O'DONNELL & CLARK LLP
ATTORNEYS AT LAW

May 2003

Holding Down the Fort at O & C

The attorneys and legal staff at O'Donnell & Clark have been extremely busy working hard for our clients. Associate Matt Lowe recently attended the First Annual Hospitality Law Conference in Houston, Texas and completed his second year as a part-time instructor in the Hospitality program at Mt. Hood Community College where he teaches Hotel, Restaurant and Travel Law. In addition to those activities, Matt has been assisting a telecommunication business client with an exciting international joint venture prospect in Turkey with a potential value of over $250 million dollars. Mark O'Donnell has been providing legal advice to the Oregon Lodging Association regarding sponsorship of the Oregon Tourism Investment Proposal which is an industry-sponsored proposal that would help increase tourism in Oregon and bolster the industry. Kelly Clark, with the help of Associates Kristian Roggendorf and Jonathan Clark and the legal assistants, had over 20 cases in mediation regarding child sex abuse and the Archdiocese of Portland. Kelly also, along with colleague Eric Winters, has filed a suit challenging Ballot Measure 26 and the prohibition of paid signature gatherers (see page two). Jonathan, the newest Associate to the firm, has been kept quite busy working on client mediations, trial preparations for an institutional sex abuse case, and heading up a case in construction litigation in the Multnomah County Circuit Court.

Table of Contents

Mark O'Donnell...2
Insurance Woes for Business Owners

Kelly Clark...2
Continuing the Fight for the Initiative

Mark O'Donnell and Matt Lowe.....................3
The "Mythical" Repeal of the Federal Estate Tax

Kristian Roggendorf.......................................4
Muddying the Waters to Keep Tahoe Blue

Contact Us..5

Matt Lowe..5
Employment Eligibility Verification Form I-9

Maris Mapolski..6
Who's Afraid of the BigBadWolf.com

Attorneys..8

What We Do...8

Insurance Woes for Business Owners

By Mark P. O'Donnell

A person in business today is challenged by such factors as flat or declining revenues, low demand, excess supply, increasing expenses, deflationary pressures, and now insurance problems.

Business and personal insurance problems can be summarized as "higher premiums" and "reduced coverages". While you immediately feel the sting of premium increases, you only realize the sting of reduced coverage when you have a claim. This article focuses on the illusions of terrorism insurance coverage and the financial stability of your insurers.

The Illusions of Terrorism Insurance Coverage under the new Federal Terrorism Insurance Act of 2002

Last November, the Terrorism Insurance Act of 2002 became Law. The Act voided the existing "terrorism exclusions" in your insurance policies if the damage or loss was the result of a "Certified Act of Terrorism." It is critical that you remember the exclusion for terrorism coverage is made inoperable only to the extent that the loss was due to a "Certified Act of Terrorism."

What is a Certified Act of Terrorism? A Certified Act of Terrorism must meet all of the following criteria: 1) the act must result in aggregate property/casualty insurance loss of more than $5 million; 2) the act must be violent or otherwise dangerous to human life, property and infrastructure; 3) the act must be committed by individuals acting on behalf of a foreign person or foreign interest, as part of an effort to coerce the civilian population or influence the United States government; 4) for the most part, the damage must occur within the United States.

To see how the Act operates, let us look at a hypothetical situation where a member of Al Quieda does not like your support of the VFW and plans to bomb your commercial building. The bomb explodes at night and damages to the property are $3 million. In as much as the loss does not meet the $5 million threshold, the act of planting the bomb by a member of Al Quieda does not "void" any current terrorism exclusion in your policy. While your lawyer may be creative and find coverage under other parts of the

continued on page seven

Continuing the Fight for the Initiative: O & C Challenges Ballot Measure 26

By Kelly Clark

On several previous occasions I have written about what I believe to be an attack on the Oregon initiative system by the political establishment of this state, in conjunction with the courts. And over the last several years, O&C has fought this trend: we represented interested parties in the Term Limits case before the Oregon Supreme Court, where the issue was the so-called single subject/ multiple amendment rule handed down by the Courts through the Armatta decisions. We also filed Friend of the Court Briefs in the Ballot Measure 7 Property Rights case before the Oregon Supreme Court. We have written and spoken extensively about the tax on the initiative. You can find these articles and case histories on our website.

