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**LAPP, LIBRA,  
THOMSON, STOEBNER  
& PUSCH, CHARTERED**

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**Newsletter: Spring 2008**

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**Dear Friends:**

This Newsletter will update you about our Firm, the legal services we provide, our attorneys, and certain developments in the law that you may find interesting.

**Our Firm:** Lapp, Libra, Thomson, Stoebner & Pusch, Chartered provides thoughtful and careful solutions for our clients' diverse legal needs. We are grateful for the opportunity to serve our clients, and we work hard to use our legal experience and knowledge on their behalf. Please call us if we can help with any of your legal issues.

**Meet Julia Christians:** Julia practices in the bankruptcy law and financial reorganization areas.



She is a member of the Panel of Private Bankruptcy Trustees for the United States Bankruptcy Court for the District of Minnesota. Julia is admitted to practice before the United States Supreme Court, the Eighth Circuit Court of Appeals and the state and federal courts of Minnesota.

Julia is a past chair of the Debtor/Creditor Remedies Committee of the Hennepin County Bar Association and is a member of the Bankruptcy Section of the Minnesota State Bar Association. She graduated cum laude from Sioux Falls College and received her J.D. from the University of Minnesota Law School.

Julia has lectured at numerous continuing legal education seminars on topics involving creditors' rights and bankruptcy law. She has been named a Super Lawyer by Minnesota Law and Politics magazine.

**Appellate Law Group:** We are successful litigators in the trial courts, and as a result of our track record, we often find ourselves representing the prevailing party in an appeal by the losing party. In other cases, lawyers who have lost in the trial court may refer the matter to us for appeal, relying on our experience and skill to obtain a reversal on appeal.

We have litigators admitted in all appellate courts, including the United States Supreme Court, the Eighth Circuit Court of Appeals, the Bankruptcy Appellate Panel of the Eighth Circuit and the Minnesota Supreme Court and the Minnesota Court of Appeals. Our appellate briefs are written by senior members of the firm, who commit themselves to crafting persuasive, well-supported arguments. Most often, the firm member who writes the brief will also undertake the oral argument

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phase of the appeal. This continuity, we believe, is a key and cost-effective element of our success on behalf of clients in the appeal courts.

Bankruptcy appeals are very fast moving and are an area in which our bankruptcy litigation lawyers excel. Creditors, banks, bankruptcy trustees, and even other bankruptcy law firms rely on our confidence and ability as experienced bankruptcy appellate attorneys. They know that we regularly win appeals.

Lawyers in the appellate practice group include Richard Thomson, John Stoebner, Ralph Mitchell, Amy Schwartz and Tyler Candee.

If you are a party to an appeal or are contemplating an appeal, please call us at (612) 338-5815.

### **Secured Lender Alert:**

Julia Christians, in her capacity as bankruptcy trustee, has recently prevailed on appeal in a case important to mortgage lenders. In a decision of the U.S. District Court *In re Nedegaard*, announced on February 29, 2008, a borrower obtained a loan of \$670,000 from a lender. The borrower intended to secure the loan by a mortgage on real estate. The proceeds of the loan were used to retire two prior mortgages. Satisfactions of the two prior mortgages were recorded with the county recorder, but the new mortgage was not recorded for more than three months. Before the mortgage was recorded, an involuntary bankruptcy was filed against the borrower and Julia was appointed trustee. The lender finally recorded the mortgage more than two months after the bankruptcy was filed. Invoking the trustee's "strong arm" power as a hypothetical bona fide purchaser, Julia argued that the mortgage was void because it was recorded after the bankruptcy petition was filed. The trustee had no actual knowledge of the unrecorded mortgage or of the two satisfactions. The lender correctly claimed that the trustee was charged with "constructive notice" of the two mortgage satisfactions because these instruments appeared of record. But the lender extrapolated that the trustee should further be charged with "inquiry notice" (a duty to inquire) that a replacement (unrecorded) mortgage may exist because two former mortgages had been paid off. The court disagreed with the lender and held that under Minnesota law, inquiry notice must be based on *actual knowledge* of circumstances and cannot be based on constructive notice. The court awarded the real estate to the trustee free of the mortgage. The lesson (a \$670,000 lesson in this case!) is not new but it is apparently *still* not learned. Lenders, get those mortgages recorded ASAP or you may end up as an unsecured creditor.

