

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Chapter 7 Case

SRC Holding Corporation,
f/k/a Miller & Schroeder, Inc.
and its subsidiaries,

BKY Case Nos. 02-40284 to 02-40286

Debtors.

Jointly Administered

Brian F. Leonard, Trustee,

ADV Case No.03-4155

Plaintiff,

vs.

AFFIDAVIT OF DANIEL S. KLEINBERGER

James E. Iverson,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

1. I am a Professor at the William Mitchell College of Law and I have been retained as a professional in these underlying bankruptcy cases to provide assistance to the trustee, Brian F. Leonard ("**Trustee**").

2. My curriculum vitae is attached hereto as Exhibit A. I believe that I am qualified to give an expert opinion as to corporate governance and, more particularly, whether fiduciary duties have been met by shareholders, directors and officers.

3. At the request of the Trustee and his counsel, I have reviewed the Stock Purchase Agreement between MI Acquisition Corporation ("**MIAC**") and James Iverson and Roger Wikner, together with many of the ancillary documents. Also, I have reviewed the Trustee's Notice of Hearing and Motion for Summary Judgment which, I understand, will be served and filed herewith.

4. As I understand the facts, Miller & Schroeder, Inc. ("MSI") had already commenced its Heritage Bond offerings by July 1997. The Trustee has presented evidence that these transactions, together with others, positioned MSI in July of 1997 with actual and potential liabilities which greatly exceeded the value of the corporation. Further, I understand that proofs of claim have been filed in these cases which evidence over \$150 million in claims dating back to 1996.

5. Based on the foregoing, it appears to me that MSI was in the vicinity of insolvency in July of 1997 and that Wikner and Iverson in their roles as shareholders, directors and officers of that corporation, owed fiduciary duties not only to MSI, but also to its creditors.

6. It is my opinion that Wikner and Iverson breached their fiduciary duties to MSI and its creditors by allowing their substantial debts to be unsatisfied in furtherance of the sale of their stock to MIAC. Despite the Stock Purchase Agreement's requirement that Wikner's and Iverson's debts to MSI be satisfied at or prior to closing, there is no evidence that this occurred. Instead, it appears that sometime after closing, MIAC generated some accounting entries to address the matter. Wikner and Iverson knew or should have known that, given the limited assets that MIAC had available, MIAC was destined not to make good the debt.

7. It also appears that, to facilitate the sale of their stock to MIAC, Wikner and Iverson replaced their existing noncompetition agreements (which did not call for compensation) with new noncompetition agreements (which called for substantial compensation). MSI, which did not request nor need such agreements, ended up being the entity responsible to make the payments.

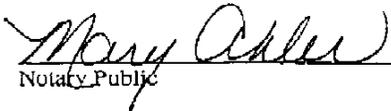
8. Based on the foregoing, it is my opinion that Wikner and Iverson each violated their fiduciary duties to MSI and its creditors with respect to their mishandling of the Stock Purchase Agreement in July of 1997.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: March 19, 2004


Daniel S. Kleinberger

Subscribed and sworn to before me
this 19th day of March, 2004.


Notary Public



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Daniel S. Kleinberger
William Mitchell College of Law
875 Summit Avenue
St. Paul, MN 55105
(651) 290-6387
fax 290-6414
dkleinberger@wmitchell.edu

EDUCATION

J.D. Yale Law School, May 1979

A.B. Harvard College, June 1972, summa cum laude
(Combined major: government, history and economics)

Junior Twelve, Harvard Phi Beta Kappa (12 juniors elected from a class of 1200)
Philo Sherman Bennet Prize for Senior Honors Thesis
Research Fellowship, West European Studies Department
National Merit Scholar

CURRENT POSITION

Professor of Law
William Mitchell College of Law
875 Summit Avenue
St. Paul, MN 55105

July, 1986 to present

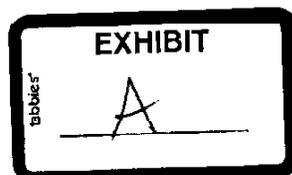
Teaching areas: corporate, partnership and agency law; law of closely held businesses;
limited liability companies; commercial transactions

Also engaged in a limited private practice, serving as an expert witness and counseling
lawyers on corporate, partnership, limited liability company, and commercial law issues

LEGISLATIVE PROJECTS

Uniform Limited Liability Company Act Revision (2003 -)

- ▶ Co-Reporter to the Limited Liability Company Act Drafting Committee of the National Conference of Commissioners on Uniform State Laws
- ▶ One of two principal drafters for statutory text
- ▶ One of two drafters of Reporters' Notes and, eventually, Official Comments



Uniform Limited Partnership Act (2001)