Recently, again on behalf of initiative activists (Don McIntire, Ted Piccolo, US Term Limits) we have launched another battle in the fight to keep the initiative strong. In late April, we challenged 2002 Ballot Measure 26, which prohibits paying initiative signature gatherers based on the number of signatures gathered. This union-backed measure was billed and sold to the people as a protection against fraud and corruption in the initiative system, but in our view it badly overswings and infringes on the constitutional right of free speech of those who would sponsor and circulate political ideas in the form of an initiative petition. Our suit claims a violation of the federal First Amendment as well as a violation of the procedural rules set down in the Armatta decisions.

The unions, of course, and their political supporters, want to make it more difficult for activists to place initiatives on the ballot, and they know that targeting the economic relationship between initiative sponsors and signature gatherers is the best way to cripple the process. The unions, as part of the political establishment, loathe the initiative because they cannot control it. The Legislature they believe they can control, or at least strongly influence; they believe they have a friend in the Governor's office; they believe they have friends in the courts. But the initiative, yielding as it does radical proposals from the Left and the Right, terrifies the political establishment. Ballot Measure 26 reflects this deep fear and distrust of the initiative process. Stay tuned for the results of this suit. With any luck, we will have a decision from the trial court by the end of the summer and we will be up into the appellate courts. •

The "Mythical" Repeal of the Federal Estate Tax

By Mark O'Donnell and Matt Lowe

The Economic Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act") has been touted as the repeal of the estate tax. It really should have been labeled the *alleged* repeal of the estate tax. In fact, Congress has already failed to pass a permanent repeal of the estate tax and most experts predict that Congress never will pass such legislation. After all, it is important to remember that the 2001 Act was passed before 9-11 when the federal government had a surplus.

This article will discuss some important considerations in planning your estate in light of the 2001 Act and provide our recommendation for how far out you should plan your estate from an estate tax planning standpoint. We recommend five years, for two reasons. The first is the "phase-in" of the increase in the estate tax exemption for each individual estate. The phase-in will occur over the next seven years with steadily increasing exemptions from $1 M in 2003 to $3.5 M in 2009, ending in the outright repeal of the estate tax in 2010. However, in 2011 the exemption returns to the current level of $1 M. The second reason is that many "experts" believe Congress will freeze the exemption level at between $2 M and $4 M for each individual estate after 2006 and before 2009.

This increase in the individual estate tax exemption has an appreciable effect on how you should structure your current estate plan. A common strategy employed before the 2001 Act was to take advantage of the then-current individual estate tax exemption to reduce the federal estate tax on the estate of the first spouse to die to $-0-. Typical will provisions often did the following: (1) At the time of the death of the first spouse, assets equal to the Federal Estate Tax Exemption ($675,000 in 2001) would be placed in a "Bypass Trust" for the benefit of the surviving spouse during his/her lifetime with any children as the beneficiaries of this trust. Upon the death of the surviving spouse, the assets would be distributed to the beneficiaries; (2) At the time of the death of the first spouse, the remainder is distributed outright to the surviving spouse (the Marital Share.)

The increase in the exemption has a dramatic effect on the Marital Share and Bypass Trust. If the first spouse dies in 2006, the Bypass Trust, (1) above, would be funded at $2 M (the amount of the exemption in 2006). If the first spouse dies in 2009, the amount of the exemption is$3.5 M and this would be the amount placed in the Bypass Trust. Remember, prior to the 2001 Act, the Bypass Trust would typically have been funded with property and assets equal to the then individual exemption of $675,000.

