VOLUME 1, ISSUE 4

ATTORNEYS AT LAW

HINMAN, HOWARD & KATTELL, LLP

ATTORNEYS AT LAW

DECEMBER 2009

Practice Areas

- Art Law
- Banking and Financial Services
- Commercial Real Estate and Financing
- Corporate and Securities
- Criminal Defense
- Disability Benefits
- Environmental
- Estates and Trusts
- Family Law
- General Business Representation
- Health Law
- Intellectual Property
- Labor and Employment
- Litigation
- Matrimonial Law
- Oil and Gas Leasing
- Pension and Employee Benefits
- Personal Injury
- Real Property Tax Assessment and Condemnation
- Residential Real Estate
- Taxation
- Zoning, Land Use and Development

Happy New Year!

HH&K wishes you and your family a Happy New Year!

Is Your Business Ready for the Red Flags Rule?

You may have noticed, recently, that your bank teller, doctor or car dealer has been asking to see your driver's license, or other form of identification, as a normal part of doing business. In all likelihood, this is because of the Red Flags Rule.

As part of the 2003 Fair and Accurate Credit Transactions Act, Congress directed the Federal Trade Commission ("FTC") to develop and implement regulations for creditors and financial institutions to protect the identities of their consumers. In response, the FTC issued its "Red Flags Rule" on November 9, 2007. All businesses at risk for identity theft must have a Red Flags Rule policy in place by June 1, 2010. Under Federal law, a business's Red Flags Rule policy must identify, detect and respond to certain practices indicative of identity theft in order to protect its customers. If you own a business and are not yet aware of the Red Flags Rule, now is the time to ensure that your business will be in compliance.

Under the Rule, the term "creditor" extends beyond typical understanding to include any entity which regularly extends, renews or continues credit. By interpreting the term "creditor" so broadly, the FTC's reading includes businesses that defer payment for goods or services or provide goods or services and bill customers at a later date. Examples include health care providers, finance companies, mortgage brokers and real estate agents. "Creditor" also includes any business where one can "run a tab" or leave without paying for goods or services in full. However, a business is not considered a "creditor" under the Rule simply because it accepts credit card transactions as a form of payment at the time goods are purchased or services are rendered. In addition, the Rule defines the term "financial institution" more traditionally, so as to include any business which, directly or indirectly, holds a transaction account belonging to a consumer. Examples of such entities include banks, credit unions and certain mutual funds. At least one Court has held that lawyers are not subject to the Rule, despite their typical post-service billing practices, and it remains to be seen whether other businesses may also attempt to carve themselves out of the Rule.

Creditors and financial institutions are required to develop a Red Flags Rule policy if they determine that they keep "covered accounts" in the course of business. The Rule defines a "covered account" as either (1) a consumer account which is designed to permit multiple

(Continued on page 2)

This Issue Features

- Is Your Business Ready for the Red Flag Rule? 1
- 2010 Rollover to a Roth IRA 2
- The New Statutory Short Form Power of Attorney..............................3
- Feeding Starving Artists...4
- New Tax Law Rewards Quick-Acting Businesses and Changes some Filing Rules and Penalties 5
- Employee Handbook Checklist 2009 6

Announcements

We are pleased to announce that

Dawn J. Lanouette

became a Partner in the Firm effective January 1, 2010

Congratulations!

We are pleased to announce that

Megan C. Curinga

was selected as a member of the 2010 Class of "20 in their Twenties" by the Southern Tier Opportunity Coalition!

Is Your Business Ready for the Red Flags Rule? (Continued)

(Continued from page 1)

payments or transactions; or (2) an account which contains a reasonably foreseeable risk of identity theft to consumers or to the safety and soundness of the financial institution or creditor. The latter definition includes services which are billed on a date after they are provided. Accordingly, if a business performs a service for its clients and bills the client for the service at a later date, the business is creditor and the bill is considered a covered account under the Rule.

Where a creditor or financial institution has determined that it must comply with the Rule because it carries covered accounts, its policy must address four issues:

- identification of "red flags" which signal possible identity theft and the incorporation of such red flags into a policy designed to prevent and/or mitigate identity theft;
- use of the policy to detect red flags;
- appropriate responses to any red flags in order to prevent and mitigate identity theft; and
- review and regular maintenance of the policy to keep it current.