### **Avoiding Subleasing Problems:**

By David A. Libra

During an economic downturn, the amount of office space available for sublease increases due to layoffs, relocation or "right-sizing" an office, reductions in workstation sizing, and other efficiencies in utilizing space. While tenants are happy to recoup a portion of their space costs and subtenants are thrilled to get a great economic deal, landlords may be unhappy to find themselves in

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competition with their own tenants. All parties to a sublease transaction need to recognize the legal and business complexity that comes with the economic benefits of a sublease.

A sublease creates a complex legal relationship that involves layers of responsibility rather than the transfer of responsibilities (as would be the case with an assignment). Legally, there is no direct contractual relationship between the landlord and the subtenant, so a three-way dialogue becomes difficult between the subtenant, tenant, and landlord. The sublease often incorporates only selective terms from the tenant's lease, and the subtenant has no direct right to require any services from the landlord. Unlike an assignment, a sublease normally does not permit the subtenant to exercise any renewal or expansion rights. The parties need to assure that the complexities of the sublease relationship are properly reflected in the sublease document.

The terms of the lease governing subleasing need to be carefully reviewed by all parties. Most commercial leases require the landlord's consent to any sublease and may contain a landlord recapture right. The subtenant should review the lease provisions on the time period for reviewing a proposed sublease, insurance requirements, and responsibility for the landlord's attorneys' fees. The landlord's form consent should be obtained and reviewed to avoid unpleasant later surprises. It is prudent for the subtenant to obtain the landlord's cooperation and allay any concerns before beginning the sublease process. Sublease negotiations often have short time frames, and any delays in the drafting or approval process can kill a favorable deal.

In negotiating a sublease, the tenant's financial condition is often a primary issue for all parties. For a strong tenant, the subleasing of excess space often goes smoothly. When the tenant is in financial distress, however, all parties need to carefully assess their rights in the event of a tenant default or bankruptcy. The landlord and tenant should consider the alternative of a negotiated lease termination. The subtenant should explore the possibility of obtaining a recognition and non-disturbance agreement from the landlord.

Due to the complexities of subleasing transactions, we recommend that you consult with our office before and during any sublease negotiations. Our experienced real estate attorneys can help you avoid unnecessary costs and delays.

### **Bankruptcies on the Increase:**

The American Bankruptcy Institute announced on April 2 that consumer bankruptcy filings increased by 27% in the first quarter of 2008 compared with the same quarter of 2007. Consumer filings for 2007 were up nearly 40% over 2006. Chapter 11 business reorganization filings increased 25% in 2007. But if you include businesses that liquidated through a Chapter 7 filing, the 2007 increase is a whopping 43% in 2007 according to AACER, a private company that tracks bankruptcy filings. With the residential real estate development and construction industry in Minnesota at a virtual standstill and unsold inventories at record levels, we could see further increases in business failures in Minnesota especially in construction and development related industries.

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## Announcements:

