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LITIGATION DEVELOPMENTS AFFECTING FOR-PROFIT SCHOOLS

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Key Litigation Risks For-Profit Institutions Face

- False Claims Act
 - Qui Tam (“Whistleblower”) claims.
- Claims by former employees relating to compensation and other terms of employment.

Key Litigation Risks For-Profit Institutions Face

- Common Law Unfair and Deceptive Trade Practices Claims:
 - Claims involving alleged misrepresentation and non-disclosures.
 - Quality of the programs.
 - Value of the education certification and qualification of the instructors.
 - Transferability of academic credits.
 - Competitiveness of admissions process.
 - Preparedness of students to take certification exams.
 - Type of degree or certificate awarded.
 - Placement statistics.
 - Starting salaries after graduation.

Key Litigation Risks For-Profit Institutions Face

- Claims alleging fraudulent inducement to enroll in an institution.
- Failure to comply with state education codes.
- Other common law claims:
 - Breach of contract.
 - Common law negligence.
 - Negligent misrepresentation.
 - Fraud.
 - Breach of implied covenant of good faith and fair dealing.

Types of Litigation For-Profit Institutions Face

■ FTC Holder Rule

- Requires all consumer defenses to be preserved against subsequent holders of a loan.
- Suits typically name lenders and schools as seller of services.

■ Regulatory Risks

- Policies and procedures for calculation and return of Title IV Funds.
- Incentive compensation rules.
- Relationship with student lenders.

Reducing Litigation Risk

- Disclaimers in Enrollment Agreements.
 - No guarantee of employment or compensation levels.
 - Use integration clause to eliminate reliance on oral statements.
 - Clearly explain refund policy.

Reducing Litigation Risks

- Focus on Student Complaints.
 - Provide process for receiving complaints.
 - Consider use of anonymous hotlines.
 - Investigate and analyze all complaints-pay attention to patterns.
 - Respond to all complaints.
 - Take appropriate action.

Reducing Litigation Risks

- Get Control of Your Documents.
 - Implement an e-mail retention program.
 - Train executives on proper use of e-mails and risk in litigation.
 - Focus on auto-delete policies and treatment of back-up tapes.

Reducing Litigation Risks

- Use Compliance Program to Assess Litigation Risks.
 - Catalog the laws that govern your business and lead to legal claims.
 - Follow industry trends and legal proceedings in industry.
 - Update compliance program to deal with new and emerging risks.
 - Identify the 20 percent of legal issues that generate 80% of your legal costs.

Arbitration Clauses in Enrollment Agreements

- Arbitration can reduce legal risk.
 - Lower legal costs.
 - Less intrusive discovery.
 - Confidentiality of proceedings.
 - Quicker decisions.

Arbitration Clauses in Enrollment Agreements

- Mandatory Arbitration is a hot button for consumer activists-can be controversial.
- Enforceability of Arbitration Clauses.
 - Properly drafted clauses enforced.
 - Recent decision in High-Tech Institute class action.
 - May be able to preclude class actions.
- Enforceability depends on state law and how clause is drafted.
 - Amex case in Second Circuit voiding class action waiver.
 - Education Finance Partners case-applying California law to void arbitration clause.
 - Enforcement attempt by non-signatory school-Microskills case.

Arbitration Clauses in Enrollment Agreements

- Drafting an Enforceable and Effective Arbitration Clause.
 - Clearly state what is covered by clause.
 - State that disputes over scope of arbitration clause must be decided by arbitrator.
 - Consider paying certain arbitration costs of consumer up to a reasonable cap to avoid contract of adhesion claims.
 - Consider allowing consumer to opt out of arbitration clause in limited time frame after signing enrollment agreement.
 - Provide for fee shifting in frivolous cases to protect against abusive claims.
 - Consider choice of law and whether there is reasonable basis for choosing a particular state law.
 - Specify qualifications and number of arbitrators.
 - Describe discovery process.

Arbitration Clauses in Enrollment Agreements

- Choice of Arbitration Forums-Pros and Cons
 - JAMS
 - American Arbitration Association
 - NAF

Reducing Costs and Exposure in Litigation

- New federal rules require company to commit resources at start of case to get handle on facts and documents, including electronic documents.
- Devise a discovery strategy for electronic documents at start of case to get handle on facts and documents.
 - Be prepared for meet and confer conference with proposals for E-discovery.
 - Avoid electronic discovery missteps and spoliation claims, e.g., Morgan Stanley.
 - Legal Holds.
 - Suspending auto-delete of electronic documents.
 - Treatment of back-up tapes.
 - Companies must understand where their documents are stored; how backup tapes are preserved and how to identify and preserve relevant documents to contain exposure and cost of litigation.

