

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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### *In This Edition . . .*

- All Defendants Must Consent To Removal.
- Are Claims Regarding The Unauthorized Use Of "Girls Gone Wild" Video Footage Worth More Than \$75,000?
- Trying To Win In The Corporate Shell Game.
- Policies In Employment Manuals Rarely Create Enforceable Contract Rights.
- Welcome Litchford & Christopher's New Associates.

Hal K. Litchford \* Donald E. Christopher \* David G. Lerner \* Alan B. Taylor \* Scott K. Lippman  
G. Steven Fender \* Richard C. Swank \* Paul E. DeHart \* Morgan W. Streetman \* Wade C. Vose

*Antitrust and Unfair Competition*  
*Financial Fraud*  
*Business Torts*  
*Real Property Transactions*  
*Corporate Control Disputes*  
*Civil Litigation*

*Agreements Not To Compete*  
*Patent, Trademark, Copyright Infringement*  
*Employment Discrimination*  
*Real Property Disputes*  
*Motor Vehicle Dealership Relations*  
*Commercial Litigation*

*Trade Secrets*  
*Contract Disputes*  
*Public Accommodations*  
*Corporate Transactions*  
*Partnership Disputes*  
*Class Actions*

## **MULTIPLE DEFENDANTS ALL MUST CONSENT TO REMOVING A CASE FROM STATE TO FEDERAL COURT**

When a plaintiff sues a defendant in state court, the defendant may have the ability to remove the case to federal court. Before a defendant considers whether a federal court may provide a better forum, however, it must first determine whether the case satisfies all of the jurisdictional and technical requirements for removal to be feasible. A full discussion of all of these jurisdictional and technical requirements is beyond the scope of this article. In Diebel v. S.B. Trucking Company, et al., however, the U.S. District Court for the Middle District of Florida addressed one important issue for removal when a plaintiff sues multiple defendants – the issue of whether and when each of the defendants must consent to the removal.

Karen Diebel was the personal representative of her husband, who was killed while rendering assistance to passengers of a vehicle that was involved in an accident on the Florida Turnpike. Mrs. Diebel sued two companies that owned a tractor-trailer, and the driver of the tractor-trailer, in state court. She claimed that because of the driver's negligence, the tractor-trailer struck and killed her husband. On September 14, 2002, one of the corporate defendants, Hi-Performance Truck Sales, Inc. was served with a summons and complaint. It responded by filing an answer and affirmative defenses. On October 23, 2002, S.B. Trucking and the driver, Robert Jackson, were served with a summons and complaint. On November 13, 2002, S.B. Trucking and Jackson filed a notice of removal from the state court to the federal court. The defendant who had been served first, Hi-Performance, did not explicitly join in or consent to the removal. S.B. Trucking and Jackson filed their respective answers and affirmative defenses in the federal court at the same time they filed their notice of removal. Hi-Performance's previously filed answer was transferred from the state court to the federal court.

On December 11, 2002, S.B. Trucking and Jackson filed bankruptcy petitions. The following day, the plaintiff filed a motion to remand the case to state court.

The U.S. District Court first considered whether the notice of removal was filed in a timely manner. Under the pertinent statute, a notice of removal must be filed within thirty days after receipt by the defendant (through service or otherwise) of a copy of the initial pleading. In this case, if the thirty-day period began when Hi-Performance was served, then the notice of removal was untimely. But, if it began when S.B. Trucking and Jackson were served, it was timely. The court noted that two different approaches have been used – the “first-served” defendant rule and the “second-served” defendant rule. Although two decisions in the Middle District of Florida had adopted the former, the District Court declined to make a determination as to which rule should apply on the facts of this case because another aspect of the plaintiff's motion for remand was sufficient to defeat the removal attempt. This aspect related to the consent issue.

In cases involving multiple defendants, all defendants must consent to the removal of a case to federal court. This consent must be demonstrated either by each defendant signing the notice of removal or explicitly stating for itself its consent on the record within the thirty-day period for filing a notice of removal. Here, Hi-Performance did not join in the notice of removal within the required thirty-day period, regardless of when that period commenced and even

considering any impact of the bankruptcy filing. The court noted that this defect was not cured by the fact that Hi-Performance filed its answer and affirmative defenses in federal court on the day the other defendants filed the notice of removal and their answers. The defect also was not cured by a statement of S.B. Trucking's and Jackson's counsel that he expected to represent Hi-Performance in the case "in the near future."

The court then addressed whether any of the three exceptions to the unanimous consent rule may have been applicable. The first exception – where the non-consenting defendants have not been served with process at the time the notice of removal was filed – did not apply on the facts. The second exception – where removal is taken pursuant to a statute authorizing removal when separate and independent federal question claims are joined with claims that are otherwise non-removable – also did not apply on the facts. Accordingly, the court only had to consider the third exception to the unanimous consent rule: Unanimous consent to removal is not required where the non-consenting defendants are nominal or merely formal defendants. The specific query for the court in this case was whether Hi-Performance was nothing more than a nominal or formal defendant, meaning it was not a necessary or an indispensable party to the action. On the facts presented, the court concluded that in the absence of Hi-Performance, it could not enter a "final judgment consistent with equity and good conscience which would not be in any way unfair or equitable to the plaintiff."

