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OPERATION OF WEBSITE MAY SUBJECT

BUSINESS TO OUT-OF-STATE LITIGATION

Advancements in technology have created opportunities for businesses to connect with clients outside of traditional geographic reach. As a consequence of greater access to out-of-state clients, businesses using interactive websites may unknowingly submit themselves to jurisdiction in unexpected venues.

The growth of e-business has forced the courts to determine when a business whose only connection to the state is through its website can be sued in that court's jurisdiction. Courts analyze a business's website activity to determine whether that business has sufficient contacts to justify jurisdiction in that state ("forum state"). In general, most states have adopted a long-arm statute, which empowers courts to exercise jurisdiction over an out-of-state entity that conducts business within the forum state. To satisfy due process guarantees under the United States Constitution, long-arm statutes can only confer jurisdiction where the defendant has sufficient minimum contacts within the forum state and purposefully avails itself of the privilege of conducting activities within that state.

While this area of the law is still in its infancy, the "sliding scale" approach has emerged as the preferred analysis. At one end of the scale, jurisdiction is asserted where the defendant transacts business via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity. On the other end of the scale, the courts refrain from asserting jurisdiction over the business because the website is passive which has been defined as merely providing information about the business or its products. The court will judge the level of interactivity on the defendant's website relative to the extremes of the scale.

Recently this standard was tested in the 2008 Florida case of *Licciardello v. Lovelady*. In that case, the plaintiff, Carman Licciardello ("Licciardello"), a Florida resident and a music artist, alleged that the defendant, Rendy Lovelady ("Lovelady"), a resident of Tennessee, infringed on Licciardello's trademarks by using his name and image on Lovelady's website without authorization. According to Licciardello's Complaint, Lovelady operated a website in which he sold CDs providing management advice and career assistance tips. The website utilized images of Licciardello as well as his name to promote Lovelady's skills as a manager of music artists. Licciardello maintained the infringement of his trademark was a tortious act committed by Lovelady in Florida, so he brought claims for trademark infringement in the District Court for the Middle District of Florida.

Lovelady maintained that he had no constitutionally significant contacts with Florida. He had no office, no agents, no employees, and no property in Florida. His infrequent travel to Florida in connection with his management of Licciardello and other music groups, he argued, was both constitutionally insufficient to allow jurisdiction in Florida and unrelated to Licciardello's cause of action.

The trial court dismissed the case on the grounds that there were insufficient contacts between Lovelady and the state of Florida to allow Florida courts to exercise jurisdiction over a Tennessee resident. The Appellate Court, however, reversed that decision. The Appellate Court found that the allegedly infringing content of Lovelady's website caused an injury to occur in Florida. Thus, jurisdiction in Florida was deemed proper despite Lovelady having no other physical contacts within the state.

A business that operates a website is advised to consider the geographical scope of its website's content to avoid a foreign court's exercise of personal jurisdiction over it. In addition, a business that contracts through website transactions should be proactive and state its choice of law and venue benchmarks in its online contract in anticipation of litigation or dispute resolution.

If you have a question about your business's potential exposure to litigation in another jurisdiction or whether your website is passive or active under the sliding scale approach, please contact a member of the firm.

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A CRITICAL ASSET PROTECTION STRATEGY: UMBRELLA INSURANCE

Do your teenage drivers drive your car in violation of local ordinances requiring hands-free cell phone usage? Do your minor children invite friends to play in parts of your home being remodeled? Are you participating in a car pool where you frequently drive your neighbor's children?

On February 12, 2009, the *Chicago Daily Law Bulletin* and the Chicago newspapers reported the story of a settlement in the amount of \$2,500,000 reached by an insurance company for an Illinois couple and a then-19-year old man who was paralyzed in an auto accident after the driver had been drinking in the couple's home with the couple's underage daughters while the wife was present. The driver alleged the wife was negligent in failing to supervise the activities in the home. The settlement was in the amount of the couple's homeowners insurance policy.

Fortunately for the couple they had sufficient insurance coverage. Most homeowners insurance policies protect against accidental bodily injury with policy limits in the range of \$100,000. Additional protection can be obtained through umbrella liability policies. The annual premium for a \$2,000,000 policy quoted to this writer was \$360 per year, which is less than the cost of a visit to your attorney's office. Why risk loss of substantial wealth as a result of . . . an accident? Umbrella liability insurance remains one of the most inexpensive and best asset protection strategies available.

