

# Nicolai Law Letter

A PUBLICATION OF NICOLAI LAW GROUP, P.C. - BUSINESS LAW & LITIGATION

Spring 2003

## IN THIS ISSUE

### • EMPLOYMENT

ADA Perception Liability  
COBRA & Disability Insurance  
Retaliation Liability Expanded  
Customer Harassment  
Veteran Entitlement  
Lies & Discrimination

### • POLLUTION

Parent Entity Liability  
Old Gas Leak Not Actionable

### • TAXES

Back Car Taxes  
Oral Proof Not Enough

### • INSURANCE

Pickup Truck Not Covered

### • INTELLECTUAL PROPERTY

Site Plan Copyright

### • CONTRACTS

Oral Agreement Too Vague



## NEWSWORTHY

- Banknorth Seminars Feature Nicolai
- Nicolai Licensed in Connecticut

**"The strongest human instinct is to impart information, the second strongest is to resist it."**

**Kenneth Grahame**

## MetaComet -- and Nicolai -- Welcome Complex Challenges

There are a hundred ways to sell a book, according to David Marlin, manager of MetaComet Systems, LLC in South Hadley, Mass. They can be sold as hardcovers, paperbacks, audiobooks, CD-ROMs and e-books. As sales increase, sliding scales and escalator clauses kick in for author payments. And different rights exist in different countries. But no matter how a book reaches the reading public, Marlin's specialized software can help publishers manage the calculation and distribution of royalties to their authors. Called Royalty Tracker, the software stores the details of royalty agreements, including author advances, and manages royalty distribution "of infinite complexity," says Marlin.

The software creates a host of intellectual property issues, and that's why Marlin turned to Nicolai Law Group. He wanted to develop a standard licensing agreement for his clients. He also wanted to buy out his partner in a way that would minimize any taxes or liabilities. Paul Nicolai advised him by email and phone, while Marlin conducted all negotiations himself.

Whenever he needed information on a specific point, or contract language revised, he says, "I got what I needed later the same day. Paul was extremely professional and responsive." Last fall, he negotiated to buy out his founding partner and in the process, restructured the company.

"I would negotiate details with my partner, which Paul then translated into the contract's legalese," recalls Marlin. "It was a difficult and complicated process, but with Paul involved, I was able to understand where I stood and the dynamics of the deal in a way that let me come through it successfully."

More information on any of these subjects is available by calling. This material is for information and education purposes only. It is not legal advice or a legal opinion.

Tarbell-Watters Building, 146 Chestnut Street, Springfield, MA 01103-1539

Telephone (413) 272-2000 • Facsimile (413) 272-2010 • E-Mail: [niclawgrp@niclawgrp.com](mailto:niclawgrp@niclawgrp.com) • Internet: [www.niclawgrp.com](http://www.niclawgrp.com)

## A Letter from Paul Nicolai

There are few bright spots in today's economic climate, but when sunlight breaks through the gloom, I want our clients positioned to take advantage of any growth opportunities. Of course, some opportunities really are too good to be true. That's when you need our firm's basic legal advice service, TeleCounsel™. We answer legal questions before they become legal problems. Typical queries involve new business relationships, human resource issues and day-to-day business concerns. For a fixed annual fee, clients may make unlimited calls for legal guidance. It's like having a staff lawyer down the hall. We answer calls the same day. Known for timely and creative advice, we'll review the facts and situations with you over the telephone. We'll answer questions and provide guidelines for future action. Even if you have an attorney, you can benefit from this dependable service to sound out your options before making a decision.

We always promote preventive law — to maximize business results for our clients through the appropriate use of professional talent. TeleCounsel™ offers an inexpensive way to head off problems that could be potentially costly if they go unaddressed. As a TeleCounsel™ client, you're equipped for future challenges.

If you would like to learn more about our TeleCounsel™ services, give Pamela Chesbro a call at 413-272-2000, extension 5. The right advice at the right time can go a long way to make these tough times a little easier.

~ Paul Nicolai, President

liability under CERCLA for corporate parents, and perhaps by extension corporate officers and directors, even if under state common law the evidence does not justify piercing the corporate veil.

