

Nicolai Law Group, P.C.

Law Letter

A NICOLAI LAW GROUP, P.C. PUBLICATION - BUSINESS & PREVENTIVE LAW

FALL 2009

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Nicolai Admitted To NH
Bar & Best Lawyer In
America For 3rd Year

"The most valuable of all
talents is that of never us-
ing two words when one
will do."

--Thomas Jefferson

USER-GENERATED CONTENT PROMOTIONS

Promotions involving user-generated content are growing as an internet-based marketing option. The legal rules for these promotions are also developing and require sponsors to make sure they have proper permission to use the content. Among the things sponsors need to be sure of are:

- ✓ Have the rights to use the materials uploaded in the relevant medium been obtained?
- ✓ Have entrants been told exactly what needs to be submitted and in what form?
- ✓ How and when will releases be gotten from entrants?
- ✓ How will third-party rights clearance be obtained?
- ✓ Has an agent been registered with the Copyright Office for Digital Millennium Copyright Act notification?
- ✓ Who will judge and using what criteria?
- ✓ How many votes does a voter get?
- ✓ Do the rules address all aspects of the promotion and contingencies should something go wrong?
- ✓ Is there a viable no-purchase way to enter?
- ✓ Is there an ongoing monitoring process?
- ✓ Can an entry be disqualified?
- ✓ Have entrants agreed to be bound to the terms and conditions and a privacy policy?
- ✓ Has the promotion been registered and bonded where required?
- ✓ Is there a prize alternative if the winning entry is inappropriate for use as a promotion?

More information on any of these subjects is available by calling. This material is for information and education purposes only.

It is not legal advice or a legal opinion.

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Laser Focus for Long-Term Success

It's tough out there. Deals are still happening but at much lower values – and with much tougher terms. The business climate remains challenging. Traditional financing has slowed to a crawl while high credit standards create additional barriers to any hope for a return to business as usual.

These times call for cautious moves informed by laser-focused strategies. Any investments need to be evaluated not just for their financial return, but more importantly, for their strategic value. The details of a deal, or any major financial transaction matter more to its long-term success than ever before.

If you are considering new investments or acquisitions for your business, be careful. Ask more than once if this fits into your business strategy. Understand all the implications involved. And if you need help navigating today's legal landmines or the opportunities they can create, we welcome your call. I can always be reached at 413-272-2000, x222.

Paul Nicolai

ALTERED RECORDS VOID POLICY

An insured patient had altered medical records in violation of the insurance policy's provisions. The court said an insurance company had no duty to defend or indemnify where the policyholder violated a policy provision. The violation voided the policy. The court granted summary judgment to the insurance company.

Why This Is Important...

Breaching the contract effectively destroys your investment in the premium. Insurance companies are not required to defend or indemnify policyholders when there has been a breach of the contract.

CASUAL SELLERS LESS LIABLE

A worker was injured on a used machine bought from another company. That company had bought it used and sold it to the new owner after using it. The court found that holding the selling company strictly liable for the design defect that caused the injury

was not appropriate. A casual seller, who sells machines in sporadic transactions incidental to its business, must only warn buyers of known defects that are not readily discernable.

Why This Is Important...

Some states do not hold casual machine sellers to the same standard as machine manufacturers. A regular seller of a product, including a used product, is likely to be strictly liable for injuries caused by any design or warning defect.

SHARING CONCERNS, STILL FIRED

A supervisor passed along concerns of his subordinates who questioned a shift change. One week later, he was fired. The appeals court held that the former employee did not engage in protected activity under the Fair Labor Standards Act. He had not taken a position adverse to the company by sharing his team's concerns.

Why This Is Important...

The FLSA anti-retaliation provision requires an employee step outside their normal

job role to have complained in a way that triggers protection.

CONTRACT NO SHIELD FROM INFRINGEMENT

A company hired a supplier to make changes to its original design. The contract with the supplier did not include a provision protecting the company from copyright infringement. The supplier made the specific changes requested, but the revised design was found to infringe on the rights of a third party. The court ruled the company, not the supplier, was the infringer. There is no right to contribution by joint infringers under federal copyright law. And under New York law, to bring a claim for indemnification under common law, the claimant must be free of guilt.

Why This Is Important...

