

LEGAL EASE

GROWTH INDUSTRY

Smith Haughey's agribusiness team helps clients take full advantage of the opportunities available in Michigan's fastest growing economic sector.

The agriculture industry in Michigan is booming.

According to the Michigan Department of Agriculture, the agribusiness industry contributes \$64 billion to the state's economy every year and employs one million Michigan residents – that's nearly 25 percent of people working in the state! What's more, this industry is continuing to grow.

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SMITH HAUGHEY
RICE & ROEGGE

*Guiding you through
the legal process.*

FALL 2009

LANDOWNER'S GUIDE TO CELL TOWER LEASES

By Joe Belsito, Attorney

Here's what to do when a cell phone company comes calling.

An unlikely combatant has emerged in the modern-day battle for high ground: the cellular phone company. In the past six months, several clients have asked Smith Haughey to review "cell tower leases." Cell tower leases are making a comeback as we move from 3G to 3GS wireless networks and as additional cellular telephone companies vie for a portion of the market.

Cell phone companies typically approach landowners with a form cell tower lease. It should come as no surprise that the cell phone company has not drafted this form lease in the landowner's favor. The tenant (in this case, the cell phone company) intends to maximize the landowner's obligations and minimize the landowner's revenue (i.e., rent).

Furthermore, most landowners underestimate both their leverage and the cell phone company's desire to use their land. Cell phone companies typically look for high ground. Therefore, property on the top of a hill, the tallest building in the area, and a church spire all offer ideal locations for a cell tower. Flat, barrier-free areas that provide easy access are also ideal.

When negotiating a cell tower lease, consider the following:

- Local ordinances and municipalities may require permits for construction of the cell tower or for the use of the property for such purposes. The landowners may even need to obtain a variance – in which case, the landowner will want to obligate the cell phone company to bear the burden of obtaining the necessary permits and exemptions.
- The term of a typical cell tower lease runs anywhere from 20 to 25 years. The longer the lease, the more important it is to consider a rent increase mechanism over the course of the lease term.
- Rent payments vary and depend in large part upon the size of the property, the demand for signal coverage in the area, and the availability of alternative locations. Fair market values of similar properties with cell tower leases may provide important support for a landowner's lease rate. Also, reservations for any "co-location" on the cell tower (i.e., use of the tower by other cell phone companies) may be important to the landowner's bottom line.
- The cell phone company usually wants the right to unilaterally terminate the lease. Depending upon the

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REACHING FOR A SAFETY NET

HAVE YOU WORKED HARD YOUR ENTIRE LIFE ONLY TO EXPERIENCE PHYSICAL OR EMOTIONAL CHALLENGES THAT MAKE IT DIFFICULT TO OBTAIN OR MAINTAIN EMPLOYMENT?

By: Beth Kromer, Attorney

Sometimes life changes in the blink of an eye. Other times, changes occur slowly with the passage of time. If someone finds they are unable to obtain or maintain employment due to a recent injury, diagnosis or condition – or as a result of a lifetime of living and accumulating a combination of conditions – he or she may be entitled to receive Social Security Disability benefits.

Social Security benefits are essentially “insurance benefits” provided by the federal government. Benefits are based on an individual’s earnings. Eligibility (calculated on the number of yearly quarters an individual has worked) differs depending if one is disabled before or after age 31. Assuming that the basic eligibility requirements have been met by paying into the system, the Social Security Act (SSA) provides for benefits if an individual meets its definition of disability.

The SSA defines disability as, “The inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than 12 months....”

An impairment will only be considered to be severe if the individual is “not only unable to do his previous work, but cannot, considering his or her age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy...”

Each aspect of this definition is important, and each imposes a requirement that must be met to qualify as disabled.

The SSA sets forth a five-step sequential evaluation process by which all disability claims are judged. To determine whether an individual is entitled to benefits, the following questions must be answered:

1)Is he/she working? If he or she is doing work that is considered “substantial gainful activity,” they are not entitled to benefits. Substantial gainful activity is activity that pays more than a specified dollar amount (\$980 per month in 2008), which is updated each year and is somewhat higher for persons with specific disabilities (i.e. blindness).

2)Is his/her impairment severe?

An impairment or combination of impairments is severe if it significantly limits an individual’s physical and/or mental ability

to do basic work activities. The combined impact of multiple impairments will be examined, even if those impairments taken individually would not be disabling.

