



LAMSON, DUGAN AND MURRAY, LLP  
ATTORNEYS AT LAW

## BUSINESS COUNSELING

# UPDATE

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SPRING 2007

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### WHERE TO SUE? WEBSITES CAN AFFECT JURISDICTION

In a nation of 50 different systems of state courts and a highly interconnected national economy, the issue of when one state's courts can assert jurisdiction over a nonresident person or business has always been fertile ground for litigation. State legislatures have addressed the matter with laws that are the civil counterparts to the notion that criminals cannot escape the "long arm of the law." But "long-arm statutes," as they are known, do have their limits. Essentially, nonresidents can be sued in the courts of any state where they have had such contacts inside the state that it is reasonable to conclude that they have submitted themselves to the authority of the courts in that state. The principle is vague, but it has to be to cover the almost endless ways in which we conduct business.

In the business world, conventional arguments over the application of long-arm statutes have involved questions such as whether a party sought to be sued had an office or personal representative in the forum state, or whether a contract was signed by the parties in that state. Those issues still arise, but in the information age, courts increasingly

have had to adapt the rules to business conducted over the Internet. Just because a company's website is accessible by customers in a given jurisdiction does not necessarily mean that the company can be sued there. The emerging rule of law is that the more that a customer can have online interactions with a business based elsewhere, the more likely it is that if things go wrong the business can be forced to play an "away game" in court.

#### *Close, but No Cigar*

Examples make the point better than statements of rules of law. A Vermont furniture store used a trucking company to deliver furniture to a customer in North Carolina. When the buyer was injured during unloading, he tried to sue the furniture company in a North Carolina court. In this case, the "long arm" was not long enough to reach the Vermont company. The furniture had been bought and paid for in Vermont. The only respect in which the store had any connection to North Carolina was that its website could be accessed there, like anywhere else. But it was a passive site, giving information about products, but not allowing purchases through the site.

When an Oklahoma resident

bought a laptop computer from a Georgia company, then returned it for repairs, never to see the laptop again, he was unable to sue the company in Oklahoma. The customer had learned about the computer from the Georgia company's website, but he had ordered it by telephone and had not used the website to make the transaction.

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### *Caught by the “Long Arm of the Law”*

At the other end of the spectrum are cases in which businesses could be sued in the states where their customers lived because the businesses had a more substantial online “presence” in those states. A dog breeder in Illinois could make a similar Oklahoma business defend a lawsuit in Illinois because the Oklahoma business operated an interactive website and also used chat rooms to reach potential customers all over the country.

A California customer of a hotel run by a Nevada casino was able to haul the casino into a California court to defend allegations that it had imposed an energy surcharge on customers without notice. The plaintiff alleged that nothing in the casino’s promotional activities, including its website, informed customers of the charge. It was important to the ruling that the casino used an interactive website where out-of-state customers could get quotes and book rooms. In addition, there was a close connection between the alleged wrong—the misleading promotions—and the casino’s website that targeted millions of California residents.



### **ADA PROTECTS EMPLOYEES WITH CANCER**

Now over 15 years old, the Americans with Disabilities Act (ADA) protects disabled persons from discrimination in employment settings. When you first think of individuals with disabilities, the millions of Americans who have some history of cancer may not immediately come to mind. But, as the Equal Employment Opportunity Commission (EEOC) discusses in a recently published guide, a cancer victim may well be entitled to the protections afforded by the ADA.

#### *Cancer as a Disability*

Cancer is a “disability” within the meaning of the ADA when the cancer itself or its effects substantially limit one or more of a person’s major life activities. The limiting condition needs to be more than just temporary in nature. Just what constitutes a major life activity is difficult to succinctly describe, but an exhaustive list would be a long one. Interacting with others, sleeping, eating, and walking are but a few examples. As with other types of conditions, cancer will be treated as a disability if it does not, in fact, significantly affect a major life activity *but an employer treats the individual as if it does*. This reflects the ADA’s goal of attacking discriminatory stereotypes and assumptions when they motivate an employer’s decision making.

#### *Information Gathering*

During the time period before any offer of employment has been made, an employer may not ask an applicant if he or she has (or has had) cancer, or about cancer-related treatments. The employer is permitted to ask if an applicant can

perform particular job requirements. If an applicant has volunteered the information that he or she has (or has had) cancer, the employer still may not question the applicant about the cancer or the applicant’s prognosis, but the employer may ask questions about whether the applicant will need an accommodation and, if so, what kind.

Once a job offer has been made, the employer may ask health-related questions and require a medical exam, as long as the employer treats all applicants for the same type of position in the same manner. The discovery that an applicant has (or has had) cancer cannot be used to withdraw a job offer if the applicant can perform safely all of a job’s fundamental duties, with or without reasonable accommodation. When an offer has been accepted, the employer can ask questions about the employee’s health or require a medical exam only when it has a legitimate reason to believe that the cancer may be affecting the employee’s ability to do the job, and to do it safely. With a few exceptions, an employer must keep confidential any medical information learned about an applicant or employee.

#### *Reasonable Accommodations*

Within reason, the ADA requires employers to make adjustments or accommodations to enable people with disabilities to enjoy equal employment opportunities. An employer is not required to subject itself to undue hardship (that is, significant expense or difficulty) in order to accommodate someone. Nor must an employer remove an essential function from

a job, although it may choose to do so. As for cancer-related disabilities, some individuals may need, and are entitled to, reasonable accommodations because of the cancer itself, the effects of cancer medication and treatment, or both. A request is necessary to trigger the duty to make a reasonable accommodation, but no “magic words” are required and, in fact, the request may come from someone acting on behalf of the disabled person. The guidance is available on the EEOC’s website at [www.eeoc.gov/facts/cancer.html](http://www.eeoc.gov/facts/cancer.html).