A business should consider its risk for identity theft and tailor its policy to its individual needs.

Since the Rule was proposed, it has been criticized for defining the term "creditor" too broadly and for being overly burdensome on small businesses which have a low risk for identity theft. The FTC counters that the Rule must encompass small businesses if such businesses put their customers at risk for identity theft. Nevertheless, on October 20, 2009, the House of Representatives voted to limit the Rule's scope for certain businesses with less than twenty employees and to include an application procedure for larger businesses to attempt to exclude themselves from compliance. The bill is currently in the Senate for discussion and debate.

The FTC was scheduled to begin enforcement of the Rule on November 1, 2008, but increasing opposition and compliance issues have delayed the enforcement date. Presently, the FTC is scheduled to begin enforcement of the Rule on June 1, 2010.

A template policy for low-risk businesses is available on the FTC's website at www.ftc.gov/redflagsrule. Should you determine that you or your business require a more extensive approach to fulfill the requirements set forth by the Rule, you should seek professional assistance to design a policy which best fits your needs.

Article written by Jacqueline A. Bain, Esq. For more information, Ms. Bain can be reached at 607-231-6999 or via email at jbain@hhk.com.

2010 Rollovers to a Roth IRA

The Roth Individual Retirement Account ("Roth IRA") is unique in several distinct ways. Unlike traditional IRAs (or regular qualified employer plans or 401k plans), where contributions are made with pre-tax funds, and withdrawals are taxable at standard tax rates, the Roth IRA is funded with after-tax dollars, but withdrawals are (generally) tax-free.

In 2009, taxpayers with modified adjusted gross income of $100,000 or less were able to convert amounts in a traditional IRA (or qualified 401k plan) to a Roth IRA. In 2010, you will be able to roll over amounts in qualified employer sponsored retirement plan accounts, such as 401(k)s or profit sharing plans, and regular IRAs, into Roth IRAs, regardless of your adjusted gross income.

There are a number of legitimate reasons to consider converting your existing retirement funds to a Roth IRA. In addition to the fact that earnings within the account are tax-sheltered, and that withdrawals are not taxed, for the owners or their beneficiaries, a Roth IRA owner does not have to commence required minimum distributions after he or she reaches age 70½, as is generally the case with regular qualified employer plans or IRAs. Beneficiaries, however, do have to commence regular withdrawals from a Roth IRA after the account owner dies.

The catch, however, is that the 2010 rollover will be fully taxed using the fair market value of the account at the time of the rollover. While you can elect to pay the entire tax in 2010, payments can also be deferred and spread out over 2011 and 2012. Either way, you will be paying tax now for the future privilege of tax-free withdrawals, and freedom from the required minimum distributions rules.

You should consider making the rollover to a Roth IRA in 2010 if:

- You can pay the tax hit on the rollover with non-retirement plan funds; otherwise, you will reduce the amount in the Roth IRA that can appreciate tax-free
- You anticipate paying taxes at a higher tax rate in the future than right now.
- You have a number of years to go before you might have to tap into the Roth IRA, giving you a chance to recoup through tax-deferred earnings the tax obligation that you absorb on the rollover.
- You are willing to pay a tax price now for the opportunity to pass on a source of tax-free income to your beneficiaries.

At the very least, you should discuss this unique one-time opportunity with your tax advisor or estate planner. Each individual's financial situation is different and there are many details to consider, such as whether the amounts you are thinking of switching to a Roth IRA are eligible for the rollover, whether you can make rollovers from your employer sponsored plan, as there are restrictions on rollovers from 401(k) plans, and the tax impact of rolling over amounts that represent nondeductible as well as deductible contributions. Additional information is available on-line, at www.irs.gov, and in IRS Publication 590 and IRS Notice 2009-75.

Article written by Ryan M. Mead, Esq. For more information, Mr. Mead can be reached at 607-231-6928 or via email at rmead@hhk.com.

THE NEW STATUTORY SHORT FORM POWER OF ATTORNEY

On September 1, 2009, a new power of attorney law took effect in New York. All powers of attorney signed on or after September 1, 2009 must comply with this statute.

A power of attorney is an essential estate planning document. The power of attorney allows an individual (the principal) to appoint another person or persons (an agent) to act on his or her behalf to conduct all types of legal transactions. Almost all powers of attorney are "durable," meaning that the power of the agent continues as long as the principal is alive, even if the principal later become incapacitated. The durable nature of the form allows for an aged or infirm individual to delegate authority to the person of his or her choosing.

