



THE KWG&C NEWS BRIEF

"LEGAL SERVICES FOR SECURITY AND SUCCESS"

INSIDE THIS ISSUE:

Focus On: Bankruptcy 2

Focus On: Transportation 3

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From The Editors:

Kalina, Wills, Gisvold & Clark, P.L.L.P. is proud to present the Fall 2007 edition of *The KWG&C News Brief*. We hope you find it interesting. Naturally, these materials should not be regarded or relied upon as individual legal advice or opinion. **Please contact us to receive future KWG&C News Briefs by e-mail!**

We would also like to welcome **Jenna T. Burfeind** as a new associate attorney to KWG&C. Jenna focuses her practice on complex litigation and will be a valuable asset to our team. Welcome, Jenna!

Carole Clark Isakson

Jason E. Engkjer

HOW DO I PROTECT MY TRADEMARK?

BY JILL A. JAMES

Trademarks can be a valuable commercial asset to your business. My last article from the spring 2007 issue of the KWG&C News Brief identified what a trademark is and how to determine its shape and size. This article explores some of the basic principles in protecting your trademarks.

How you protect your trademark – commonly known as a “Mark” – depends, in part, upon how and where you plan to use it. Here are some tips that all owners should know and practice to protect their Mark:

Consistently use your Mark. Make sure that you consistently display and use the same Mark in the public marketplace. Updating the “look” of a Mark or slogan may be a bad idea. You may end up with two Marks instead of one. You may then not be able to rely upon the continuous use of the “old” Mark to claim priority over third party infringers. If this happens, and you stop using the “old” mark, you may be deemed to have “abandoned” the Mark.

Avoid substantially changing the types of goods or services that your Mark represents. While

expanding the goods and services your Mark represents will increase the value of your Mark, be careful to avoid changing the goods and services you offer. An extensive change can cause you to lose your trademark protection. Therefore, always use your Mark as originally intended. You should make sure to offer the same services or goods that the public associates with your Mark.

Protect against the Mark becoming generic. You can help avoid the Mark from becoming generic if you use it as an adjective. Never use the Mark as a noun, in plural or possessive form. The word “brand” can also help to protect against it becoming generic. For example: “JELL-O Brand gelatin”, not “JELL-O”.

Build marketplace recognition by distinguishing your Mark. Consider setting your Mark apart from other text so that it stands out and is less likely to become a generic term. You might consider using: a) all capital letters; b) a special font; or c) setting the Mark in quotation marks. Remember: the more pub-

(Continued on pg. 4)

EMPLOYERS RECLAIM CONTROL OF VACATION/PAID TIME-OFF HANDBOOK POLICIES

Great news for employers! The Minnesota Supreme Court recently reversed a troubling court of appeals decision that prevented employers from contractually limiting when they must pay unused but earned vacation benefits to departing employees.

At the heart of this case is whether “earned” vacation benefits constitute “wages” for purposes of Minnesota Statute Section 181.13(a). This section requires employers to pay terminated employees within 24 hours after a demand for payment.

In its October 2006 opinion in Susan Lee v. Fresenius Medical Care, Inc., the Minnesota Court of Appeals held that earned vacation/paid time off benefits

constituted “wages”. The Court of Appeals invalidated employee handbook vacation pay forfeiture provisions. This forced employers to pay vacation benefits to a terminated employee regardless of what the handbook said, and even if the employee was terminated for misconduct or poor performance. The Minnesota Supreme Court reversed this unfair result, restoring an employer’s right to limit an employee’s ability to receive payment in lieu of paid time off in its employee handbook.

Now is an excellent time for every employer to review its employee handbook. Even a minor adjustment to your handbook could save your business significant time and money.



FOCUS ON: BANKRUPTCY

BANKRUPTCY CAN BENEFIT CREDITORS—NO REALLY!

BY GORDON B. CONN

Rippling through the economy are the effects of the sub-prime meltdown, record levels of mortgage foreclosures, turmoil in credit markets, tightening credit, increasing bond defaults, and escalating costs from high oil prices and the falling dollar. These conditions will contribute to business failures and, ultimately, bankruptcies.

