

# LEGAL UPDATE

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

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### EMPLOYMENT EMPLOYMENT AUTHORIZATION AND E-VERIFY

All employers are required to obtain a completed U.S. Citizenship and Immigration Services (USCIS) Form I-9 for all newly hired employees within three days of the employee's date of hire. This form verifies the identity and employment authorization of the employee. Employers can verify the employment authorization of employees through the USCIS E-Verify service.

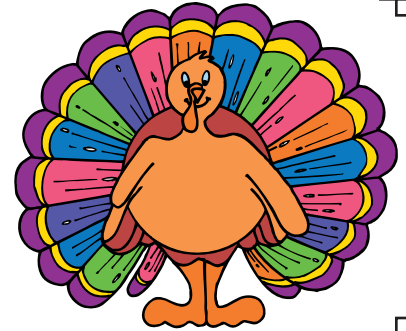
E-Verify is a voluntary online service provided by USCIS which allows E-Verify enrolled employers to confirm Form I-9 information against records contained in Social Security Administration and Department of Homeland Security databases. Employers can enroll in E-Verify at [www.uscis.gov](http://www.uscis.gov). By simply entering information from the Form I-9, the employer can determine in a matter of moments whether the employee is eligible for employment in the United States and whether the employee's information matches Social Security Administration records. This electronic verification will confirm that the identity information supplied with the Form I-9 is authentic.

While E-Verify is voluntary in private  
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# Happy Thanksgiving



### NEGLIGENCE LIABILITY FOR CRIMINAL ACTS OF ANOTHER DIFFICULT TO PROVE

It is not an unusual situation. An innocent party is the victim of a criminal act in an area under the "control" of a commercial enterprise or governmental entity. A negligence suit is brought against the party owning or controlling the property—alleging essentially a breach of that party's duty to provide protection from the foreseeable risk of criminal behavior. Separate three-judge panels of The District of Columbia Court of Appeals recently decided cases of that nature. In both instances the Court found no liability.

In the case of *Bruno v. Western Union Financial Services, et al.*, D.C.C.A. No. 06-CV-64 (June 18, 2009), plaintiff/appellee had been assaulted and injured at a service station, which she had visited to obtain cash to wire to her daughter. Western Union was named as a defendant because a Western Union representative had referred Ms. Bruno to the station. Prior to trial Western Union's motion for summary judgment was granted because no *agency* relationship between Western Union and the station had been established. Subsequently, the station owner's motion for summary judgment was granted for lack of *foreseeability* of criminal conduct. The Court of Appeals affirmed the trial court's ruling, explaining that plaintiff's burden is to show

that the criminal act that caused his or her injury was so foreseeable that the owner had a *heightened duty* to take preventive measures. The Court was unimpressed with plaintiff's evidence of two known crimes at the station, *i.e.*, an armed robbery *in front* of the station and a theft from the cash drawer: "The prior crimes at the gas station are remote from or dissimilar to the robbery in this case." Ultimately, the Court concluded that the circumstances and history of criminal activity at the station did not give the owner heightened or increased awareness of the danger.

The Court of Appeals reached a similar conclusion in *Board of Trustees, University of the District of Columbia v. DiSalvo*, D.C.C.A. No. 06-CV-1481 (July 2, 2009). Ms. DiSalvo was assaulted and injured in a UDC parking garage. The case is procedurally different than *Bruno* in that the case brought by Ms. DiSalvo and her husband survived defense motions and resulted in a \$400,000 verdict. On appeal, though, the appellate court sided with the University and overturned the verdict. The appellate panel in *DiSalvo* explained that there is a *sliding scale* in matters of this nature. Citing a prior ruling, the Court explained, "If the relationship between the parties strongly suggests a duty of protection, then specific evidence of foreseeability is less important, whereas if the relationship is not of a type

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**BUSINESS****WE NEED A NAME; NAMING A NEW COMPANY**

Amazingly, one of the more painstaking business decisions the entrepreneur may make will be naming the company. Should he name it after himself, his wife or his favorite pet? Should the nature of the business be immediately clear or purposely obscure? Should it start with an "A"? Should it be kitschy and cute, or official and austere? What is a trademark? Should the name be eight letters or less? Is the *URL* available? Should it end with an "X"? Should it be a fictitious word? Will I be stuck with it? Should it be an amalgamation of existing words? Does the name really matter?