#### **ESTATE PLANNING 101: WHAT IS A TRUST?**

A trust is a legal instrument that transfers title to designated property from the owner, called the settlor, to a trustee, who holds the property for the beneficiaries of the trust. The settlor can also serve as the trustee, thereby enhancing control over the trust during the life of the settlor. In such a case, a successor trustee is usually named in case the settlor dies or is incapacitated. Depending on the size or complexity of the trust, the trustee, or co-trustee, might be an institution, so as to bring more expertise to the position.

##### ***Testamentary Trust***

A testamentary trust, created in a will, takes effect when the grantor dies. It names the beneficiaries and gives directions for payment of the income from the trust and for disposition of the assets. The testamentary trust has the advantage of increasing the odds that an inheritance is used prudently. The trustee can manage the assets of the trust until such time as the

beneficiaries are prepared to do so, as opposed to an immediate transfer of assets to the beneficiaries.

##### ***Inter Vivos Trust***

The second category of trusts is the inter vivos, or living, trust, which is created during the settlor’s lifetime. An important decision for an inter vivos trust is whether the trust will be revocable by the settlor or irrevocable. In either case, the assets are retitled in the name of the trust.

As the name suggests, a revocable trust may be dissolved entirely by the settlor. But short of that, the settlor may also change beneficiaries, replace the trustee, or change the composition of the assets in the trust. Revocable trusts do not remove assets from the settlor’s estate. The settlor pays taxes on its income during his or her lifetime, and if any assets remain in the trust at the death of the settlor, they are part of his or her estate and at least potentially taxable as such.

An irrevocable trust permanently takes assets out of the settlor’s estate and puts them into the trust. While tax savings can be realized with an irrevocable trust, this type of trust is not to be entered into lightly, as it will take action by a court to alter it later. For tax purposes, the trust becomes a separate entity. Assets in the trust generally are not subject to estate taxes on the death of the settlor, but the transfer of assets into the trust may be subject to gift taxes.

When the settlor of an inter vivos trust dies, the trust assets pass directly to the beneficiaries. This is a distinct advantage over having to go through probate, the often costly and time-consuming process of administering a will. An inter

vivos trust also maintains the privacy of the estate, because bypassing probate also means that no public record is created, as occurs with probated wills.

Effective use of trusts in estate planning requires not only awareness of these trust basics, but familiarity with more specialized trusts, such as those involving life insurance policies and charities.

##### **SELLER’S DUTY TO DISCLOSE**

Before building a home on property it owned, a developer obtained a study of the soil conditions in the area that included the lot for the home. The study was prompted by the fact that a church that formerly owned adjoining land had abandoned plans to build a church structure on that land because of its own study indicating that there was too much collapsible soil to support the building. After receiving the soil study of the neighboring land, the developer dug out some soil on the lot for the home, reducing its grade by about six feet, and built the new house.

That there were any concerns over soil suitability came as news to the buyers of the new home when, not long after the purchase, cracks appeared in the foundation, doors would not open or close, and, as the court later put it, “[e]vidence of excessive settling abounded.”

The developer had not disclosed the contents of the soil study to the buyers. A state supreme court ruled that the buyers’ lawsuit for fraud should go to a jury. The court reasoned that a developer/builder may owe his buyer a duty to disclose information known to him

concerning real property, including property not being conveyed to the buyer, when that information is material to the condition of the property being purchased. To be material, the information must be "important." Importance, in turn, is measured by the degree to which the information could be expected to influence the judgment of a person buying property.

In the case before it, the court found that a jury could well conclude that the buyers would have wanted to know about collapsible soil on adjacent land before they bought their home. In the court's view, a property boundary should not be considered a perimeter outside of which, as a matter of law, nothing is material to a prospective buyer.

#### **SMOKE ALARMS: INEXPENSIVE GUARDIAN ANGELS**

If you could pay \$10 and, in return, get a guard who would warn your family if your house caught fire, would you? Of course you would. Despite this, most people do not have enough smoke detectors in their homes—detectors that will stand guard over your family's lives 24 hours a day. The evidence shows that using even an inexpensive smoke detector increases your family's chance of surviving a house fire by 50%, making it one of the best investments you can make for your family's safety.

Experts recommend installing smoke detectors, the cheapest of

which start at about \$10, throughout your house. At a minimum, install one detector for every floor and one outside of each bedroom. Test your smoke alarms once a month, and replace the batteries once a year. Make sure that every member of your family knows (1) what to do when the smoke alarm sounds, and (2) the fire escape route from each room. A little advance planning can help make sure that you and your family have a better chance if a fire should start in the night.

#### **TAX CONSEQUENCES OF SELLING COLLECTIBLES**

Collectibles, such as gold and silver coins, works of art, antiques, and stamps, have seen significant appreciation in value lately. As the buying and selling of collectibles pick up, it is important to be familiar with the tax consequences of such transactions.

If collectibles are sold at a profit, the price increase is treated as a capital gain for income tax purposes. For a holding period of more than one year, the gains are long-term. The downside for sellers is that long-term gains on collectibles are taxed at 28%, not the 5% or 15% rate likely to be used for gains from the sale of other forms of property. To establish the basis, which is the cost of an item for tax purposes, owners of collectibles should keep records of the price paid for items, as well as records of any expenses

related to the items, such as insurance or storage costs. The expenses may be added to the basis, thus decreasing the taxable capital gain when the property is sold.

Someone who inherits valuable collectibles will receive a "step-up" in basis to market value at the time of inheritance, rather than using a basis determined by the earlier cost of acquiring the property. The new, higher basis means a reduced tax when the property is eventually sold. Inherited collectibles should be appraised right away, so as to establish the value to be used for the stepped-up basis.

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