

# LEGAL UPDATE

CLIENT NEWSLETTER OF  
**CARR, MORRIS & GRAEFF, P.C.**

1120 G STREET, N.W., SUITE 930 • WASHINGTON, D.C. 20005-3801 • (202) 789-1000

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## **CONTRACTS/EMPLOYMENT IMPLIED CONSENT TO NEW EMPLOYMENT TERMS**

In the recent case of *Kauffman v. International Brothers of Teamsters*, D.C.C.A. No. 06-CV-1198 (June 12, 2008) the D.C. Court of Appeals reviewed, explained and applied its ample precedent on how an employment relationship may be modified prospectively with the implied consent of an at-will employee.

Plaintiff-appellant Kauffman was employed by UPS in New Jersey when he was recruited by the Teamsters in 1992 to become an International Representative for the union. Since moving to the Washington area was a significant expense and Kauffman's wife and family were to remain in New Jersey, the parties agreed that Kauffman would receive an expense reimbursement. In 1994, that evolved into a monthly \$1,000 housing allowance. Kauffman himself had by then permanently relocated. He still owned the New Jersey house, but he and his wife had divorced. In April 1996 the Teamsters advised Kauffman that, since he had permanently relocated, he was no longer qualified for the housing allowance. Kauffman objected, but the Teamsters did

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## **BUSINESS**

### **CORPORATE IDENTITY THEFT HITS THE DISTRICT**

Thanks in large part to the 24-hour news cycle, investigative reporting, public service announcements, infomercials and advertisements in nearly every weekly circular, we have been inundated with the gathering threat of identity theft and the attendant perils. To combat this insidious scourge we purchase cross cut / confetti cut shredders and lockable mailboxes, monitor our credit reports, and guard our SSN like the crown jewels. We are all well aware of identity theft and how to protect against it. However, a new case in federal court in Alexandria may serve to change our expectations of identity theft and its scope. Can an entity steal the identity of another entity? Can a company steal the identity of another company? Identity theft may no longer be confined to the realm of Nigerian princes and stolen DOJ laptop computers, at least in the eyes of the law.

In *The Flexible Benefits Council v. Feltman*, Case No. 1:08cv371, a D.C. corporation claims its identity was appropriated by a former director, who allegedly stole the company name, its website address, its trademarks, and its place as a trade organization that supported flexible benefit compensation for employees. On June 16, following a hearing on the Defendants' motion to dismiss, Senior U. S. District Judge James C. Cacheris ruled that the nonprofit corporation formerly known as the "Employers Council on Flexible Compensation" can sue its former executive director ("Feltman") for violation of federal trademark and anticybersquatting laws, as well as breach of fiduciary duty, civil conspiracy and tortious interference under Virginia state law.

In denying Feltman's motion to dismiss Judge Cacheris's opinion gave the following account of Feltman's alleged transgressions. The Flexible Benefits Council ("FBC") was incorporated in 1981 under D.C. law as a non-profit corporation. Plaintiff was originally incorporated under the name "Employers Council on Flexible Compensation," and did business under that name for 27 years. Between 1985 and July 2007, Feltman was responsible for FBC management and operations. Beginning in 1997 Feltman continued to serve as FBC's Executive Director, as well as in other positions, as an employee and principal of Radnor, Inc. ("Radnor"), an association management company formed by Feltman. Radnor contracted with FBC to provide day-to-day management until FBC terminated the relationship on July 31, 2007. Judge Cacheris notes that the master services agreement between FBC and Radnor, in combination with Feltman's status as an officer of FBC, imposed upon him fiduciary, ethical and other duties toward FBC.

