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The New A.R.S. § 38-1104: A Shift Away from a Deferential Review of Police Officer Terminations (Effective July 20, 2011)

By Michele Molinario and Erin Richardson

When Donald Trump says, "You're fired," the employee is sent packing. But terminating a police officer may not be so easy. Unlike employees in the private sector, police officers have due process rights that include an appeal process. In most cases, the police officer has an opportunity to convince a merit board, hearing officer, or other reviewing body to reverse the agency's termination decision. Then the police officer has the right to appeal the decision of a reviewing body to the Superior Court. The revised A.R.S. § 38-1104 changes the Superior Court's involvement in the appeal process in the limited scenarios set forth below. The change in the law could impact the outcome in certain situations. Think about this scenario:

A police cruiser video captured an incident that showed a suspect driving erratically on a highway, which led to a police chase. The suspect struck a police officer in the roadway with his van and continued to drive erratically, until the suspect crashed into a ditch and was

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Internet-Based Liability: How To Minimize Risk In The Digital Age

By Erik Stone

There is no denying that the Internet offers businesses a wealth of opportunity. According to the United States Census Bureau, e-commerce accounts for over three trillion dollars of the country's economy. *See* U.S. CENSUS BUREAU, E-STATS (May 26, 2011). Not surprisingly, e-commerce has grown tremendously over the past decade and does not appear to be slowing down. *Id*. But as businesses rely more heavily on the Internet to compete in a digital age, they should be mindful of the legal pitfalls they face. In most cases, such as copyright and trademark infringement, Internet-based companies are only now realizing their potential risks.

Indeed, many of the Internet-based lawsuits we see today were practically non-existent just a decade ago. This is likely due to a myriad of factors; however, there is a common trend in these cases that we have seen. Simply put, companies don't seem to understand that some of their Internet-based activities can create liability.

More importantly, these torts may carry severe consequences despite being committed naively. For instance, the Copyright Act allows statutory damages up

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In This Issue

Recovering Attorneys' Fees in Contract Actions: PARTIES BEWARE!

By Whitney M. Harvey

It is generally known that in a contested action arising out of contract, a prevailing party may be able to recover reasonable attorneys' fees. Doing so, however, is no cake walk. The Arizona Court of Appeals recently identified several factors that may impede a prevailing party's ability to recover its attorneys' fees. The implications of its opinion in *Berry v. 352 East Virginia, L.L.C.*, 2011 Ariz. App. LEXIS 106, 610 Ariz. Adv. Rep. 14 (Ariz. Ct. App., Div. 1, June 9, 2011), are noteworthy.

In *Berry*, the parties entered into a contract for the sale of a building. A dispute arose as to a contractual provision regarding the repair of a staircase. The plaintiff, Frederick Berry ("Berry"), filed suit for breach of contract, and the defendant, 352 Virginia LLC ("352"), counterclaimed for costs related to a staircase, as well as breach of warranty for the air-conditioning system. 352 won the counterclaim for costs related to the staircase, but lost its counterclaim for breach of warranty. Both parties requested attorneys' fees. The trial court concluded that 352 was the successful party pursuant to A.R.S. §12-341.01, and awarded 352 its attorneys' fees. The court declined, however, to award Berry any of his requested fees.

Berry appealed on several grounds regarding the trial court's denial of his request for attorneys' fees. He first argued that the parties' contract, rather than A.R.S. §12-341.01(A), governed his fee request. In Arizona, if a contractual provision contains the conditions under which attorneys' fees may be recovered, A.R.S. § 12-341.01 is inapplicable. *See Connor v. Cal-AZ Properties, Inc.*, 137 Ariz. 53, 668 P.2d 896 (App. 1983). The problem with Berry's attorney fee request, however, was that he cited A.R.S. § 12-341.01 as the *sole* basis for his request, without also citing the contractual provision. The Court of Appeals concluded that a fee request, based upon contract, requires *both* pleading and proof. Accordingly, Berry's failure to cite the contract in his pleadings precluded a fee award on that basis.

