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Report From Counsel

Insights and Developments in the Law **Summer 2008**

Employer Forced to Pay Unapproved Overtime

An enforcement action by the U.S. Department of Labor resulted in a ruling that nurses were employees, not independent contractors, of a staffing agency that provided them on a temporary basis to hospitals. After this ruling, the agency took action to attempt to deter unauthorized overtime by the nurses and to avoid having to pay time and a half for such hours. It adopted a policy, printed on all of the nurses' time sheets, stating that the nurses had to notify the agency in advance of any hours exceeding 40 hours a week. If they did not, the notice stated that the nurses would be paid for such time only at their regular rate.

When nurses who had worked overtime hours at hospitals without notifying the agency ahead of time sought to recover pay at the overtime rate, they prevailed despite not having followed the employer's policy. A federal court ruled that the agency had not done enough to meet its duty under the federal Fair Labor Standards Act to "make every effort" to prevent performance of unauthorized overtime work of which it had knowledge. The agency's knowledge was present, albeit after the fact, as was evidenced by the nurses' time sheets showing the unauthorized overtime that was worked.

Employers desiring to prevent unauthorized overtime by their employees must do so essentially by "getting tough" with the employees through enforcement of sufficiently strong disciplinary policies.

Suggestions from the Court

The ironic lesson from the decision is that employers desiring to prevent unauthorized overtime by their employees must do so by essentially "getting tough" with the employees through enforcement of sufficiently strong disciplinary policies, and not simply by declining to pay for the unauthorized overtime hours. Although the agency suffered a defeat in the litigation, the court's opinion offered suggestions for alternative approaches that it or other similarly situated employers can take in the future to deter

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Like-Kind Exchanges

Normally, capital gains are recognized and taxable upon the sale of property. The Tax Code provides an exception to this rule for certain exchanges of property. If all requirements are met, any gain from the exchange is not taxed, and any loss cannot be deducted. Gains or losses will not be recognized until the person who received property in the exchange sells or otherwise disposes of it. The most common type of nontaxable exchange is the exchange of property for the same kind of property, or like-kind exchanges.

Requirements

To qualify as a like-kind exchange, the property traded and the property received must be both (1) qualifying property and (2) like property. Qualifying property must be held either for investment or for productive use in a trade or business. Typical examples include machinery, buildings, land, trucks, and rental houses. Like property refers to the nature or character of the property. Characteristics relating to the grade or quality of the property are immaterial. All real estate is like-kind to all other real estate, whether or not one or both of the properties are improved. Similarly, an exchange of personal property for similar personal property is an exchange of like property.

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Protection for Parodies

It is the very nature of parody to present two opposing messages: that the parody is, in fact, the genuine article that is being parodied, and that it is not the original, but is instead just a parody. When used to promote a product, the parody may transgress federal trademark law if it succeeds in the first objective but not in the second. In that case, the parody will have created customer confusion, which is a critical element for a claim of trademark infringement.

There was a recent victory for parody in the marketplace when a federal court rejected claims of trademark infringement and trademark dilution brought against the imitator. On one side was Louis Vuitton Malletier (LVM), the maker of luxury handbags, luggage, and even some pricey pet accessories. Some of LVM's trademarks go back to the 19th century.

Distinctly at the other end of the spectrum was the upstart defendant Haute Diggity Dog (HDD), purveyor of dog toys and beds which play on the names of luxury items. Among HDD's offerings were "Chewnel No. 5" and "Dog Perignonn." You get the idea.

HDD targeted LVM, in particular, by offering chew toys that were shaped like miniature handbags resembling LVM products and that used patterns evoking trademarked LVM designs. Predictably, the chew toys were sold under the name "Chewy Vuiton."

Not amused, LVM sued HDD in federal court for trademark infringement and trademark dilution. Unfortunately for LVM, the court was amused, or at least it got the joke. As the court put it, the chew toy "irreverently presents haute couture as an object for casual canine destruction. The satire is unmistakable."

The obvious nature of the parody was legally significant because there was no real likelihood of confusing the chew toys with the upscale leather goods they were meant to evoke. There were clear and immediate differences between the products, and even the "simplified and crude" imitation of the LVM designs was not such as to create a danger of confusion with the real thing among the dog masters who do the buying. (Dogs might see no difference and chew up a $1,000 handbag as vigorously as they would a chew toy, but they have no say in trademark lawsuits.)

