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Federal Courts Are allowing Businesses to trademark Customer-Created Nicknames and Slogans

Federal District Courts in New York have begun to revive a dormant but useful wrinkle in the trademark laws: permitting a business to acquire trademark rights in nicknames and slogans that its customers developed but that the business itself has never officially used. Although at first glance this may not seem significant, this doctrine can be incredibly useful to a savvy and cost-conscious business.

The Most Effective Marketing Team You Will Ever Have.

The most apparent benefit to trademarking nicknames and slogans that your customers developed is that you are acquiring branding rights that have already proven effective. Good branding strives to establish familiarity with customers so that, when a customer needs to make a purchase, they think of and ultimately choose your brand. There may be no greater way to establish familiarity with customers than to officially adopt nicknames and slogans that your customers are already using. The more these customers see those nicknames and slogans on your merchandise, the stronger the bond becomes and the more likely they are to choose your brand when making purchases.

And The Cheapest Marketing Team You Will Ever Have.

Not only does trademarking customer-created nicknames and slogans provide a business with proven branding, but the business acquires that proven branding for essentially no cost. Businesses have no obligation, moral or otherwise, to compensate customers for developing catchy nicknames and slogans. Indeed, it would likely be

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Happy Holidays!

HH&K Wishes You and Your Family Happy Holidays and Happy New Year!

Federal Courts are allowing Businesses to Trademark Customer-Created Nicknames and Slogans (continued)

impossible to find "the customer" who developed the nickname or slogan anyway (if one such customer even exists). Trademarking customer-created nicknames and slogans thus enables a business to utilize effective branding without incurring the cost to develop it—a substantial windfall.

An Advantage in Trademark Disputes.

Trademarking customer-created nicknames and slogans can also be extremely advantageous if your business is ever entangled in a trademark dispute. Trademark disputes often come down to timing; the business that used the trademark first usually has superior rights. Courts have permitted businesses to rely on customer usage of later-trademarked nicknames and slogans to establish dates of first use during trademark disputes. In some cases, this type of customer usage may be decisive to determining which business is entitled to use a trademark.

More Developments May Be Coming.

Although the New York District Courts appear friendly to businesses trademarking customer-created nicknames and slogans, neither the Court of Appeals for the Second Circuit (which includes New York) nor the Supreme Court of the United States have commented on this issue. Eventually, one of those two Courts may address this practice and, in doing so, could alter or abolish it. However, while that remains a legal possibility, that outcome seems unlikely, because ensuring that customers know the source of goods is the goal of trademark law and this practice furthers that goal. For now, however, businesses can and should make use of the advantages that trademarking customer-created branding provides.

Article written by Michael Keenan, Esq. For more information, contact Mr. Keenan at (607) 231-6927 or via email at mkeenan@hhk.com.

The Case for Making Gift Transfers in Trust—Part I

Introduction to Modern Estate Planning

Estate planning has traditionally been concerned with saving taxes, especially transfer taxes.[1] Recent legislation has significantly reduced, if not eliminated, estate tax reduction as a concern for many families (at least until the laws change again). Today, many financial advisors claim that this recent legislation is a "game changer" that should cause planners to rethink the traditional emphasis on reducing transfer tax and shift their focus to reducing income tax.

Formerly, estate planning focused inordinately on the reduction of estate tax liability through the use of "credit shelter trusts" to hold estate tax exempt property and ensure its passage to children and grandchildren free of estate tax. These trusts followed a very traditional design and contained relatively inflexible and rigid provisions that were intended to restrict a beneficiary's access to the trust assets until some future time when he or she would be better able to manage them directly. Clients would then choose the date (usually based on the age of a child or grandchild) at which the trust would terminate and full control of the assets would be turned over to the beneficiary.

Because trusts also require additional administration and are subject to relatively high income tax rates, many advisors now claim that trusts are not only no longer necessary, but also that they may be detrimental to the preservation of family wealth.

