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Business Law Newsletter

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Creative Pleading in Business Torts

By James Irving

On January 5, 2016, the U.S. District Court for the Eastern District of Virginia, Newport News Division, handed down its Memorandum Opinion & Order disposing of two motions to dismiss filed in Tax International, LLC v. Kilburn and Associates, LLC et al. In denying these motions, Judge Raymond A. Jackson provided a succinct exposition of several federal pleading and practice rules while providing an assessment of the law on business torts in Virginia.

Tax International alleged that former consultants Kilburn and Taylor violated the terms of their confidentiality and non-compete agreements as well as substantive federal law when, after terminating their business relationships with Tax International, they started a competing business. The agreements of Kilburn and Taylor stated that they would not use Tax International's client confidential information in any effort to divert Tax International's business, that they would not solicit tax services from Tax International's clients and that they would not act as a tax consultant or preparer "at any time in the future following termination of their consultancy." Significantly, Tax International did not attempt to enforce this non-competition language, probably because they judged it to be overbroad and unenforceable under Virginia law. Instead, they creatively relied on other business tort theories.

Tax International brought an eight-count complaint, including seeking relief for copyright infringement, trademark infringement, trade secret misappropriation, unfair competition and tortious interference with a business expectancy, among other things. The defendants both moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the plaintiffs had failed to state a claim upon which relief can be granted. The Court denied both motions.

The copyright infringement count alleged that 1) the plaintiffs have a valid copyright and 2) the defendants had offered and provided tax preparation services using materials that were "substantially identical to Tax International's copyright protected materials." The Court stated that these two allegations satisfied the two prongs of the cause of action sufficiently to state the claim.

To successfully plead a trademark infringement claim under the Lanham Act, a plaintiff must show that 1) it possessed the mark, 2) the defendant used the mark, 3) the defendant's use of the mark occurred in commerce, 4) the defendant used the mark in connection with the sale, distribution or advertising of goods or services and 5) the defendant used the mark in a

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manner likely to confuse consumers. Once again, the plaintiff's pleading covered these elements sufficiently to support the claim.

The Court also found the pleading sufficient to support a misappropriation of trade secrets claim. In Virginia, a trade secret must 1) provide independent economic value, not be known or ascertainable to third parties through proper means and 3) be subject to reasonable efforts to maintain its secrecy. Since Tax International properly pleaded that they owned a trade secret and that the defendant misappropriated it, nothing further was required under federal pleading rules.

The elements of tortious interference with a business expectancy are 1) the existence of a valid business expectancy or reasonable expectation of business, 2) knowledge of the relationship on the part of the interferer, 3) intentional interference causing a breach or termination of the expectancy and 4) resulting damage. Note that this claim does not require proof of a currently binding and enforceable contract. Once again, the Court found the allegations to be sufficient.

Having denied the motions to dismiss in their entirety, the case will proceed to discovery and trial unless settled. While the plaintiffs will still have to prove their case at trial, creativity in characterizing the bad acts of the defendants has put them in the driver's seat.

On its face, this seems like an easy case. If true, the acts of the defendants are offensive and the plaintiff ought to have access to an appropriate remedy. At the motion to dismiss level, the Court assumes the allegations in the complaint are true and under the liberal pleading laws of the federal courts, it doesn't take a lot to meet this threshold. All the plaintiff has to do is state facts which, if proved, would be sufficient to substantiate each legal claim. What is instructive is that these plaintiffs wisely eschewed the traditional and perhaps obvious path. They did not sue for violation of the non-compete. If they had, they most likely would have lost, as the non-compete seems clearly overbroad and therefore unenforceable. One wonders if Kilburn and Taylor, when contemplating a competing business, thought this through as thoroughly as the plaintiffs did.

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Uber Reaches Settlement of Independent Contractor Misclassification Lawsuits in California and Massachusetts

By Doug Taylor

On April 21, 2016, Uber, the on-demand ride-hailing service, reached a settlement of two class action lawsuits pending against it in California and Massachusetts. These were filed by Uber drivers who claimed that the company had misclassified them as independent contractors instead of employees. The settlement is pending approval by the federal district judges overseeing the cases. The California and Massachusetts lawsuits reportedly cover more than 385,000 Uber drivers. Similar class action law suits remain pending against Lyft, Uber's main competitor.

What the Lawsuits Were About

The drivers alleged that Uber, by misclassifying them as independent contractors, had deprived them of the legal protections of state and federal anti-discrimination, overtime and leave laws, which are only applicable to employees. Uber's alleged misclassification also left the drivers to pay their own payroll withholding taxes and employment-related expenses. The lawsuits have been closely watched, as other entities in the technology economy utilize independent contractors, using a business model similar to

Uber's. The settlement by Uber follows a $228 million settlement by FedEx of a lawsuit filed by its home delivery drivers who also made claims of misclassification as independent contractors.

What's in the Settlement?

For the Drivers: For the drivers, the settlement appears to be primarily about the money. Under the settlement agreement, Uber is obligated to pay the drivers a minimum of $84 million. In addition, Uber could be obligated to pay the drivers up to an extra $16 million if the value of the company increases by 150% over its December 2015 financing valuation during the first year following an initial public offering. While the settlement numbers are significant after reductions for attorneys' fees, settlement administration costs, and other expenses, most of the drivers could end up receiving as little as $200, although others who logged significant mileage for Uber could receive as much as $2,000. Lead counsel for the drivers, trying to put the settlement in context, explained that the drivers faced a significant risk of losing had the case moved forward.

Uber is also required under the settlement agreement to help fund and assist in the creation of a "drivers' association." While the drivers' association has some of the attributes of organized labor – drivers elect association leaders, and Uber has agreed to meet with association leaders quarterly about drivers' concerns – it is not a union.

For Uber: For Uber, the primary benefit coming out of the settlement with its drivers is that it allows the company, with a few minor adjustments, to retain its current independent contractor business model. While the settlement agreement resolves the company's independent contractor dispute with its drivers for now, it is worth noting the resolution does not preclude state or federal labor authorities or other courts from making a determination in the future that Uber's driver are, in fact, employees.

The Takeaway

The consequences for a business that misclassifies its workers as independent contractors, especially on a large scale, can be disruptive and financially debilitating. Moreover, it seems unlikely that Uber's settlement with its drivers will do anything to diminish what in recent years has become increasingly aggressive enforcement by the U.S. Department of Labor. Nor does the settlement diminish the attractiveness of large scale misclassification litigation for plaintiffs' lawyers. Businesses should continue to exercise great care when making decisions about how to characterize their relationships with workers.

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