3)Is his/her severe impairment listed in at least one of the Social Security regulations? If the answer is yes, then the Social Security Administration will find disability without considering vocational factors such as age, education, and work experience.

4)If he/she does not have a listed impairment, can they still do their past “relevant” work (work done in the last 15 years)? This involves an analysis of their residual functional capacity. Residual functional capacity is defined as the most you can still do despite your limitations. To make decisions, the Social Security Administration uses a chart that makes assumptions about medical conditions and jobs. It is generally easier to establish disability after age 49.

5)If he/she cannot do their past relevant work, based on their residual functional capacity and their age, education and work experience, can they make an adjustment to do other work?

The burden of proof on this step, unlike the others, is on the federal government.

We at Smith Haughey Rice & Roegge have the proficiency to guide you through the Social Security guidelines and effectively gather the medical and vocational evidence to present to the Social Security Administration. If you think you may qualify for Social Security benefits, contact us to discuss the specifics of your situation and how we can assist you in your claim for benefits. Attorney fees are only paid if there has been a successful award of Social Security Disability benefits.

Beth can be reached directly at bkromer@shrr.com or 616.458.1338.

Smith Haughey Welcomes New Client: JetCo

Smith Haughey welcomes new client JetCo Solutions. JetCo is a business development and marketing company that specializes in targeting government buyers at all levels – local, state and federal. JetCo converts bids to contracts by walking clients through the bid process.



- Government has great access points at all levels – local, regional, state and federal.
- Government buys from diverse companies of all sizes.

However, selling to the government is not for the half-hearted or the impatient, nor is it ideal for a company looking for quick contract wins in order to stay afloat. Executives looking to add local, state or federal government agencies as customers must first decide if they are ready to make a full-time commitment to this new audience. The shape this commitment takes depends on the unique situation for each prospective government vendor – some invest in a full-time government sales division, and some outsource government sales and

marketing to a qualified firm that specializes in government sales. Successful government contractors share one commonality – they make a full-time commitment. Companies that just dabble in government sales tend to become frustrated by the obstacles and lack of success.

JetCo recommends developing and executing a comprehensive sales and marketing plan that integrates and complements a company's business goals. An honest and candid assessment of government sales potential is essential.

There are many reasons to consider government contracting:

- Government pays promptly – typically within 30 days.
- Government buys trillions of dollars worth of goods and services.
- Government buys everything from saplings to buildings, from technology to welding equipment.

For more information, contact Sue Schweim Tellier by phone at (616) 656-0015 or by e-mail at stellier@jetcosolutions.com.

WHERE ARE THEY NOW?

This is the first in an ongoing series of articles about former Smith Haughey attorneys who have gone on to stellar careers in private and governmental sectors. We like to think their success is a reflection on us. But regardless, we are proud of their accomplishments and feel lucky to know them.

Lieutenant Colonel Joe Rossi

Joe Rossi's path as an attorney has taken him from being a student at Notre Dame Law School to an attorney at Smith Haughey Rice & Roegge to Assistant U.S. Attorney at the U.S. Attorney's Office Western District of Michigan. Throughout it all, he has also served as a member of the Marine Corps Reserve.

Joe first joined Smith Haughey in 1994 as a summer clerk. Upon graduation from law school, he returned to Smith Haughey in 1995 as an attorney. Over the next seven years, he focused his practice on governmental and employment litigation.

"My experience and training at Smith Haughey really shaped the way that I have

practiced law since then," says Joe. "Working with Smith Haughey shareholders like Tom Weibel, Chip Behler, Jack O'Loughlin, Bob Stone, and Tom Blackwell, I learned how to practice law fairly but vigorously. I have always appreciated the lessons I learned at Smith Haughey."

In 2002, Joe was offered and accepted the opportunity to join the U.S. Attorney's Office Western District of Michigan where he continues to serve today.

Joe's time in this position has been punctuated by his work in the Marine Corps Reserve. Lt. Col. Rossi was called up twice – in 2003 and in 2006 – each for one-year stints, which he served as Commander of the Marine Corps Reserve unit in Grand Rapids. In this role, his responsibilities

included media relations, family support, and casualty notification.

Back at the U.S. Attorney's Office, Joe is the Affirmative Civil Enforcement (ACE) coordinator. In this position, he is responsible for all civil suits with regards to money taken from the U.S. government by fraud, including health care fraud, government contracting fraud, and fraud against other government programs – such as the Department of Agriculture and the U.S. Postal Service.