There are several reasons why a party may prefer to have a contractual-based fee request, versus a statutory fee request. Under A.R.S. § 12-341.01, the successful party is not automatically granted its attorneys' fees. Rather, it is within the sound discretion of the trial court to decide whether or not fees are awardable. *See Ayres v. Red Cloud Mills, Ltd.*, 167 Ariz. 474, 808 P.2d 1226 (App. 1990). On the other hand, where the parties provide for a mandatory award of attorney fees to the successful party in a contractual agreement, A.R.S. §12-341.01 cannot be discretionarily applied by the trial court in determining whether to award fees. *Coldwell Banker Com. Group, Inc. v. Camelback Office Park*, 156 Ariz. 214, 751 P.2d 530 (App. 1987). Thus, a contractual-based attorney fee request eliminates the risk that the prevailing party will recover nothing.

Although Berry was unable to rely upon the parties' contractual provision for his fee request, he made two other arguments on appeal. First, he argued that the trial court erred in finding that 352 was the "prevailing party," because Berry had succeeded in avoiding liability for one of 352's counterclaims. The *Berry* Court discussed the implications of an attorney fee award where there are competing claims, counterclaims, and setoffs all tried together in one lawsuit. The Court then concluded that a party's partial success does not preclude it from being designated the "prevailing party." Rather, the trial court can properly find that the "net winner" is the prevailing party for purposes of a fee award. Because 352 received a monetary judgment, and Berry did not, 352 was the "net winner" and, therefore, the prevailing party.

Second, Berry argued that he was entitled to attorneys' fees pursuant to the second sentence in A.R.S. § 12-341.01(A). The language of that section provides:

> If a written settlement offer is rejected and the **judgment finally obtained** is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees.

Berry argued that because his settlement offer to 352 equaled the jury's verdict, he should have received a portion of his attorney fees. The Court of Appeals held, however, that "judgment finally obtained" is distinct from a jury's verdict. The "judgment finally obtained" by 352 included the verdict, along with taxable costs, and prejudgment interest. As a result, 352's "final judgment obtained" was not equal to or more favorable to Berry

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Recent Ruling on Expert Witness Issues in Medical Malpractice Cases

By Douglas R. Cullins

Expert witness testimony is an important component of a medical malpractice case. Arizona courts have recently interpreted and clarified the rules concerning these expert witnesses. From upholding the constitutionality of Arizona's "expert qualification statute" to clarifying the disclosure requirements for a medical malpractice defendant who testifies as an expert on his or her own behalf, there have been many recent decisions that affect the way medical malpractice cases are litigated.

Arizona's expert qualification statute, A.R.S. § 12-2604, prohibits a licensed health professional from testifying as an expert witness as to the appropriate standard of practice or care unless: 1) the expert witness is of the same specialty as the party against whom the testimony is offered; and 2) during the year immediately preceding the occurrence giving rise to the lawsuit, the expert witness devoted a majority of his or her professional time to the active clinical practice of and/or instructed students in the same health profession/specialty as the defendant. If the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must also be board certified in that specialty.

Although Arizona courts have previously held that A.R.S. § 12-2604 does not violate the separation of powers clause of the Arizona Constitution, in *Governale v. Lieberman*, ___ Ariz. ____, 250 P.3d 220 (App. 2011), the Court of Appeals examined whether the statute violates the anti-abrogation, equal protection, due process or special legislation clauses of the Constitution. *Governale* involved a medical malpractice action against a neurosurgeon. When the plaintiff disclosed an anesthesiologist and a pain management specialist as expert witnesses, the defendants moved for summary judgment because the experts were not qualified to render standard of care opinions against a neurosurgeon pursuant to A.R.S. § 12-2604. Despite the plaintiff's challenges to the constitutionality of the statute, the trial court granted the defendants' motion. The plaintiff appealed.

In holding that A.R.S. § 12-2604 was constitutional, the Arizona Court of Appeals found that the statute neither abolished nor infringed upon the fundamental right to bring a medical malpractice action. While the statute may have prevented the plaintiff from using his chosen expert, it did not prevent him from disclosing a qualified expert witness or create "insurmountable hurdles to recovery for large and foreseeable classes." Further, since the statute was rationally related to the legitimate state interest in avoiding a shortage of qualified physicians as a result of continued increases in medical malpractice insurance rates, it did not violate the equal protection or due process clauses of the Arizona Constitution.

Additionally, because the statute: 1) protects the public health by addressing rising medical malpractice insurance rates; 2) applies uniformly to all members of the classes of health care providers and to persons suing them; and 3) provides a classification that is sufficiently elastic to admit entry of additional persons or to allow others to exit the class, the *Governale* Court also concluded that the statute was not a forbidden special

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Announcements

JS&H is pleased to announce that **Jonathan Barnes** has joined the firm as an associate.

