

LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

WINTER 2004

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JUDGMENT CREDITOR MAY SEIZE AUTOMOBILE OWNED JOINTLY BY JUDGMENT DEBTOR AND HIS WIFE

There are significant legal consequences associated with each of the various ways in which two or more people hold title to real or personal property. One consequence concerns the ability of a creditor to levy on the property. In Xayavong v. Sunny Gifts, Inc., Florida's Fifth District Court of Appeal addressed this issue in connection with a judgment creditor's attempts to seize an automobile owned jointly by the judgment debtor and his wife.

Sunny Gifts obtained a final judgment against Vongsack Xayavong, but not also against his wife, Daononh Xayavong. Sunny Gifts obtained a writ of execution and instructed the Sheriff to seize an automobile titled in both of their names. On the title, their names were separated by the word "or." The Sheriff took possession of the vehicle. The Xayavongs moved to dissolve the levy. They argued that they owned the vehicle as tenants by the entirety – a form of co-ownership unique to husbands and wives, which precluded the levy because the wife was not also a judgment debtor. They based their position on a 2001 Florida Supreme Court case, which held there is a presumption of tenancy by the entirety when spouses jointly hold property. The trial court determined, however, that the presumption did not apply to the ownership of motor vehicles and denied the motion to dissolve the levy.

The Fifth District Court of Appeal affirmed the trial court's decision. It began its analysis by discussing creditors' rights to execute on property held as joint tenants and property held as tenants by the entirety. If property is held as joint tenants with a right of survivorship, a creditor of one of the owners may attach a joint tenant's portion of the property to satisfy his individual debt. On the other hand, if property is held as tenants by the entirety, only creditors of both the husband and the wife may attach the property they co-own. That is, entirety property cannot be reached to satisfy the debt of one spouse only. The court then turned to Florida Statute §319.22. This statute provides, in essence, that if a motor vehicle or mobile home is registered in the names of co-owners separated by the word "or," the vehicle is held as a joint tenancy with a right of survivorship, even if the co-owners are husband and wife. The statute also provides that if the names of the co-owners are separated by the word "and," then the signature of each is required to transfer title to the vehicle.

The issue, then, was whether the Florida Supreme Court's 2001 decision in Beal Bank, SSB v. Almand and Associates affected the language in this statute. In Beal Bank, the supreme court extended a rebuttable presumption of tenancy by the entirety to financial accounts and other personal property acquired and held by married couples. Before this opinion, the presumption applied only to real property. The Fifth District held that the Beal Bank presumption did not affect the plain language of §319.22. The presumption only applies if there is some ambiguity in the title to the property. According to the court, that statute accomplishes the same thing by eliminating any ambiguity regarding the ownership of motor vehicles. The presumption gives way to the statute, which specifically describes how co-owners may title vehicles.

The Xayavongs' vehicle was titled in the name of the husband "or" the wife. The vehicle, therefore, was held as joint tenants, not tenants by the entireties. Sunny Gifts' levy was proper.

**COURT AFFIRMS DISMISSAL WITH PREJUDICE OF AMENDED COMPLAINT
ALLEGING BREACH AND FRAUDULENT INDUCEMENT
OF EMPLOYMENT AGREEMENT**

In Florida, employment is considered employment "at will" unless the employer and employee enter into an agreement to the contrary. An employee at will may be terminated for any reason. Occasionally, employers enter into employment agreements with employees to cover other aspects of the employment relationship without significantly modifying the employment at will concept.

This is essentially what happened when PainCare Holdings, Inc. entered into an employment agreement with William Ranieri. PainCare desired to memorialize several aspects of its relationship with Mr. Ranieri but to still have the ability to terminate his employment for any reason. It entered into a contract with him that provided, in part, that Mr. Ranieri's employment was to continue for three years unless it was not renewed or terminated according to the specific terms of the contract. The pertinent terms of the contract stated he could be terminated without cause by mutual agreement of the parties, at the election of PainCare by giving notice in the event Mr. Ranieri became ill or incapacitated (as defined in another provision of the contract), upon his death, or "any other termination of this agreement by the company other than 'for cause.'"