Against this background, it is no wonder that clients continue to struggle with balancing their desire to provide their children with access to the wealth that they have worked so hard to accumulate against the dangers inherent in providing unrestricted access too early and subjecting those assets to risk associated with the child's relative immaturity and lack of experience. Those who still support the use of traditional trusts are not helped by suggestions that simpler is better and that income tax considerations argue against transferring property in trust. If all a trust represents is a rigid, income tax detrimental restriction on a beneficiary's access to her assets, then resistance to the use of trusts is understandable.

A fundamental premise of this series is that the game has not changed. While saving tax (whether income or transfer tax) is important, a narrow focus on tax planning strategies can obscure the real, underlying objective of all financial planning—and that is to so organize and conduct one's financial affairs so that they are relatively transparent. This means that the pressures, stresses, concerns, worries, identity, ego, and self-esteem issues surrounding one's relationship with money cease to matter to his or her enjoyment of and involvement in life. Family financial wealth can provide options and alternatives that contribute to an increased quality of life.

If planning ignores this fundamental objective, a considerable amount of individual time and physical and emotional energy is spent in dealing with money problems and opportunities or in using money and other financial assets to compensate for a failure to thrive in other areas of life.

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The Case for Making Gift Transfers in Trust—Part I

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We have all witnessed poor decisions involving financial assets. The burgeoning field of behavioral finance has catalogued the various thinking biases (called "heuristics") to which human beings are subject.[2] Experienced estate planning lawyers have a plethora of horror stories illustrative of the many (though similar) ways that beneficiaries can lose or squander a large inheritance. Proper estate planning, at minimum, includes intelligent risk management and the implementation of legitimate asset protection strategies so that our hard-earned assets remain available to those people and causes we care about.

Indeed, the entire game is and has always been in creating lives that consistently and progressively increase our clients' (and our own) experience of well-being. Protecting against avoidable risk of loss is critical to winning that game over the long-term.

As trusts became less necessary to accomplish estate tax reduction, the question many clients now have is why leave property to children and grandchildren in trust at all?

If trusts were required to be written in the traditional, restrictive way, then it would be difficult to argue that they continue to be necessary or even desirable as a method of passing property and assets to children and grandchildren.

Modern estate planners are familiar with the general concern and misconception (rooted in decades of unimaginative practice) that trusts are created by lawyers to keep beneficiaries from enjoyment of property they believe should rightfully be theirs.

The reality is that property transmitted to a beneficiary in trust can confer significantly greater benefits than can be derived from property transferred to that beneficiary outright, not only with regard to tax savings but also from the claims of creditors and other financial predators, including an estranged spouse in a divorce context. From the beneficiary's perspective, it is difficult to envision any rights in property owned outright that cannot also be provided in a trust through proper design and drafting, including flexible distribution standards, trustee powers and beneficiary powers of appointment.

In the second installment, we will describe in more detail the advantages of using trusts.

1. For purposes of this discussion, transfer taxes include the federal gift, estate and generation-skipping transfer (GST) taxes. Many states (including New York) have their own separate estate tax, but no current gift tax or GST tax system. All transfer taxes are similar in that they are excise taxes on the transfer of wealth.

2. Kahneman, D. (2011). Thinking, Fast and Slow. New York: Farrar, Strauss, Giroux

Article written by John R. Bedosky, Esq. For more information, contact Mr. Bedosky at (607) 231– 6795

New York State's Penalties for Cell Phone / Texting Violations are Becoming More Severe

The National Highway Traffic Safety Administration recently reported that, statistically, 80% of all motor vehicle accidents involve a driver looking away from the roadway just prior to impact. In addition, looking away from the road for two or more seconds will double your risk of being involved in a motor vehicle accident. New York State has recognized these statistics and has recently taken a tougher stance on the use of cell phones and texting while driving, particularly when being used by young drivers. As of November 1, 2014, young drivers with a probationary license, a class DJ (junior operator, age 16-17), class MJ (junior motorcycle operator, age 16-17), or a driver with a learner's permit, who are convicted of using a cell phone or texting while driving will receive a mandatory 120-day suspension of their license or permit, together with the recently increased fines and surcharges associated with the conviction. Subsequent convictions within six months of a license being restored will result in a revocation of the driver's license or permit for a minimum of one year. For drivers other than those listed above, a conviction of using a cell phone or texting while driving is a five-point penalty, together with fines and surcharges being assessed.