Mark D. Zukowski was recently accepted into the National Academy of Distinguished Neutrals (NADN). NADN is a national association whose membership consists of mediators and arbitrators distinguished by their hands-on experience in the field of civil and commercial conflict resolution. Mark is one of only 21 attorneys and former judges who have been recognized as Charter Members of the Arizona Chapter. Parties can visit the Chapter website at www.NADN.org/arizona to schedule, at no administrative cost, mediations with Mark by having direct access to his availability calendar.

Erik Stone has been elected to the State Bar of Arizona's Young Lawyers Division Executive Board for 2011-2013.

Tyler Carrell has been appointed to the Maricopa County Bar Association's Young Lawyers Division Executive Board for 2011-2012.

The Family Purpose Doctrine: Alive and Kicking in Arizona

By Liana J. Garcia

Jason Beck was like most seventeen year-old kids. He liked to hang out with his friends, he had a part-time job and an active social life. And like many teenagers, Jason didn't always listen to his parents. Jason's parents, Barb and Ken, owned an SUV they allowed Jason to drive to school, work, and social events. But after Jason got into a fender bender, his parents gave him strict instructions that he was not allowed to "taxi" his friends around. He was only allowed to use the SUV to drive to work, school, and church.

One night, Jason's parents gave him permission to spend the night at a friend's house after work. But instead of following his mother's orders to go directly to his friend's house, Jason had a different idea. He decided to drive his buddies around "egging" houses and parked cars. As he was driving a friend home after their night of shenanigans, Jason was involved in a major car accident, causing serious injuries to Amy Young.

Ms. Young sued Jason, and she sued Ken and Barb Beck, arguing that Mr. and Mrs. Beck were vicariously liable for their son's negligence under Arizona's family purpose doctrine. The family purpose doctrine is a concept first set forth in *Benton v. Regeser*, 20 Ariz. 273, 278, 179 P. 966 (1919). Although it is nearly 100 years old, the Arizona Supreme Court recently decided that the doctrine is still very much alive. In *Young v. Beck*, 251 P.3d 380, 385, 605 Ariz. Adv. Rep. 22 (2011), the Court held that the family purpose doctrine applies today as much as it did in 1919.

The family purpose doctrine "subjects the owner of a vehicle to vicarious liability when the owner provides an automobile for the general use by members of the family … and when the vehicle is so used by a family member." *Young* at 383, 23. The doctrine was established because the Court recognizes that family members, often teenagers, drive the family car for the convenience of the head of the family. *Benton* at 278, 968. Arizona courts have grounded the family purpose doctrine in principles of agency law, setting forth that "any member of the family driving the machine with the father's consent, either express or implied, is the father's agent." *Id*. Arizona courts have also held that the family purpose doctrine is unique to families, and is not intended to apply to relationships other than the family relationship. *McDowell v. Davis*, 8 Ariz. App. 33, 38, 442 P.2d 856, 861 (App. 1968).

Ken and Barb Beck argued that the family purpose doctrine should not apply because Jason was expressly prohibited from driving his friends around. Because he exceeded the scope of their permission, they argued, Jason was not using the car for a "family purpose." Besides, they reasoned, Jason was using the car for his *own* pleasure, not for family business. Alternatively, the Becks argued that the family purpose doctrine should be abolished altogether. They asserted that the nearly 100 year-old doctrine was a relic of a past era, and was contrary to public policy.

The Court of Appeals disagreed, finding that regardless of whether Jason's parents gave express permission for each and every use of the vehicle, he had their implied permission to drive the car for a family purpose. *Young v. Beck*, 224 Ariz. 408, 412, 231 P.3d 940, 944 (App. 2010). The Arizona Supreme Court granted review of the Court of Appeals' decision because "the continued vitality of the family purpose doctrine is of statewide importance." *Young*, 251 P.3d at 382, 605 Ariz. Adv. Rep. at 23.

The Supreme Court affirmed the Court of Appeals' finding that a parent need not give permission to a teenager for a family-specific purpose in order for the doctrine to apply. The doctrine does not require that the vehicle be furnished for a parental or communal errand, nor does it require that a parent give permission for every possible route taken or deviation made while driving the vehicle. *Id*. at 387, 25. To hold otherwise, the Court reasoned, would enable parents to immunize themselves from liability by imposing general, unrealistic, or unenforced limitations on their child's use of the vehicle.

