

Cash the Check, Lose the Money

By: Brian Davidoff



Sometimes simple business decisions can cost your company in unexpected ways. California law can often be contrary to what good business sense might suggest. Here is a quick question to test your knowledge of California law. When a creditor who owes your company \$10,000 sends you a \$5,000 check with "payment in full" written on the check, you should:

- (a) Cash the check immediately,
- (b) Delete the words "payment in full" on the check, and cash it, or
- (c) Return it, and demand a new check without the words "payment in full."

From a legal point of view in California, the correct response in this situation is (c) return the check. If you deposit it, you will lose the right to collect the balance, even if you delete the words "payment in full".

Two contradictory statutes in California address this issue. A recent court decision has attempted to reconcile this contradiction. The California Civil Code permits a creditor to deposit the check after deleting the words "payment in full" and subsequently collect the balance due, while the later enacted California Commercial Code prohibits such an action. In

Directors Guild of America v. Horoway Pictures, the court found the later enacted California Commercial Code applies.

California Commercial Code Section 3311 applies when: (1) the amount of the claim cannot be easily determined or is subject to dispute; (2) the creditor sent the check in good faith as a full payment; and (3) the recipient cashed the check. Under these circumstances, if the creditor either writes "payment in full" conspicuously on the check or an accompanying document and if the recipient had actual knowledge of these terms, then the claim will be resolved in the amount of the check. Thus, the balance of the debt cannot be collected.

Business situations arise from time to time that require knowledge of the law. Having this knowledge or consulting with someone who does can save your company a significant amount of money. Financial disasters can often be prevented with a precautionary phone call to a knowledgeable legal professional.

Brian Davidoff's practice focuses on insolvency, corporate reorganization and emerging growth companies. He is a certified business bankruptcy specialist and can be reached via e-mail at bld@rutterhobbs.com.

NOTES FROM CYBERSPACE

John Doe on the Web

By Sam Poss



Welcome to the first installment of "Notes from Cyberspace," the column which addresses the wide range of current topics involving the intersection of the

law, the Internet and high technology. We begin with the issues of anonymity on the Internet and "long-arm" jurisdiction. Our future columns will address a wide range of current topics including e-commerce, strategic alliances, on-line gambling, privacy, domain names, on-line securities trading, Internet rumors and "clickwrap" contracts. At the moment, one of the hottest Internet-related issues confronting our nation's courts is anonymous criticism of companies

on Website message boards. Companies are not fond of criticism, especially if it threatens their business or damages their public image. For various reasons, some critics prefer to remain anonymous. In attacking this criticism, companies have begun to mount so-called "John Doe" lawsuits to challenge anonymity on the Web. A number of suits have been instituted during the past year to identify anonymous Internet users.

One of the more significant cases was initiated in February 1999 by Raytheon Company, a Lexington, Massachusetts-based defense contractor. Raytheon brought suit in a Lexington court against 21 unknown John Does for claims based upon anonymous postings on a Yahoo message board devoted to Raytheon.

Alleging "upon information and belief" that the John Does were employees of
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Raytheon, Raytheon sued for breach of employment contract and employee policy as well as misappropriation of trade secrets causing injury including harm to the business reputation of Raytheon.

Before the case went to trial, the Massachusetts Court granted discovery motions against Yahoo and other Internet Service Providers (ISPs) to determine the identity of the John Does. Some of the discovery was directed to distant states, including California, where as discussed below it was not at all clear that the Court had personal jurisdiction over the John Does.

However, by May, 1999, Raytheon had used the discovery process to determine the identities of most (and perhaps all) of the John Does. After that, apparently without serving a complaint on any of the John Does, Raytheon voluntarily dismissed the lawsuit.

Raytheon stated publicly that it did not plan any further action, even internally. However, it has been reported that four John Doe employees either resigned or were dismissed by Raytheon and that criticism of Raytheon on the Yahoo Website was less spirited after the anonymous critics had been identified.