When not serving his country in either the U.S. Attorney's Office or the Marine Corp Reserve, Joe enjoys spending time with his family, which includes eight children ranging in age from one to 18. "I do it all," he says. "I do everything from helping with college applications to changing diapers."

raisingthebar: Recent SHRR Achievements

Space does not allow publication of every success we achieve on behalf of our clients – but in each issue, we’ll spotlight some of our more noteworthy accomplishments:



Cheryl Chandler successfully defended physicians in two recent medical malpractice trials. In the first trial, she represented a gastroenterologist in Oakland County. In the second trial, she defended an internist in Wayne County.



Pat Geary, Dale Hebert, and Kristen Ray achieved a significant result for our client, a retail grocer, in a case brought against it by the receiver for

insurance in the U.S. District Court for the Eastern District of Michigan. We moved to dismiss or to transfer venue to the Western District, arguing that venue was improper in the Eastern District. The Court agreed and ordered the case transferred to the Western District.



Mark Gilchrist and **Matt Wikander** successfully represented a minor who was injured in an automobile accident. In a trial for damages, the jury awarded substantial damages to our client, to which the Court added interest and costs.



Bill Henn, Craig Neckers, and Mark Gilchrist successfully represented our client, a divorce attorney, in a legal malpractice case that went before the Court of Appeals.



Craig Noland and **Bill Henn** successfully represented our township client in a case before the Court of Appeals. In this case, the plaintiff property owner claimed that the “vibrations” from sewer construction activities along the road right of way caused structural damage and rendered the building “unsafe.” The plaintiff attempted to avoid a governmental immunity defense by claiming a “taking” without just compensation. The trial court denied our motion for summary disposition as to the taking claim, but the Court of Appeals held that plaintiff’s claims did not constitute a taking, and that the case against the township should be dismissed.

In a case handled by **Craig Noland** in the trial court and **Bill Henn** in the appellate court, we represented a township that was sued by dozens of plaintiffs whose homes had been damaged by a severe flood of the Grand River. The defendant township, as a matter of public safety, suspended occupancy permits for the damaged houses. The plaintiffs argued that the government had wrongfully taken their property without just compensation by the suspension of their occupancy permits,

and also by the imposition of certain building code requirements relating to structures in flood zones. The Circuit Court denied summary disposition for the defendants, but the Court of Appeals reversed, ordering that all claims be dismissed.



On behalf of their client, **Craig Noland** and **Todd Millar** obtained dismissal of a complaint by property owners that denial of zoning requests for a special use permit violated their constitutional rights.



In a six-day trial in Muskegon County, **Paul Oleniczak** successfully defended a general surgeon in a medical malpractice case.



Jason Sebolt was successful in obtaining summary disposition for a hospital client. In this case, the plaintiff had claimed that the hospital

was legally responsible for the actions of an independent contractor physician through the legal doctrine of ostensible agency. The Court disagreed and dismissed the case.



Steve Stawski is providing contract review and negotiation services for engineers and contractors specializing in energy efficient designs and applications. For

example, he is providing counsel to an electrical subcontractor client that is connecting utility-scale turbines to the grid at the largest utility-scale wind farms in Michigan, and a mechanical contractor that is retrofitting a number of schools with energy efficient systems.

GROWTH *from page 1*



Jason Thompson and Mike Lewis were successful in representing a semi-trailer leasing company that repossessed a trailer and its contents from the plaintiff's ex-wife's home because the plaintiff had not completed payment for the purchase of it. When the plaintiff learned the contents of the trailer were stolen, he tried to prosecute his ex-wife for theft. When this failed, he sued our client for tens of thousands of dollars in district court for conversion. Jason and Mike successfully obtained a verdict for just \$3,200.



Matt Wikander and Shawn Worden were successful in a trial in Barry County Circuit Court in which they represented a motorcycle driver who suffered a permanent shoulder injury in a non-contact car/motorcycle accident. While the driver of the car denied crossing the centerline, Matt and Shawn presented overwhelming evidence to the contrary and were able to prove to the court that she did in fact cross the centerline which then caused our client, the motorcycle driver in the other lane, to be forced off the road. As a result, the jury found the defendant to be negligent

The agribusiness team of attorneys at Smith Haughey has a long history of representing individuals and businesses engaged in all manner of agricultural operations throughout this state. Michigan is the second most agriculturally diverse state in the country, and our experience representing those in the agribusiness industry is just as diverse. We serve a wide variety of clients, including local farmers, international distributors, food processors, supermarkets, dairies, vineyards, agricultural trade associations, and agricultural research institutions.