The Supreme Court similarly rejected the Becks' argument that the family purpose doctrine should be abolished because it is out of touch with modern life and contradicts public policy because it is "grossly unfair to any parent [of] a young driver," functioning "solely [as] a penalty against wealthy parents." *Id*. at 385, 24. The Court noted that the doctrine's policy goals of providing compensation to accident victims and encouraging parents to ensure that their children operate cars safely are no less important today than they were ninety-two years ago. Further, the Court noted that there are currently fourteen states, including Arizona, which recognize a common-law family purpose doctrine, plus nine others which have

a statutory version of the doctrine. Thus, the Court noted, Arizona "is neither alone nor clinging to an antiquated doctrine." *Id*. at 386, 26.

In short, Arizona's highest court has answered the question of whether the family purpose doctrine is still relevant today with a resounding "yes." In many ways, the Court's reasoning is not surprising in light of the way families and teenagers operate. After all, what busy parent wants to drive a teenager to school and work each day, and to each and every soccer game, dentist appointment, or friend's house? Providing a teenager with a vehicle to use certainly eases a parent's burden, thus establishing a family purpose. And in real life, teenagers rarely adhere to every single directive provided by their parents. Let's face it: prohibiting a teenager from driving his friends around is about as likely to meet with 100% compliance as the Cubs are likely to win the World Series this year. The Arizona Supreme Court recognized that Jason Beck is no different from the vast majority of teenagers. Thus, far from an anachronism, the family purpose doctrine is alive and kicking in Arizona. As a result, insurance companies need to make sure that their insureds under family policies are adequately covered and take into account the family purpose doctrine. ◆

EXPERT WITNESS continued from Page 3

law that conferred rights or privileges on particular members of a class or to an arbitrarily-drawn class that is not rationally related to a legitimate governmental purpose. Therefore, A.R.S. § 12-2604 was a constitutional and proper exercise of the legislature's power to prescribe the elements of a medical malpractice cause of action.

Shortly after A.R.S. § 12-2604 was held constitutional, the Arizona Court of Appeals clarified the requirements of the statute by holding that although A.R.S. § 12-2604 requires an expert witness to be board-certified in the same specialty as the board-certified specialist he or she is testifying against, the expert witness does not have to be board-certified at the time of the underlying incident/treatment. In *Awsienko v. Cohen*, ___ Ariz. ____, 257 P.3d 175 (App. 2011), the plaintiff brought a wrongful death action against multiple health care providers. One of the defendants who had treated the plaintiff's decedent was board certified in internal medicine nephrology. Although the expert witness disclosed by the plaintiff had been board certified in internal medicine for many years, he did not achieve board certification in nephrology until approximately one year after the time of the alleged negligence. The defendant physician moved for summary judgment.

In reversing the trial court's decision to grant summary judgment, the Arizona Court of Appeals held that the statute contains no requirement that the expert witness be board-certified at the time of the occurrence. The Court explained that although the Legislature attached a temporal requirement to the specialization language, it chose not to include the same language as to board certification. Thus, while A.R.S. § 12-2604 requires an expert witness to have devoted a majority of his or her professional time to the active clinical practice and/or instruction of students in the same specialty as the defendant during the year immediately preceding the occurrence giving rise to the lawsuit, the expert witness need not be board-certified during that time.

Finally, the Arizona Court of Appeals recently held that a medical malpractice defendant who testifies as to the standard of care on his own behalf is subject to the same disclosure requirements as an independently retained expert witness. Although the Court found that Arizona's disclosure rules do not require a party to provide a "script" of its expert witnesses' testimony, the rules do require disclosure of "the substance of the facts and opinions to which [the defendant] is expected to testify or a summary of the grounds for each opinion." In *Solimeno v. Yonan*, 224 Ariz. 74, 227 P.3d 481 (App. 2010), the Arizona Court of Appeals held that even though the defendant's disclosure statement stated the defendant physician would testify "regarding his background, training and experience" and the defendant physician testified about his knowledge of thrombolytics during his deposition, the disclosure was insufficient to notify opposing counsel that the defendant physician would testify regarding his personal experience of prescribing thrombolytics to his patients. Further, the *Solimeno* Court held that though disclosing a defendant physician will testify "consistently with the medical records" may be a sufficient disclosure concerning testimony regarding raw test results that are included in the medical record, it is insufficient as a disclosure of opinions concerning the significance of those results and how they are relevant in selecting a course of treatment that complies with the standard of care.