For most creditors, learning of a customer's bankruptcy is bad news. The banks and other secured creditors are first in line, often with little or nothing left over for unsecured trade creditors, such that unpaid accounts receivable will remain unpaid. Worse yet, despite the efforts of hard-nosed credit managers in having obtained some payment, payments obtained in the ninety days prior to the bankruptcy filing may have to be disgorged as voidable preferences. Sometimes, however, bankruptcy can actually benefit the unsecured creditors.

People involved in failing businesses do strange things. Creditors holding personal guaranties receive favored treatment. Inventory and equipment may "get legs" and disappear. Assets may be removed or sold for inadequate prices to a new business formed by insiders. Where insiders have made loans to the business, those loans may be repaid or supported by new grants of security interests in any remaining unencumbered assets.

Options Outside of Bankruptcy

Outside of bankruptcy, creditors do, of course, have legal remedies. When a financially troubled debtor makes a payment or transfer of property for less than fair value, or makes the transfer with intent to hinder, delay, or defraud a creditor, creditors may have a right to recover under state fraudulent-transfer laws. State law may also permit recovery of debt repayments made to "insiders" of the debtor. In general, Minnesota law permits a creditor to recover fraudulent transfers—including insider preferences—made within six years prior to suit. Thus, an insider (or an affiliate of an insider) who has provided capital to a business enterprise in the form of purported loans, and then extracted repayment of the loans while the business was insolvent or made insolvent by the transfers, may face exposure for up to six years after receiving the preferential payment. Insiders' defenses are few, generally limited to having provided "new value" to the business debtor in the form of further loans or capital contributions.

How Bankruptcy May Help

Of course, starting legal action may trigger a bankruptcy filing, and in any case, unsecured creditors may consider filing a petition for involuntary bankruptcy. Pursuing an involuntary bankruptcy may be well-advised where the creditor has reason to believe that the debtor has made improper transfers or preferential payments. An unsecured creditor, usually with at least two other creditors, may obtain an involuntary bankruptcy adjudication simply by showing that the debtor

is generally not paying its debts when due. If the resulting bankruptcy is a Chapter 7 liquidation, a trustee will be appointed and armed with some remedies for creditors not otherwise available under state law. A trustee may pursue both fraudulent transfer and preference claims as provided by the Bankruptcy Code. The trustee may be able to "avoid" fraudulent transfers made up to two years prior to bankruptcy, and avoid and recover preferential payments to creditors made within ninety days of the bankruptcy filing, or one year if the payment was to or for the benefit of an insider. In addition to avoidance actions under the Bankruptcy Code, the trustee may be able to "piggy-back" on other applicable law. Section 544, the bankruptcy "strong-arm" provision, permits a trustee to exercise all powers of a hypothetical lien creditor, and thus he or she may enforce fraudulent transfer claims otherwise available to a creditor under state law.

Bankruptcy and the Pool of Creditors

If the bankruptcy remedy is considered, a petitioning creditor must recognize that any recovery will go to the benefit of all creditors, not merely the petitioning creditor. If the resulting dilution is not a significant factor, bankruptcy proceedings may provide the best remedy for creditors for a variety of reasons.

If the debtor voluntarily files for bankruptcy under Chapter 11, or elects to convert to Chapter 11 after an involuntary petition is filed, the major unsecured creditors may form an unsecured creditors' committee. The committee and its counsel can work to keep the debtor honest, prevent overreaching by the secured creditors, and investigate and encourage pursuit of avoidance actions. The committee can also have an important function in negotiating the debtor's plan of reorganization. It is not uncommon for courts to confirm a plan of reorganization which provides for little payment to unsecured creditors but which assigns to the committee or its liquidating agent the right to pursue avoidance actions for the benefit of the unsecured creditors. In some cases, this arrangement can be highly beneficial for unsecured creditors. KWG&C acted as liquidating agent in the Excelsior-Henderson Motorcycle bankruptcy and through avoidance recoveries the unsecured creditors ultimately realized a higher percentage return on their claims than did the secured creditors.