- < Reporter to the Limited Partnership Act Drafting Committee of the National Conference of Commissioners on Uniform State Laws
- < Principal drafter of statutory text
- < Drafter of Official Comments

Minnesota Economic Loss Statute, Minn.Stat. § 604.101, Minn. Laws 2000, chapter 358

- < Co-drafter of statutory text
- < Principal drafter of Reporters' Notes

Minnesota Limited Liability Company Act, 1999 Amendments

- < Principal drafter of statutory text
- < Drafter of Reporter's Notes

Minnesota Professional Firms Act, Minn. Stat. chapter 319B, Minn. Laws 1997, chapter 22

- < Principal drafter of statutory text
- < Drafter of Reporter's Notes

Minnesota Limited Liability Partnership Amendments, Minn. Laws 1995, chapter 58

- < Co-drafter of statutory text
- < Co-drafter of Reporter's Notes

Minnesota Limited Liability Partnership Provisions, Minn. Laws 1994, chapter 539

- < Co-drafter of statutory text
- < Co-drafter of Reporter's Notes

Minnesota Limited Liability Company Act, 1993 Amendments, Minn. Laws 1993, chapter 137

- < Co-drafter of statutory text
- < Co-drafter of Reporter's Notes

Minnesota Limited Liability Company Act, Minn. Stat. chapter 322B, Minn. Laws 1992, chapter 517

- < Co-drafter of statutory text
- < Co-drafter of Reporter's Notes

Minnesota Manufactured Housing Sales and Lot Rental Reform Act, Minn. Stat. chapters 327B and 327C, Minn. Laws 1982, ch. 526

- < Co-drafter of statutory text

Minnesota Plain Language Contract Act, Minn. Stat. §§ 325G.29 to 325G.36, Minn. Laws 1981, chapter 274

- < Principal drafter of statutory text

PUBLICATIONS

Books

AGENCY, PARTNERSHIP AND LLCs: EXAMPLES AND EXPLANATIONS (Aspen; 2002)

LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW (2nd edition) (Warren Gorham and Lamont/RIA; forthcoming 2004) (with C.Bishop)

AGENCY AND PARTNERSHIP: EXAMPLES AND EXPLANATIONS (Little Brown and Company; 1995)

LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW (Warren Gorham and Lamont, 1994) (with C.Bishop) [supplemented twice a year, with new chapters issued at least once each year, until 2nd edition is published]

Law Review Articles

“‘Apparent Servants’ and Making Appearances Matter: A Critique of *Bagot v. Airport & Airline Taxi Cab Corporation*,” 28 WILLIAM MITCHELL L. REV. 1527 (2002) (with P. Knapp)

“‘Magnificent Circularity’ and the Churkendoose: LLC Members and Federal Employment Law,” 22 OKLA. CITY U. L. REV. 477 (1997), reprinted at 40 CORPORATE PRACTICE COMMENTATOR 379 (1998)

“LLC/LLP Joint Ventures and the Hart-Scott-Rodino Act,” 3 J. LTD. LIAB. CO. 157 (1997)

“Direct vs. Derivative, or What’s a Lawsuit Between Friends in an ‘Incorporated Partnership?’” 22 WILLIAM MITCHELL L. REV. 1203 (1996) (with I.Bergmanis)

“Guilty Knowledge,” 22 WILLIAM MITCHELL L. REV. 953 (1996)

“Who Owns the Christmas Trees? – The Disposition of Property Used by a Partnership,” 39 KAN. L. REV. 245 (1991) (with B. Wrigley)

“Why Not Good Faith? – The Foibles of Fairness in Closely Held Corporations,” 16 WILLIAM MITCHELL L. REV. 1143 (1990)

“Ethics and Conscience – A Rejoinder,” 21 CONN. L. REV. 397 (1989)

“Wanted: An Ethos of Personal Responsibility – Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers,” 21 CONN. L. REV. 365 (1989)

“No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification,” 13 WILLIAM MITCHELL L. REV. 775 (1987)

Shorter Articles

“*Respondeat Superior* Run Amok,” 59 BENCH AND BAR OF MINNESOTA 16 (November, 2002)

“RUPA is Coming: UPA-LLPs Beware,” 58 BENCH AND BAR OF MINNESOTA 34 (September, 2001)

“Building a New Foundation: Torts, Contracts, and the Economic Loss Doctrine,” 57 BENCH AND BAR OF MINNESOTA 25 (September, 2000)

“The Attorney as Agent,” 53 BENCH AND BAR OF MINNESOTA 30 (April, 1996)

“Limited Liability Partnerships,” 51 BENCH AND BAR OF MINNESOTA 23 (October, 1994) (with C.Bishop)

