



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

UPDATE

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ANDREW T. CHAPEAU, EDITOR

**NUMEROUS EMPLOYMENT LAW
CHANGES FOR THE NEW YEAR**

With a rash of new regulations set to go into effect, the New Year brings with it many new challenges for employers. On January 1, 2009, the ADA Amendments Act became effective, expanding greatly the number of injuries or illnesses that will now be disabilities under the Americans with Disabilities Act.

On January 15, 2009, the final rule implementing Executive Order 13465 and requiring certain government contractors to verify employment eligibility of employees through the E-Verify system becomes law. A day later, on January 16, 2009, the new Family and Medical Leave Act ("FMLA") regulations will go into effect. This is the first substantial update since the FMLA was enacted over 15 years ago. Finally, the U.S. Department of Homeland Security (DHS) has approved a new Form I-9. Employers must use the new form beginning on February 2, 2009 when verifying the employment status of employees. Please contact a Lamson, Dugan and Murray employee benefits attorney if you need any assistance with incorporating any of these matters into your human resources practices.

Brian J McGrath

**INCREASE IN FEDERAL ESTATE
TAX EXCLUSION AMOUNT**

The federal estate tax exclusion amount, currently at \$2 million, is set to increase to \$3.5 million on January 1, 2009. This means that in 2009, an individual may transfer up to \$3.5 million and a couple, if proper planning is done, may transfer up to \$7 million without any federal estate tax liability. Proper planning means not only appropriate preparation of documents but also careful analysis regarding the titling of assets.

If Congress takes no action, the federal estate tax will be repealed altogether in 2010. While this is an unlikely scenario, it does underscore the uncertainty involved in estate planning over the next few years. Due to this uncertainty, it is important to periodically meet with a professional to review your estate plan.

**LANDOWNER GETS
SETTLEMENT FOR "TAKING"**

When the government takes aim at private property to be taken for some public purpose, more often than not any resulting litigation is a contest over how much the property owner should be paid, rather than whether the exercise of the power of eminent domain was appropriate in the first place.

From the landowner's standpoint, it is important to realize that adequate compensation is not determined simply on the basis of the current use of the property. Instead, the landowner is entitled to the value of the property based on its "highest and best" use (whether that use already exists or is only in the eye of a developer), so long as such a potential use is not too

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speculative or otherwise foreclosed by applicable laws and regulations.

The importance to a property owner of negotiating compensation on the basis of a best-case, but realistic, development scenario for the property is illustrated by a recent case in which the owner of a vacant, 22,000-square-foot lot settled with a town for compensation in an amount that was about 27 times higher than the amount initially offered by the town.

The lot was zoned for residential use, although at the time of the condemnation action the owner had no building or development plans. Appraisers hired by the town offered an opinion that the vacant lot's best use was only as open space, or as a buffer for an abutting lot. They reasoned that compliance with the town's lot area and frontage requirements, as well as with its road standards for improving the dirt road on which the lot was located, would be so burdensome as to make any development of the property prohibitively expensive. They also indicated that extensive development costs would preclude development even if the lot was considered to have grandfathered status that would protect it from certain town requirements.

*A pessimist
sees the difficulty in
every opportunity;
an optimist
sees the opportunity in
every difficulty.*

Winston Churchill

For its part, the landowner retained experts who opined that the lot was, in fact, suitable for residential purposes and should be valued as such when arriving at a compensation figure for the taking. As the town's experts had noted, there were various requirements on the books that, in theory, could be costly to comply with. However, an examination of past rulings by the town's zoning and conservation officials showed that the lot was likely to be exempted from some of the requirements. Moreover, improvement of the dirt road, which would have been an especially big-ticket item, was not likely to be required.

Both sides were necessarily looking into the future to some extent, but the landowner was able to depict a scenario for the lot that was optimistic enough to bring about a favorable monetary settlement with the town.

LLC RULING FAVORS TAXPAYERS

Anna was the mother of three children and the widow of the man who invented the heart defibrillator implant. In 1992, she created a trust for each of her daughters and gave a portion of her substantial interests in patent licenses to the trusts. In 2001, she created a limited liability company (LLC), to which she made some large transfers. She then gave a 16% interest in the LLC to each of the trusts, keeping a 52% interest for herself. Only four days later, Anna died suddenly and unexpectedly.