These recent decisions highlight the importance of expert witness testimony in medical malpractice cases. They will undoubtedly shape both the way expert witnesses are selected and how their testimony is disclosed. ◆

A.R.S. § 38-1104 continued from Page 1

ejected from the driver side window of the van. Five officers descended on the suspect, who was apparently unconscious. All five officers then contemporaneously began to take the suspect into custody by striking the unconscious suspect with their hands, feet and batons.

The merit board reinstated all five officers, finding that the "City didn't prove their case." The City Manager disagreed, however, and upheld the termination. The police officer exercised his rights and appealed the termination to the Superior Court. What should the Superior Court do? Before the change in the law, the Superior Court would have conducted a review of whether the merit board's decision was arbitrary and capricious. "Arbitrary or taken without reasonable cause" standard of review is a highly deferential and objective standard. *Maricopa County Sheriff's Office v. Maricopa County Employee Merit System Commission*, 211 Ariz. 219, 119 P.3d 1022 (2005). Where there is room for two opinions, an action is not "arbitrary or capricious" if exercised honestly and upon due consideration, even though the Court may believe an erroneous conclusion has been reached. *Id*. As a result, discipline for a public employee typically cannot be found "arbitrary" when it falls within the permissible range of discipline set forth by the agency. *Maricopa County Sheriff's Office*, 211 Ariz. at 223, 119 P.3d at 1026. The Superior Court's review was therefore limited to a review of the record, and was highly deferential toward the terminating agency. Furthermore, the officer could not get a new hearing, unless there was no record of the merit board proceedings.

The "new" A.R.S. § 38-1104 creates a different standard of review in two limited situations: (1) In cases where a City does not have a merit board, the Superior Court will act like a merit board and hold a trial; and (2) In cases where a merit board recommends reinstatement but the City Manager or final decision-maker of the city or town upholds the termination, the officer may get another chance to present his case to the Superior Court.

So what does this mean for police departments? If the city or town does not have a merit board or has a merit board that "recommends" a decision to a final decision-maker, that city or town may be incurring the costs of a second hearing. The officer may be afforded a second hearing before the Superior Court, which is not a "deferential review" of the record. The Superior Court will not be limited to an "arbitrary and capricious" review, but rather can hold an entirely new proceeding to determine whether the agency had just cause to terminate the officer. The new law also provides for an award of discretionary attorneys' fees and mandatory costs for the prevailing party.

Helpful tips: Knowing that the Superior Court may end up conducting a new hearing, police departments and city governments must ensure that the officer's performance evaluation, supervisory notes, and the investigative file accurately reflect the officer's job performance. And they should do so *before* upholding a termination becomes an issue. ◆

ATTORNEYS' FEES continued from Page 2

than his offer, and Berry was not eligible for an A.R.S. § 12-341.01(A) award of attorneys' fees.

The *Berry* case illustrates the importance of evaluating procedural rules relating to attorneys' fees prior to making a fee request. The trial court is not obligated to award attorney fees to a successful party, and it will not award fees unless certain procedural requirements are met, including properly pleading the basis for an attorney fee request. Parties in contractual actions must therefore beware by ensuring attorney fee requests are properly pled and presented to the trial court.◆

Appellate Highlights

Berry v. 342 E. Virginia, LLC
Arizona Court of Appeals
A mandatory contractual attorney fees clause overrides the trial court's otherwise discretionary award of fees under A.R.S. § 12-341.01, but only if specifically pled. A trial court has discretion to award attorneys' fees to a party who only prevails on some claims if the court determines that party is the "net winner."

Staub v. Proctor Hospital
United States Supreme Court
In the long-awaited "cat's paw" case, an employer is liable for unlawful discrimination if it acts on a biased supervisor's recommendation, notwithstanding higher management's innocence in the decision-making process.

Maudsley v. Meta Services
Arizona Court of Appeals
The operators of licensed mental health facilities and their employees owe a duty of reasonable care to persons they receive for mental health screenings, which arises from Arizona's mental health statutes.

American Asphalt & Grading Co. v. CMX, LLC
Arizona Supreme Court
The Superior Court must give counsel prompt notice when a case is placed on the Inactive Calendar (even where a 150 day notice was previously issued), but its failure to provide contemporaneous notice is only one factor when deciding a Rule 60(c) motion to set aside a dismissal.

