

EMPLOYER FORCED TO PAY UNAPPROVED OVERTIME

An enforcement action by the U.S. Department of Labor resulted in a ruling that nurses were employees, not independent contractors, of a staffing agency that provided them on a temporary basis to hospitals. After this ruling, the agency took action to attempt to deter unauthorized overtime by the nurses and to avoid having to pay time and a half for such hours. It adopted a policy, printed on all of the nurses' time sheets, stating that the nurses had to notify the agency in advance of any hours exceeding 40 hours a week. If they did not, the notice stated that the nurses would be paid for such time only at their regular rate.

When nurses who had worked overtime hours at hospitals without notifying the agency ahead of time sought to recover pay at the overtime rate, they prevailed despite not having followed the employer's policy. A federal court ruled that the agency had not done enough to meet its duty under the federal Fair Labor Standards Act to "make every effort" to prevent performance of unauthorized overtime work of which it had knowledge. The agency's knowledge was present, albeit after the fact, as was evidenced by the nurses' time sheets showing the unauthorized overtime that was worked.

Suggestions from the Court

The ironic lesson from the decision is that employers desiring to prevent unauthorized overtime by their employees must do so by essentially "getting tough" with the employees through enforcement of sufficiently strong disciplinary policies, and not simply by declining to pay for the unauthorized overtime hours. Although the agency suffered a defeat in the litigation, the court's opinion offered suggestions for alternative approaches that it or other similarly situated employers can take in the future to deter unauthorized overtime while complying with federal law.

For example, an employer could keep a daily, unverified tally of its employees' hours and reassign shifts later in the week that would otherwise result in overtime, or it could refuse to assign any shifts to employees who habitually disregard an overtime rule. Whereas the agency had admitted that a nurse who disregarded its preapproval rule faced no adverse consequences beyond getting only straight-time wages for the ensuing overtime, if it were serious about preventing unauthorized overtime, said the court, the agency would discipline nurses who violate the rule.

According to the court, an employer could even entirely disavow overtime hours, announcing a policy that it will not, under any circumstances, employ an individual for more than 40 hours in a week. Under such a policy, any hours over the limit would not be compensated for the employee. ■

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It's not enough that we do our best; sometimes we have to do what's required.

— Sir Winston Churchill (1874 - 1965)

Protection for Parodies

Outlaw vs. Rule of Law

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Legal Matters

Summer 2008

HUTCHISON & STEFFEN SPONSORS EAGLE BALLOON IN THE 2008 SUMMERLIN PATRIOTIC PARADE



In honor of our country's celebration of Independence Day, the Firm's partners, associates and vital staff members came together to provide an amazing display of the American Bald Eagle. This symbol of our freedom has a wingspan of 33 feet, is 25 feet tall and takes twelve balloon handlers to navigate it through the parade route.

We are honored to participate in this celebration of our American heritage and freedom. The eagle received many cheers and much applause along the parade route.

A big thank you to everyone on our team who participated in the parade and to all of the parade spectators for their support. ■



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. ■



Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.

OUTLAW VS. RULE OF LAW

Recently, court documents were uncovered from a successful civil case involving some notorious nineteenth century defendants who were better known for avoiding the legal consequences of their acts: Jesse and Frank James.

Not surprisingly, the case against the James brothers stemmed from one of their signature activities, a bank robbery. During an attempted bank robbery by the brothers in Gallatin, Missouri, in 1869, Jesse James killed a cashier. As the brothers made their getaway, Jesse was thrown from his horse, which he left behind in favor of doubling up on Frank's horse. Soon thereafter, the brothers happened upon the unfortunate Dr. Smoote, who was also on horseback. Jesse relieved Smoote of his horse, at gunpoint, and continued the escape.

Smoote was not the first or last victim of the James brothers, but he was unusual in then bringing, and winning, a lawsuit against them for the full value of the horse, saddle, and bridle that they had stolen.

One might expect the outlaws to have ignored the lawsuit altogether, but the brothers answered the lawsuit by arguing that they were not personally served with notice of it. Although a sheriff testified that

he had delivered the papers to the James family farm (pity the process server charged with serving a summons on Jesse James), the case was dismissed on that technicality. That might have been the end of the litigation, were it not for Jesse's decision to publish a letter in a newspaper declaring himself innocent of the holdup and murder.