Our clients rely on us for knowledgeable, proactive counsel on ever-changing regulatory matters, including environmental, labor and employment, product labeling, product recalls, food liability issues, land use, water and mineral rights, and interstate transportation.

Our agribusiness team consists of lawyers – including those who also are an economist, biologist, and small farm owner – who help clients with general business issues such as financing, corporate entity formation, lease and contract preparation, estate and tax planning, workers' compensation, government relations, e-commerce, insurance coverage, environmental issues, and litigation.

We are well equipped to assist every level of agribusiness operation, from small farmers

who are facing more sophisticated legal issues than ever before, to corporations that wrestle with the complexities of international distribution.

Our agribusiness attorneys are also called upon to help owners of family farms and vineyards launch agri-tourism (or value-added agriculture) operations. Whether a farmer wants to offer a corn maze in the fall or a vineyard owner seeks a liquor license for an on-site tasting room, we have the experience and insight to smooth the way.

We are also pleased to assist farmers and other landowners with another emerging business issue: the granting of their wind and solar rights to third parties. Our renewable energy team of attorneys has provided invaluable counsel to land owners venturing into this arena.

Smith Haughey's agribusiness team is an accessible, efficient, economical legal resource for the rapidly expanding agricultural community in Michigan.

To learn more about how Smith Haughey's agribusiness team can help you and your business, please contact the chair of the team, Jon Vander Ploeg, at 616.458.1365 or jvanderploeg@shrr.com.



Have You Heard The News?



George Bearup spoke on the topic of estate planning at the Northern Michigan Legal Institute, sponsored by the State Bar of Michigan.



Dave DeGraw was elected vice chairperson of the Workers' Compensation Section of the State Bar of Michigan.



Chris Genter gave a presentation titled, "Legal Consent and Surrogate Decision Makers in Michigan" at a webinar sponsored by MPIE.



Bill Jack was named the recipient of the 2009 Respected Advocate Award, presented by the Michigan Association for Justice.

Smith Haughey's **Health Law** department recently presented two webinars. In June, **Veronica Marsich** and **Maria Saez**



presented a webinar about the HIPAA-related provisions in the HITECH



Act. In August, **Adil Daudi** presented a webinar about Section 111 of the Medicare, Medicaid, SCHIP Extension Act.



Tom McCarthy spoke at a seminar sponsored by the Institute of Continuing Legal Education. The seminar was called "Winning Civil

Cases With Expert Testimony," and Tom's presentation was titled, "The Economic Loss Expert."



Brian Molde and **Jason Sebolt** gave a presentation on charting issues and

informed consent issues to office managers from a local physician's group.



Larry Mulligan, Paul VanOostenburg, Joe Engel, and summer associate **Lindsay Weber** volunteered at the Stand Down for homeless veterans in Grand Rapids.



Robert Stone recently gave a presentation entitled "Employment Legislation Update: What's New and What's on the Horizon" to the MARO Employment &

Training Association Spring Leadership Conference in Traverse City, and to the Michigan Council of the Society for Human Resource Management Quarterly Meeting at Grand Traverse Resort.



Client Services Director **Lisa Young** was elected secretary of the board of the American Marketing Association of West Michigan.

The **Diversity Committee** at Smith Haughey recently established a new internship program with Hope College. Each semester, one Hope student who has demonstrated an interest in pursuing a career in the legal field will be selected to serve as an intern in the Grand Rapids office of Smith Haughey. The purpose of the program is to reach out to students of color at the undergraduate level and



assist them in achieving their goal of attending law school and becoming attorneys. Hope student **Rocio Ibarra** joined the firm in September as the first intern in this program.

Smith Haughey Becomes First Michigan Law Firm to be a Member of Elite Healthcare Law Program

Smith Haughey continues to maintain its national reputation as a leader in the area of health care law by recently becoming one of the first firms to join the elite Healthcare Law Roundtable organization of The Advisory Board Company, a hospital research and consulting company. Smith Haughey is the only Michigan law firm represented within the organization.

Benchmark Litigation

Smith Haughey has been selected by *Benchmark Litigation 2010* as having one of the leading litigation practices in Michigan. Benchmark has also selected the following six attorneys from Smith Haughey as "litigation



stars" in Michigan: **Chip Behler, Mark Bickel, Tom McCarthy, Todd Millar, Jack Oostema, and Ed Stein.** *Benchmark* is a national publication that describes itself as "the definitive guide to America's leading business litigation firms and attorneys." Smith Haughey submitted to an extensive research process, which included an evaluation of recent case successes, personal interviews, and client referrals, to be considered for inclusion in this prestigious publication.