Article written by Ronald L. Greene, Esq. For more information, contact Mr. Greene at (607) 231-6718 or via email at rgreene@hhk.com.

Congratulations!

Ryan M. Mead, Esq.
Has become a Partner in the Firm, effective January 1, 2015.
Mr. Mead's practice concentrates in business and corporate law, representing clients in all stages of their business. Mr. Mead consults with clients on choosing the right type of entity to form, including for-profit corporations, LLCs, LPs, partnerships or not-for-profit corporations. Mr. Mead has extensive experience with business succession planning, including mergers and acquisitions, asset purchase agreements, stock redemptions, buy-sell agreements and entity dissolutions.

Christopher L. Roma, Esq.
Has joined the firm as an Associate Attorney. Mr. Roma is a graduate of Pace University School of Law and a member of the firm's Business and Corporate Law Practice Group.

Wage and Hour Headaches: Wage Theft Prevention Act, Comp Time, Non-Exempt Salaried Employees

By some estimates, 70% of employers are committing one or more wage and hour violations. The law is complicated, and employers must be constantly vigilant to avoid legal liability. For employers who fall short, the penalties are stiff—New York provides for a 100% penalty for any unpaid wages, and the federal government is stepping up its assessment of penalties as well.

Compensation Time, or "Comp Time" for short, is a constant area of liability for employers. It sounds like a great idea—let an employee who works over 40 in a week save that extra time to take paid time off at a later date. The employee gets more vacation, and the employer avoids paying overtime rates for work. But if that employee is an hourly paid employee and you are an employer in New York, your Comp Time policy is likely illegal.

New York law requires that non-exempt employees be paid for all hours worked in a work week, and that they be paid time and a half for hours worked over 40 in a work week. It does not permit an employer to have employees "bank" extra hours to take as paid time off at a later date. While an employer can flex hours within the work week, carryover is not permitted.

With regard to exempt employees, the rules are more permissive. Since the salary for exempt employees covers all hours they work, regardless of when employees work the hours, Comp Time is permissible (though not required) for exempt employees.

Employers and non-exempt employees looking for stability in wages may instead consider a non-exempt salary arrangement. Under such an arrangement, a non-exempt employee is paid a set salary each week regardless of the number of hours worked (like exempt employees are paid). The employee is also paid half-time overtime for any hours in a work week over 40. This sort of arrangement is permissible in New York, but it is not without risk. First, the arrangement is only permitted if an employee's hours are flexible—that is, sometimes they fall over and sometimes under 40 hours a week. In other words, the arrangement must benefit both employee and employer. Second, the arrangement must be communicated in writing to the employee. New York has specific Wage Theft Prevention Act forms for this arrangement. Any employer considering the arrangement would be wise to seek legal counsel before implementation. For employers in Pennsylvania, the arrangement is not allowed and can result in significant overtime liability.

In other wage and hour news, the New York State Legislature has amended the Wage Theft Prevention Act to eliminate the requirement of annually provided wage notices. It is anticipated that Governor Cuomo will sign the amendment in time to become effective in January of 2015. The downside of the statue is that the notices are still required at the time of hire, and any time a wage is changed. The statute also increases certain penalties for non-compliance with the wage and hour laws.