The significance of the Bypass Trust comes into play upon the death of the second spouse. The amount in the Bypass Trust is excluded in determining the value of the surviving spouse's estate for federal estate tax purposes. In light of the substantial increase in the exemption and the resultant effect of the increase in the amount of the Bypass Trust, the question becomes how much does each spouse want to leave the other spouse outright (the Marital Share) and how much should be placed in the Bypass Trust. Of course, there are non-tax reasons for the use of a trust, which are something that you will want to consider.

Another important issue to consider is the valuation of your estate. Any value of your estates will be influenced by the value of your ownership interest in any business you own. You stand a better chance of reducing or eliminating your estate tax liability if you implement some of these general recommendations:

—Try to balance the ownership of your estates by evenly distributing the ownership of your assets;

—Review the ownership of any insurance policies. Note that insurance proceeds are included in your gross estate;

—Depending on the value of your estates, formulate a plan concerning the ownership of your assets to take advantage of minority ownership and marketability discounts. You may also be able to take advantage of the annual gift tax exclusion of $11,000, which for a married couple means that the couple can make a total gift of $22,000 per recipient. By using family limited partnerships or limited liability companies (even for stocks and bonds), you may be able to have an effective annual exclusion of $20,000-$25,000, individually, and $40,000-$50,000 for a married couple.

—Determine how much you want to put into the Bypass Trust upon the death of the first spouse and how much the surviving spouse should receive outright. We recommend a "disclaimer trust" vehicle that places this determination in the hands of the surviving spouse.

Our combined experience over the last 33 years tells us that we Americans really do not like to think of death. Unfortunately, estate tax planning includes such concepts. If you would like more information or would like to meet to review your current estate plan, please contact the authors at 503-306-0224 or mattl@oandc.com. •

Muddying the Waters to Keep Tahoe Blue

The Supreme Court Declares a Moratorium on Property Rights

By Kristian Roggendorf

The next time you see a bumper sticker that says "Keep Tahoe Blue," remember it was individual landowners who paid for it. One year ago, the United States Supreme Court sidestepped the opportunity to provide some clarity in takings law—one of the murkiest areas of law affecting landowners and developers. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), a 5-4 decision, rejected the developers' plea to provide clear rules for determining when a governmental taking has occurred, and in the process, gave governments a tool to lock away land from development indefinitely.

The Fifth Amendment to the US Constitution affirms that the government must provide fair compensation to land it "takes" for public use. The Supreme Court had said that takings do not need to be forever to require compensation. Cases have held that even if a regulation that creates a taking is later repealed, the government must pay the value of the time that the land was unavailable to the landowner — viewed as a kind of "rent." Also, rules and regulations that limit the use of private property can amount to a "taking" under two circumstances: (1) **anytime** a regulation prevents "all reasonable economic use" of the land (known as "total" takings); or (2) **sometimes** when the regulation frustrates the reasonable economic expectations of a landowner, without "good" government reason (known as "partial" takings).

Because the partial takings depends almost entirely on the facts of each particular case, no firm legal rules can be drawn from past cases. And any regulation that does not present a total taking is evaluated under the balancing test set out in *Penn Central Transportation Co. v. New York City.* Takings analysis is terribly muddled as a result. In fact, to qualify for a total takings, land has to lose more than 95% of its value.

Turning to *Tahoe-Sierra Preservation Council* case, the government there — the Tahoe Regional Planning Agency (or TRPA) — established a complete moratorium on all commercial and residential development anywhere upstream or uphill from Lake Tahoe for 32 months, due to concerns that pollution in rain runoff would cause the lake to turn green with algae. By banning all development on even undeveloped property for at least 32 months, the landowners argued that they suffered a total takings during the moratoria. The landowners sought compensation for the "rent" that TRPA had taken by its complete development moratorium.