The IRS claimed a deficiency of millions of dollars in estate taxes. It pointed to a part of the Internal



Revenue Code which provides that all property is to be included in a decedent's estate to the extent that the decedent has transferred an interest in the property while retaining for life the possession or enjoyment of, or income from, the property. There is an exception to this general rule in cases of a bona fide sale for full and adequate consideration in money, but the IRS argued that the exception did not apply in the case of Anna's estate.

In a somewhat surprising decision, given a recent trend favoring the IRS in such disputes, the United States Tax Court sided with the estate and kept the LLC assets out of the gross estate for estate tax purposes. The court ruled that the bona fide sale exception applied, notwithstanding that the LLC activities were not in the nature of a "business." It was sufficient that Anna had "legitimate and significant nontax reasons" for creating and funding the LLC, including joint management of family assets, pooling family assets to maximize investment opportunities, and providing for each of her daughters on an equal basis.

Some practical lessons for minimizing estate tax liability while using family LLCs emerge from the case of Anna's estate. They include the following: (1) document the legitimate and significant motivations, unrelated to estate taxes, for forming such an entity; (2) continue the entity after the decedent's death to avoid the appearance of an ordinary trust; (3) if, as in Anna's case, the donor dies unexpectedly a short time after the gifts, be prepared to demonstrate that the death was unexpected; and (4) keep sufficient assets outside of the entity to cover the donor's living expenses and to avoid the possibility that the donor will treat the assets of the entity as her own. The planning, drafting and advice associated with a family LLC entails resolution of complex issues and requires the guiding hand of a knowledgeable professional.

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.

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.

GET IT IN WRITING

When an Internet executive held a meeting with the chairman of a telecommunications company, the agenda was a new business idea that the Internet executive had. The discussion was transformed into a recruitment when the telecommunications executive suggested that the idea should be pursued within the company he headed. For two men in the upper echelons of high-tech businesses, they then chose a decidedly low-tech way to memorialize their agreement. The end result, however, shows how substance can sometimes triumph over form in the law of contracts formation.

At the end of their meeting, the telecommunications executive simply wrote out the agreement by hand on two notebook pages, and both men signed it. The writing included specifics as to how the newly hired executive would be compensated, the terms on which he could quit if he became unhappy and what would happen if intellectual property involved in the deal could not be transferred to the telecommunications firm. It also included the statement that “[t]he parties will complete formal contracts as soon as possible but this is binding.” This would turn out to be pivotal language in the litigation that followed.

Unfortunately, the new arrangement

quickly went downhill, and after about six months the new employee was fired. The relationship ended with the “formal contracts” never having been drafted and executed. When the former employee sued for breach of contract and other wrongs, more than six years of litigation ensued, with two trials and two appeals.

Much of the case focused on whether the handwritten agreement that started everything was a valid, binding contract. The telecommunications company argued that it was merely an “agreement to agree.” However, a jury eventually ruled that the agreement was valid, and that the telecommunications firm had breached the terms of the contract represented by the two notebook pages.

Four factors are usually considered in determining whether a “preliminary agreement” is binding. In this case, the first two clearly favored the fired executive: There was no explicit reservation of a right not to be bound (in fact, the handwritten agreement said the opposite) and the executive had partially performed the contract. The third factor is whether all of the terms of the alleged contract were agreed upon. On that point, the agreement, although it may have lacked some details, addressed all of the essentials for a binding contract.

The final factor is whether the agreement was a type of contract that is usually committed to writing in a formal manner. When millions are at stake, as was the case here, it may be unusual to seal the deal with a handwritten document, in outline form, and drafted on the spot by one of the principals without benefit of legal counsel. The agreement was not much to look at, barely surpassing in formality the proverbial agreement scribbled on a cocktail napkin. Still, that it was unorthodox did not mean that the method was unprecedented. In the end, this factor, balanced against the other three, was not enough to discard the agreement and deprive the departed executive of the benefits of his bargain.

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