Within six months after the commencement of his employment, PainCare terminated Mr. Ranieri without cause. He sued PainCare. His amended complaint alleged claims for breach of contract and fraudulent inducement. PainCare filed a motion to dismiss. Mr. Ranieri argued that the "any other termination" language in the contract was ambiguous. The trial court disagreed. It believed this language was clear and specifically allowed PainCare to terminate Mr. Ranieri without cause. The language directly contradicted a claim for breach or fraudulent inducement of the agreement, and the court dismissed the amended complaint with prejudice.

In Ranieri v. PainCare Holdings, Inc., the Fifth District Court of Appeal agreed the challenged language was clear and unambiguous. It rejected Mr. Ranieri's position that the language could mean PainCare did not have to renew the contract after its three-year term; there was no provision in the agreement that required PainCare to renew the agreement at all. The only logical meaning of the challenged language was that PainCare could terminate Mr. Ranieri at anytime, without cause. The appellate court made a point to state that it had been Mr. Ranieri's burden to strike a better bargain at the time he negotiated and entered into the employment agreement.

**THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA ENTERS A DEFAULT JUDGMENT FOR INFRINGEMENT
OF AN INTERNET DOMAIN NAME**

PetMed Express, Inc. is a nationwide pet pharmacy. It sells pet care medicines and products directly to consumers through catalogues, television commercials, and the Internet. Its various domain names all include the term “PetMed.” PetMed owns federally registered service marks “PetMed Express, Inc.” and “1888PetMeds.”

MedPets also advertised and sold pet care products on the Internet. Its web addresses were “www.MedPets.com” and “1888MedPets.com.” PetMed warned MedPets that MedPets’ domain names infringed its trade and service marks and demanded that MedPets cease this infringement. MedPets, however, ignored the warning and continued to use the domain names. As a result, PetMed filed a six-count complaint. It alleged claims of federal trademark infringement, unfair competition, trademark dilution, cyberpiracy, Florida common law trademark infringement, and Florida common law unfair competition. MedPets failed to respond to the complaint and also failed to respond to PetMed’s motion for entry of a final default judgment.

In PetMed Express, Inc. v. MedPets.Com, Inc., the Southern District granted PetMed’s motion for default judgment. In doing so, it analyzed each of the six counts of the complaint. Count I for federal trademark infringement was brought under a section of the Lanham Act codified at 15 U.S.C. §1114(1)(a). This statute provides that liability for trademark infringement occurs when a person uses in commerce a “reproduction, counterfeit, copy, or colorable imitation of a registered mark” that is likely to cause confusion, mistake, or to deceive.

Count V of the complaint alleged Florida common law trademark infringement. The analysis for Florida common law trademark infringement is the same as the Lanham Act analysis.

Count II of the complaint alleged a claim for federal unfair competition under another portion of the Lanham Act, 15 U.S.C. §1125(a). To succeed on a federal unfair competition claim, a plaintiff must show it has prior rights to the mark at issue, and the defendant adopted a mark or name that is the same or confusingly similar.

The plaintiff’s federal trademark dilution claim in Count III of its complaint was based on a section of the Lanham Act codified at 15 U.S.C. §1125(c). Under this section, a plaintiff must prove its trademark is famous, the defendant adopted the mark after the plaintiff’s mark became famous, the defendant’s mark diluted the plaintiff’s mark, and the defendant’s use of the mark is commercial and in commerce.

Yet another section of the Lanham Act provides a cause of action for cyberpiracy, which formed the basis for the fourth count of PetMed’s complaint. Under 15 U.S.C. §1125(d), a person is liable for a bad faith intent to profit from a protected trademark by using a domain name that is identical or confusingly similar. Under this statute, therefore, a defendant is liable if the plaintiff establishes that its mark is distinctive or famous, the defendant’s domain names are

identical or confusingly similar, and the defendant registered the domain names with the bad faith intent to profit from them.

The last count of PetMed's complaint alleged MedPets was liable under the Florida common law of unfair competition. To establish the elements of this claim, the plaintiff must show it is the prior user of the trade name or service mark, and the trade name or service mark is suggestive or has acquired a secondary meaning. The plaintiff must also establish that the defendant is using a confusingly similar trade name or service mark to identify similar services rendered or similar goods marketed by it in competition with the plaintiff in the same trade area where plaintiff has already established its trade name or service mark. Finally, the plaintiff must show that confusion among consumers is likely.