Critics of Raytheon contend that the suit was instituted merely to silence criticism involving unflattering but generally public

information. They argue that the ISPs should have taken a stronger position to protect the identities of the parties.

Raytheon has consistently maintained that the suit was necessary to protect trade secrets and confidential information. Although the conflict between anonymous Internet speech on the one hand and protection from improper disclosure on the other was given significant exposure in this lawsuit, it does not appear that much progress was made in resolving this important issue.

Many legal questions remain. Should there be a right to post these critical messages on Website message boards anonymously? What about messages that harm a company's business reputation? What if the posting party is a company employee? What about a protective order to temporarily shield the identities of anonymous Web posters pending consideration of personal jurisdiction or permitting the John Does to anonymously defend the suit or perhaps permitting *amicus curiae* briefs from interested parties who may wish to protect first amendment or related privacy rights?

These are important questions and there are many others. There are likely to be further developments involving anonymity on the Internet in the coming months.

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Congratulations!

Terry Nunan and Geoff Gold recently convinced the California Court of Appeal to affirm a favorable trial court ruling on trust interpretation issues. The appellate court's opinion was published at *Catch v. Phillips*, 73 Cal.App.4th 648, 86 Cal.Rptr.2d 584 (1999).

Mr. Nunan also recently co-authored an article entitled, "Of Fiduciary Bondage," on the subject of fiduciary bond requirements with respect to qualified plan assets. The article was published in the Summer of 1999 issue of the *California Trusts and Estates Quarterly*.

Terry Nunan specializes in representing clients with estate planning and trust administration issues. He is a graduate of Pomona College (B.A. 1971, cum laude) and University of California, Los Angeles School of Law (J.D. 1974).

Congratulations!

By *Olivia Goodkin*

BEWARE THE NEW OVERTIME LAW

By now most employers and employees have heard about the passage of AB 60 in California, which reinstates the daily overtime rules for non-exempt employees. The law took effect on January 1, 2000. If you have not yet done so, now is the time to review your procedures and to make sure that your documents, such as your employee manual, are in compliance with the new law. To briefly summarize, the new law requires employers to pay overtime of one and one-half times regular hourly rates to employees who work more than eight hours in one day, and double time for hours worked in excess of 12 in one day, or eight hours on a seventh day of a work week. The previous law, which mirrored the federal overtime wage and hour

laws, required overtime of one and one-half times regular pay only if employees worked in excess of 40 hours in the entire work week. The result of AB 60 is to eliminate some of the flexibility that was enjoyed in the last few years. Employers were able to accommodate ebbs and flow of work, and employees' desires to work fewer than eight hours in one day, and more than eight hours the next day, without incurring overtime liability. The new law does permit a flexible work week under certain circumstances. If two-thirds of affected workers vote, in a secret ballot, in favor of an alternative work week (e.g., four days of up to 10 hours of work), then the employer is permitted to adopt such a work week without overtime liability.

There are also some rules regarding making up missed work in the same work week, but we do not find the rules very practical, as they require written requests of the employees each time make-up work is requested, among other things.

There are **new**, heavy penalties, in addition to the old penalties, for failing to abide by the new law. It is extremely important for all human resource professionals to acquaint themselves with AB 60. To receive a copy of the new law, please contact Olivia Goodkin at (310) 286-1700, or og@rutterhobbs.com.

Olivia Goodkin has in-depth experience representing clients in the area of employment and business law.

GO-GO-GOLD

Within the last eighteen months, Geoff Gold has been busy. He has represented plaintiffs in misappropriation of trade secrets cases and obtained substantial monetary settlements. He has successfully defended a publicly traded company in a wrongful termination arbitration proceeding, a family-owned business in racial discrimination and sexual harassment cases, and a number of private individual clients in a property line dispute.