Reducing Costs and Exposure in Litigation

- Once you have been sued, identify what is at stake for the company and the other parties.
- Determine whether case has high risk of potential damage in public relations area even if case is defensible.
- Recognize that some cases have to be litigated even if costs of litigating exceeds exposure in that case.
- Don't litigate in a vacuum: involve public relations group and if public company, consider disclosure and reserve issues.
- Clearly identify role of in-house attorney; business lead and outside attorney; don't turn the case over carte blanche to outside attorney.

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Robert S. Lavet

Rob Lavet joined PPSV's Education Practice Group in 2008 as a Principal. Mr. Lavet counsels schools and financial institutions on a wide range of transactions, litigation and regulatory compliance matters, as well as the resolution of audits and government investigations. Prior to joining the firm, he was General Counsel to SLM Corporation (Sallie Mae). At Sallie Mae, Mr. Lavet managed the Legal, Corporate Compliance and Student Loan Servicing Policy functions. He regularly advised board members and senior management on securities disclosures and corporate debt offerings; oversaw significant litigation and regulatory matters; led due diligence on numerous acquisitions and transactions; and integrated legal teams of acquired businesses in multiple locations. He and his team of attorneys took on leadership roles in postsecondary education as they developed strategies to address the emerging array of regulatory, legislative, corporate, and transactional challenges facing the nation's student loan programs. He successfully litigated the only federal court case involving the Department of Education's attempted application of the prohibited inducement section of the Higher Education Act to a lender.

Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney in the Civil Division of the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn, where he specialized in complex commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia. He served as a past President of the Washington Metropolitan Area Corporate Counsel Association and as a member of the Board of Directors of the Association of Corporate Counsel.



Mr. Lavet graduated with honors from the University of Pennsylvania in 1976 and received his law degree with honors, from Georgetown University Law Center in 1979. He was named one of Washington D.C.'s top lawyers, General Counsel category, by the Washington Business Journal in 2007.

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Thomas Hylden

Thomas Hylden, a principal in the firm, has been practicing law in Washington since receiving his degree. Mr. Hylden's background is primarily as a litigation and trial lawyer, with principal involvement in private commercial litigation and civil and criminal litigation against the United States. In addition, as a result of several noteworthy litigation successes under the Higher Education Act, he has developed a substantial practice representing clients in the higher education community in federal and state regulatory and compliance matters, regulatory aspects of education investments, mergers, and acquisitions, and educational accreditation.

Mr. Hylden's education practice extends to all aspects of the educational regulatory environment, including regulatory compliance generally, regulatory advice and representation in connection with mergers, acquisitions and securities underwritings, program review and Inspector General audit resolution, accreditation and credentialing proceedings and appeals, and regulatory litigation. Mr. Hylden's clients include public and non-profit educational institutions, publicly traded and privately held for-profit institutions, trade associations, and strategic and financial investors. He represents clients before the United States Department of Education, various state agencies, accrediting and credentialing agencies, and the federal and state courts.

Mr. Hylden's litigation practice includes general commercial and federal program litigation for health care, education, and other clients of the firm, and the representation of individuals and corporations in connection with administrative and Inspector General investigations, Congressional investigations, grand jury and independent counsel investigations, and False Claims Act and white collar criminal defense litigation. He has been successful lead counsel in numerous reported and unreported matters in the federal and state courts.

Mr. Hylden has been admitted to practice before various federal district and appellate courts. He is a member of the Section of Litigation, the Criminal Justice Section, White Collar Crime Committee, and the Administrative Law Section of the American Bar Association.

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J. Devitt Kramer

Since 2006, J. Devitt Kramer has served as the Senior Vice President, General Counsel and Secretary of Pittsburgh-based Education Management Corporation (EDMC) (www.edmc.com), one of the largest providers of post-secondary education in North America, with approximately 110,800 enrolled students as of October 2008. Mr. Kramer joined EDMC in 2004 as Vice President and Senior Corporate Counsel. In his role as General Counsel, Mr. Kramer oversees all litigation matters for EDMC's 89 post-secondary institutions located in 28 states and Canada. EDMC educational institutions include The Art Institutes, Argosy University, Brown Mackie College and South University.

Prior joining EDMC, Mr. Kramer served as the General Counsel of Printcafe Software, Inc. (2000-2004) and as an associate at the law firm of Benesch, Friedlander, Coplan & Aronoff in Cleveland, Ohio (1994-1999). Mr. Kramer was employed as an auditor for the accounting firm of Ernst & Young LLP prior to attending law school.

Mr. Kramer earned a Juris Doctor degree from the Case Western Reserve University School of Law (*cum laude*), and holds a Bachelor of Science degree in Accounting from Miami University. He is admitted to practice law in the Commonwealth of Pennsylvania and has met all requirements of the CPA licensure examination in the State of Illinois. Devitt, his wife Julia, and their two sons reside in Pittsburgh, PA.