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**BREACH OF FIDUCIARY DUTY OWED BY CONDO BOARD MEMBERS
CAN RESULT IN PERSONAL LIABILITY**

A condominium association is governed by an elected board of managers (called “managers” under Illinois law rather than “directors” as in a for-profit corporation). A condominium unit owner who agrees to serve on the board of managers, whether to protect his investment or out of a sense of duty, must understand that he undertakes certain legal responsibilities and obligations. Under the Illinois Condominium Property Act (the “Act”), a condominium board is required to exercise the care required of a *fiduciary* of the unit owners. A “fiduciary” is a person who acts for the benefit of another person and as a result has a special relationship of trust, confidence, and responsibility when performing those duties.

When agreeing to be a board member, one must understand the consequences of board decisions could result in personal liability for the board members. In one Illinois case, the Appellate Court held that a condominium board had committed constructive fraud on a unit owner by imposing unreasonable requirements on the unit owner in connection with the reconstruction of her unit. The board’s constructive fraud constituted a breach of their fiduciary duty to the unit owner, and the individual board members could be held personally liable for damage suffered by the unit owner.

Illinois will allow the personal liability of board members to be limited to *willful misconduct* if the condominium declaration so provides, but such limitation language will be narrowly construed. In the case mentioned, the declaration provided exculpatory language that stated the individual members would not be liable except for *gross negligence* or *fraud*. The court held that this exculpatory language did not protect the managers from personal liability.

Another Illinois case involved a condominium created in 1980, but for which the developer did not begin to sell units until 1992. The purchasers of the units discovered there were serious problems with the structures and parking lots and that the developer had failed to adequately fund the association’s reserves during the 12 years the developer rented out the condos. The unit owners sued the board of managers for breach of their duty – imposed by the Act – to provide adequate reserves for replacement. The board members who had acted from 1980 until the association was turned over to the unit owners in 1993 were all appointed by the developer. The plaintiffs alleged that the individual board members failed in their duty to attend meetings for the purpose of determining adequate reserves. The Appellate Court held that the unit owners had pleaded sufficient facts in their complaint to state a cause of action against the individual board members. The court also held that the duty to fund the capital reserves began in 1980.

Managers and prospective managers should make certain that the association has in place directors and officers’ liability insurance and must ascertain that the association’s by-laws have been updated to include manager indemnification provisions permitted by the Act. Please do not hesitate to telephone us if you have any questions regarding your responsibilities as a manager of your association or if you would like us to review your condominium by-laws or otherwise advise your board of managers.

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OMISSION IN INSURANCE POLICY APPLICATION CAN VOID POLICY

An applicant for an insurance policy, whether life insurance, automobile liability, homeowners or other, must answer the questions in the application with full disclosure or risk the policy being declared void by the insurance company. In general, if the omitted information could have altered the insurance provider's risk assessment, the policy may be voided by the insurance company.

For example, an omission on a life insurance application allowed the insurance company to void the policy in the 2007 decision in *Spinelli v. Monumental Life Ins. Co.* In that case, the plaintiff, a widow and beneficiary of a life insurance policy, sued to recover life insurance benefits on the life of her husband ("Spinelli") that were denied to her by the defendant, Monumental Life Insurance Company ("Monumental"). Monumental filed a counterclaim to rescind the policy due to Spinelli's omission of health information from his insurance application.

Monumental issued a universal life insurance policy to Spinelli in 1985. However, due to non-payment, the policy lapsed in February 2001 and Spinelli lost all coverage. During the lapse period, Spinelli was diagnosed and treated for lung cancer and heart disease. In April 2001, Spinelli applied for reinstatement of the life insurance policy. Monumental required Spinelli to fill out a reinstatement application. As part of the reinstatement application, Spinelli was required to submit satisfactory proof of eligibility, including representing that he was free from all disease, deformities, or ailments.

In February 2003, Spinelli died. Because Spinelli's death occurred less than two years from the effective date of the reinstatement, which was within the contestable period, Monumental performed a routine claim investigation. Monumental obtained Spinelli's medical records, which verified that he had a significant medical history which he failed to disclose on the reinstatement application.

The records disclosed that Spinelli failed to disclose the lung cancer diagnosis, heart conditions and his related treatment when answering the relevant inquiries on his reinstatement application. Plaintiff argued that Spinelli merely signed his name to the reinstatement application before submitting it, and that Monumental's insurance agent was responsible for writing "None" on the reinstatement application in response to the question asking whether he had any ailments or had been attended by a physician.

The court found that Spinelli committed a misrepresentation on his reinstatement application by omitting a fact while answering an inquiry on the application. Because Monumental could demonstrate the misrepresentation by omission materially affected the risk Monumental assumed when coverage was originally granted, Monumental was allowed to rescind the policy.

A purchaser of any type of insurance should be cautious to answer every question on the application as honestly as possible to avoid rescission of the policy. If you have a question about an insurance policy or if an insurance policy which you have purchased is being challenged by the insurance company, please contact a member of the firm.