Let's start with the basics; every company must have a name. If a corporation, the corporate name must contain the word "corporation," "incorporated," "company" or "limited"—or the abbreviation "corp.," "inc.," "co." or "ltd." Similarly, if a limited liability company, the name must contain the words "limited company" or "limited liability company" or the abbreviation "L.C.," "LC.," "L.L.C." or "LLC." With limited exceptions every company is chartered under state law. Each state maintains an agency that proscribes the procedures and protocols, including the naming requirements, under which a new business entity may be incorporated, in the case of a corporation, or organized, in the case of a limited liability company. States generally require that each company created under their jurisdiction have a unique name from all previously existing companies. For instance it is probable that nearly every state already has a company on its books called "Smith Roofing, Inc." Additionally, some states, notably New Hampshire, will not allow new companies that are phonetically similar to existing companies, regardless of the spelling. Therefore, the threshold inquiry is whether the desired name is available for registration in the state of incorporation.

Next one must consider whether the new name will infringe on that of an existing competitor. This serves two purposes: 1) to avoid trademark infringement and any resulting litigation down the road which may necessitate changing the company's name anyway, and 2) in order to build brand eq-

uity, you want a name that is identifiable and distinct from your competitors. The geographic scope of the new company's operations will greatly affect the extent to which you need to search. For instance a lawn care maintenance startup should review its likely competitors in the same metropolitan area, whereas a more scalable business, like software development, must search nationwide. If the name you want to use is already in use by a competitor you should choose a different name – the *prior use* doctrine. Also, regardless of geographic proximity and expected competition, if a company in your industry has already successfully registered the trademark, you should choose a different name. You can search registered trademarks at the U.S. Patent and Trademark Office's website, <http://www.uspto.gov/>. Note that a trademark is a distinctive indicator used to identify that the products or services to consumers with which the trademark appears originate from a unique source. A company's trademark and its corporate name may be identical but need not be so. For example the "Nike" trademark could be owned by the Acme Shoe Company. Nevertheless, in practice, most companies conduct business and brand their products with their corporate name.

An increasing concern is the availability of the *URL*. With the rise of virtual offices and the concentration of white-collar industries in the DC metropolitan area, having a choice *URL* is important to many of our clients. Various companies allow you to search and register available *URLs*, including <http://www.godaddy.com>. More than likely you will find that the *URL* you desired is already registered; it is increasingly difficult to find any available ".com" *URL*. Although your desired *URL* may already be registered that does not mean it is in use. Often *URLs* are registered with the intention of reselling – a practice called *cybersquatting*. If your desired *URL* is not in use you may be able to purchase it from the owner. There are not any legal repercussions for not having a *URL* that matches your company name, but it is convenient for your clients and for marketing purposes.

So, we have covered name availability, trademark infringement issues, distinction

from competitors and *URL* availability, but what makes for a *good* company name? It is obviously subjective, but there are several recurring themes on the issue:

**Phonetic.** The name should be phonetic. When someone hears it via word-of-mouth they should be able to spell it when they search online. Similarly, when people read the name, they should know how to pronounce it. Initials/letters work well, e.g., "ING Direct," "HSBC" or "PNC Bank."

**Short and Sweet.** The name should only have a few syllables. Long names are difficult to remember and difficult to spell correctly. You want to make it easy for customers to remember and find your company's name on their first try. Again initials/letters work well.