“Structuring the Minnesota LLC,” 50 BENCH AND BAR OF MINNESOTA 22 (November, 1993) (with C.Bishop)

“Beyond Subchapter S: The New Limited Liability Company,” 49 BENCH AND BAR OF MINNESOTA 18 (July, 1992) (with C.Bishop)

“Contracts and Disputes: Winning the War or Waging the Peace?” 44 BENCH AND BAR OF MINNESOTA 15 (October, 1987) [*winner of the 1987 author's award*]

“Plain Language for Lawyers,” 42 BENCH AND BAR OF MINNESOTA 22 (March, 1985)

C.L.E. Presentations and Publications

“Business Law Institute – 2002” – sponsored by Minnesota C.L.E (April 18, 2002)
presented: *Entity Proliferation and “The Punctilio of an Honor the Most Sensitive”*
(plenary session)

“Business Law Institute – 2001” – sponsored by Minnesota C.L.E (April 26, 2001)
presented: *Economic Loss Statute* (plenary session); *RUPA Transition Glitches*
(plenary session); *The Impact of Divorce on a Closely Held Business*

- “Limited Liability Entities” – sponsored by M.I.L.E. (September 17, 1999)
presented: *What’s New in Limited Liability Companies, Limited Partnerships and Professional Organizations and Re-RULPA*
- “Business Law Institute – 1999” – sponsored by Minnesota C.L.E (May 21, 1999)
presented: *Entity Selection in Minnesota* (keynote speaker)
- “Adapting to Change: The Professional Firms Act Takes Over” – sponsored by the MSBA Business Law Section (February 17, 1999)
solo presentation
- “Partnership Formation and Practice” – sponsored by Minnesota C.L.E (November 10, 1998)
presented: *Dissolution and Breakup*
- “Minority Shareholder Disputes” – sponsored by M.I.L.E. (April 1, 1998)
presented: *Metamorphosis: Owner/Employee and Federal Employment Law*
- “Walking Through the New Professional Firms Act” – sponsored by the MSBA Business Law Section (February 25, 1998)
solo presentation on the new Act
- “1997 New Law Business Series” – sponsored by Minnesota C.L.E (July 30, 1997)
presented: *The Professional Firms Act (319B)*
- “Business Law Institute – 1997” – sponsored by Minnesota C.L.E (May 6, 1997)
presented: *The New Professional Firms Act*
- “Minority Shareholder Disputes” – sponsored by M.I.L.E. (January 15, 1997)
presented: *Close Corporations – The Legal Frontier*
- “Bridge the Gap” – sponsored by Minnesota C.L.E. (January 9, 1997)
presented: *Management, Governance, and Fiduciary Duties of the Owners*
- “The Ultimate Entity Analysis for Business” – sponsored by Minnesota C.L.E (November 5, 1996)
presented: *Fiduciary Duties of Entity Owners and Officers*
- “Business Law Institute – 1996” – sponsored by Minnesota C.L.E (May 3, 1996)
presented: *Management, Governance, and Fiduciary Duties of the Owners*
- “Limited Liability Companies” – sponsored by M.I.L.E. (May 2, 1996)

presented : *Delaware LLCs*

“Conciliation Court Referee Workshop” – sponsored by Ramsey County District Court (January 30, 1996)

presented: *Proper Parties; Responsible Parties*

“Bridge the Gap” – sponsored by Minnesota C.L.E. (January 11, 1996)

presented: *Management, Governance, and Fiduciary Duties of the Owners*

“Legislative Drafting Workshop” – presented to the Research Department of the Minnesota House of Representatives and the staff of the Revisor of Statutes (November 16, 1995)

“Business Entity Selection in Minnesota” – sponsored by Minnesota C.L.E. (September 28, 1995)

presented: *Management, Governance, and Fiduciary Duties of the Owners; Business Continuity of the Entity*

“Limited Liability Companies -- IRS Changes Require Adjustment” – sponsored by M.I.L.E. (June 15, 1994)

presented : *Dissolution Laws*

“1993 MSBA Agricultural Law Section Seminar” – sponsored by Minnesota C.L.E. (February 26, 1993)

presented: *Minnesota's New Limited Liability Company – Applications and the Status of the Farmer Exclusion*