In September 1998, unbeknownst to FBC, its corporate charter was revoked for failure to file an annual report and to pay filing fees with the District of Columbia, a duty imposed by agreement on Radnor. FBC did not learn of the revocation until March 31, 2008, because of Feltman's and Radnor's failure to disclose. FBC now blames the revocation of its charter on the intentional and/or negligent acts of Feltman and Radnor. Following Feltman's termination in July 2007, on November 13, 2007, FBC filed a demand in arbitration against Radnor, accusing Feltman and Radnor of pilfering millions of dollars. In the case at bar, FBC charges that Feltman and others have con-

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**DAMAGES****VIRGINIA CASE DISCUSSION:  
\$0 FOR SOLACE TO SURVIVING  
SPOUSE IN WRONGFUL DEATH  
CASE PERMITTED**

When a family member dies due to the wrongful or negligent acts of another, the personal representative of the decedent may file a *wrongful death* claim. In Virginia wrongful death suits are governed by statute. *Virginia Code §8.01-50, et seq.* Virginia law provides that any damages awarded shall be paid to the decedent's beneficiaries (usually the surviving spouse and children). The jury may award "such damages as to it may seem fair and just." This may include compensation for emotional loss (sorrow, mental anguish and solace), medical expenses, reasonable funeral expenses, loss of income and services to those dependent on the financial support of the decedent. Punitive damages may be awarded if the tortfeasor's negligence is deemed *willful and wanton*.

In 1991 the Supreme Court of Virginia examined the damages component of a wrongful death action in the case of *Johnson v. Smith*. James Johnson had been killed when his motorcycle was struck by a van operated by Joseph Smith. Despite testimony that Johnson was an attentive father who often played with his children, the jury awarded his family nothing for sorrow, mental anguish and solace. Upon review the Supreme Court declared "it impossible to conceive of a rational basis for the denial [of damages]." The Court ordered a new trial on the issue of damages.

Recently, the Supreme Court of Virginia again confronted the issue of the adequacy of an award for solace or, rather, lack thereof, to a surviving spouse. In *Wright v. Minnicks* the jury learned that Anthony Wright was killed when he swerved on his motorcycle to avoid a tow truck backing out of a private driveway. Wright's wife sued the truck driver and his employer for wrongful death. The defendants put on

evidence that the Wrights' marriage was failing at the time of Anthony's death. There was testimony that his wife was having an affair and that the couple were separated and soon to sign papers confirming that separation. In addition to medical and funeral expenses, the jury awarded Mrs. Wright \$942,535 for loss of income and for services, protection, care and assistance provided by the decedent—but nothing for sorrow, mental anguish and solace. Relying on the holding of the *Johnson* case, the trial court set aside the verdict and ordered a new trial on the issue of damages. After a re-trial, the matter eventually reached the Supreme Court of Virginia. The Supreme Court explained that there is no rule that a verdict *must* be set aside because it fails to include an award for solace damages. In *Johnson* the lack of solace damages was illogical based upon the evidence provided—that, the decedent Johnson was a good father and there was no evidence of marital discord. In *Wright*, though, the Supreme Court stated that it was within the province of the jury to rely on testimony regarding the marital discord and "emotional bankruptcy" between spouses at the time of death in deciding not to award any solace damages. "In contrast to the evidence in *Johnson*, there was evidence to support a finding by the jury that the Wrights' marriage was dysfunctional."

DANA THERIOT

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**CONFIDENTIALITY  
REQUEST FOR PROTECTIVE  
ORDER MUST BE SUPPORTED  
BY GOOD CAUSE SHOWING**

In our experience, clients often overestimate the value or impact of publicity on litigation decisions. For instance, it is not uncommon for a client to believe the fear of exposure—*i.e.*, bad publicity—will compel the prospective defendant to sue for peace. In reality, unless the parties are high profile or the underlying dispute truly

unique, most civil litigation generates no publicity whatever. A walk through any courthouse on a routine day is comparable to a walk through church or a library; some people are engaged, but no one is watching.

Every court's rules, though, do provide means of cloaking proceedings in secrecy. The parties, of course, can agree to a protective order, which the court can approve and enforce. This is a fairly routine practice when trade secrets are at issue and both parties agree on the need for confidentiality. Court rules also allow one party to unilaterally seek court imposition of a protective order. In such instances, one opponent simply does not agree on the need for privacy. (Of course, that opponent may well believe that someone actually is watching, and that exposure to the public provides some leverage.)