Correctly pegging Jesse James as a newspaper reader, Smoote's attorney cleverly won the court's approval to file a notice of service in the classified section of a local newspaper, thus giving Dr. Smoote another bite at the apple. Again, through their attorney, the James brothers initially fought the lawsuit, but soon they withdrew from the suit and allowed a judgment to be entered against them for \$223. The judgment was satisfied when Smoote took possession of the horse which Jesse had left behind at the robbery.

Yes, Dr. Smoote had to endure the dreaded prospect of staring down the barrel of Jesse James's weapon, but in dollars and cents he fared well. The horse he now had, which Jesse had bought with cash gained from some of his successful robberies, was believed to have been from Kentucky racing stock and was valued at \$500 (a considerable sum for the time). ■

LAWYER'S APPROVAL FOR ACCEPTANCE OF OFFER

When the owners of a party store received an offer to purchase not the entire property, but only their liquor license and fixtures, they accepted the offer, but on the condition that their attorney approve the deal. Before the attorney's review of the first offer, the owners received a better offer from another potential buyer, this time for the entire property, including the license, the fixtures, the real property, and the business itself.

The second offer was for about five times as much money as the first offer. The owners also accepted this offer, but again conditioned acceptance on approval by their attorney. The owners' attorney then reviewed both offers at the same time and, not surprisingly, approved the second, more favorable one.

The disappointed party that had made the first offer sued the owners to enforce what it regarded as a completed contract for the sale of the license and fixtures. It contended that the sellers had waived the requirement of attorney approval by their bad faith in simultaneously submitting to

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LAWYER'S APPROVAL FOR ACCEPTANCE OF OFFER

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the attorney two competing purchase agreements, both of which conditioned acceptance on approval by the attorney. The disappointed party further argued that, by procuring the second offer and prospective agreement, the sellers had wrongly hindered the fulfillment of the only condition remaining to be fulfilled on the first agreement—attorney approval.

A court disagreed that there was any bad faith and upheld the contract formed when the second offer was accepted and approved by the sellers' attorney. While the plaintiff had been the first to make an offer of any kind, nothing in its potential contract prohibited the sellers from considering other offers. Nor were the sellers obliged to take the property off the market pending review of the first offer by legal counsel. Consideration and eventual full acceptance of the second offer was not legally impermissible where the first offer had been only conditionally accepted.

There was no limit on what aspects of the first agreement were subject to the attorney's approval. He was free to disapprove it, as he did, simply because there had been a better competing offer made by a competing prospective buyer. Moreover, the sellers had not interfered with their attorney's actions, such as by instructing him to disapprove the first offer. In short, the sellers had not acted in bad faith. They were guilty of nothing more than shrewd business moves during what the court described as a period of "dickering" that preceded the formation of an enforceable contract. ■

HOME IMPROVEMENT SCAMS

Your home is your castle ... and it is also probably your most valuable investment. Unfortunately, many homeowners unwittingly hire crooked contractors to improve or repair their castles, and they wind up being cheated out of money or paying for inferior work. The home improvement business is crawling with cheats. Before signing on the dotted line, remember the following:

- Be wary of a salesman who comes to your home uninvited, especially if he claims he was doing some work for your neighbor or was just "in the neighborhood."
- Ask for references, with names and telephone numbers—nothing drives away a swindler quicker than a request for references.
- Beware of the low-ball bids or offers that seem too good to be true, because they usually are.

- Beware of people who ask for a large "deposit" or ask to be paid in full before the

work is done.

- Read everything carefully before you sign it, and make sure you understand all of the terms.

- Do not sign a contract with blanks in it.

- Beware of a salesman who claims that his offer is for a "limited time" or is "today only," especially where he is pressuring you to sign before you have read the contract.

If you have a complaint about your home improvement project, begin by trying to resolve it with the contractor. Honest mistakes can occur and can be easily corrected. Make sure to follow up with a letter that you send by certified mail and keep a copy for your records. If this approach is unsuccessful, contact your local or state consumer protection office. ■