The new power of attorney statute in New York makes sweeping changes in both form and procedure. These changes include:

The agent must now sign the power of attorney before it becomes effective. Under the old law, only the principal was required to sign the power of attorney. The new law requires the agent to sign, and he or she must do so before the power of attorney is effective. The revised form also provides important information for the agent and describes the agent's powers, duties, obligations and responsibilities. This disclosure provides the agent with a more complete understanding of what actions can be taken and what procedures should be avoided. One of the disadvantages of this change is the potential delays attendant to sending a signed power of attorney to the agent and awaiting its return before the power is effective. This possible delay may require clients to plan ahead if a power of attorney is contemplated or required.

There are new requirements regarding the specification of the powers being extended to agents. A principal signing a power of attorney can extend one, a few, or virtually unlimited authority to an agent. In most cases, principals extend full authority to their agents. The new form allows the principal to choose what powers are extended to the agent and if additional powers not listed on the form are desired, they can be added as a "Modification" to the form. The new law also allows the principal to extend to the agent the power to access medical records, medical billing information, and other powers that were not clearly defined under the prior law. When deciding to sign a power of attorney, it is important for the client to discuss with the attorney-draftsman the purpose behind the decision to give the power of attorney. The expectation of the form is essential so that the attorney can appropriately draft the power of attorney to meet the client's needs.

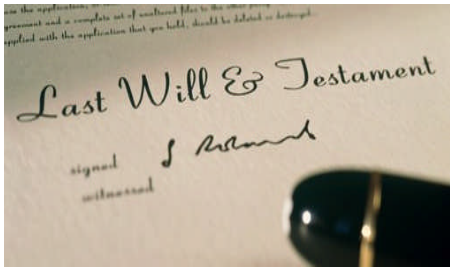
Photographer David Muir

Gifting by the agent on behalf of the principal now requires a separate part of the power of attorney and the signature of the principal must be witnessed like a Last Will and Testament. Under prior law, the authority of an agent to gift assets of the principal was unclear. Gifting is sometimes necessary in order to finalize an estate plan or to attempt to qualify the principal for Medicaid in anticipation of a nursing home admission. The confusion inherent in the old form has been eliminated with the implementation of a "Statutory Major Gifts Rider", an option to the new power of attorney. This Rider allows a principal to extend to the agent the power to make "major" gifts (defined as gifts greater than $500.00) to others, including to the agent. This gifting authority can be tailored to meet the exact requirements of the principal. If gifting of assets is not anticipated by the principal, then this Rider is not signed and is omitted from the new form. If gifting powers are desired, the principal's signature must be witnessed and notarized.

The new power of attorney form is more complex than its predecessor. The execution requirements for the new form are more cumbersome and difficult to follow. The new form requires the agent(s) to agree to act as agents and mandates that the agents sign before the power of attorney is effective. The new form allows the principal to state whether the agent should be paid, and if so, how much. The new form also authorizes the principal to name a "Monitor" to review the actions of the agent. **If you signed a power of attorney prior to September 1, 2009, it is still effective and you need not sign the new form if your existing form is still consistent with your needs.** If you do decide to execute a new power of attorney, all prior powers of attorney will be automatically revoked.

Despite the complexities of the new power of attorney statute, the power of attorney remains an extremely valuable estate planning tool. Every adult should have this document in place to protect against a potential future disability. Together with a Will or Trust and a Health Care Proxy, the power of attorney remains a critical document to protect your property in the event of incapacity. The new power of attorney law requires a careful analysis of your intentions, allows you to more specifically outline the powers granted, and institutes safeguards not present under the prior law. If you need any additional information or have any questions or wish to implement a power of attorney, please contact the Firm's Estate Planning Practice Group.

Article written by Martin J. Kane, Esq. For more information, Mr. Kane can be reached at 607-231-6767 or via email at mkane@hhk.com.



Photographer Steven Owens

FEEDING STARVING ARTISTS

Shakespeare may have been a little quick when he unceremoniously wrote, in *Henry IV*, "The first thing we do, let's kill all the lawyers." Had Shakespeare been around today, struggling to produce his tragedies and comedies, he may have wanted to hear what the lawyers had to say. Poets, playwrights, painters and musicians all have certain legal rights and obligations, an understanding of which can make the difference between a "starving artist" and success.