Best Lawyers

Smith Haughey has been selected as #1 in 12 categories listed in the 2010 edition of *The Best Lawyers in America*. For each of these categories, Smith Haughey has more attorneys listed in *Best Lawyers* than any other law firm:

- #1 in Michigan in legal malpractice law
- #1 in Michigan in medical malpractice law
- #1 in Michigan in personal injury litigation
- #1 in Ann Arbor in medical malpractice law
- #1 in Grand Rapids in legal malpractice law

- #1 in Grand Rapids in medical malpractice law
- #1 in Grand Rapids in personal injury litigation
- #1 in Traverse City
- #1 in Traverse City in commercial litigation
- #1 in Traverse City in insurance law
- #1 in Traverse City in personal injury litigation
- #1 in Traverse City in trusts and estates

A total of 12 attorneys from all three Smith Haughey offices have been selected for inclusion in the 2010 edition of *The Best Lawyers in America*. The attorneys and the respective categories they are listed in:



George Bearup – trusts and estates



Chip Behler – bet-the-company litigation; commercial litigation; construction law



Mark Bickel – bet-the-company litigation; commercial litigation; personal injury litigation



Joe Engel – medical malpractice law



Bill Jack – alternative dispute resolution; legal malpractice law; medical malpractice law; personal injury litigation



John Kruis – medical malpractice law



Tom McCarthy – personal injury litigation



Todd Millar – insurance law



Jack O'Loughlin – medical malpractice law



John Oostema – legal malpractice law



Bud Roegge – bet-the-company litigation; commercial litigation; legal malpractice law; medical malpractice law; personal injury litigation



Ed Stein – medical malpractice law; personal injury litigation

Best Lawyers is regarded as the definitive guide to legal excellence in the United States. *Best Lawyers* are selected in an exhaustive peer-review survey in which 16,000 leading attorneys throughout the country cast votes on the legal abilities of other lawyers.



Jon Siebers is a well-regarded and experienced business and real estate attorney. Jon assists business clients with entity creation, buy/sell agreements, partner buyouts, and asset acquisitions and dispositions. Jon regularly negotiates, drafts, and reviews a wide variety of contracts for businesses, including equipment leases, service agreements, and intellectual property licenses.

Jon represents real estate clients with the acquisition, disposition, development, leasing and financing of commercial real estate, and with the development of residential real estate. Jon has represented developers, lenders, health care facilities, physician groups, minority investors, landlords, tenants, retailers, restaurants and other businesses with their commercial real estate needs. In addition, he represents lenders and borrowers in mortgage-based loan transactions and work-outs.

Jon also has construction law experience and is accredited as a LEED Green Associate by the U.S. Green Building Certification Institute. He has represented general contractors, subcontractors, suppliers and owners with respect to negotiation, drafting, and review of construction documents, and with lien and permitting issues.

Jon earned a Bachelor of Arts degree in philosophy from Hope College and a Juris Doctor, *magna cum laude*, from Indiana University School of Law, where he was a member of the Indiana Law Journal and Order of the Coif. He is licensed to practice in the state courts of Michigan and North Carolina.

... most landowners underestimate both their leverage and the cell phones company's desire to use their land ...

circumstances, the cell phone company may be required to pay a penalty for early termination of the lease.

- The cell phone company's use of the property should be limited to a specific, designated area – and then, only for specific activities. If the arrangement requires an easement, the impact of the easement on the property should be minimized.
- The cell tower lease should require the cell phone company to maintain sufficient liability and property insurance. The cell phone company's insurance policies should also name the landowner as an additional insured. Also, landowners should notify their own insurance carrier of the lease and provide them with a copy for its review; preferably before it is signed.
- The cell tower lease should obligate the cell phone company to indemnify the

landowner against claims, injuries, or damages that arise from the cell phone company's use of the land.

- At a minimum, the cell phone company should pay for its portion of utilities used. The cell phone company should share a portion of the landowner's real estate taxes if they have not been included in the lease calculation.

Addressing each and every potential issue that applies in a given cell tower lease negotiation can be very complex. It suffices to say that landowners should seek legal counsel before signing a cell tower lease.

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