A case-by-case review must consider whether a company's relationship to its subsidiary reflects normal investor oversight or undue attention. Something more than common corporate personnel acting at management and directorial levels is necessary to support a finding of direct liability against a parent. "[A]n operator," the court wrote, "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."

### Why This Is Important . . .

This opens the door wider for parent corporation liability for environmental clean up costs incurred by a subsidiary or related corporation. Corporations should avoid active supervision or control over operations specifically related to pollution or decisions about compliance with environmental regulations by subsidiaries and other related entities or understand that the corporate separation may not be enough.

### OLD GAS LEAK, NO CASE

When gasoline leaked onto their property, landowners sued a gas station. In 1982, they learned the property was contaminated. After 1984, there was no further release of gasoline. They sued in 1991 and 1992. The Court held the claim was barred by the three-year statute of limitations, rejecting the argument that the presence of gasoline on the property was a continuing trespass and nuisance. The Court found there must be recurring conduct for a continuing trespass or nuisance.

### Why This Is Important . . .

Property owners must protect their interest within the time limits imposed by the law. Claims must be brought within the statute of limitations. It may not matter that the damage remains for

*(Continued on page 3)*

### ADA SUIT BITES HELPING HAND

An employee violated company policy by drinking and driving a company van. The company gave the employee a choice: enter an alcohol treatment program or be fired. The employee refused to enter the program. When she was fired, she sued under the ADA. A U.S. Court of Appeals ruled the company could be liable under the ADA as it "regarded" the employee as having a disability.

### Why This Is Important . . .

Offering to help an employee with a "problem" like alcoholism can be proof the employer "regards" the employee as having a disability. The safest approach: focus on the conduct without making assumptions about cause.

### THE FAT LADY SINGS

A 375-pound college professor was awarded \$137,500 under the ADA. The employee

sued after getting a memo that said her contract would not be renewed. The memo also mentioned her inability to get to her office when there was snow on the ground and her difficulty walking during graduation ceremonies. The judge had previously ruled that although the professor wasn't "disabled" under the ADA, the claim could go to the jury since the college "regarded" her as disabled.

### Why This Is Important . . .

An employee does not have to have a "disability" to recover under the ADA; it is enough if the employer "regards" the employee as disabled.

### PARENT ENTITY AS POLLUTION PAYER

Can direct liability for environmental cleanup costs be imposed on a parent company under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) without piercing the corporate veil? Yes, answered the U.S. Supreme Court. It found a distinct basis for direct

More information on any of these subjects is available by calling. This material is for information and education purposes only.

It is not legal advice or a legal opinion.

Tarbell-Watters Building, 146 Chestnut Street, Springfield, MA 01103-1539

Telephone (413) 272-2000 • Facsimile (413) 272-2010 • E-Mail: [niclawgrp@niclawgrp.com](mailto:niclawgrp@niclawgrp.com) • Internet: [www.niclawgrp.com](http://www.niclawgrp.com)

years after its occurrence and may simply mean the property owner cannot recover.

## PICKUP TRUCK NOT A PASSENGER CAR

A third party sued the company after an accident with a pickup truck driven by an employee. The company's insurance carrier was found not liable, despite a policy that contained a clause providing for coverage for damage done by "any private passenger automobile" not owned by the policy holder but being used for the business." The Court found that while the vehicle was being used for the business, the term "private passenger automobile" did not include commercial vehicles.

### Why This Is Important . . .

Many commercial insurance policies contain clauses covering automobiles used in the business even though the automobile is not owned by the company. If the clause covers only private passenger vehicles, it will not cover commercial vehicles, even light trucks, used but not owned by the business, leaving the business without coverage.

## DISABILITY INSURANCE ISN'T MEDICAL CARE

A company does not have to let a former employee keep his disability insurance under COBRA because it is not a "medical care" plan, according to a U.S. Circuit Court. COBRA requires that certain former employees be allowed to continue in an employer's group health plan. A group health plan provides medical care, defined as "the diagnosis, cure, mitigation, treatment, or prevention of disease."

### Why This Is Important . . .

The decision limits employer COBRA obligations.

## NO ESCAPE FOR CAR TAXES

The Bankruptcy Court in Massachusetts has ruled that the Massachusetts automobile excise tax is an excise tax and not a property tax.

