

LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

SPRING 2003

© 2003, Litchford & Christopher Professional Association, 390 North Orange Avenue, Post Office Box 1549, Orlando, FL 32802. All Rights Reserved.

Legal News for Clients is published periodically by Litchford & Christopher Professional Association. It contains summaries of court decisions and other materials in an effort to keep you abreast of recent developments in areas of the law in which the firm represents clients. Each edition, however, does not necessarily cover cases and information relevant to all of the firm's practice areas. The substantive areas covered in each edition are selected by the firm's lawyers at their discretion based on their views of the significance of the cases and the other information available at the time of publication. The material covered in *Legal News for Clients* is condensed and is not intended to provide legal advice. While the information set forth in each article is accurate, every situation presents unique factual and legal considerations. Accordingly, we encourage you to consult an attorney for proper legal advice before taking any action based on the information summarized in *Legal News for Clients*. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. You may write to us at the address listed above, call us at (407) 422-6600, fax us at (407) 841-0325, or contact us through our website at www.litchris.com.

In This Edition . . .

- Sometimes A Win Is A Loss
- Guarantor Of Commercial Lease Escapes Liability
- The United States Supreme Court Upholds The Application Of Traditional Vicarious Liability Principles In A Housing Discrimination Case

Hal K. Litchford * Donald E. Christopher * David G. Lerner * Alan B. Taylor
Scott K. Lippman * G. Steven Fender * Richard C. Swank * Paul E. DeHart

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

SOMETIMES A WIN IS A LOSS

Often times, contracts contain a clause providing that one contracting party agrees to pay the other's costs and attorney's fees in a legal action to enforce or defend rights under the contract. A Florida statute renders mutual, however, a unilateral contract clause for prevailing party attorney's fees. Over the years, there have been a number of cases concerning the issue of who is a prevailing party for purposes of this statute. Florida's Third and Fourth District Courts of Appeal have held that the trial judge must designate one party as the prevailing party. The Second District has adopted a more flexible approach, noting generally that a rule regarding an award of fees in all cases may result in an unjust reward to a party whose conduct caused the failure of the contract – especially in cases where the fees exceed the damages claims arising from the contract.

Florida's Fifth District Court of Appeal agreed with the Second District's analysis in a case decided in early 2002. In Merchants Bonding Company (Mutual) v. City of Melbourne, the Fifth District recently reaffirmed its adherence to this approach in a bit of a different context.

In this case, Continental Acreage Development contracted with the City of Melbourne to replace a sewer line. The contract contained a clause that awarded attorney's fees to the prevailing party in a suit involving the contract. Merchants Bonding Company furnished the performance and payment bond for Continental on this project. The City contended Continental breached the contract and sued it for damages; it also sued Merchants under the bond. Continental filed a counterclaim for breach of warranty, negligent misrepresentation, and other claims. The case was tried for six days. A final judgment was entered denying relief to all parties – Continental was found to have breached its contract, and the City was found to have committed economic waste. The trial court denied a damage award to any party. Merchants, as surety, asserted it was entitled to an award of attorney's fees as a prevailing party pursuant to the contract between Continental and the City. The trial judge ultimately determined that Merchants was not entitled to any fees.

The appellate court affirmed this ruling. It reasoned that if in fact Continental was the prevailing party, then, as surety, Merchants also would be entitled to prevailing party attorney's fees under the contract between Continental and the City. However, Merchants' claim to fees rose and fell under that contract. Had Merchants prevailed on a defense that applied to it in its capacity as surety, then its surety status would have disappeared along with any right to make a fee claim under the principal contract. Merchants did not prevail on its own defenses and was held not liable only because Continental was not liable. Because both principal parties fought to a draw, neither of them won or lost, no party prevailed, and Merchants was not entitled to fees.

GUARANTOR OF COMMERCIAL LEASE ESCAPES LIABILITY

Commercial landlords usually require tenant leases to be guaranteed. In Amerishop Mayfair L.P. v. Billante, the Third District Court of Appeal affirmed the trial court's judgment that a guarantor was not liable for the tenant's breach of a commercial lease agreement.

Amerishop, the landlord, entered into a shopping center lease with Thomas Specialty Restaurants as a tenant. Thomas Billante signed a rental guaranty as part of this transaction. Under the terms of the guaranty, Billante guaranteed all terms of the lease, including payment by the tenant of rent. The rental guaranty provided in part that the landlord and tenant may enter into modifications to the lease without notice or consent by the guarantor, and the guarantor would not be released from his obligations should that occur. It also provided that the obligations of the guarantor will remain in effect as long as the tenant's obligations under the lease remained in effect. Further, the guaranty provided that it may only be amended or modified in a writing executed by both the landlord and the guarantor.

Approximately six months after Thomas Specialty Restaurants entered into the lease and the guaranty was signed by Billante, the tenant assigned the lease to La Fontaine Restaurant, L.C., with the written consent of both the landlord and Billante. La Fontaine Restaurant defaulted on the lease less than two years later. Several months after that, Billante sold his interest in the restaurant. Subsequently, Amerishop entered into a lease termination agreement with La Fontaine Restaurant. Billante was not a party to the lease termination agreement, and he was not given notice that a lease termination agreement was to be signed by the landlord and La Fontaine Restaurant.

Under the lease termination agreement, the lease was deemed to be terminated more than three years after Billante entered into the rental guaranty. The lease termination agreement provided that the landlord released the tenant from all obligations under the lease but did not release any rights of the landlord to proceed against Billante under the rental guaranty he signed.