In this case, PetMed established each element of all of its claims by virtue of MedPets' default. In addition, it also submitted uncontroverted evidentiary support for its position.

The Southern District then considered the amount of damages to which PetMed was entitled. PetMed sought statutorily available damages, as opposed to actual damages, under 15 U.S.C. §1117(c) for trademark infringement, and under 15 U.S.C. §1117(d) for cyberpiracy. Under 15 U.S.C. §1117(c), if the plaintiff establishes willfulness, then statutory damages for trademark infringement may be awarded up to \$1 million for each counterfeit mark. PetMed established willful infringement on this record. PetMed sought \$400,000 for each of the two infringing MedPets marks, and the court made that award. Statutory damages for cyberpiracy under 15 U.S.C. §1117(d) may range from \$1000 up to \$100,000 for each domain name. After considering the record, the court determined that \$50,000 for each of the two MedPets' domain names was reasonable and also made that award to PetMed.

In addition, PetMed sought an award of attorney's fees under 15 U.S.C. §1117(a). The court granted this relief and awarded PetMed fees in an amount just over \$16,500, which was established by its counsel's declaration.

Finally, PetMed sought, and the court ordered, permanent injunctive relief preventing MedPets from resuming infringement. The injunction also required MedPets to file and serve a sworn report, within thirty days after the entry of the order, detailing the manner and form by which it complied with the injunction.

THE ELEVENTH CIRCUIT COURT OF APPEALS DISMISSES AN APPEAL CONCERNING THE ADA'S APPLICABILITY TO INTERNET WEB SITES

Robert Gumson is blind. He is unable to use a computer monitor or a mouse. He installed on his computer a "screen reader" to overcome this difficulty. A screen reader is a software program that converts graphic and textual information on a computer monitor into speech, which an electronic voice reads through the computer's speakers. Although screen readers make many Internet web sites accessible to persons with visual impairments, Southwest Airlines' website, Southwest.com, was not one of them. Because Southwest.com was not

accessible through his screen reader, Gumson could not take advantage of the site's services and information.

As a result, Gumson and a non-profit advocacy group called Access Now, Inc. brought a lawsuit in the U.S. District Court for the Southern District of Florida. They sought a declaration that Southwest.com is inaccessible in violation of Title III (the public accommodations provision) of the Americans With Disabilities Act, and an injunction making the site accessible to blind persons. The sole legal issue raised by the complaint was Southwest's web site is a place of public accommodation for purposes of Title III of the ADA.

Southwest moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. The trial court granted the motion. It found that Southwest.com is not a place of public accommodation and thus not covered under Title III of the ADA. Gumson's and Access Now's complaint was dismissed with prejudice.

On appeal, Gumson and Access Now abandoned their theory that Southwest.com is a place of public accommodation. Instead, they argued, for the first time, that Southwest Airlines as a whole is a place of public accommodation because it operates a "travel service" – a category of places of public accommodation specified in the statute (even though airlines are largely not covered by Title III) – and the connection between the inaccessible web site and the travel service formed the basis for the ADA violation.

In Access Now, Inc. v. Southwest Airlines Co., the Eleventh Circuit declined to evaluate the merits of either the question litigated before the trial court, or the question raised for the first time on appeal. In dismissing the appeal, the court ruled that because Gumson and Access Now abandoned their argument that Southwest.com is itself a place of public accommodation, the issue was not briefed, and it was improper under longstanding precedent to review the merits of the position. Similarly, the appellate court found no exceptional circumstance that would support its deviating from the general rule of not entertaining new theories and arguments on appeal that were not presented to the trial court. Therefore, it would be a waste of resources and contrary to the purpose of an appellate court to address the newly raised fact-based question of whether the connection between the web site and the airline violated the ADA. While noting that the legal questions in the case are significant and matters of first impression in this circuit, the court concluded this case did not provide the proper vehicle for answering them.

HAPPY HOLIDAYS!

Litchford & Christopher hopes you had a very happy holiday season and wishes each of you a safe and healthy New Year.