In the recent case of *Hitchcock v. Democratic National Committee, C.A. No. 07-003040* (May 20, 2008), D.C. Superior Court Judge Jeanette Clark fielded a request for a protective order, ruling eventually that the requesting party had not cleared the fairly high standard of "good cause." In the matter before Judge Clark, plaintiff had raised discrimination and retaliation claims against a former employer under the D.C. Human Rights Act. The defendant moved for a broad protective order under Rule 26(c)—broad enough to cover discovery materials, depositions and even counsels' notes. The court noted that the request was overly broad and would be difficult to enforce. Some materials were drawn from public sources and were never treated as confidential. Some materials had already been leaked to the media. (In this instance, one party—the DNC—actually does attract media attention.) Significantly, the defendant failed to satisfy the court that it would be significantly harmed by the disclosure it sought to prevent. Lacking adequate *good cause*, the motion was denied.

**JURISDICTION****ADVERTISING AS BASIS FOR LONG-ARM JURISDICTION**

It is a fundamental legal principle that a court must have *subject matter* and *personal* jurisdiction in order to adjudicate a dispute. While easily stated, application of that principle has led to judicial precedent that fills many library shelves. Litigants prefer to select the court where they think their chances of success are best, and the practice of *forum shopping* is as old as the common law itself.

One topic of regular judicial scrutiny in this arena is the exposure of a foreign (*i.e.* out-of-state) entity to a court's jurisdiction because it *transacts business* in that jurisdiction. What it means to "transact business" in the District of Columbia was the starting point of a recent D.C. Court of Appeals case.

In the matter of *Jackson v. Loew's Washington Cinemas, Inc.*, D.C.C.A. No. 03-CV-1048 (Mar. 27, 2008), the D.C. Court of Appeals reviewed and affirmed the trial court's order granting Loew's summary judgment. Plaintiff in the case below had been injured in an accident at a suburban Virginia theater. Because she had been drawn to the theater by an advertisement in a D.C. newspaper, she sued in D.C. Superior Court. Her jurisdictional theory was that, under the D.C. "Long-Arm Statute" [D.C. Code §13-423(a)(1)], the theater's advertisement was sufficient evidence that Loew's was "transacting business" in the District.

Plaintiff-appellant's argument collapsed because the evidence showed that the advertisement was commissioned by the distributor rather than the theater. The court rejected the related arguments that the corporate entities were *alter egos* and that the distributor should be deemed the theater's *agent* under the circumstances. Thus, concurring with the trial court, the Court of Appeals ruled that summary judgment was proper and that suit should properly have been brought in Virginia.

**CONTRACTS/EMPLOYMENT**

*Continued from page 1*

not relent. In March 1999, just before the statutory deadline, Kaufmann sued the Teamsters in D.C. Superior Court for breach of contract. He was terminated immediately.

The dispute reached the Court of Appeals after the trial judge granted the Teamsters summary judgment. The appellate court affirmed the lower court's ruling, flatly rejecting Kauffman's several alternative arguments.

First, Kaufmann argued that the change in his employment contract was unilaterally imposed *without consideration*. The court explained, "[U]like employment contracts for a fixed duration, neither party to at-will employment is bound to continue performance, and thus courts properly view future performance by each as valid consideration for the change in terms." To rule otherwise, the court reasoned, would invite the undesirable practice of firing and re-hiring employees in order to modify terms of employment.

Kauffman argued further that the three years between the change and filing suit was a reasonable time for him to consider his options. The court recognized that an employee's acquiescence to such a change would not be assumed until a reasonable period for consideration had passed but rejected Kauffman's argument that three years was reasonable. Kauffman clearly knew of the change yet continued to work and to accept the benefits of continued employment; thus, his acquiescence was implied or imputed.

Kauffman's last ditch argument was that at-will employees may sue for breach of a subsidiary agreement. The court agreed that in situations such as suits for accrued commissions or bonuses, that would be the case. Future housing allowance, though, is distinguishable because it is a prospective benefit. In other words, suit for an accrued but unpaid benefit would be proper, while Kauffman by his actions had acquiesced to a change to a future benefit.

