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FOS NEWS - *Our clients come first*

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LIABILITY WAIVERS: A MUST OR A BUST?

By Robert Ollman

Living in a pandemic means living with endless uncertainties.

Add operating a business, and the potential risks and costs become paramount considerations.

Regardless of your business' industry, the foundation of risk mitigation begins with following local, state and federal requirements and guidance on providing a safe environment for clients and customers.

With the recent state and nationwide spikes in coronavirus cases, many business owners are looking for additional ways to shield their businesses and themselves from potential future liability for COVID-19 related claims.

In comes the liability waiver – an agreement between a business and an individual, in which, in exchange for a client or customer accepting benefits or services, or participating in a business' activity, waives the business' potential liability for its ordinary negligence.

It can also indemnify the business for losses caused by the individual.

In Wisconsin, liability waivers, no matter how well drafted, may run into difficulties if challenged in court.

Wisconsin law does not favor exculpatory clauses, and the Wisconsin courts have often ruled against them on public policy grounds.

Despite such rulings, well-drafted, targeted COVID-19 related liability waivers have not yet been interpreted by the Wisconsin appellate courts. As a result, their enforceability is an open question.

Generally, courts will look to see whether the liability waiver is well-drafted, clear, unambiguous, sufficiently narrow, and reasonable in scope and practice.

They should not excuse a company from its own gross negligence or intentional conduct.

Whether a court will enforce a COVID-19 liability waiver depends on multiple factors and can vary by industry and jurisdiction.

In evaluating the use of COVID-19 liability waivers, businesses should consider that, on the one hand, liability waivers, if drafted properly and upheld by the court, are relatively easy to employ and cost-effective.

On the other hand, liability waivers could be held unenforceable, including on public policy grounds. Even if enforceable, they might not sit well with clients or customers.

So, what should a business do?

The answer may depend on your business' circumstances and risk tolerance, and how well the waiver is drafted. Your FOS attorney can guide you through this issue.

LITIGANTS: BE CAUTIOUS IN USING SOCIAL MEDIA

By Lauren Maddente

Social media has become a primary method of communication.

We "like," "follow," and post comments on Facebook, Instagram, Twitter and other sites.

Sometimes, we don't even know the background of the post we "like" or retweet.

Under normal circumstances, social media participation is communicative, fun, and even informative (if properly vetted).

Those who may be or already are parties to lawsuits, however, should be careful where, what, and to whom they post.

Even judges can get caught up in the social media whirlwind, with potentially adverse results.

The Wisconsin Supreme Court, in *Miller v. Carroll*, recently held that a trial court judge violated a litigant's due process rights by accepting the opposing party's Facebook friend request while the parties' case was pending before the judge.

In that custody case, shortly after an evidentiary hearing, but before the judge issued his decision, the mother sent the judge a "friend request."

The judge accepted.

Then, still before the decision, the mother "liked," "loved," commented on, and "shared" several of the judge's posts.

After discovering this social media activity, the father challenged the judge and his decision.

The Supreme Court held that the social media activity

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SUPREME COURT UPHOLDS DISGORGEMENT OF PROFITS AS SECURITIES FRAUD REMEDY

By Jacob Manian

Securities fraud continues to be a significant threat to investors.

One committing such fraud is subject to potential civil fines and even criminal prosecution.

The U.S. Supreme Court recently upheld a remedy in the enforcement arsenal of the Securities and Exchange Commission ("S.E.C.").

In *Liu v. Securities and Exchange Commission*, the Supreme Court confirmed that the S.E.C., on behalf of defrauded investors, can recover ill-gotten funds from scammers who have committed securities fraud.

The legal process, known as "disgorgement," requires those committing fraud to repay, or "disgorge," their illicit profits.

This remedy makes sure that wrongdoers are not unjustly enriched by their own misconduct.

In *Liu*, the S.E.C. brought a civil lawsuit against Liu and his wife, claiming they had misappropriated funds solicited from foreign investors in connection with a program subject to the federal securities laws.

