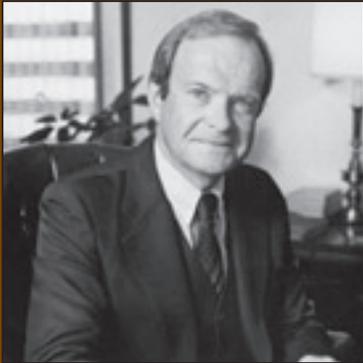
*This article is for informational purposes only and is not intended to constitute legal advice. If you intend to navigate the nuances and complexities involved with this new legislation – whether as a government contractor or a private citizen with knowledge of a potential violation – you are encouraged to seek the advice of legal counsel prior to doing so.*



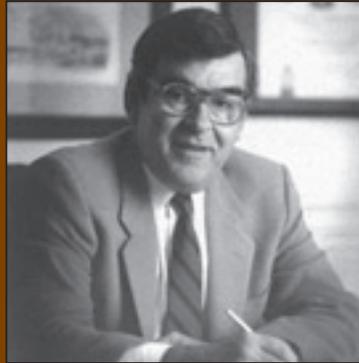


## IN MEMORIAM

*We remember our friends and leaders for their monumental contributions to our law firm, our lives, and our community.*



*Patrick F. Flaherty (1933 - 2010)*



*Michael L. Flanagan (1935 - 2010)*



*Stanley R. Stasel (1932 - 2010)*

### **Patrick F. Flaherty**

**March 2, 1933 - May 24, 2010**

Patrick F. Flaherty served in the United States Air Force as an Intelligence Officer with the 318th Fighter Interceptor Squadron. After graduating from law school, Pat practiced as a solo practitioner for a short time until joining the law firm that would one day bear his name, Van Valkenburg, Comaford, Moss, Fassett, Flaherty & Clarkson. In 1983, Pat was instrumental in merging the two law firms that exist today as Moss & Barnett. He spent the remainder of his legal career at Moss & Barnett until his retirement in 1995.

Pat was a leader in the areas of estate planning, trust administration, and litigation, serving his clients with expertise, commitment, and compassion. He was a Fellow of the American College of Trust and Estate Counsel; he co-authored *Estate Planning for Everyone* (Premier Publishing 1982); and he was noted in Naifeh and Smith's editions of *The Best Lawyers in America*.

Pat is survived by his wife of 56 years, Beverly, daughters Pady and Terri, sons Dan and David, their spouses, and many grandchildren and great grandchildren. Although Pat retired from the practice of law nearly 15 years ago, his leadership and friendship will continue to inspire us for years to come.

### **Michael L. Flanagan**

**April 1, 1935 - January 25, 2010**

Michael L. Flanagan started his career working for the Judiciary Committee of the Minnesota House of Representatives. In 1969, he joined a law firm that, through a series of mergers, became part of Moss & Barnett in 1983. Mike spent the next 15 years, until his retirement in 1998, at Moss & Barnett.

Mike spent much of his time representing the interests of clients, such as the Minnesota State Bar Association, at the Minnesota legislature. Mike's lobbying efforts resulted in an overhaul of the Probate Code, the merger of municipal and county courts into the District Courts, the creation of the Minnesota Court of Appeals, and the passage or defeat of legislation of interest to a wide range of clients.

The entire bar benefited from Mike's intimate knowledge of the legislature's activities. He prepared an annual summary of new legislation which was published in *Finance and Commerce* following the close of each legislative session. The summary was one of the legal publisher's most read features.

Mike is survived by his wife Marguerite, sons Brian and Patrick, daughter Kathleen, and their respective families. Although he retired 12 years ago, Mike retained close ties with Moss & Barnett, and he will be greatly missed.

### **Stanley R. Stasel**

**March 4, 1932 - May 26, 2010**

Stanley R. Stasel served in the United States Navy as an officer. After graduating from law school in 1960, he joined the law firm that would one day bear his name, Barnett, Ratelle, Hennessy, Vander Vort & Stasel. This firm became a part of Moss & Barnett in 1983. Stan spent the remainder of his legal career at Moss & Barnett until his retirement in 1991.