**Meaningful.** If possible the name should promptly convey the nature of the business. Consider a two-word corporate name, the first word being phonetic and short, and the second describing the nature of a business. For example consider the hypothetical homebuilder "Asic Builders, Inc."

**Coining a Word.** When seemingly every existing word in the language has been trademarked (and the *URL* taken), the option of coining a name is becoming more popular. Prior to the internet "Google" was just a fifth-grader's misspelling of the term for a number with the digit "1" followed by one hundred zeros (that's a "googol"). Derivations of proper nouns and combinations of syllables work well. When in doubt just add an "X" to the end of the word, e.g., a hypothetical "Iconx" corporation.

**Geographic Locations.** For service industries what if you expand in the future?

**Principal Names.** Naming your company after its principals is advisable if it is a professional practice (doctors, lawyers, accountants, architects, etc.), or if the founder is a VIP.

GMAC recently rebranded itself as "Ally Bank." While "Ally" is not a coined word, it is short, phonetic and distinctive within the banking industry, and the second word, "Bank," succinctly describes the nature of the business. (I suspect they had to purchase the "ally.com" *URL* from a cybersquatter.)

Like anything else in business, execution is everything and a name alone will not make or break your company, but please consider the foregoing before calling to inquire if "Smith \_\_\_\_\_, Inc." is available.

**JUSTIN BANFORD**

## **BUSINESS** **YET ANOTHER REASON TO ARBITRATE BUSINESS DISPUTES**

The attorneys of this firm are enthusiastic promoters of arbitration as a means of resolving business disputes. We have done enough litigation to know that if you are looking for a relatively prompt, rational resolution to a business dispute, a trial in court is not a good way to get it. Some of the key advantages of arbitration are: the accelerated timetable as compared with most courts; the limited range of motions, objections and discovery that can be filed; the ability to choose someone with expertise in the subject matter to hear the case; having the arbitrator's full attention when you present the case; and the finality of the result.

One often-overlooked advantage has been more and more on my mind, lately, though—that of *privacy*. This is because civil litigation among private parties is usually neither civil nor private, when it comes to the allegations that feuding parties make against each other. This can be as true in business case as it is in a divorce case.

There is no longer any privacy in a routine federal lawsuit. Other than rare cases that justify handling under seal, federal courts have placed all their filings on an on-line system known as *Pacer*. This system is searchable for any party's name, and once you find a case involving that party, the court filings can be accessed by PDF. The well-funded federal courts are setting the pace in going on-line, but virtually all state systems are racing to implement similar systems.

One thing that we routinely do now, when facing an unknown adversary, is to check out what federal lawsuits that party has been involved in, and what kind of allegations were made in the case (by and against the adversary). Any case, anywhere in the federal system (including Bankruptcy Courts) can be readily accessed. Given the nature of our practice, these are all business disputes; but, in many cases, the pleadings contain allegations of

dishonesty, fraud, conspiracy, libel, theft of trade secrets and a variety of other kinds of misconduct. Many initial pleadings make sweeping allegations that, when the case is resolved, simply aren't proven. Yet they now remain in the record, easily accessible to anyone with access to the *Pacer* system. Even if the case is settled with a confidentiality agreement, all of this dirty linen remains hanging out on the line. And even if the case is sealed (as might happen with a case involving trade secrets), a good deal of information remains in the record that could damage the parties in future business dealings.

We are used to media reporters delving into state court divorce files for salacious allegations that feuding spouses make against each other. We've also gotten used to a certain amount of claims information being available to insurance companies (CLUE reports), and to the federal database of all malpractice-related payments and sanctions (National Practitioner Data Bank). Now, at least as to the federal courts, we can readily access all of the court pleadings in any federal case, anywhere. Of course, the goal of any plaintiff's lawyer is to make a strong statement in the complaint, so normally these are as spicy as possible. The phrase "upon information and belief..." is a euphemism for "I can't prove it but..."