Johnson v. Lucent Technologies, Inc.
Ninth Circuit Court of Appeals
Retaliation claims pursuant to 42 U.S.C. § 1981 are governed by the four-year statute of limitations applicable to claims arising after December 1, 1990.

Fidelity and Deposit Company of Maryland v. Bondwriter Southwest
Arizona Court of Appeals
The comparative fault principles established in A.R.S. § 12-2506 do not apply to a breach of contract claim.

Engler v. Gulf Interstate Engineering, Inc.
Arizona Court of Appeals
The conduct of an employee assigned to out-of-town work was not with in the course and scope of his employment when driving to and from a restaurant to eat after his work day was finished.

Ryan v. San Francisco Peaks Trucking
Arizona Court of Appeals
Disclosure statements may be used as evidentiary admissions pursuant to Rule 801(d)(2)(D) by a party-opponent. The admission is not conclusive as to fault, but the jury can weigh the evidence and consider the significance of the statements.

Cohen v. Maricopa County
Arizona Court of Appeals
The county does not owe a non-delegable duty of care to a person undergoing outpatient psychiatric treatment after his release from involuntary custody.

AT&T Mobility LLC v. Concepcion
United States Supreme Court
The Federal Arbitration Act protects an employer's right to include a class action waiver in its arbitration agreement, even though a state law bars such provisions as unconscionable.

INTERNET-BASED LIABILITY continued from Page 1

to $150,000 per infraction, if found to be willful. In trademark actions, plaintiffs are entitled to actual losses, as well as the infringer's profits, and may be awarded treble damages for willful infringement. Examining the most common Internet-based torts will hopefully provide some guidance on how to avoid these legal ramifications when competing in a digital market.

A. Copyright Infringement

Perhaps the most common Internet-based tort we see is copyright infringement. In its simplest form, copyright infringement is the unauthorized copying or use of another's work of art. Pursuant to the Copyright Act, works of art can consist of literary works, pictures, music, audio recordings, and videos. It is important to note that every single work of art is protected by copyright. That means every picture, audio recording, literary work, and video on the Internet is copyright protected. As a result, it is not uncommon to find unauthorized use occurring on the Internet.

For instance, numerous online retailers use pictures or other works of art to advertise their products or services. The problem is that most of these retailers do not actually own the works of art they use on their website. Typically, these retailers (via their web developers) search the Internet for photographs or obtain photographs from product manufacturers. Both of these methods, however, expose the company to liability. Of course, using digital images from an Internet search exposes companies to the greatest risk. In these cases, it is nearly impossible to obtain authority from the copyright owner. For this reason, we counsel our clients to employ a different method.

Alternatively, using digital images from product manufacturers can provide some protection for companies. This is because the manufacturers that provide product images typically provide their own images. Nevertheless, we have seen instances in which manufacturers provided images for which they did not actually own the copyrights. An online retailer would still be liable in this situation despite obtaining apparent authority from a product manufacturer. In these cases, we recommend: (1) confirming ownership of the copyrights with the manufacturers; and (2) documenting the authority granted to them. Often times, this is accomplished through a licensing agreement. A simple indemnity provision may be sufficient as well.

Of course, the most effective method to prevent liability for copyright infringement is to simply create a new image and register the copyright. For many of our clients, however, this method is not economically sound, especially when there is a need for a complex work of art. As a result, we caution our clients to confirm ownership and authorization when using works of art from third-parties.

B. Trademark Infringement

Trademark infringement is a more sophisticated tort. It is the unauthorized use of a word, phrase, or symbol used to identify a particular manufacturer or its product.

Speaking Engagements

Don Myles presented "Dealing With Insureds, Handling The Tough Issues" at the Professional Lines Attorney Network's (PLAN) Conference on September 14, 2011 in Atlanta.

Ed Hochuli presented "The Ten Minute Drill" at the Minnesota Defense Association on August 19, 2011 in Duluth.

Several JS&H attorneys presented at the 2011 Arizona Public Risk Management Association (PRIMA) Conference on August 18, 2011 in Flagstaff: **Ed Hochuli** presented "Managing a Crisis in Real Time, aka The Story of My Life;" **John DiCaro** presented "Qualified Immunity Is Under Attack;" **Joe Popolizio** presented "Appropriate Application of Comparative Fault Principles Under A.R.S. Section 12-2506;" **John Masterson** presented "New Case Law Regarding Notice of Claim;" and **Michele Molinario** presented " Employers Beware: Retaliation Claims are on the Rise."