Trademark dilution differs from infringement in that it is not necessary to show confusion in the marketplace. It is a more nebulous concept, but prohibited dilution occurs when there is "blurring" or "tarnishment," that is, an association arising from the similarity between the challenged mark or name and the famous mark that impairs the distinctiveness of the famous mark. In the end, the very fact that the chew toy parody was successful defeated the dilution claim, just as it had the infringement claim.

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Outlaw vs. Rule of Law

Recently, court documents were uncovered from a successful civil case involving some notorious nineteenth-century defendants who were better known for avoiding the legal consequences of their acts: Jesse and Frank James.

Not surprisingly, the case against the James brothers stemmed from one of their signature activities, a bank robbery. During an attempted bank robbery by the brothers in Gallatin, Missouri, in 1869, Jesse James killed a cashier. As the brothers made their getaway, Jesse was thrown from his horse, which he left behind in favor of doubling up on Frank's horse. Soon thereafter, the brothers happened upon the unfortunate Dr. Smoote, who was also on horseback. Jesse relieved Smoote of his horse, at gunpoint, and continued the escape.

Smoote was not the first or last victim of the James brothers, but he was unusual in then bringing, and winning, a lawsuit against them for the full value of the horse, saddle, and bridle that they had stolen.

One might expect the outlaws to have ignored the lawsuit altogether, but the brothers answered the lawsuit by arguing that they were not personally served with notice of it. Although a sheriff testified that he had delivered the papers to the James family farm (pity the process server charged with serving a summons on Jesse James), the case was dismissed on that technicality. That might have been the end of the litigation, were it not for Jesse's decision to publish a letter in a newspaper declaring himself innocent of the holdup and murder.

Correctly pegging Jesse James as a newspaper reader, Smoote's attorney cleverly won the court's approval to file a notice of service in the classified section of a local newspaper, thus giving Dr. Smoote another bite at the

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Lawyer's Approval for Acceptance of Offer

When the owners of a party store received an offer to purchase not the entire property, but only their liquor license and fixtures, they accepted the offer, but on the condition that their attorney approve the deal. Before the attorney's review of the first offer, the owners received a better offer from another potential buyer, this time for the entire property, including the license, the fixtures, the real property, and the business itself.

The second offer was for about five times as much money as the first offer. The owners also accepted this offer, but again conditioned acceptance on approval by their attorney. The owners' attorney then reviewed both offers at the same time and, not surprisingly, approved the second, more favorable one.

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures.

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures. It contended that the sellers had waived the requirement of attorney approval by their bad faith in simultaneously submitting to the attorney two competing purchase agreements, both of which conditioned acceptance on approval by the attorney. The disappointed party further argued that, by procuring the second offer and prospective agreement, the sellers had wrongly hindered the fulfillment of the only condition remaining to be fulfilled on the first agreement—attorney approval.

A court disagreed that there was any bad faith and upheld the contract formed when the second offer was accepted and approved by the sellers' attorney. While the plaintiff had been the first to make an offer of any kind, nothing in its potential contract prohibited the sellers from considering other offers. Nor were the sellers obliged to take the property off the market pending review of the first offer by legal counsel. Consideration and eventual full acceptance of the second offer was not legally impermissible where the first offer had been only conditionally accepted.

There was no limit on what aspects of the first agreement were subject to the attorney's approval. He was free to disapprove it, as he did, simply because there had been a better competing offer made by a competing prospective buyer. Moreover, the sellers had not interfered with their attorney's actions, such as by instructing him to disapprove the first offer. In short, the sellers had not acted in bad faith. They were guilty of nothing more than shrewd business moves during what the court described as a period of "dickering" that preceded the formation of an enforceable contract.

Protection for Parodies

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LVM's trademarks are quite famous—the court called them "icons of fashion." But the fame actually worked to LVM's disadvantage in court by increasing its burden of demonstrating that the parody really was likely to tarnish the distinctiveness of LVM's name and products. Not only that, but the court saw the parody as probably having a salutary effect on LVM: A successful parody might actually enhance the famous mark's distinctiveness by making it more of an icon. As the court put it, the target of the joke becomes yet more famous. You might say that the court told LVM to lighten up and see the upside of having its products lampooned.