As is common in environmental cases where the court is ruling against the citizens, the 5-justice majority began by waxing poetic about the pristine nature of blue, blue Lake Tahoe. Of course, little mention was made of the hopes, dreams, and pains of the landowners who were impacted by the moratoria. Rather, the majority's takings analysis focused on the potential cost to the government of paying for the normal delays in the permitting process. Instead of drawing a rational distinction between procedural delays in obtaining permits and moratoria issued to bar development for environmental concerns, the majority retreated to the *Penn Central* test holding that the moratoria were not harmful to the "fairness and justice" underlying the Fifth Amendment. In other words, the Court simply looked beyond the Constitution and placed a thumb on the scales in favor of the government's planning process, giving more weight to bureaucrat's convenience than to average citizens' constitutional rights. Indeed, with *Tahoe Sierra Preservation Council*, the Supreme Court gave government regulators a blank check to prevent development: Call your development ban a moratorium.

The dissents of Chief Justice Rehnquist and Justice Thomas pointed out the majority's inconsistency in failing to break down units of time for takings purposes, a technique specifically approved of in prior precedent. Chief Justice Rehnquist also noted that the moratoria were, while in effect, depriving the landowners of absolutely all economic value in their land. The dissenters finally argued that if Lake Tahoe is such a national treasure, then the public should pay for its protection. In truth, having the public pay for public goods is the "justice and fairness" underlying the Fifth Amendment. Expect to see a "moratorium" coming soon to a planning department near you. •

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EMPLOYMENT ELIGIBILITY VERIFICATION FORM I-9
The Importance of Strict Compliance

By Matthew D. Lowe

In this time of war and heightened concerns over domestic terrorism, it is now more important than ever for employers to strictly comply with immigration laws applicable to their businesses. This article will focus on only the requirements associated with Form I-9.

Employers are required to have every new employee hired after November 7, 1986 fill out and sign Section 1 of Form I-9 by the end of the employee's first day of employment. Employees are then required to present original verification documents (except for a certified copy of a birth certificate), or a receipt for a replacement document, from the list attached to the I-9 within three days of their hire date. If the employee presents a receipt for a replacement document, the employee must be granted an additional 90 days to present the original verification documents. Employers must then complete Section 2 of the I-9 by the end of the employee's third day of employment. If the documents appear valid, there is no legal obligation for the employer to take any additional steps. Employers must then keep I-9 records in their own files until the later of three years after the date of hire, or one year after the date the employee's employment is terminated. While employers are not required to attach photocopies of verification documents to a completed I-9, we strongly recommend that if you choose to do so, you do so for every employee without exception.

Most of you should already be following these requirements strictly. These must be applied evenly to each new employee and absolutely no exceptions should be granted. Problems can arise when employers begin granting special exceptions to certain newly hired employees or decide to take it upon themselves to conduct additional investigation of a particular employee or require additional verification beyond that required by Form I-9. Such conduct can lead to the imposition of significant civil penalties for violation of the I-9 anti-discrimination provisions passed by Congress in 1990. This was passed to address concerns about employers attempting to avoid hiring "foreign looking" or "foreign sounding" employees. In other words, you can actually expose your business to greater risk of investigation or allegations of illegal discrimination if you undertake additional investigation of an employee not required by Form I-9.

If the employee is able to provide a satisfactory document from the list contained on the Form I-9, this should be sufficient. However, if you have additional concerns, you can contact the local immigration office to request assistance. In the end, if a document presented to you reasonably appears genuine, you must accept that document as valid. You cannot be penalized by accepting what appears to be a valid document if it is later found out that the document was not valid and the employee was not legally eligible for employment.

If you later find out that an employee provided a false document, you are not required to fire that employee, although you certainly may do so under any applicable personnel policies your company already has in place. If an employee later presents to you documents reflecting proper work authorization, you can accept this documentation and correct the relevant portions of Form I-9. However, if you learn that an employee is not eligible for employment, you should question the employee and provide them with another opportunity for review of proper Form I-9 documentation. If the employee is unable to to provide satisfactory documentation, employment should be discontinued.