The landlord did not provide notice to Billante that La Fontaine Restaurant had failed to pay rent. Amerishop did not seek payment of past due rent until over a year after La Fontaine Restaurant had defaulted on the lease payments. At that time, Amerishop sued Billante to enforce the terms of the rental guaranty and recover the rent delinquency in the amount of around \$336,000. The trial judge entered a judgment in favor of Billante. He reasoned that Billante's obligation under the rental guaranty was discharged by the lease termination agreement. Amerishop appealed.

The Third District Court of Appeal affirmed this judgment. Amerishop argued that even though the common law rule is that a guarantor is released by the release of the principal debtor, there was specific language in the lease termination agreement that avoided the application of that rule and kept Billante responsible. The appellate court disagreed. After noting and agreeing with the general rule to which Amerishop had referred, it focused on the express language of the rental guaranty. In particular, the court noted that in that contract, Billante agreed to be liable for all damages arising from the tenant's breach of the lease only for so long as the tenant was obligated under the lease. Thus, if the tenant had defaulted within the term of the rental guaranty, then Billante would have been liable to the landlord; however, once the lease termination agreement discharged La Fontaine Restaurant's obligations, Billante's obligations to the landlord also terminated. The language in the lease termination agreement that provided it did not release or impair any rights the landlord had against Billante simply was not enforceable, according to the court of appeal: Billante was not a party to that agreement and did not consent

to it, and the rental guaranty agreement to which Billante was a party did not attempt to hold him liable for damages even if the tenant was released.

THE UNITED STATES SUPREME COURT UPHOLDS THE APPLICATION OF TRADITIONAL VICARIOUS LIABILITY PRINCIPLES IN A HOUSING DISCRIMINATION CASE

An interracial couple, the Holleys, tried to buy a house in a city in California. The house had been listed for sale by a real estate corporation. The couple claimed that a salesman for the company prevented them from purchasing the house for racially discriminatory reasons.

The Holleys sued the salesman and the real estate company in federal court. They claimed both were liable for a violation of the federal Fair Housing Act, which prohibits racial discrimination in connection with the sale or rental of a dwelling. The Holleys subsequently filed a separate suit against David Meyer, who was the real estate company's president, sole shareholder, and its licensed "officer/broker." In this suit, the Holleys claimed that Meyer was vicariously liable in one of these capacities for the salesman's unlawful, discriminatory actions.

The trial court consolidated the two cases. It dismissed the claims against Meyer in his capacity as an officer of the corporation because those were claims of vicarious liability only, and the Fair Housing Act did not impose personal vicarious liability on a corporate officer. The trial court also dismissed the claims against Meyer personally in his other capacities for similar reasons.

The Ninth Circuit Court of Appeals reversed these determinations. It believed that the vicarious liability criteria for the Fair Housing Act were different from vicarious liability principles of general tort law. According to the Ninth Circuit, the Act specified liability for persons who either direct or control, or have the right to direct or control, the conduct of another even if they were not involved at all in the discriminatory actions and even in the absence of a traditional principal/agent or employer/employee relationship. The court reasoned here that as sole owner of the real estate corporation, Meyer had the authority to control the acts of the salesperson. As an officer, Meyer directed or controlled the conduct of the salesman (or had the right to do so), even if he did not participate in or authorize the discrimination. For similar reasons, Meyer could be held vicariously liable as the corporation's licensed broker. Meyer appealed.

In Meyer v. Holley, the U.S. Supreme Court determined that the Fair Housing Act does not impose personal liability without fault on an officer or owner of a corporation for the unlawful activities of the corporation's employee or agent. An action claiming housing discrimination is in essence, a tort action. Under traditional vicarious liability principles applicable in tort actions, principals or employers are vicariously liable for acts of their agents or employees in the scope of their authority or employment. With respect to a corporation, the corporation, as an entity, and not its owner or officer, is the principal or employer.

The unanimous Court did not agree with the Ninth Circuit that the Fair Housing Act extended these traditional vicarious liability rules. First, it found that Congress had said nothing in the Act or its legislative history about extending the vicarious liability rules, and therefore there was no evidence of any intent to use some sort of “strict” vicarious liability standard in Fair Housing Act cases. Second, the agency primarily charged with implementing and administering the Act, the Department of Housing and Urban Development, specified in its regulations that ordering vicarious liability rules apply. Finally, the Holleys conceded in their argument before the Court that traditional vicariously liability rules apply. Although the Act’s objective is viewed as an overriding societal priority, that objective and characterization alone did not carry with it a rule that would hold every corporate supervisor personally liable without fault for the unlawful act of every corporate employee whom the supervisor has the right to supervise.

The Holleys argued that although traditional vicarious liability rules applied, those rules themselves imposed liability on Meyer because, under those ordinary rules, Meyer did in fact have the right to control the salesperson. The Supreme Court rejected this argument because of its determination that “right to control” by itself, is insufficient under traditional agency principles to establish a principal/agent relationship. The Court did not suggest whether other aspects of the broker relationship, added to the “right to control,” would establish the necessary relationship upon which liability could be imposed. In this regard, it only noted that the court of appeals did not consider this issue, so it would not consider it. The Holleys also argued that in some circumstances, a corporation’s liability may be imputed to its owner by piercing the corporate veil. Again, though, because the court of appeals did not consider this point, the Supreme Court would not consider it.

For all of these reasons, the Court vacated the Ninth Circuit’s judgment and remanded the case. In doing so, it specially noted that the Ninth Circuit remained free to decide whether the two particular issues – the totality of the circumstances of the relationship between Meyer and the salesperson, and the piercing of the corporate veil – had been properly raised and if so, to consider these issues in further proceedings.