“Limited Liability Companies: The Essentials” – sponsored by Minnesota C.L.E (January 29, 1993)

presented: *Mechanics of Creating An LLC; Drafting the Member Control Agreement*

“Highlights of Our New Limited Liability Company Act Seminars” – sponsored by Minnesota C.L.E (December 17, 1992)

presented: *answers to questions generated by video replays*

“Tax Institute” – sponsored by Minnesota C.L.E (October 5-6, 1992)

presented: *Limited Liability Company Act – An Introduction and Overview*

“Minnesota's New Limited Liability Company Act” – sponsored by Minnesota C.L.E. (September 10, 1992)

course co-chair

presented: *An Introduction to a Minnesota LLC; From the Entity's Perspective:*

Member Dissociation, Entity Dissolution and Business Continuity

- “Business Law Institute – 1992” – sponsored by Minnesota C.L.E (May 20, 1992)
presented: *An Introduction to the Minnesota LLC Act*
- “Advising Small Businesses” – sponsored by Minnesota C.L.E (October 16, 1991)
presented: *When Shareholders or Directors Fight, Where Does the Corporate Lawyer Stand?*
- “From the War of Tort Versus Contract: Practical Insights for Product Defect Litigation with Commercial Plaintiffs” – sponsored by the Robins firm (September 14, 1991)
a solo 4-hour program
the use of contract law to frustrate or advance the claims of commercial plaintiffs in product defect cases
- “Business Law Institute – 1989 ” – sponsored by Minnesota C.L.E. (November 6 and 7, 1989)
presented: *The Law of Closely Held Corporations: An Overview*
- “Writing for Effect” – sponsored by M.I.L.E. (April 28, May 4, October 4, 1989 and May 17, 1991)
course co-chair and co-presenter
clarity and efficacy in legal writing
- “Dealer Terminations – What the Generalist Needs to Know” – sponsored by M.I.L.E. (January 27, 1989)
course chair
presented: *Basic Antitrust Concepts; Tortious Interference -- The Basics of the Law and the Law Applied to Dealer Terminations; No-Cause Dealer Terminations and Contract Law Theories*
- “New Civil JIGs” – sponsored by Minnesota C.L.E. (March 18, 1988)
presented: *Interference with Contractual Relationships; Interference with Contractual Advantage*
- “Minimizing, Managing and Resolving Disputes” – sponsored by the Civil Justice Task Force of the Minnesota Business Partnership (April 9, 1987)
co-presented: *Writing Better Contracts*

OTHER WORK EXPERIENCE AS AN ATTORNEY

Office of General Counsel/3M
St. Paul, MN 55144

April, 1982 – May, 1986

Assignments included: advising a major production and marketing division on issues ranging from trade secret protection to antitrust to partnership law; counseling a trading company on issues ranging from perfection and priority of security interests, to the interaction of U.S. and foreign law in "back-to-back" trading situations, to the proper structure for long-term countertrade relationships; negotiating and drafting construction and engineering contracts (including agreements for the development of computer-assisted manufacturing); general legal advice to health care sector divisions, including negotiating and drafting distribution agreements and advising on antitrust issues

Special Assistant Attorney General
Consumer Division
Office of the Minnesota Attorney General
St. Paul, MN 55155

August, 1979 – April, 1982

Litigation, legislation, negotiation and mediation in various areas of trade regulation (Litigation involved both trial and appellate work in state court. Legislative duties included drafting and lobbying for the Minnesota Plain Language Contract Act, Minn. Laws 1982, ch. 274)

PUBLIC SERVICE

Reporter, Uniform Limited Liability Company Act Revision (2003 -) (National Conference of Commissioners on Uniform State Laws)

Reporter, Uniform Limited Partnership Act (2001) (National Conference of Commissioners on Uniform State Laws)

Member, American Law Institute

Member, ALI Members Consultative Group for the RESTATEMENT (THIRD) OF AGENCY

Referee, Ramsey County Conciliation Court

Member, Executive Council of the Minnesota State Bar Association Business Law Section

Member, Business Law Pro Bono Task Force of the Minnesota State Bar Association

Reporter, Minnesota State Bar Association Joint Committee on the Minnesota Limited Liability Company Act

(co-recipient of the 1992 Special Legislative Award from Minnesota Bar Association for “outstanding legislative advocacy”)

Reporter, Chapter 319A Task Force of the Business Law Section of the Minnesota Bar Association

Reporter, Minnesota Limited Liability Partnership Provisions (1994) and Amendments (1995)

“Where Have All the Good Cases Gone?” Eighth Circuit Judicial Conference (panel discussion; August 6, 2002)

“Attitude is Essential Weekend,” Council on Legal Education Opportunity Thurgood Marshall Legal Educational Opportunity Program (July 5 - 7, 2002)

Memorial Address, Annual Hennepin County Bar Memorial Session (April 17, 2002)

formerly chair, Minnesota State Bar Association Business Law Section Committee on Partnerships and Limited Liability Companies

formerly member, Ramsey County Fee Arbitration Committee

formerly chair and nonresident member, Ethics Commission, City of Roseville

formerly chair and nonresident member, Ethics Commission, City of North Oaks

former member, Ramsey County Ethics Committee