Moreover, the court found that the absence of consent in the notice of removal was not the sort of deficiency for which a correction was authorized. That is, it was not the sort of deficiency that would merely set out more specifically grounds for removal that were already stated in the notice but in an imperfect manner. The court held that the absence of allegations that all defendants consent to removal is a substantive, not a technical, defect in a notice of removal.

For all of these reasons, the case was remanded to state court.

**THE TOTALITY OF THE CIRCUMSTANCES DETERMINES WHETHER  
THE AMOUNT IN CONTROVERSY IN A REMOVED CASE BASED ON  
DIVERSITY OF CITIZENSHIP EXCEEDS \$75,000**

A state court case may be removed to federal court if it is a civil action of which the federal district court has original jurisdiction. Original jurisdiction includes diversity jurisdiction. Diversity jurisdiction requires that the parties be citizens of different states and the amount in controversy exceeds the sum or value of \$75,000 exclusive of interests and costs.

In Florida, a plaintiff need not state the precise amount of its damages in its state court complaint. An allegation that the damages exceed a certain amount (and that jurisdictional amount depends on whether the case is filed in county court or circuit court) is sufficient. Accordingly, it sometimes can be difficult to know whether the amount in controversy in a removed case based on diversity jurisdiction exceeds the requisite \$75,000.

The Fort Myers Division of the U.S. District Court for the Middle District of Florida recently addressed this issue in Glaze v. M.R.A. Holding, LLC, et al. There, the plaintiff sued the defendants in state court alleging five claims arising from the videotaping of the plaintiff exposing her breasts while intoxicated and the subsequent use of the footage in a video titled, “Girls Gone Wild, Dorm Room Fantasies 2.” The plaintiff made an unspecified demand for damages in her complaint; she only averred that her damages were in excess of \$15,000.

The defendants filed a timely notice of removal, alleging in part that they were all citizens of different states and the amount in controversy exceeded \$75,000. The plaintiff filed a motion for remand on the grounds that the amount in controversy was less than \$75,000.

To decide whether the defendants proved by a preponderance of the evidence that the amount in controversy more likely than not exceeded \$75,000, the court looked at the “totality of the circumstances.” In particular, the court noted that: (1) the notice of removal specifically set forth the facts alleged in plaintiff’s complaint that caused the defendants to believe the jurisdictional amount had been exceeded; (2) the notice cited other allegedly similar cases where the amount was satisfied; (3) the plaintiff’s motion to remand characterized the plaintiff as the victim of a professional pornography scheme and characterized the defendants’ conduct as the photographic equivalent of date rape; and (4) the videotape had been marketed extensively with a purported 50,000 copies having been sold, to which the plaintiff asserted royalty rights.

Considering all of these facts, the court concluded the defendants satisfied their burden of proof. It denied the motion to remand.

### **“MERE CONTINUATION OF BUSINESS” LIABILITY**

Charles Mason was employed by E. Speer & Associates, Inc., a Georgia corporation, for around ten years. When his employment ended, he sued ESA Georgia seeking compensation he claimed he was owed under a profit participation plan. Mason obtained judgment but before he could collect it, ESA Georgia declared bankruptcy.

Subsequently, Mason filed a complaint against Erling Speer, the sole shareholder and manager of ESA Georgia. He alleged he was entitled to apply his unsatisfied judgment against property he claimed was fraudulently transferred to Speer by ESA Georgia. Later that same year, Mason purchased the claims of the bankruptcy trustee of ESA Georgia at an auction. These claims included all potential claims ESA Georgia had against Speer for fraudulent transfers. As the assignee of the bankruptcy trustee, Mason filed a complaint against Speer alleging he mishandled and misappropriated ESA Georgia’s assets.

Mason also filed a separate action against Speer seeking to hold him liable for Mason’s unjustified judgment against ESA Georgia. In this third suit, Mason again alleged that Speer misappropriated ESA Georgia’s assets.

Mason amended his pleadings in all three cases to add as a party defendant E. Speer & Associates, Inc., a Florida corporation. ESA Florida was set up by Speer just before ESA Georgia declared bankruptcy. As with ESA Georgia, Speer was the sole shareholder and manager of ESA Florida. Mason sought to impose liability on ESA Florida for his unsatisfied judgment against ESA Georgia.

All three cases were consolidated for trial. Final judgment in all three cases was entered in Mason's favor. Speer was found personally liable, but ESA Florida was not liable for Mason's unsatisfied judgment against ESA Georgia.

There were several issues addressed by Florida's Fourth District Court of Appeal in Mason v. E. Speer & Associates, Inc., et al. This article, however, focuses on only one of those issues: Whether ESA Florida should have been held liable for Mason's judgment against ESA Georgia?