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WORKS FOR HIRE AND COPYRIGHT PROTECTION

Businesses constantly create materials such as brochures, drawings, or other documents that may be protected by copyright laws. Such materials may be created by employees or others paid to create them. As long as the materials consist of "original works of authorship fixed in any tangible medium of expression," copyright protection may be available.

Unlike patent or trademark protection, copyright protection attaches to the materials upon creation. Publication is no longer required to invoke copyright protection, nor is state or federal registration; however, registration is often desirable because it may establish a public record of ownership, is a condition to bring an infringement action, and may entitle the owner to statutory damages and recovery of legal fees and costs incurred in any infringement case.

Copyright protection inures to the author of the materials. The person or persons who created the materials generally are considered the author, unless the materials are considered "works for hire." A "work for hire" is "(a) a work prepared by an employee within the scope of his or her employment; or (b) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." The party that ordered or commissioned a work for hire is considered the author for copyright purposes.

Materials created by an employee belong to his employer if created within the scope of employment. The existence and scope of the employer-employee relationship may be established by reference to a variety of factors including, but not limited to, the employer's control over the means and methods of creating the materials, use of the employer's tools or equipment, creation of the materials within the customary working hours and on the employer's premises, inclusion in payroll and benefits plans and coverages, and hiring and firing authority. If an employer-employee relationship exists and the materials are created within the scope of employment, no written agreement is required and the employer will be considered the owner, even if the materials are outside the nine categories specified in the definition of a work for hire.

Materials created by an independent contractor belong to the principal only if there is a written agreement and they are within the specified categories. The agreement should be executed before the work begins. An agreement may relate to materials beyond the nine categories, in which case the independent contractor will be considered the author, but the principal will be the owner of the copyright. Care must be exercised in the preparation of any agreement to ensure the parties clearly determine ownership rights, which will affect who may claim copyright protection and the control over use of the materials and any derivative work or application. License agreements providing specified royalty or royalty-free use rights are often used to provide each party certain benefits relating to the materials created.

If you have a question about works for hire, please telephone a member of the firm.

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OWNER'S EFFORTS TO SAVE HIS HOME RESULTED IN A FRAUDULENT TRANSFER

The recent bankruptcy case of *Grochoncinski v. Schlossberg* demonstrates how a owner's efforts to save his home resulted in the Bankruptcy Court finding that the homeowner and his business associates had committed fraud.

Jeffrey Eckert ("Eckert") entered into a contract for the construction of a new home (the "Property"). Prior to the Property's completion, Eckert made payments pursuant to the sales contract totaling \$120,000. Thereafter, Eckert began experiencing financial difficulties and could not obtain a mortgage to complete his purchase of the Property.

To protect the \$120,000 in equity in the Property, Eckert approached two business associates, David Schlossberg and Gary Laliberte (collectively "Schlossberg and Laliberte"), who agreed to purchase the Property and resell it to Eckert under a contract for deed. Schlossberg and Laliberte were to receive an assignment of Eckert's purchase contract for the Property and his \$120,000 in equity and were to obtain a mortgage for the balance of the purchase price. Eckert's contract for deed for the Property provided Eckert was to receive a credit for his \$120,000 in equity assigned to Schlossberg and Laliberte and that he would make monthly payments to Schlossberg and Laliberte in the amount of their mortgage payment, plus pay a premium which was Schlossberg and Laliberte's profit on the transaction.

Pursuant to their agreement, Eckert assigned his contract to Schlossberg and Laliberte and the sale of the Property to Schlossberg and Laliberte closed. Eckert, Schlossberg and Laliberte also entered into the contract for deed for the Property as described above. Thereafter, Eckert began making his monthly payments to Schlossberg and Laliberte.

As Eckert's financial problems continued, he defaulted on the payments to Schlossberg and Laliberte. At the time of his default, Eckert's payments to Schlossberg and Laliberte had increased the equity in the Property to \$200,000. Thereafter, Eckert found another purchaser for the Property, Marcelo Carlos ("Carlos"). Carlos purchased the Property from Schlossberg and Laliberte for \$920,000. At the closing, the \$200,000 in equity from Eckert's payments was to be distributed to Schlossberg, Laliberte, Carlos and Eckert's wife, Christine, as provided in the various side agreements between the parties.

Since the payments to Schlossberg, Laliberte, Carlos and Christine were made from the equity created by Eckert's payments, Eckert was able to shield his equity in the Property from his creditors. When Eckert filed bankruptcy and the Bankruptcy Trustee discovered the sales of the Property, the Trustee filed suit to recover the payments to Schlossberg, Laliberte, Carlos and Christine, alleging the sales were fraudulent because they violated the Uniform Fraudulent Transfers Act (the "Act").