An important element here is that the contract between the parties did not require the supplier to indemnify the original company for copyright infringement. Absent a contract provision regarding infringement, the fact that the first company was itself found liable for infringement meant it could not pursue indemnification under common law.

PAY UP NOW...OR LATER

A football stadium issued licenses for prime seats. They required an annual payment for 10 years for each season of games. Shortly after buying the license, a customer defaulted. The agreement said the damages would equal the full ten years' balance due. The court held the stadium had no duty to mitigate its damages. The burden was on the customer to prove the damages were unreasonable.

Why This Is Important...

Consider the damages clause during negotiation. Once the parties have agreed, it is unlikely a court will undo the deal.

ONLY CORPORATIONS GET CHARITY BREAK

Eligibility for a charitable exemption for real and personal property taxes requires that

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an entity (1) be a corporation, (2) occupy the premises for which the exemption is claimed, and (3) operate the premises for a charitable purpose, ruled the Massachusetts Supreme Court.

Why This Is Important...

To claim the charitable exemption, the entity must be a corporation. Any other kind of entity, like a Limited Liability Company, is not eligible.

HARMFUL JOB EMPLOYER'S PROBLEM

Some states are relaxing their standards to prove employer intent when an employee is injured on the job. A North Carolina construction worker was killed when the dirt walls of an open trench collapsed. The court ruled his family could sue the employer for wrongful death because the employer disregarded a dangerous work condition which was "substantially certain" to result in harm. Most states still require proof of an employer's specific intent but there has been movement in Michigan, Ohio and West Virginia towards this doctrine of constructive intent.

Why This Is Important...

These decisions signal a trend, creating direct liability where worker compensation once was a barrier.

STATE NEVER LONG-TERM TENANT

A multiple-year lease signed by a state agency was subject to annual appropriation and terminable on notice, held the Massachusetts Supreme Court. The termination clause, in the standard form for state agencies as tenants, allowed for termination on seven days' notice for convenience or loss of funding.

Why This Is Important...

Multi-year leases to state agencies are subject to termination annually. While this case interprets Massachusetts law, this kind of provision is found in many states. Landlords investing in fitout for state agencies have to remember they may not get their money back if they rely on multiple years of

rent to cover the investment.

PASSED OVER WORKING MOM CAN SUE

A woman was passed over for promotion because, as her boss explained, "going to school, you have the kids, you just have a lot on your plate right now." The First Circuit court held a reasonable jury could infer from this that the plaintiff was denied the promotion because the supervisor assumed that as a woman with four young children, she would not give her all to her job.

Why This Is Important...

The essence of Title VII is that women have the right to prove their mettle at work without the burden of stereotypes concerning their family responsibilities. This is a growing trend in discrimination law and is being applied to both men and women.

ASKING THEN FIRING STILL WRONG

In response to an employer's questioning, an employee voiced objections to discrimination and was then fired.

Those objections, while in response to an internal investigation, still qualified as the opposition necessary for discrimination under Title VII, the court held. Her firing was considered retaliation.

Why This Is Important...

Any adverse action against employees who reveal wrongdoing should be scrutinized closely. To be protected, an employee is not required to make an official report to a discrimination agency or even respond to an internal investigation.

GIVE 'EM A REST!

An employer terminated a technical support engineer for refusing to work eight consecutive days without a day off. The court found the employer's requirement was a violation of Massachusetts' "Weekly Day of Rest" law and denied summary judgment.

Why This Is Important...

Employers can require employees to work on Sundays, but under Massachusetts law, there must be one day off in each consecutive seven-day period. This same law applies in many states.



NEWSWORTHY

BEST LAWYER IN AMERICA FOR THIRD YEAR

For the third year in a row, peer review of the nation's top attorneys selected Attorney Paul Nicolai for inclusion in *The Best Lawyers in America*®, now in its 16th edition for 2010. The international publication cites him in the specialty of Commercial Litigation.

NICOLAI ADMITTED TO NH BAR

Attorney Paul Peter Nicolai has been admitted as an attorney in the state of New Hampshire. He attended the July swearing-in ceremony and is now licensed in Massachusetts, New York, Connecticut, the District of Columbia and New Hampshire.

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BUSINESS LAW & LITIGATION

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