John DiCaro and **Georgia Staton** were both presenters at the Arizona College of Trial Advocacy on August 2-6, 2011.

The key factor in determining liability is whether the unauthorized use creates a "likelihood of confusion" among consumers. Interestingly, there are several ways in which the use of a mark can create liability. For instance, infringement occurs when two companies have the same name (i.e., there cannot be two McDonalds). Similarly, one company cannot use the same name for a unique product (i.e., there cannot be two Big Macs). The Internet, however, presents new ways in which trademark infringement can occur.

Recently, we defended an action in which a company was using "keyword tags" to attract users to its website when those users searched the Internet. Essentially, when an Internet user searches the web, search engines use a variety of methods to seek out the best results for the searches. One method is to identify "keyword tags" embedded in a website's source code. These keyword tags are created by the web developer. As a result, a company could use any keyword tag it chooses, including a competitor's trademark. Doing so, however, constitutes infringement because it creates a likelihood that the keyword tag will lead a consumer to the wrong website (i.e., causing customer confusion). In this case, there is no alternative other than to remove infringing material.

Although we recognize that businesses must use tools like keyword tags to compete over the Internet, we caution them to be mindful of intellectual property rights. In most cases, a business can avoid liability by using generic terms that merely describe the type of service or product they are offering. Ultimately, as the Internet continues to grow and evolve, we expect to see new types of Internet-based lawsuits.

C. Web Scraping

Web scraping is a prime example of how new developments in the Internet can create liability for companies trying to compete in the digital market. Web scraping is a new tactic companies use to obtain information from competitors' websites, computers, and servers. It utilizes an automated process (a software program) to sift through a competitor's website to find targeted information while dumping the rest. These programs can identify pricing trends, sales leads, online databases, job postings, and other financial data. The benefit is that these programs can do this in mere hours, whereas employees could take weeks or months to gather the same information.

As an emerging issue, the law surrounding web scraping is still developing. Nevertheless, it can potentially implicate contracts, copyright, trademark, patent, Internet law, various federal statutes, and even trespass to chattels. The few courts to have considered cases involving web scraping have focused on: (1) the breach of a website's "terms of use" agreement and (2) the theory of trespass to chattels (i.e., the website). Some courts have held that web scraping creates liability under these theories - reasoning that these programs exceed the authorized scope of use allowed by the website owner. *eBay Inc. v. Bidder's Edge, Inc.*, 100 F.Supp.2d 1058 (N.D. Cal. 2000). Other courts, however, have held that these theories are not sufficient to create liability because the scraping software does not cause physical damage to the chattel. *Ticketmaster Corp. v. Tickets.com, No. CV99-7654-HLH*, 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 6, 2003); *Intel Corp. v. Hamidi*, 30 Cal.4th 1342 (2003).

Ultimately, the law is far from settled on this emerging issue. But it does demonstrate that Internet-based torts will continue to evolve as businesses employ new techniques to compete in the digital age. Accordingly, these companies would be well-served to seek legal counsel before engaging in innovative practices through the use of the Internet. ◆

About The Authors

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Mr. Cullins joined Jones, Skelton & Hochuli in 2003 and has been a partner since 2011. He practices in the areas of medical malpractice, nursing home and pharmacy defense, and commercial litigation. He received his law degree from Texas Tech University in 2003 and is admitted to practice in Arizona.

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Ms. Garcia joined Jones, Skelton & Hochuli in 2009 and concentrates her practice on wrongful death and personal injury defense, construction litigation and civil rights defense. She received her law degree from Arizona State University College of Law where she received the Order of the Barristers and the Jenckes Cup Award. Ms. Garcia is admitted to practice in all state and federal courts in Arizona.

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Ms. Molinario joined Jones, Skelton & Hochuli in 2008 and has been a trial attorney since 2000. She concentrates her civil litigation practice on governmental entity defense with an emphasis on labor/employment disputes and civil rights matters. Ms. Molinario received her law degree from Arizona State University in 2000 and is admitted to practice in all state and federal courts in Arizona and the U.S. Court of Appeals, Ninth Circuit.

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