- The Firm welcomes **Tyler D. Candee**. Tyler comes to the Firm's litigation and bankruptcy practice as an associate from Faegre & Benson, LLP. During law school, Tyler clerked for Gingras, Cates & Luebke, S.C. and the U.S. Attorney's Office, both in Madison, Wisconsin. Before beginning his legal career, Tyler was the Marketing and Sales Director for Avenet, LLC, the nation's leading provider of web sites to local governments and political campaigns. Tyler also has served as a Legislative Assistant to Senator Byron Dorgan (D-ND). Tyler received his J.D. from the University of Wisconsin (2006), cum laude, Order of the Coif and his B.A. from the University of Minnesota - Twin Cities (1998).
  - The Firm is happy to announce that **Amy Schwartz** was named to the "2008 Rising Stars" list by *Minnesota Law and Politics*. *Minnesota Law & Politics* recognizes Rising Stars as a way to highlight emerging attorneys who have demonstrated superior professional potential. Only 2.5 percent of Minnesota attorneys are given this honor. The selection process involves a survey of all Minnesota Super Lawyers and independent research to identify outstanding up-and-coming attorneys.
  - **Bill Lapp** (*Business & Corporate, Mergers & Acquisitions*), **Dave Libra** (*Real Estate, Business & Corporate, Estate Planning & Probate*), **Dick Thomson** (*Business Litigation, Employment & Labor*), **John Stoebner** (*Bankruptcy & Creditor/Debtor Rights, Real Estate*), and **Ralph Mitchell** (*Bankruptcy & Creditor/Debtor Rights*) were recently named as "Super Lawyers" by *Minnesota Law & Politics*, *Twin City Business* and *Mpls/St. Paul Magazine*. Only five percent of Minnesota lawyers receive this annual designation, which is based on peer recognition and professional achievement.
  - **Dick Thomson** was also named to the national list of "Super Lawyers" in the business litigation field in the premiere edition of 2008 *Super Lawyers Corporate Counsel Edition*. This publication identifies outstanding business litigation attorneys across the country through a detailed research process of peer recognition and professional achievement.
  - **Dave Libra** recently participated in a presentation sponsored by the Minneapolis Building Owners and Managers Association (BOMA) on **Tenant Leases in Bankruptcy** covering the rights and remedies of landlords and tenants in bankruptcy proceedings and practical lease drafting tips. Dave is a Minnesota State Bar Association Board Certified Real Property Law Specialist and he regularly represents both landlords and tenants in negotiating, drafting and reviewing commercial leases and related documents.
  - **Ralph V. Mitchell** recently participated in a roundtable for the Independent Community Bankers of Minnesota on *Problem Loan Strategies*. The presentation contained a
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refresher course in the legal rights and remedies of secured lenders. It also provided practical advice for workouts of problem loans.

Ralph has also been appointed to represent the Committee of Unsecured Creditors in the Izatys Group, LLC Chapter 11 bankruptcy case. The debtor owns Izatys Resort on the shores of Lake Mille Lacs.

- **Robert L. Richert** recently participated in the presentation of the *Oddities and Challenges in Probate Law* seminar sponsored by the National Business Institute. Rob's presentation addressed the challenges of dealing with claimants and creditors of a deceased person's estate as well as how to manage distributions from the estate to beneficiaries.

On April 24, 2008, Rob will be participating in the presentation of a seminar titled *Real Estate Closings A-Z: Navigate Your Closings with Confidence*, which is sponsored by the National Business Institute. As part of the seminar, Rob will discuss various issues relating to real estate transactions and closings.

#### Our Attorneys:

William S. Lapp  
David A. Libra \*  
Richard T. Thomson  
John R. Stoebner \*  
Gregory D. Pusch  
Julia A. Christians

Ralph V. Mitchell  
Robert L. Richert +  
Amy L. Schwartz  
Tyler D. Candee +

\* Minnesota State Bar Association Board  
Certified Real Property Specialist  
+ Also licensed in Wisconsin

We strive to provide you with "Excellent, Efficient and Economical" legal services. Thank you for your confidence in trusting us with your important legal matters in the past. We also appreciate your referrals of friends and relatives to our Firm. If we can be of assistance on any legal matter, please contact us.

If you have any comments on our Newsletter or want to change your address, to receive our Newsletter by e-mail, to add anyone to our Newsletter list, or to be deleted from our Newsletter list, please e-mail us at: [receptionist@lapplibra.com](mailto:receptionist@lapplibra.com).

**Best Regards,  
Ralph Mitchell**

This Newsletter is published to inform our clients and other readers about our law firm and legal developments. The information in this Newsletter is only a general summary and is not intended, and should not be relied upon, as legal advice. If you have any questions, please contact one of our attorneys at 612-338-5815.

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BANKRUPTCY  
BUSINESS & CORPORATE  
COMMERCIAL LITIGATION  
EMPLOYMENT

REAL ESTATE  
SECURITIES  
TAX LAW  
WILLS, TRUSTS & PROBATE

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