To determine whether a transfer is made with actual intent to defraud under the Act, the Act sets forth several 11 factors known as the "badges of fraud," which, if present in sufficient number, create an inference that fraudulent intent is present. The badges of fraud include the following:

- (1) the transfer or obligation was to an insider;

- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (4) the transfer was of substantially all the debtor's assets;
- (5) the debtor removed or concealed assets;
- (6) the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; and
- (7) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

The Bankruptcy Court found that Schlossberg, Laliberte, Carlos, and Christine were insiders under the Act as a result of their relationship to Eckert. Moreover, the Property was transferred to Schlossberg, Laliberte and Carlos without consideration or Eckert's receipt of reasonably equivalent value. Eckert also continued to reside in and control the Property after the sale. Additionally, at the time of the sale, Eckert was insolvent and subject to various collection suits by creditors. Finally, the sale of the Property was a transfer of substantially all of Eckert's assets and was made to conceal Eckert's assets from his creditors. Thus, the Bankruptcy Court entered judgments against Schlossberg, Laliberte, Carlos and Christine totaling the \$200,000 of Eckert's equity they received from the sale of the Property.

If you are having financial difficulties and are considering an asset transfer to protect your assets, please contact a member of the firm for advice regarding proper structuring of the transfer so you can avoid the badges of fraud.

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From anonymous:

On qualifiers: "Before law school, if I did not know an answer, I had a 3 word response: "I don't know." After law school, I still had a 3 word answer. "Well, it depends."

On lawyers: "Ignorance of the law is no excuse not to practice."

- **Conrad Teitell**

On taxes: "Death and taxes are both inevitable; but death doesn't happen annually."

- **Roy Adams**

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SILENCE IS NOT ALWAYS GOLDEN

JUST ASK MARK CUBAN . . . OR THE SEC

Mark Cuban (“Cuban”) owns the Dallas Mavericks basketball team and tried to buy the Chicago Cubs. In November 2008, the U.S. Securities and Exchange Commission (“SEC”) filed a civil complaint against him alleging he engaged in insider trading in 2004. The complaint alleged he sold shares of Mamma.com, Inc. (“Mamma”) based on material, nonpublic information concerning an upcoming PIPE – “private investment in public equity” – transaction.

More specifically, Cuban owned 6.3% of the shares of Mamma, a small public corporation. In 2004 the CEO of Mamma called Cuban, told him that Mamma was planning a PIPE transaction priced at a discount to market price, and asked him if he wanted to participate. Allegedly he prefaced his statements by telling Cuban that the information was confidential. Cuban did not want to participate because he thought PIPE transactions were dilutive and reflected adversely on a company’s reputation. After the call, Cuban immediately called his broker and sold all of his stock at an average price of \$13 per share.

Mamma publicly announced the PIPE transaction the next day. The shares opened at a trading price of \$11.89 per share, closed at a trading price of \$11.99 per share, and declined for the next week to \$8.00 per share.

In its complaint, the SEC claimed that Mr. Cuban avoided more than \$750,000 in losses by trading on nonpublic information. The SEC alleged that the Mamma CEO made it clear to Mr. Cuban that the information they discussed in their telephone call was nonpublic information and was to be kept confidential, that Cuban acknowledged the CEO’s statement of confidentiality, and agreed to keep the information confidential, and knew that the PIPE offering would be made at a discount to the prevailing market price.

Cuban claimed that there was no agreement to keep information disclosed in the telephone call confidential. In response to the SEC claim, Cuban published a statement on his website that included his attorney’s interview with Mamma’s CEO in which, in response to the question, “Do you recall anything Mr. Cuban said in response to ‘I have confidential information for you,’” the CEO replied, “No, I do not.”

The SEC is of the opinion that the CEO’s offer to provide information about the PIPE offering was conditional on Cuban maintaining the confidentiality of the information. The SEC relied on Rule 10b5(2) Proposing Release, which states the court could find that an implicit understanding of confidentiality existed during the CEO’s and Cuban’s telephone call. Depending upon facts learned in discovery, the SEC may also be able to argue that the CEO and Cuban had a history of confidential communications, and that this call was along the same lines.

Silence isn’t always golden. There may be a duty to speak, or silence may indicate assent. Cuban’s first call should have been to his attorney, not his broker. He now faces not only disgorgement of \$750,000, but also a civil penalty in the amount of three times the loss avoided, or \$2,250,000. Not to mention the possible bad mark on his reputation that may have caused his bid for the Cubs to be rejected.

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