The couple allegedly misled foreign nationals into investing in what the investors were led to believe was the construction of a cancer treatment center.

The construction, however, never occurred.

Instead, the Lius funneled nearly $20 million to themselves and their companies.

The Lius challenged the S.E.C.'s attempt to recover from them the profits they obtained through their fraud.

The issue before the Supreme Court was the extent of the S.E.C.'s legal authority to recover such wrongly obtained profits.

The Supreme Court held that the S.E.C. indeed has such authority, with certain restrictions.

Disgorgement of profits is proper, as long as the amount ordered to be repaid does not exceed the wrongdoer's net profits.

In addition, the disgorged proceeds must be awarded to investors as "equitable relief," and not as a prohibited penalty.

Not surprisingly, the S.E.C. hailed the ruling as upholding an indispensable tool in the agency's fight against investor fraud.

The ruling serves as a cautionary tale for anyone seeking money from investors.

If the S.E.C. can establish that invested funds were fraudulently obtained or misappropriated, it can obtain potentially huge disgorgement awards.

A defendant is then left in the unenviable position of proving which portion of the funds that the defendant received were actually legitimate.

The ruling is also a cautionary reminder to investors that due diligence is a key to avoid being defrauded.

REAL ID DEADLINE EXTENDED

Our Winter 2019 issue described the October 1, 2020 deadline for driver's licenses to comply with the federal REAL ID program: http://foslaw.com/wp-content/uploads/2019/12/Revised-Winter-2019-Newsletter-11.22.2019.pdf

Licenses without REAL ID will not allow the holder to enter federal buildings or fly after the deadline.

While the program was designed to provide additional national security protections, its implementation has been delayed by the COVID-19 pandemic.

As a result of the pandemic, federal agencies are now conducting many activities remotely, rather than face-to-face.

Recognizing the pandemic's effects, the Transportation and Security Administration has extended the REAL ID deadline from October 1, 2020, to *October 1, 2021*.

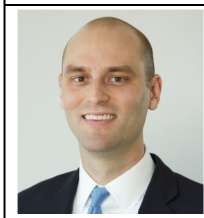
For additional information on REAL ID, go to www.tsa.gov/real-id.

FOS WELCOMES ANOTHER FUTURE ATTORNEY

FOS Shareholder **Laurna Kinnel** and her husband Jeff welcomed their second child, a son, on July 28, 2020. Alexander Paul joins big sister Margot, only 17 months apart.

Alexander weighed in at 8 lbs., 8 oz. and debuted a shock of black hair. He is happily resting, and Laurna and Jeff hope to do the same within the next 15 years.

THE BEST WAY TO PREVENT EMPLOYEE COVID-19 CLAIMS? COMMON SENSE.



By Michael Koutnik

A recent survey published by the *Wisconsin Law Journal* showed that 36% of employees would "very likely" sue their employer if the employee contracted COVID-19 within a week of a coworker contracting the disease.

In addition to a lawsuit related to contracting COVID-19, the issues surrounding COVID-19, and the speed at which laws and rules are evolving, provide a number of areas of potential exposure for claims from employees.

What can employers do to eliminate some of the risk they are facing?

Legislation has been introduced in Congress to grant employers some type of immunity against COVID-19-related claims by employees. As this newsletter goes to print, Congress is deadlocked on the legislation and the Senate is scheduled to be in recess until after Labor Day. There are practical steps now, however, that employers can take to mitigate their potential risk.

First, employers would be well served by proactively implementing commonsense protocols for their workplace.

These include face coverings, requiring social distancing among employees, and eliminating or limiting in-person meetings.

Employers should also follow additional guidance issued by the CDC and state and local health departments.

Taking such reasonable precautions can help position an employer in defending a potential claim from an employee.

Further, being proactive can protect an employer in the event an employee files a claim with an employee-protection agency, such as OSHA or the Wisconsin Department of Workforce Development.