The chief advantage of the bankruptcy remedy can be cost—outside of bankruptcy, a creditor seeking to enforce its claims through legal remedies does so on its own nickel, often throwing good money after bad. In bankruptcy, the cost of pursuing such claims (including legal fees) is borne by the estate, not individual creditors. So, it really is true that bankruptcy can benefit creditors under the right circumstances. Remember to contact your attorney if you think a bankruptcy is around the corner.

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FOCUS ON: TRANSPORTATION

OWNER-OPERATORS: INDEPENDENT CONTRACTOR OR EMPLOYEE?

BY JAMES H. WILLS

There may be a problem brewing for the trucking and construction industries in the age-long battle with the IRS on the proper classification of owner operators as independent contractors versus employees. As most of our readers are aware, those industries have long relied on the “Safe Harbor” provisions of Section 530 of the Tax Code. Recent case law and public statements by the IRS, however, are giving rise to concerns that the application of the Safe Harbor provisions to many motor carriers and construction companies may no longer be as certain. First, a bit of history.

The U.S. Congress passed Section 530 in response to the IRS’ onerous application of very subjective standards in determining the classification of a worker as an employee (requiring payment of withholding tax, etc.) versus an independent contractor (exempt from withholding taxes). To fall under the Safe Harbor provisions, the employer must be able to prove all three of the following: (1) The company must have a reasonable basis for not treating the worker as an employee (and that reason must be on the IRS list of acceptable reasons); (2) the company (and any predecessor business) must have treated the worker and any similar workers as an independent contractor for all applicable periods beginning after December 31, 1977; and (3) the company must have filed Form 1099 MISC for each worker (if required).

If the company misclassified its workers but the Safe Harbor applied, the company did not owe any employment taxes for those workers. For many years Section 530 gave the trucking and construction industries a certain amount of comfort provided, of course, that the company kept current on maintaining eligibility under the Safe Harbor requirements. The IRS now appears ready to challenge the application of the Safe Harbor provisions based on the second element above.

Those not able to use the Safe Harbor provisions, but wishing to assert that a worker was an independent contractor, must look to a “20 factor” test promulgated by the IRS in 1987. The IRS issued Rev. Rul. 87-41 at that time as a result of the confusion resulting from inconsistency in applying factors used to determine the worker’s classification. Rev. Rul. 87-41 sets out the 20 factor test based on common law standard definitions focusing on three areas: behavioral control; financial control; and type of relationship. The 20 factor test has been used by the IRS since 1987 in making its classification determinations.

A recent case has called in to question the ability of many companies to continue to rely on the Section 530 Safe Harbor provisions. In this case, the IRS assumed that the Safe Harbor provisions didn’t apply and went directly to the 20 factor test. The IRS concluded that the worker was an employee of the company, citing some of the following reasons to support that determination:

- The company provided training and instructions. The IRS also considered customer instructions the same as company instructions in demonstrating control;
- The relationship was relatively permanent although both parties had the right to terminate at any time, for any reason without any penalties;
- The company integrated the worker’s services into the company’s business operations;
- All permits and licensing were in the company’s name;
- The company controlled the worker to satisfy governmen-

tal/regulatory matters;

- The company and not the worker advertised its name on the equipment;
- Because the leasing company was related to the carrier and the driver could obtain advances from the carrier for operating expenses, there was no financial investment or capital at risk and opportunity for “profit or loss” for the worker.

An interesting note: the IRS relied on and cited Revenue Rulings from 1971 or earlier –former practices that ultimately resulted in the passage of the Section 530 Safe Harbor.

This case will be of particular concern to any company that has re-classified workers. During the 1980s, many trucking and construction companies converted employees to independent contractors. These companies made this conversion in an effort to avoid the burden of workers compensation as a result of increasing rates. With the IRS’ new attitude however, those companies will likely be unable to benefit from the Safe Harbor provisions, and will instead be forced to pass the 20 factor test. Looking at the analysis from the recent case, passing the 20 factor test may be a big challenge.

