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BEAN KINNEY & KORMAN PC
ATTORNEYS

# Business Law Newsletter

## Inside This Issue:



"Getting It Done"

## BANKRUPTCY REFORM: Residential Landlords

*by Thomas W. Repczynski, Esq.*

Residential landlords are among those benefiting from this year's sweeping bankruptcy reforms. Specifically, the "automatic stay" provision, which currently forestalls eviction efforts against individual residential tenants from proceeding without sometimes costly and substantial delays, will no longer apply in many cases and will be significantly reduced in many others.

Subject to any unforeseeable and unanticipated last-minute amendments, the reform legislation removes the stay in most situations where the residential tenant files for bankruptcy after a judgment for possession has been entered by a state court. Like any rule, this one is not without its exceptions. A residential tenant-debtor shall be afforded a 30-day reprieve if she files with her bankruptcy petition, a certification under penalty of perjury that (1) under state law she could cure the entire monetary default underlying the judgment granting possession; and (2) she deposits any rents coming due within 30 days of the filing of the bankruptcy. No certification? No rent deposit? No automatic stay. If, however, both of those conditions are satisfied, a landlord would have to wait the balance of the thirty days to afford the debtor the opportunity to cure and certify to the court that she had cured. The new law also requires the clerk to transmit the rent "promptly" so there will hopefully not be any additional delays in securing payment.

What about a false certification by the debtor? It would not buy her much other than a possible federal perjury conviction and/or loss of her discharge due to bankruptcy fraud. A landlord's objection to a false certification would require the bankruptcy court to hold an immediate hearing (i.e. within ten days) after which the landlord would be allowed to proceed with the eviction process without separately seeking relief to do so.

In addition, in those situations where a landlord seeks to regain possession based on endangerment of the property or the illegal use of controlled substances on the property, the landlord will not need to pursue relief from the stay as is required now. Instead, in this latter situation, the landlord will merely have to certify to the court that landlord has initiated an eviction action on such grounds or that the debtor "has endangered property or illegally used or allowed to be used a controlled substance on the property" within the 30-day period preceding the certification. If debtor does not object within fifteen days, the landlord may proceed in state court without doing more. If the debtor objects to the truth or legal sufficiency of the landlord's certification, a hearing must be held within ten days at which the bankruptcy court must determine whether the dangerous situation exists or has been remedied.

More generally, landlords will benefit as well from changes which will now prevent debtors – again with only minor exceptions – from refiling for bankruptcy less than eight years since their last Chapter 7 discharge or within two years since their last Chapter 13 discharge.

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## THE BATTLE OVER INTERNET FILE SWAPPING

*by Scott J. Spooner*

The meteoric rise of the Internet in the last decade ushered in a variety of new business models and brought greater convenience to all electronic consumers. The Internet revolution also spawned the cultural phenomenon known as "Napster" and digital file sharing. While the copyright infringing aspects of Napster have been brought to an end by the courts as a result of the vigilance of record labels, illicit file sharing of digital music continues unabated on the Internet. The U.S. Supreme Court squarely confronted the issues of file sharing of digital music on March 29, 2005 when the Court heard arguments in Metro-Goldwyn Mayer Studios, Inc. v. Grokster.

The Grokster case raises the question of whether the developer of peer-to-peer networking software can be held liable for copyright infringement where the software developer does not in any way control the content distributed among users of the peer-to-peer software. The record labels and movie studios that sued Grokster contend that the only purpose of the peer-to-peer software is to facilitate copyright infringement among the users of the software. Grokster argues in rebuttal that its software has a number of permissible uses and that many users avail themselves of these permissible uses. The legal issue presented in the appeal to the U.S. Supreme Court is whether the peer-to-peer software has a "substantial non-infringing use."

The Ninth Circuit Court of Appeals in Metro-Goldwyn Mayer Studios, Inc. v. Grokster, 380 F.3d 1154 (9th Cir. 2004), held that the software developers Grokster and StreamCast could not be held liable for contributory copyright infringement or held vicariously liable for the copyright infringement committed by users of their peer-to-peer software. The Ninth Circuit first analyzed the nature of the peer-to-peer software. The Court observed that "[i]n a peer-to-peer distribution network, the information available for access does not reside on a central server. No one computer contains all of the information that is available to all of the users. Rather, each computer makes information available to every other computer in the peer-to-peer network. In other words, in a peer-to-peer network, each computer is both a server and a client."

The Ninth Circuit then focused on how users of the peer-to-peer network retrieve and access content. The utility of a peer-to-peer network depends on the creation of an index of files available for sharing by the users in the network. Three indexing models exist in the peer-to-peer networking environment. First, the software developer of the peer-to-peer network can create a centralized indexing system on its server that lists all of the available files in the peer-to-peer network. The Napster peer-to-peer network utilized this centralized indexing system. This indexing model, however, raises fundamental problems under the U.S. Copyright Act. The Ninth Circuit Court of Appeals in the Napster case held that Napster's centralized indexing system "materially contributes to the infringing activity" of the users who illegally shared copyrighted digital music files. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001).