Outlaw Justice

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apple. Again, through their attorney, the James brothers initially fought the lawsuit, but soon they withdrew from the suit and allowed a judgment to be entered against them for $223. The judgment was satisfied when Smoote took possession of the horse which Jesse had left behind at the robbery.

Yes, Dr. Smoote had to endure the dreaded prospect of staring down the barrel of Jesse James's weapon, but in dollars and cents he fared well. The horse he now had, which Jesse had bought with cash gained from some of his successful robberies, was believed to have been from Kentucky racing stock and was valued at $500 (a considerable sum for the time).

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Like-Kind Exchanges

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Because a straight swap of property is often impractical, the Tax Code allows deferred like-kind exchanges. If the transaction is structured properly, a person can sell one property, have the proceeds held for a period of time, and then use the proceeds to buy new property. The seller must identify the replacement property within 45 days of selling the relinquished property. Also, acquisition of the replacement property must take place within 180 days of the sale of the relinquished property, or the due date of the taxpayer's return for that year, whichever is earlier.

Qualified Intermediary

It is common to use a qualified intermediary in making a deferred exchange of like property. A qualified intermediary is a person who enters into a written exchange agreement to acquire one party's property and transfer it to a second party, and also to acquire replacement property from the second party and transfer it to the first party. The agreement must explicitly limit the first party's rights to obtain in any way the benefits of money or other property held by the intermediary. A qualified intermediary cannot be either an agent or a relative of the "exchanger."

There are special rules for like-kind exchanges between related persons. In this context, "related persons" include not only spouses, siblings, parents, and children, but also a corporation in which an individual has more than 50% ownership, and a partnership in which an individual owns over 50% of the capital or profits. For a like-kind exchange between related persons, the ability to postpone tax liability for the gain from the exchange is lost if either person disposes of the property within two years after the exchange.

An exchange of like-kind property is only partially nontaxable if the taxpayer also receives money or unlike property in an exchange that produces a capital gain. In that case, the gain is taxable, but only to the extent of the money received and the fair market value of the unlike property.

Factors to Consider

In general, three basic factors may be considered in deciding whether a like-kind exchange will make sense. The exchanger should (1) receive property with a price equal to or greater than that of the relinquished property; (2) have as much, or more, debt in the acquired property as in the property given up; and (3) take no cash out of the transaction. While these are good general guidelines, they are not a substitute for sound advice from an attorney familiar with all of the requirements for a valid like-kind exchange.

Overtime

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unauthorized overtime while complying with federal law.

For example, an employer could keep a daily, unverified tally of its employees' hours and reassign shifts later in the week that would otherwise result in overtime, or it could refuse to assign any shifts to employees who habitually disregard an overtime rule. Whereas the agency had admitted that a nurse who disregarded its preapproval rule faced no adverse consequences beyond getting only straight-time wages for the ensuing overtime, if it were serious about preventing unauthorized overtime, said the court, the agency would discipline nurses who violate the rule.

According to the court, an employer could even entirely disavow overtime hours, announcing a policy that it will not, under any circumstances, employ an individual for more than 40 hours in a week. Under such a policy, any hours over the limit would not be compensated for the employee.

Home Improvement Scams

Your home is your castle . . . and it is also probably your most valuable investment. Unfortunately, many homeowners unwittingly hire crooked contractors to improve or repair their castles, and they wind up being cheated out of money or paying for inferior work. The home improvement business is crawling with cheats. Before signing on the dotted line, remember the following:

- Be wary of a salesman who comes to your home uninvited, especially if he claims he was doing some work for your neighbor or was just "in the neighborhood."
- Ask for references, with names and telephone numbers—nothing drives away a swindler quicker than a request for references.
- Beware of the low-ball bids or offers that seem too good to be true, because they usually are.
- Beware of people who ask for a large "deposit" or ask to be paid in full before the work is done.
- Read everything carefully before you sign it, and make sure you understand all of the terms.
- Do not sign a contract with blanks in it.
- Beware of a salesman who claims that his offer is for a "limited time" or is "today only," especially where he is pressuring you to sign before you have read the contract.

If you have a complaint about your home improvement project, begin by trying to resolve it with the contractor. Honest mistakes can occur and can be easily corrected. Make sure to follow up with a letter that you send by certified mail and keep a copy for your records. If this approach is unsuccessful, contact your local or state consumer protection office.