Stan served his clients in the areas of estate planning and trust and estate administration, as well as personal and business taxation. He successfully defended clients on contested tax matters before the Internal Revenue Service and handled tax litigation in the United States District Court and the United States Tax Court.

For many years, Stan chaired the Moss & Barnett Library Committee. The library was greatly expanded and modernized under Stan's leadership.

Stan was dedicated to his family and to his clients. He is survived by his daughter Steffany, sons Scott and Lance, and their respective families. Stan's contributions to Moss & Barnett have endured, and he will be fondly remembered by his colleagues.

# PROFESSIONAL *Excellence + Teamwork*

## MOSS & BARNETT CONGRATULATES ITS ATTORNEYS INCLUDED IN 2010 *SUPER LAWYERS*

***Moss & Barnett is pleased to congratulate its attorneys who were included in 2010 Super Lawyers***

- **Michael J. Bradley** - *Utilities*
- **Kevin M. Busch** - *Banking*
- **Mitchell H. Cox** - *Business/Corporate*
- **Jana Aune Deach** - *Family Law*
- **Ben M. Henschel** - *Family Law*
- **Thomas A. Keller III** - *Business/Corporate*
- **James E. O'Brien** - *Closely Held Business*
- **Charles A. Parsons, Jr.** - *Real Estate*
- **Susan C. Rhode** - *Family Law*
- **James A. Rubenstein** - *Bankruptcy & Creditor/Debtor Rights*
- **Dave F. Senger** - *Business/Corporate*
- **Thomas J. Shroyer** - *Business Litigation*
- **Curtis D. Smith** - *Construction/Surety*
- **Cass S. Weil** - *Bankruptcy & Creditor/Debtor Rights*
- **Edward L. Winer** - *Family Law*

Special congratulations to **Susan Rhode**, who is also included in the "Top 100" and "Top 50 Women" *Super Lawyers* for 2010, and to **Ed Winer**, who is also included in the "Top 100" *Super Lawyers* for 2010.

*Super Lawyers* is a leading brand in lawyer ratings for consumers. *Super Lawyers* employs a rigorous selection process – one that has been recognized by bar associations and courts across the country for its credibility and sophistication. It combines peer nominations and evaluations with third-party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis. Designation as a *Super Lawyers* is awarded annually to 5% of the licensed active lawyers in Minnesota who have attained a high degree of peer recognition and professional achievement.

***To learn more about Moss & Barnett, our attorneys, and our various practice areas, please visit our web site at [moss-barnett.com](http://moss-barnett.com).***



*Michael J. Bradley*



*Kevin M. Busch*



*Mitchell H. Cox*



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*Susan C. Rhode*



*James A. Rubenstein*



*Dave F. Senger*



*Thomas J. Shroyer*



*Curtis D. Smith*



*Cass S. Weil*



*Edward L. Winer*



**Remember to tune in to WCCO 830AM every Saturday at Noon to listen to MINNESOTA LAW, Presented by Moss & Barnett**

Each program focuses on interesting law facts, important new developments in the law, and other topical information and features a different Moss & Barnett attorney discussing his or her practice area and responding to listener questions. In addition to featuring many of our attorneys, past *MINNESOTA LAW* guests have included Susan Segal and Lois Conroy of the Minneapolis City Attorney's Office (May 1, 2010), the Honorable Joseph Klein, Judge of Hennepin County District Court (July 10, 2010), and Gerald Nissenbaum, author of *Sex, Love, and Money: Revenge and Ruin in the World of High-Stakes Divorce* (Hudson Street Press) (July 17, 2010). You can learn more about our upcoming programs and listen to any of our past broadcasts by visiting our web site at [moss-barnett.com](http://moss-barnett.com) and clicking on the *MINNESOTA LAW* icon.

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