Artists should be aware that there are available resources to ease the contract process, protect the artistic product, and maybe in the end make "art" profitable. In short, artists faced with contractual and intellectual property (IP) matters not only can, but should seek out the legal guidance and assistance.

The first goal for an artist is to deal with issues that they face on a daily basis, taking the guesswork out of contracts involving the display, production, and exhibition of art. Such contracts are not limited to the display of gallery work, but can be applied to film production, performance dance, and writing. Some of the most important decisions regarding works of art are made at the contract stage, before anything is ever displayed or sold. Contracts not only capture both parties' (i.e. the gallery owner's and the artist's) understanding of the agreement, but also protect the rights of the artist. It is easy for artists just starting out to believe that their bargaining abilities are limited, possibly due to their perceived obscurity in the art community at large. However, with basic contract knowledge and maneuvering, artists can help to ensure that they are getting the best possible deal with the biggest potential pay-off.

While some artists do not care to think about their work in monetary terms, at the end of the day even those committed to "the work" have to be able to create "the work." With the assistance of legal concepts, artists do not have to sacrifice anything in the way of commitment while making sure they are getting what they deserve. Contracts that clearly and explicitly provide the basic rights of parties, the payment terms, promotion and advertisement, and selling strategies, can go a long way to not only protect the artist and a promoter (i.e., publisher, gallery owner, film studio, etc.), but also show the art community that the artist will not be taken advantage of.

Image from Comstock

With respect to works of art as a whole, what an artist does not know can hurt him or her, both in terms of protecting the creative work and in terms of infringing on the rights of others. It is important to know more than how galleries and forums and performance centers work; the artist should also ensure that he is not ripped off when contracting to show his work or have it performed.

Image from Stockbyte

Protecting the artist's work and the artist himself from claims of infringement by other artists is important to every artist. Guidance with respect to such issues will help inform and advise the artist about protecting his rights and about respecting the rights of others who came before him.

Lawyers trained in this area can help artists to understand the copyright law — both in the United States and in other countries — and the limits of fair use in the copyright law. Artists should also be aware of the laws of privacy and publicity.

It is helpful to understand that property, in general, comes in three flavors: real property, personal property, and intellectual property. Real property covers land and things affixed to the land, like houses, office buildings and factories. Personal property covers tangible things that are also movable, like clothing, computers, tools and instruments, and artist supplies. Finally, intellectual property covers things that come out of the artist's head.

All three types of property have attributes in common. For example, one can transfer property that he owns. Different words are used to describe transfers, but the concept is the same for all three types of property. In real estate, a house, for example, is "sold" and ownership rights are conveyed by means of a "deed." In personal property, goods are also "sold" with a "bill of sale." In intellectual property, however, rights to artistic works can be "assigned."

With all three types of property, the owner may want to own the land or the car or the music, but allow someone else to use it. For real estate, the terms we use are "rent" or "lease." For personal property, the terms are "lend" or "rent" or "lease." But for intellectual property, we say the work is "licensed."

Qualified attorneys can discuss other subjects with artist-clients, such as:

- registering work in the U.S. Copyright Office
- copyright notices
- parodies
- derivative works
- public domain
- duration of copyright rights
- co-ownership
- the rights of privacy and publicity
- copyright infringement
- actual vs. statutory damages for copyright infringement
- other topics that concern creators of artistic works.

Article written by Ryan Miosek, Esq. and Mark Levy, Esq.
For more information, Mr. Miosek can be reached at 607- 231-6804 or via email at rmiosek@hhk.com or Mr. Levy at 607- 231-6991 or via email at mlevy@hhk.com.