This new attitude is evident in other IRS actions as well. At a November 6, 2007 program hosted over the internet by the IRS, “Tax Talk Today: What’s Hot in Employment Taxes: Independent Contractor or Employee”, a number of key IRS staff (including the Assistant Division Counsel/Prefiling and the Program Manager - Employment Tax Policy of the Small Business/Self Employed Division) made the presentation with this stated purpose:

Our November program will deal with worker classification issues. Panelists will discuss legislative and judicial background and recent changes regarding worker classification, why the worker classification issue is important and what the IRS is doing about it, and what workers who feel they have been misclassified can do to correct their situation.

The message appeared to be that the IRS is taking a more aggressive approach to make certain that workers are properly classified for unemployment tax purposes. The IRS plans on seeking out workers that it may feel have been misclassified, and asking those workers to complete IRS Form SS-8 – claiming that the worker is an employee.

To further this push, the IRS has also published a new Form #8919 for the worker that believes he or she should be classified as an employee. On November 6, 2007, the IRS signed a new cooperation agreement with 29 states creating a more formalized and structured procedure for state agencies and the IRS to share information regarding any reclassification of workers for any employer.

If any carrier receives a notice of inquiry and a questionnaire to fill out for the IRS regarding worker classification, it should contact its CPA or attorney immediately for assistance in properly completing the questionnaire.

FOR MORE INFORMATION:

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(Trademark—Continued from pg. 1)

licly recognized the Mark is, the more protection it receives.

Monitor against third party use. Competitors or innocent third parties may attempt to use or register the same or similar Marks. If you learn that someone else is using a confusingly similar Mark, notify that person, in writing, of your trademark rights. This notice should demand that the offender stop using the Mark. Obtain a written statement from the offender agreeing to discontinue use. If the offender cannot or will not do so, you may need to bring a trademark infringement lawsuit. Contact your attorney to assist you with this process, especially if you are unsure who was first to use their respective Mark in the marketplace.

Anytime You Use the Mark, Include a Proper Designation. Even an unregistered Mark is entitled to some protection. However, it is important to inform the public marketplace that you are asserting your ownership rights to the Mark. Including the symbol “TM” after your Mark is the easiest way to send this message for unregistered or state

level only registered Marks.

Consider Registering your Mark. Depending upon whether your Mark is used within the borders of one state or across state lines, you may consider registering it in your state or federally with the U.S. Patent & Trademark Office. Federal registration provides you with the most comprehensive protection against infringers and gives the public constructive notice of your ownership rights in your Mark. Contact your attorney to help you determine if state or federal level trademark registration is right for you.

At a first glance, protecting your trademarks may seem like a daunting task. However, with the right planning, and taking the time to completely understand what a trademark is and how to use it, you will find that protecting your Mark is fairly easy to do.

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“PROOF” OF INSURANCE, OR NOT?

Lenders frequently require proof of insurance in lending transactions. The most common response to those requests is the tender of one of two forms – the ACORD Form 27 (for personal property insurance) or the ACORD Form 28 (for commercial property insurance). In the past, these forms contained no liability disclaimers and could actually be relied upon as proof of the described insurance. This is no longer true.

Recent changes have been made to the forms. New disclaimers are now included in the ACORD 27 and ACORD 28 stating that the forms are for informational purposes only – the forms cannot be relied on as proof of insurance. It is common to require that if the policy is to be cancelled, the insurance company must notify the party to whom the form was provided. The revised forms no longer provide for this notice. Instead, if

cancellation (not termination) occurs, the insurer will “endeavor” to give notice. These changes create significant problems for lenders, borrowers, and closers. Several major lenders no longer accept the forms, and instead require an actual copy of the insurance policy or a declarations page at closing. This delays closings and impacts the timing and transferability of many loans.

Various professional organizations are at work on this issue, and some compromise language on the cancellation notice may be available.

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