An employer will be shielded from immigration penalties if the employer follows the requirements of Form I-9. However, it is also important to use common sense in light of current events. If the documents presented to you do not appear to be valid, and you have legitimate concerns about the employee's status, you should not hesitate to contact the local immigration office immediately. By keeping these concerns in mind when reviewing Form I-9 verification documentation, you will be in a position to take the necessary steps to protect your business from immigration violations as well as possible terrorist threats. If you have any questions about the issues discussed in this article, you can reach the author at mattl@oandc.com. •

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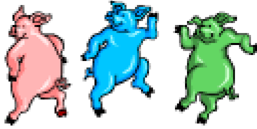


WHO'S AFRAID OF THEBIGBADWOLF.COM?
A Cautionary Tale for Young Readers

By Maris Mapolski (Corporate Legal Assistant at O'Donnell & Clark LLP)

Once upon a time, in the Mt. Hood National Forest, there lived a young girl called Red Riding Hood and her Grandmother, Mrs. Elspeth Hood. Together, they opened a small bakery in 1997 featuring wolf-shaped cookies, baskets of goodies, and woodsmen's axes (just in case). They started a business called The Big Bad Wolf, LLC, and registered the business and their assumed business name "The Big Bad Wolf Bakery" with the Oregon Secretary of State. Their popularity grew, they hired more people, and in 2002 the Hoods decided they wanted to start an Internet website for their business. The obvious name for their website was TheBigBadWolf.com.

Elsewhere in the forest lived three little pigs. One day, they decided to make some fast money selling Internet domain names. They decided on some common names to register. They would then offer these names for sale, but at a significantly higher price than it had cost them to register the names. One of the names they registered in 2000 was TheBigBadWolf.com.

When the Hoods tried to register TheBigBadWolf.com with the Internet Committee for Assigned Names and Numbers ("ICANN"), they were in for a nasty shock. The name was already registered. When they looked at the website, all they found was an email address to contact with offers to buy the name. The "opening bid" was set at $5,000 (it costs around $35 to register a name as of this writing). What were they to do?

As you may have recognized, the Hoods had been victimized by a "cybersquatter." A cybersquatter is the owner of a domain name who purchased it "in bad faith" or, in other words, only bought it because they knew someone else would want it. But how could the Hoods "recover" the right to use their name? In order to understand the options available, the Hoods needed to understand at least a little about what a name *is*, the difference between a business name, a trademark, and a domain name, and how the various regulatory agencies that register and protect the names interact. This basic understanding would help the Hoods (and you) protect their business and solve the problem of cybersquattting.

DO YOU HAVE A CYBERSQUATTER?
Take these tests from the Anticybersquatting Consumer Protection Act

* Does registrant have any independent rights in thetrademark or domain name?
* Is the name the registrant's legal name or nickname?
* Has the registrant been using the domain name to offer goods or services?
* Has the registrant made use of the mark in a site accessible under the domain name?
* Did the registrant intend to divert users from the online location of the mark's legitimate owner to a site that could harm the goodwill represented by the mark?
* Did the registrant offered to sell the domain name for profit without having used or intended to use the name to offer goods or services?
* Did the registrant mislead the company that registered the name?
* Did the registrant acquire multiple domain names, knowing they were similar to the names or trademarks of others?
* Is the trademark incorporated in the registrant's domain name "distinctive?"

The important thing to remember is that even if you "do everything right," you can still be the victim of a cybersquatter. However, there are remedies available to you, both to protect the value you have built in your name, and to discipline persons who try to take advantage of you or usurp that value. These and other relevant issues are discussed in the full text of this article, available from O'Donnell & Clark LLP. •

continued from page two

policy, the loss would not be paid by the act's voiding of the terrorism exclusion in your policy as the loss was not caused by a Certified Acto of Terrorism.

Insurer's are required to offer coverage for Certified Acts of Terrorism, subject to the same limits and provisions as applied to other covered events in the policy. As mentioned earlier in this article, the existing terrorism exclusions are void, but only to the extent that they exclude claims in connection with a Certified Act of Terrorism. The exclusion for terrorism in the policy can be reinstated if your insurer obtains from you a written statement that you reject its offer of terrorism coverage or you do not pay the required additional premium. Unfortunately, the insurer can charge whatever it wants for coverage without prior approval of State regulatory authorities. While the rates are still subject to subsequent State regulatory oversight, this oversight is quite limited by the Act.