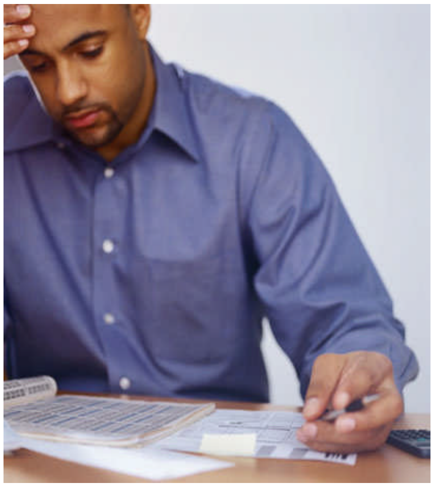
New Tax Law Rewards Quick-Acting Businesses and Changes Some Filing Rules and Penalties

The Worker, Homeownership, and Business Assistance Act of 2009 (the Act), which was signed into law on November 6, 2009, makes it easier for most businesses to get immediate tax savings from net operating losses. It does so by allowing certain losses to be carried back to earlier, more profitable years. In these tough economic times, that's good news for businesses which paid high taxes in prior years, but have suffered recent losses. On the negative side, the Act defers a scheduled drop in the FUTA (Federal Unemployment Tax Act) tax rate, increases penalties for certain businesses that fail to meet return filing requirements, and boosts estimated taxes for large corporations in 2014.

Net Operating Losses. A net operating loss (NOL) is the excess of business deductions (computed with certain modifications) over gross income in a particular tax year. The loss can be deducted, through an NOL carryback or carryover, in another tax year in which gross income exceeds business deductions. In general, NOLs may be carried back two years and forward 20 years. The NOL is first carried to the earliest tax year for which it is allowable as a carryback or a carryover, and is then carried to the next earliest tax year. A business may elect to carry the losses forward only and not carry any NOLs back.

Under the new law, eligible small businesses (ESBs) (defined as a trade or business whose average annual gross receipts are $15 million or less for the three tax-year period ending with the tax year in which a loss arose) can elect to increase the NOL carryback period from two years to three, four, or five years, for NOLs arising in a tax year beginning or ending in 2008. A calendar year business could only make the election for 2008. A fiscal-year taxpayer whose year ended in 2008 could make the election either for (a) its fiscal year ending in 2008 or (b) its fiscal year beginning in 2008 and ending in 2009, but not both.

Essentially, the new law allows most businesses to carry back their NOLs further than they could before. The Act generally permits any business (not just an ESB) to increase the carryback period for an applicable NOL. However, businesses getting certain federal bailout funds are not eligible. An applicable NOL is a business's NOL for any tax year ending after December 31, 2007, and beginning before January 1, 2010. Generally, an election may be made for only one tax year. However, an ESB that made an election under the rules in effect before November 6, 2009 (the Act's enactment date) may make an election for 2 tax years instead of just 1.


Photographer Ryan McVay

The amount of the NOL that can be carried back to the fifth tax year before the loss year cannot be more than 50% of a business's taxable income for that preceding tax year, determined without taking into account any NOL for the loss year or for any tax year after the loss year. The amount of the NOL otherwise carried to tax years after the fifth preceding tax year is adjusted to take into account that the NOL could offset only 50% of the taxable income for that fifth preceding tax year.

For example, assume that Ace Corp (not an ESB) has an NOL of $5 million for its tax year ending August.31, 2009. In its tax year ending August 31, 2004, it had taxable income of $6 million. If Ace elects to carry back its NOL to the 2004 tax year, then it may apply only $3 million of that loss against its taxable income for 2004. In determining the amount of the NOL that ACE can carry over to years ending after August 31, 2004, the NOL is reduced by only the $3 million that was offset for the 2004 tax year. However, note that the 50% limitation does not apply to the applicable 2008 NOL of an ESB that makes an election under pre-Act law, even if the election is made after November 6, 2009.

This change is not just an interesting tax technicality; it allows most businesses to go back in time and lower their previous tax bills by immediately utilizing net operating losses they are experiencing now.

The Act also carries a separate, similar set of NOL carryback rules for life insurance companies.

NOL Transition Rules to Watch Out For. Normally, an election to waive the carryback period cannot be revoked. The Act's transition rules afford an opportunity to undo a waiver for an applicable NOL, or an applicable loss from operations for a tax year ending before November 6, 2009. These rules allow a business to revoke any election to waive the carryback period for an applicable NOL or an applicable loss from operations for a tax year ending before November 6, 2009. The election can be revoked by the extended due date for filing the tax return for the business's last tax year beginning in 2009. Similarly, any application for a tentative carryback adjustment to gain an immediate refund for such a loss is treated as timely filed if filed by the extended due date for filing the tax return for the business's last tax year beginning in 2009.