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## Virginia Civil Procedure

*by James V. Irving*

The Virginia General Assembly has passed legislation modernizing much of Virginia's sometimes arcane civil practice rules. The rule changes are effective January 1, 2006.

Virginia is one of the last states that still divides its civil courts into "Law" and "Equity" sides. Generally the Law side of the court hears claims for money damages while the Equity side has jurisdiction to grant "extraordinary remedies" including divorce, injunctions and declaratory judgments.

For decades, Virginia has embraced tradition and resisted the modernization trend that has streamlined civil procedure in the Federal Courts and in most states. The legislation will be a landmark to attorneys and court personnel, but may have little effect on the day-to-day experience of the litigant. While the disappearance of phrases like "Chancery Jurisdiction" and "Final Decree" may be missed by many, the process is likely to simplify the process for both litigants and their attorneys.

## THE BATTLE OVER INTERNET FILE SWAPPING

*by Scott J. Spooner*

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Because of the holding in Napster, developers of peer-to-peer networking software created different indexing models. The second indexing model, used by StreamCast, operates in a more decentralized manner. In this indexing model, an individual user of the software can broadcast a search request to all other computers in the network for the purpose of obtaining content stored on another user's computer. This approach ensures that software developers do not store copyrighted files on their servers.

The third indexing model, known as the "supernode" model, likewise removes the software developer from the process of making digital files centrally available. Under the "supernode" indexing model, a number of select computers on the network are designated as "supernodes," and a network user initiating a file search is connected with the most easily accessible "supernode" to maximize efficiency. Grokster's peer-to-peer software uses this "supernode" indexing model.

With an emphasis on these indexing models, the Ninth Circuit Court of Appeals held that that the lack of a centralized file index in the StreamCast and Grokster software prevented StreamCast and Grokster from maintaining "control over index files." The lack of control over the index files precluded a finding that the two software developers had knowledge of the on-going copyright infringement of network users.

The Ninth Circuit also held that the software developers did not materially contribute to the copyright infringements carried out by users of the network. The Ninth Circuit reasoned that StreamCast and Grokster "are not access providers, and they do not provide file storage and index maintenance. Rather, it is the users of the software who, by connecting to each other over the internet, create the network and provide the access."

Finally, the Ninth Circuit ruled that Grokster and StreamCast cannot be held vicariously liable for the copyright infringement committed by users of the network. The Court emphasized that there is no evidence "that either of the defendants has the ability to block access to individual users." Based on this fact, the Court held that Grokster and StreamCast did not have the right or ability to supervise the conduct of the direct infringers (the users of the network).

The Grokster case raises fundamental issues under the U.S. Copyright Act as to whether the developers of new technology can be held secondarily liable for the copyright infringements committed by users of the technology. A decision is expected from the U.S. Supreme Court in the next several months.

## GAMBLING ON GAMBLING

*by James V. Irving*

A certain level of risk forms part of the allure of gambling. A law suit recently decided in Louisiana demonstrates that some risks are unacceptable, and that casino operators are gamblers themselves.

On June 24, 2004, the Orleans Parish Civil District Court awarded damages to a pair of gamblers after the casino failed to pay off their progressive slot machine jackpot. Plaintiffs Griggs and Livaudais rode a hot streak at Harrah's Casino to an eventual jackpot of 1.36 million dollars. At that point, a representative of IGT, Inc., the owner and manufacture of the slot machine and the party responsible for paying on progressive slots turned off the machine, claiming a malfunction. When IGT refused to pay, Griggs and Livaudais sued IGT and the casino. The jury awarded damages in the amount of the unpaid jackpot.

Griggs and Livaudais now face another roll of the dice. During the course of the litigation, Harrah's was dismissed from the case as a result of its bankruptcy filing, and IGT's appeal is pending.

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## STANDARD MILEAGE RATES

*by James V. Irving*

The Internal Revenue Service has released the 2005 schedule for mileage rates to be used in computing deductible costs of operating an automobile (including car, van, pickup or panel truck) for business, charitable, and medical purposes. Beginning January 1st, the amounts are:

40.5 cents per mile for all business miles driven, (previous rate: 37.5 cents).
.15 cents a mile for all deductible medical or moving expenses, (previous rate: 14 cents).
.14 cents a mile for providing services to a charitable organizations;

These standard rates may not be used for any vehicles using any depreciation method under the Modified Accelerated Costs Recover System, after claiming a 179 deduction for that vehicle for any vehicle for hire, or for more than four vehicles simultaneously.



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