Mr. Gold worked with Olivia Goodkin in winning a summary judgment ruling for a defendant and cross-complainant in a corporate stock dispute case and then securing a substantial monetary settlement for the client on the cross-complaint. Ms. Goodkin and Mr. Gold also represented a major retailer as plaintiff in a construction defect/commercial landlord tenant case and, following mediation, secured a seven-figure settlement award.

On August 5, 1999, after a nine-day jury trial, Mr. Gold won a verdict on a defamation/intentional emotional distress cross-complaint and an award for a client of \$750,000 in compensatory damages and \$1.6 million in punitive damages. The client was a doctor who was wrongly accused by a patient of committing a crime. This trial followed a dismissal of the original complaint against the doctor on summary judgment in November 1998. Mr. Gold's second son, Ryan, was born on November 18, 1999.

Geoff Gold is a partner with the law firm of Rutter, Hobbs & Davidoff, Inc. and a graduate of Boalt Hall School of Law, University of California at Berkeley. He specializes in business and real estate-related litigation. He can be reached via e-mail at gmg@rutterhobbs.com

NOTES FROM CYBERSPACE

Virtual Jurisdiction

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By Sam Poss

As you know, via the Internet, we can conduct business anywhere in the world from a desktop. However, the world can reach back — an Internet user may end up being sued in a court anywhere in the country! In June, 1999, the Second District Court of Appeal in Los Angeles considered whether a California court could assert personal jurisdiction over New York defendants whose Website allegedly included defamatory statements concerning a New York plaintiff.

This case is known as *Jewish Defense Organization v. Superior Court of Los Angeles County, Steven Rambam (real party in interest)*.

Although the defendants had contracted with California-based Internet Service Providers (ISPs) and the Website was accessible in California, the Court of Appeal held that there were insufficient contacts with California to assert jurisdiction over the defendants and vacated the trial court's order permitting jurisdiction.

The California court applied traditional "long-arm" jurisdiction analysis to the

Internet. In a case such as this, where the nonresident defendants do not have substantial, continuous and systematic contacts with California sufficient to establish general jurisdiction over them in California, a three-part test is employed:

- ◆ The nonresident defendant must "purposely avail" himself of the privilege of conducting activities in California.
- ◆ The claim must arise from those activities.
- ◆ Exercise of jurisdiction must be fair and reasonable.

In this case, the California court found that the actions of the New York defendants did not satisfy even the first prong of the test. They relied in large part on a determination that defendants' Website was "passive," meaning that its purpose was to disseminate information, not to attract people to the site or to capture or receive any information from those who "hit" the site. The Appellate Court also concluded that the nature and quality of the "passive" activity did not rise to a level sufficient to find "purposeful availment" of the benefits and protections of California law. The court also employed traditional defamation analysis to conclude that personal jurisdiction was lacking in California, because the plaintiff neither resided in California nor established the foreseeability of a risk of injury by defamation arising in California.

The law of long-arm jurisdiction both inside and outside of California will continue to evolve in the coming years. As noted in this

case, long-arm Web jurisdiction generally may be analyzed on a sliding scale based on three categories of Websites:

- ◆ On one end of the spectrum, passive informational sites without any interactive aspect.
- ◆ At the other end of the spectrum, sites involved in repeated and substantial business transactions with the foreign jurisdiction.
- ◆ The great in-between of interactive Websites where specific jurisdiction would have to be addressed on a case-by-case basis considering the level of interactivity and the commercial nature of the information exchange.

Although national uniformity is not likely any time soon, there may be a trend toward denying long-arm jurisdiction based upon purely passive sites. However, in Virginia, a state recognized as a leader in Internet policy, a new act has recently been adopted. If constitutional, this law would allow that the mere "use" of a computer or computer network within Virginia would constitute action within the borders of Virginia. With AOL, PSINet and UUNet headquartered in Virginia, the jurisdictional consequences could be extremely broad.

Sam Poss is a business lawyer who specializes in e-commerce and other Internet, computer and high technology transactions. Sam can be reached at sp@rutterhobbs.com.

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