Scheduled Drop in FUTA Tax Rate Is Deferred. Before the Act, the FUTA rate was scheduled to drop from 6.2% to 6% after 2009. Under the Act, the 6.2% FUTA tax rate continues to apply through June 2011, and afterwards a 6.0% rate will apply. The .2% surtax was always intended to be temporary, but will now be extended until July 2011

Estimated Tax Change. For large corporations (those with $1 billion or more in assets), the required payment of estimated tax otherwise due in July, August, or September of 2014 under pre-Act law will be increased by 33%. The amount of the next required installment will be appropriately reduced to reflect the amount of the increase in the earlier installment.

(Continued on page 6)

New Tax Law Rewards (continued)

(Continued from page 5)

Passthrough Penalties Increased. Under the Act, the base amount on which a penalty is computed for a failure to file either a partnership or S corporation return for a tax year beginning after December 31, 2009, is increased to $195 per partner or shareholder. Over the fiscal period 2011 to 2019, this provision is projected to raise $642 million in partnership penalties and $587 million in S corporation penalties. Whether these revenue projections will stand up remains to be seen. The huge percentage increase in the amount of the penalty (almost 120%) could cause even more taxpayers than anticipated to comply with the filing requirement so that less revenue will be realized than projected. Given the relatively small revenue projections associated with these increased penalties, it appears that this change in the law is aimed at encouraging compliance, rather than trying to boost federal revenues. The problem is, as with most tax penalties, broad-based knowledge of their existence often takes years before taxpayers start to conform their behavior to avoid the penalty.

Article written by Dan M. Smolnik, Esq. For more information, Mr. Smolnik can be reached at 607-231-6862 or via email at dsmolnik@hhk.com.

Employee Handbook Checklist 2009

As the year draws to a close, it is time for employers to review their employee handbooks and posters to make sure that they are up-to-date. Both the federal and New York legislatures were very busy this year enacting a number of new laws affecting employers. Here is a checklist of major changes in employment law this year:

Federal

- **Americans with Disabilities Act Amendment (ADA)-**There are updated definitions for "substantially limits" and "major life activities," plus changes to the mitigating measures rules. New regulations will be forthcoming in 2010.
- **Family and Medical Leave Act (FMLA)-**New military leave provisions are in effect, and there have been updates to several time limits and forms.
- **Genetic Information Non-Discrimination Act (GINA)-** New legislation which prohibits discrimination on the basis of genetic information, including family medical history
- **Consolidated Omnibus Reconciliation Act (COBRA)-** Changes under the stimulus bill regarding cost of coverage and changes to who is covered, including dependent children over age 25
- **Updated I-9 Forms**

State

- **Social Security and Personal Protected Information Laws-**Two laws requiring employers and business owners to cease using social security numbers in all but a very few excepted cases, and to provide protections for personal information of employees (includes a policy and posting requirement)
- **Corrections Law-**Updates the law prohibiting discrimination on the basis of conviction to include posting and handout requirements
- **WARN Act-**Updates requirements for a "mass layoff" in New York
- **Mothers Expressing Breast Milk-** Requires employers to provide time and space for nursing mothers
- **Blood Donation Law-**Updated regulations regarding notification to employees of their rights under the law
- **Human Rights Law-**Amended so as to include victims of domestic violence as a protected class
- **Labor Law Notification-**Requires employers to provide written notice to employees, at their time of hire, of their rate of pay (regular and overtime) and regular pay date, and to obtain and maintain written acknowledgment from the employee

Newspaper reports indicate that both the state and federal authorities responsible for enforcing such laws are stepping up their efforts. Particularly in these difficult economic times, employers are advised to stay in contact with their legal counsel to discuss these and other changes as appropriate.

Article written by Dawn J. Lanouette, Esq. For more information, Ms. Lanouette can be reached at 607-231-6917 or via email at dlanouette@hhk.com.

HH&K
HINMAN HOWARD & KATTELL, LLP
ATTORNEYS AT LAW

FOR MORE INFORMATION

Hinman, Howard & Kattell, LLP
700 Security Mutual Building
80 Exchange Street
P.O. Box 5250
Binghamton, New York 13902-5250

Phone: (607) 723-5341
Fax: (607) 723-6605
www.hhk.com

This newsletter is for information purposes only, and does not constitute legal advice. The Publisher assumes no liability for the reader's use of information herein.