Employers should also be aware of various self-inflicted pitfalls to avoid.

For example, employers must not terminate or take an adverse employment action against employees who raise concerns related to COVID-19 and the protocols (or lack thereof) implemented by the employer.

Doing so can expose the employer to wrongful termination and discrimination claims.

If the economic downturn results in layoffs, employers should make sure that such reductions in force are handled in accordance with applicable laws.

These potentially include the federal WARN Act and Wisconsin Business Closing and Mass Layoff Law.

Work-from-home arrangements have also complicated compliance with the various wage-and-hour laws.

Care should be taken to ensure that policies have been updated to reflect the new reality.

Finally, employers should keep in mind that employees are facing new stressors and uncertainties.

As always, maintaining clear lines of communication and providing meaningful responses to concerns raised by employees remains a good rule of thumb.

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overcame the presumption that the judge acted fairly, impartially, and without bias.

The Court was particularly troubled by the judge's affirmative acceptance of the mother's "friend request."

The Court's concern was not lessened by the fact that there was no evidence that the judge discussed the case with the mother.

Whether or not actual partiality existed, it was the *appearance of partiality* that violated the father's rights.

You might be wondering: how could this possibly affect me?

Without knowing it, you might be engaging on social media with a judge, another party, opposing counsel, a witness, or someone else with an interest in the case.

This could be perceived as an attempt by you to curry favor with or sway your social media "friend" to your side in a lawsuit.

It is true that, in the end, your social media posts may be found to have been innocuous, and may not adversely affect your position in a lawsuit.

Even so, you could have to endure costly motions and hearings to prove your contacts were minor or unintentional and would not affect the lawsuit.

In *Miller,* the court did not find that the mother had a bad intent, or that the contacts had an impact on the merits of the case.

Even so, the Court was still persuaded that the father's due process was violated.

So, if you think you may become or already are a party to a lawsuit, think twice before affirmatively engaging in social media.

This includes "liking," "loving," sharing, sending or accepting a "friend request," and re-posting others' social media posts.

This is especially true when you cannot confirm a social media source's identity.

If you have questions, contact your FOS attorney.

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IN THIS ISSUE

WILL GENERIC TRADEMARKS BECOME THE NORM?

By Laurna Kinnel

The United States Supreme Court recently upheld the trademark registration of "Booking.com," a seemingly generic mark associated with online hotel reservations.

Its ruling departed from long-standing trademark rulings that generic trademarks are not eligible for trademark protection.

It reversed the U.S. Patent and Trademark Office's ("USPTO") initial refusal to register the Booking.com mark for online services due to its generic name. This makes sense – trademarks are supposed to be unique and distinctive source identifiers for goods or services.

So, a baker cannot trademark the generically descriptive term "cupcake," and a shoe maker cannot trademark the descriptive term "shoes."

That would allow those trademark owners to exclude others from using those generic terms to promote their goods.

So why did the Supreme Court conclude, in an 8-1 decision, that Booking.com qualifies for trademark protection?

According to the majority opinion, even if "booking" alone is a generic term which could not be trademarked, combining the generic "booking" with ".com" (Booking.com) created a new, non-generic term.

Moreover, "Booking.com" itself reached a high level of notoriety, indicating that consumers attributed a special origin and unique meaning to the entire name, and did not view it as generic.

Are all generic marks now eligible for registration if the applicant adds ".com" at the end? No.

Whether any given term is generic, versus distinctive, depends on how consumers perceive the term, including whether consumers identify the mark as a distinctive source of goods or services.

Unfortunately, no bright-line rules exist as to when a term crosses the line from generic to distinctive.

The more unique and "fanciful" a mark is, the stronger it will be and the greater the likelihood of its successful registration.

Such marks often include made up words or phrases, which help products stand out in a crowded marketplace.

Since no one else is using them to sell a product, there is no chance of confusion as to the source of the goods associated with the mark.