Therefore, the privacy that arbitration affords looks more and more valuable. It's hard to imagine how privacy would not be both a short-term and a long-term benefit to any business involved in a dispute, whether it is among its shareholders, or with employees, contractors, suppliers or any other person with whom the business has a contractual relationship. Accordingly, we frequently recommend that the parties agree to "mandatory, binding, confidential arbitration" as the exclusive means of resolving disputes relating to the relationship. The last thing a business wants is to have the unproven allegations of a disgruntled ex-employee, or ex-partner, in the public record forever.

**ROY MORRIS**

## **EMPLOYMENT**

*Continued from page 1*

employment, its use is mandatory for certain federal government contractors. On June 6, 2008, President George W. Bush issued Executive Order 13465 – "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System." That Order provides that "[e]xecutive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the Contractor to perform work within the United States on the federal contract." The Federal Acquisition Regulations (FAR) were amended following issuance of this Executive Order to require all federal contractors to use E-Verify. Following the resolution of litigation seeking to block the required mandatory use of E-Verify in federal contracting matters, E-Verify became mandatory on September 8, 2009 for federal contractors with contracts valued at \$100,000 or more and federal contract subcontractors with subcontracts valued at \$3,000 or more.

Required federal contractors and subcontractors have 30 days from the date of contract/subcontract award to enroll in E-Verify. Following E-Verify enrollment the employer has 90 days to initiate verification queries for employees already on the employer's staff who will be working on the federal contract (if the employer elects to verify all of its employees, including those not assigned to the federal contract, the employer has 180 days to complete the company-wide verification). After an initial 90 day phase-in period, the employer must complete the E-Verify query for newly hired employees within three days after the employee's start date.

**PHILIP SCHWARTZ**

## 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; Employment/Labor; Discrimination and Wage-Hour; Criminal; and Alternative Dispute Resolution.

The firm maintains its office in Tysons Corner, Virginia—the business hub of the metropolitan region. It has attorneys admitted to all of the local judicial jurisdictions.

## STAFF NOTES

Margarita and Néstor Cruz spent Thanksgiving break in Germany. While in Munich they attended a performance of *Don Giovanni* at the Bavarian Court Opera.

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*Now, let me show you what this baby can really do.* As previously reported veteran driver/instructor Roy Morris inspired Justin Banford to accompany him to the track at Summit Point, WV. Justin returned; his wife's BMW did not. The official after-action report attributes the on-track mechanical breakdown to predictable failure of a key component. That instructor Roy had taken the wheel for a lap when the mishap occurred was mere coincidence. *That's the story, and Justin and Roy are sticking to it.*

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In what can only be described as yet another victory of optimism over experience, Phil Schwartz has accepted the nomination to serve as Vice President of Springfield Golf and Country Club for the upcoming year. In addition to his current seat on the board of directors, Phil was President in 2006 and 2007.

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*Holiday needs.* Drunken holiday office parties are so very 1960's. As you develop your more dignified and sedate holiday event, imagine the fun of sponsoring a group blood donation! The American Red Cross can help: 1-800-GIVE-LIFE.

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### NEGLIGENCE

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that entails a duty of protection, then the evidentiary hurdle is higher." The DiSalvos attempted to meet their burden with proof of other criminal activity on campus and a security officer's testimony that he had requested assignment of a parking lot attendant. As in *Bruno* the Court was not persuaded. Looking again to precedent the Court noted a nexus between the criminal behavior at issue and a history of similar behavior. The Court concluded, "The facts simply do not establish that UDC had reason to foresee the attack

on DiSalvo any more precisely than any other possible criminal act on campus."

*(Interestingly, Judge Newman in dissent sided with the "unreasonable thirteen" over the "reasonable two." Judge Newman noted that an experienced trial judge felt the quantum of evidence was sufficient to send the case to a jury, that he captured the law well in his instructions, and that twelve jurors unanimously found that UDC breached its duty to plaintiffs.)*

**LAWRENCE CARR**

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