The Council of Insurance Agents and Brokers recently conducted a survey of 212 insurance brokers concerning the cost and acceptance of terrorism coverage since the Act was signed. Small businesses, in particular, are choosing to do without terrorism insurance. A majority of the brokers surveyed said that less than 10% of small businesses were buying the coverage. This result was expected due to the pricing mechanisms that the insurance industry is using for terrorism coverage. Please excuse the author's cynicism about the insurance industry. The insurance industry is using the tragedy of 9-11 to make-up for its loose underwriting standards and bad investments in equities during the "bubble years."

Until now, we have been discussing terrorism coverage in connection with property insurance. Terrorism presents a potential liability exposure as well. In view of the controversial nature of these issues such as punitive damages, the Act included a section on litigation management. The Act creates a Federal cause of action that will provide the exclusive remedy for liability claims for property damage, personal injury or death. This provision preempts all stated causes of action and the substative law in the State in which the act of terrorism occurred will be applied. Once again, the Act only applies to certified acts of terrorism.

Why the Financial Stability of your Insurer Should be of Concern

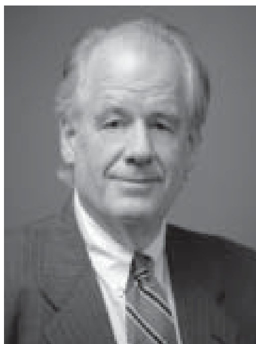
We have previously advised you to pay particular attention to your insurer's financial stability. This advice continues and it is even more important today.

Insurers are expected to pay as much as $50 billion in 9-11 claims. Insurers are substantially unreserved (not enough money set aside to pay future claims). According to a recent study by Conning Research and Consulting, Inc., insurers have an estimated reserved efficiency of $38.5 billion. The National Council on Compensation Insurance estimated a $21 billion aggregate reserved efficiency for workers compensation insurers.

During the last nine months, A.M. Best Company and other rating agencies have downgraded one insurer after another. You can expect more downgrades by rating agencies for insurers, especially for insurers who offer workers compensation insurance. Your author received notice that The Kemper Insurance Companies have been downgraded by major rating agencies from A- to B+. Legion Insurance Company was a major casualty insurer last year. It had an A- (excellent) A.M. Best Company rating as late as March of 2002, Legion was insolvent and placed under regulatory supervision in the state of Pennsylvania on April 1, 2002.

A critical component of your asset protection plan is your liability and property insurance program. In fact, it is probably the most important part of your asset protection plan. If your comprehensive liability insurer becomes insolvent, you have only $300,000 of liability coverage and not the limits of coverage you thought you had in your policy. If you have an umbrella liability policy, which you should have, and it requires a minimum level of primary insurance, you will be self-insured for the amount between $300,000 and the required primary insurance in the event of insolvency of your primary liability insurer. As markets dry up, you may be forced to place business with insurers of lesser strength than you would like – either to fill a gap, get a better price, or both. In doing so, you need to some facility for judging an insurer's financial condition. It is critical that you view your insurer's ratings with your agent/broker.

continued on page eight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continued from page seven

Conclusions and Recommendations

If you are like the majority of business owners, you will not purchase terrorism insurance coverage or, will only purchase the coverage that covers Certified Acts of Terrorism. As the plaintiff lawyers would say, you, your business and your assets are "going bare."

Here are some recommendations due to the substantial increase in the risk to your net worth due to conditions in the insurance industry: 1) Have your asset protection plan reviewed carefully and updated to conform to the change in conditions. 2) Start early when you are going to renew coverages. Meet with your agent or broker as soon as possible and make sure that your insurance representative submits this information 60-90 days in advance of the renewal deadline. 3) Ratings have become more critical than ever and pay strict attention to your insurer's financial stability. If any of your insurers have a rating of less than A, you need to review your asset protection plan in light of this problem. 4) Make sure that your broker or attorney carefully reviews your insurance policies due to the reduction in coverages.

For any information on this article call the author at 503-306-0224 or email marko@oandc.com. •

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