**LAWRENCE CARR**

ps: It is also worth noting that this case has taken *twelve* years to reach this point.

**BUSINESS**

*Continued from page 1*

spired to steal FBC's identity. To start, in February 2008 Feltman and others formed and registered a new corporation in the District of Columbia, Employer's Council on Flexible Compensation, Ltd. ("ECFC Ltd."), whose stated purpose is to perform the same type of work as FBC. On March 28, 2008, Feltman reserved the acronym "ECFC" with the D.C. Corporation Division. The formation of ECFC Ltd. and the reservation of the "ECFC" acronym has precluded FBC from reinstating its corporate charter with its old name and acronym. In addition, on March 3, 2008, Feltman and others registered the trademark "Employers Council on Flexible Compensation," and on March 4 applied to register a design mark using the acronym "ecfc." Both the name and the design have been used by FBC for the past 27 years. ECFC Ltd. has also obtained a domain name, "www.ecfc.com," that is similar to both FBC's trademarks and FBC's domain name, "www.ecfc.org." Moreover, the website itself is similar to FBC's in both design and in the proclaimed mission statement. Finally, ECFC Ltd. has obtained offices on the same street as FBC's offices and with an identical suite number.

In denying the motion to dismiss, Judge Cacheris found that FBC could sue both ECFC Ltd., and Feltman and his co-conspirators individually, for the "alleged scheme to steal [FBC]'s identity," because these corporate officers "personally and actively participated in the commission of these illegal acts," which removed corporate protection, thereby exposing them to personal liability. The case is ongoing.

**JUSTIN BANFORD**

## CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Criminal Representation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions—the District of Columbia, Maryland and Virginia.

## STAFF NOTES

*Vacations and books*<sup>1</sup>...how have we twittered away the summer?

- Nestor Cruz: two weeks in Boca; *A Brief Economic History of the World* by Gregory Clark; *The Dynamics of Industrial Capitalism* by Alfred D. Chandler, Jr.; *Greenspan's Bubbles* by William Fleckenstein...*Nestor is listed first in recognition of the superior academic level of his reading choices...*
- Larry Carr: family gathering at Fripp Island, South Carolina; brother's wedding in Minnesota; *American Scoundrel* by Thomas Keneally; *Pennsylvania Avenue: Profiles in Backroom Power* by John Harwood and Gerald F. Seib.
- Phil Schwartz: a week on the Outer Banks; *Living on the Black: Two Pitchers, Two Teams, One Season To Remember* by John Feinstein; *Golf Course Yardage Books*—The Currituck Club and Kilmarnock Golf Club (??).
- Roy Morris: Bicycle touring Greece in September, led by a classics professor. (*What exactly is a classic bicycle?*).
- Steve Graeff: Time at the beach and time in New York in August; *Hold Tight* by Harlan Coben; *World Without End* by Ken Follett; *A Prisoner at Birth* by Jeffrey Archer.
- Dana Theriot: to Corolla on the OB, shorter trips to Lake Anna; *Bee Season* by Myla Goldberg; *Dervishes* by Beth Helms; *All Saints* by Liam Callahan.
- Justin Banford: intense house hunting, valiantly leading his adult co-ed soccer team out of the cellar; *House Lust: America's Obsession With Our Homes* by Daniel McGinn.

\* \* \*

The Entrepreneurs Organization held its annual retreat in Cambridge, Maryland in June. Roy Morris, Phil Schwartz and Larry Carr made presentations—Roy on asset protection, Phil on non-compete/non-solicitation agreements and Larry on the myths of litigation. *Significantly, this venture led Phil Schwartz to cross the Bay Bridge for the first time...Phil came to Washington for law school 23 years ago, yet he had never before ventured beyond Annapolis on Route 50—although he sailed under the bridge in his yachting days...having breached that barrier, Phil's future is bright, as he has heard about an ocean and beaches that lay beyond.*

\* \* \*

<sup>1</sup> The editorial staff took no steps to confirm counsels' claims of vacation destinations or reading materials, some of which are dubious.

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