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

Employer Beware: Employees Can Now Use Your E-mail System to Organize

In a lengthy decision issued December 11, the National Labor Relations Board overruled its previous decision, *Register Guard*[1], which held that employers could lawfully ban employees from using their employer's e-mail systems to communicate concerning non-work related matters. The new Decision, *Purple Communications, Inc.*[2] , holds that there is a presumption that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment during non-working times. Employers may only overcome the presumption by showing special circumstances justifying a restriction. In making that showing, employers must articulate "the interest at issue and demonstrate how that interest supports the email use restrictions it has implemented."

Given the Board and General Counsel's recent trend toward increased protection of non-union workers' rights, all employers would do well to review their current e-mail policies with counsel to determine whether they will now be deemed unlawful under the Board's new standard.

[1] The Guard Publishing Co. d/b/a The Register Guard, 351 NLRB No. 70 (2007).

[2] Purple Communications, Inc., 361 NLRB No. 126 (2014).

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

New Residential Lease Law Encourages Fire Safety and Awareness

On January 21, 2012, three people in their early twenties perished in a fire that ravaged 112 Fairview Avenue, a private home rented by Marist College students. Although four people were able to escape from the home through windows, three others died from a combination of smoke inhalation and collapsed debris. The cause of the fire was undetermined at the close of the investigation, but it was clear, however, that the house did not contain a sprinkler system.

Sprinkler systems remain a rare feature of private residences, despite their usefulness. Structure fires reported to the National Fire Protection Association from 2007-2011 indicate that, when sprinklers were activated, they were 96% effective. There are two main kinds of sprinkler systems: a wet pipe sprinkler system and a dry pipe sprinkler system. Wet pipe sprinkler systems use water. When the sprinklers are activated by heat from a fire, the water flows from the sprinklers immediately. With a dry pipe sprinkler system, the piping system contains air or nitrogen under pressure instead of water. When the sprinklers are opened, they release the air or nitrogen, and water pressure opens a valve to allow water to flow through the sprinklers.

In New York State, sprinkler systems are only required in newly constructed apartment buildings outside the Big 5 cities—New York City, Buffalo, Rochester, Syracuse, and Yonkers. Thus, countless residential structures and older apartment buildings throughout the state do not provide these life-saving devices.

The New York State legislature decided to take on the lethal issue in 2013. Real Property Law § 231-A went into effect on December 3, 2014 and requires sprinkler system disclosures on all residential leases in New York. All new leases or renewals of existing leases must contain a conspicuous notice in bold type. The notice must state whether a maintained and operative sprinkler system is present on the premises; if a system exists, the notice must also state the last date on which it was maintained and inspected. The New York State Association of REALTORS, Inc. provides model language to use in residential leases:

THE LEASED PREMISES (CHOOSE ONE OF THE FOLLOWING) IS/IS NOT SERVICED BY A MAINTAINED AND OPERATIVE SPRINKLER SYSTEM THAT WAS LAST MAINTAINED ON ___/___/___ AND WAS LAST INSPECTED ON ___/___/___.

Landlords and tenants alike must ensure that all leases contain the required disclosure. While it is not illegal for landlords to lease apartments or houses that do not have sprinkler systems, they now need to make the existence or non-existence of a system clear. As a result of the new law, tenants and potential tenants are better informed when determining where to live. No landlord should fail to include the disclosures on his or her leases, and no tenants or potential tenants should sign a lease that does not have the notice displayed conspicuously on it.

While the sprinkler system disclosure is an important step in improving the health and welfare of New York residents, it alone cannot explain the importance of fire safety. The following checklist from the U.S. Fire Administration offers important questions to answer before choosing where to live:

- Are there working smoke alarms in each bedroom, outside of sleeping areas, and on each level of the building?
- Are there at least two ways out of each room and the building?
- Do the upper levels of the building have at least two sets of stairs inside and/or a fire escape?
- Are there exit signs in the hallways to show the way out?
- Are there enough electrical outlets for all appliances, computers, printers, and electronics without using an extension cord?
- Has the building's heating system been inspected recently?
- Does the building have a fire alarm system?
- Does the building have a sprinkler system?
- If the building has a fire alarm or sprinkler system, does the system send a signal to the local fire department?
- Is the building address clearly posted so emergency services can find it quickly if they need to?