On appeal, Mason argued ESA Florida should be liable on a "mere continuation of business" theory. Under this theory, ESA Florida would be liable if it was found to be merely a continuation or reincarnation of ESA Georgia but only under a different name. Mason argued that ESA Florida was a mere continuation of ESA Georgia because both were wholly owned by Speer, both provided the same real estate management services to clients, ESA Florida had the same office, telephone, stationery, and part time employees that ESA Georgia had used, and the ESA Florida office was opened only a matter of days after Mason obtained his underlying judgment against ESA Georgia.

Mason also alleged ESA Georgia transferred two income producing management contracts to ESA Florida – a contract with a company called Wintergreen and a contract with a company called Atlantic Gulf. The court was not impressed with Mason's position. It observed that as regards Wintergreen, an initial contract between Wintergreen and ESA Georgia was completed and ended by its terms, and a new contract was entered into by Wintergreen directly with ESA Florida. Thus, there was no "transfer" of assets. As regards the Atlantic Gulf contract, Speer used ESA Georgia as the invoicing and billing company for the contract. ESA Georgia received the payments and distributed them to Speer. Still, because ESA Georgia was never a party to Speer's contract with Atlantic Gulf, and this contract, like the Wintergreen contract, was a personal services contract requiring performance by Speer, the court again found there was no transfer.

In rejecting Mason's mere continuation theory, the court also held there was no real transfer of personnel or equipment from ESA Georgia to ESA Florida. In addition, for the first two years of ESA Florida's existence Speer was the only salaried employee. The only connection between the companies was Speer. As the court put it, "In incorporating ESA Florida, Speer set up a new corporate existence through which to provide his services. Based on his reputation, he was able to gain clients for ESA Florida that had previously been clients of ESA Georgia. . . . Speer took the proper steps to dissolve ESA Georgia through bankruptcy and he is not prevented from incorporating ESA Florida as a means through which to provide his consulting services."

## **POLICIES IN EMPLOYMENT MANUALS DO NOT GENERALLY CREATE ENFORCEABLE CONTRACT RIGHTS**

In EEOC v. Rio Bravo International, Inc., et al., the Equal Employment Opportunity Commission brought an employment discrimination action against the defendants alleging that the former assistant manager at the defendants' restaurant sexually harassed female crew members. The defendants, as third-party plaintiffs, filed a complaint against the alleged harasser for breach of fiduciary duty and breach of an implied employment contract. The third-party defendant moved for a judgment as a matter of law on both claims. His motion was denied as regards the breach of fiduciary duty claim. The U.S. District Court for the Middle District of Florida granted the motion, however, as regards the breach of contract claim.

In granting this aspect of the motion, the court began by stating that an at-will employee cannot rely on an employee manual as a basis for enforceable contract rights. It characterized a restaurant's policies set forth in an employee handbook as unilateral expressions of firm policy as opposed to providing the terms of an employment contract. Thus, the only way policy statements in employment manuals may give rise to enforceable contract rights is if they contain specific language that expresses the parties' explicit mutual agreement that the manual constitutes a separate employment contract.

The only agreement in place was an oral contract for an indefinite term between the third-party plaintiffs and the alleged harasser pursuant to which he agreed to perform an assistant manager's duties, and the restaurant agreed to pay him. In the absence of any separate agreement that transformed the restaurant's policies, including its sexual harassment policies, into enforceable contract rights, there could be no breach of contract action. And, in this case, the third-party plaintiffs could not establish a separate written agreement with the alleged harasser. Because employees cannot rely on employers' manuals for enforceable contract rights, employers cannot do so either according to the court.

## **WELCOME WADE C. VOSE AND MORGAN W. STREETMAN**

Litchford & Christopher is pleased to announce that Wade C. Vose and Morgan W. Streetman, both of whom were summer law clerks with the firm a year ago, began work this week as the firm's newest associate lawyers. Wade Vose graduated with honors from the University of Florida Levin College of Law. During his third year of law school, Wade prosecuted cases as a Certified Legal Intern with the Eighth Judicial Circuit State Attorney's Office. While in law school, Wade also received honors in his legal research and writing class and his appellate advocacy class. He is the recipient of the Levin College of Law Leonard Scholarship. Wade was a political science major at the University of Florida, where he graduated with honors in May 2000 with a cumulative 3.95 grade point average. In college, Wade was a National Merit Scholar, a Florida Academic Scholar, and a member of the Omicron Delta Kappa Leadership Honorary – just to mention a few of his accomplishments. He is an Orlando native. Morgan Streetman graduated from the Duke University School of Law. He was a member of the *Duke Law and Technology Review* and was the editor-in-chief of *Alibi* Literary

Magazine. Morgan graduated in December 1999 with honors from the University of Florida, where he majored in economics. Among other distinctions there, Morgan was a National Merit Scholar, a Florida Academic Scholar, and a member of Phi Beta Kappa.

Litchford & Christopher is proud of the fine accomplishments of these two associates and is happy to have them as part of the firm's legal team. We know you will enjoy working with Wade and Morgan.