Source: http://www.usfa.fema.gov/downloads/pdf/home_safety_checklist.pdf

All are encouraged to visit the U.S. Fire Administration's website and explore their resources at: http://www.usfa.fema.gov/.

Article written by Rebecca A. Koval, Esq. For more information, contact Ms. Koval at (607) 231-6858 or via email at rkoval@hhk.com.

Piercing The Corporate Veil In Litigation

Businesses are often structured vertically, with a corporate parent acting as a holding company for subsidiary companies engaged in various business lines. Often perceived as having deep pockets, parent companies are regularly sued by plaintiffs whose real claim is against one or more of the operating subsidiary companies.

Fortunately, New York law offers protection from this kind of litigation. Under New York law, absent evidence of complete domination of the subsidiary, plaintiffs cannot drag parent holding companies into lawsuits when they had nothing to do with the alleged harm. The law disallows reaching through the subsidiary to the parent's assets unless the plaintiff can show that the subsidiary is a sham.

McAnaney v. Astoria[1] illustrates the contours of this rule. In that case, the plaintiffs brought Truth in Lending Act and related state law claims against Astoria Federal Savings & Loan Association, the bank that actually engaged in the allegedly wrongful mortgage lending, and Astoria Financial Corporation, the bank's parent holding company, which did no lending. Plaintiffs asked the court to "pierce the corporate veil" to reach the parent because it owned 100% of the bank's stock, the bank and parent filed consolidated financial statements, and the companies had overlapping directors and officers.

The court dismissed all claims against Astoria Financial and made these points:

- Parent companies are generally not liable for actions of their subsidiaries;
- To pierce the corporate veil, a plaintiff must show that the parent exercised complete dominion over the subsidiary with respect to the transaction at issue and that such domination was used to harm the plaintiff;
- Courts consider a number of factors to determine whether the necessary dominion and control exists to pierce the corporate veil, including: (i) absence of corporate formalities such as the issuance of stock, election of directors and corporate record-keeping; (ii) inadequate capitalization; (iii) overlap in ownership, officers, directors, and personnel; (iv) common office space, address and telephone numbers; (v) the subsidiary's business discretion; (vi) dealing at arms length; and (vii) treatment as independent profit centers.

Summing up, the court held:

> "The facts which plaintiffs claim indicate excessive control and domination in the instant case -- controlling ownership interest in subsidiaries, reporting of consolidated results of such subsidiaries in public filings, and overlapping directors and officers between parent and subsidiary corporations -- *are commonplace as generally-accepted corporate form*, and are insufficient without more, as a matter of law, to eviscerate *the presumption of corporate separateness.*" (emphasis added)

Takeaway: The law presumes that parent corporations and their subsidiaries are legally separate and imposes a high evidentiary bar to piercing the barrier. Even if the companies share offices, directors, officers and employees and consolidate their financial statements, if subsidiaries observe basic corporate governance formalities and have legitimate business operations and purposes, New York courts will uphold that separation and dismiss attempts to ensnare a parent as a defendant in a lawsuit.

1. *McAnaney v. Astoria*, 665 F.Supp.2d 132 (E.D.N.Y. 2009)

Article written by Clifford S. Weber, Esq. For more information, Mr. Weber can be reached at (914) 694-4102 or via email at cweber@hhk.com

Congratulations!

Erica L. Lawson, Esq.

HH&K partner Erica Lawson has been named Chair of the Business and Corporate Law Practice Group.

Ms. Lawson concentrates her practice in advising business and corporate clients on all aspects of their operations. She has handled formation and organization of business entities including LLCs, LLPs, corporations, professional corporations and not-for-profit corporations. She is part of the mergers and acquisitions team, and regularly engages in negotiation and drafting of transaction documents for various complex business transactions.

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