### Why This Is Important . . .

Massachusetts auto excise taxes are now not dischargeable in bankruptcy. The debtor remains liable for them.

## RETALIATION SUIT OK THO' WORKER DIDN'T HELP

A hospital worker's father sued the hospital for age and disability discrimination. Management fired the son, thinking he had helped in his father's case. He had not. The son sued under a federal law which makes it unlawful for an employer to interfere with, restrain or coerce employees who have assisted another employee in a discrimination claim. The federal appeals court ruled that the employer's discharge of an employee for discriminatory reasons was illegal retaliation, even if the employee did not engage in protected activity.

### Why This Is Important . . .

Anti-retaliation laws are broader than discrimination law. Other cases have ruled that employees can win for retaliation even if their discrimination case fails. This case says the employer is liable even if the employee engaged in no protected act. The employer thought he did.

## CUSTOMERS NOT ALWAYS RIGHT

A waitress who was fondled and sexually harassed by customers can sue her employer, ruled a federal court of appeals. The employer refused to honor her request not to serve customers who previously made lewd comments to her. While the waitress was serving the customers, one of them pulled her by her hair and then grabbed and kissed her breast. The employer claimed he was unable to control the customers. The court said an employer who condones or tolerates the creation of a hostile work environment should be liable even when the environment was created by a nonemployee, since the employer ultimately controls the work environment.

### Why This Is Important . . .

Employers must take steps to prevent harassing behavior from both employees and customers alike.

## RESIGNED VETERAN ENTITLED TO JOB

A police officer resigned his job to join the Active Duty Guard Reserve program. When he later asked to be reinstated, the town refused. Even



## "Smart Business" Series Features Nicolai

Three seminars focusing on the needs and concerns of small businesses are being hosted by Banknorth Massachusetts in Springfield, Mass. in May, June & July. Designed to arm small business owners with the tools to compete in tight economic times, the seminars include materials prepared by Nicolai Law Group and presentations by Paul Nicolai. Topics include "Managing in Tight Times," "Hiring and Keeping Employees," and "Keeping Your Profits."

## Nicolai Admitted to Practice in Connecticut

Attorney Paul Nicolai has been admitted to practice in the State of Connecticut. He is now licensed in Connecticut, New York, Massachusetts and Washington, D.C.

More information on any of these subjects is available by calling. This material is for information and education purposes only.

It is not legal advice or a legal opinion.

Tarbell-Watters Building, 146 Chestnut Street, Springfield, MA 01103-1539

Telephone (413) 272-2000 • Facsimile (413) 272-2010 • E-Mail: [niclawgrp@niclawgrp.com](mailto:niclawgrp@niclawgrp.com) • Internet: [www.niclawgrp.com](http://www.niclawgrp.com)

though he never received an induction notice, signed an enlistment contract, or received an order or call to active duty prior to his resignation, he was entitled to reemployment.

### **Why This Is Important . . .**

Employees are entitled to reemployment after performing military service even if they resigned before they were legally bound to perform military service, as long as they left with the intention of performing military service and successfully carried out that intention.

### **SITE PLAN COPYRIGHT PROTECTED**

A surveyor made a site plan for the development of an assisted living facility under a contract which said the plans could not be used for the completion of the project by others without written permission. The surveyor also obtained a copyright for the plan. New architects amended the site plan and submitted it for approval. The surveyor sued for copyright infringement and other claims. A federal appeals court has allowed the claims to go forward.

### **Why This Is Important . . .**

The Court ruled a site plan can contain copyrightable material, just like an architectural drawing.

### **ORAL CONTRACT TOO VAGUE TO ENFORCE**

An oral contract that said the plaintiff was to be paid "very well" was too uncertain as to

payment to be enforceable. The plaintiff alleged the employer breached an oral contract to pay him a fee for helping form an alliance between the defendant and a third-party. The plaintiff alleged the defendant agreed to pay him "very well." The court effectively dismissed the case finding that "very well" provides no way to decide the nature and extent of the obligation.

### **Why This Is Important . . .**

Parties often enter into oral contracts. Many are enforceable. What many forget is that if the essential terms of a verbal contract are not defined it is likely the contract will not be enforced.

### **LIES COST MORE THAN DISCRIMINATION**

A woman's employer replaced her with a male. She was awarded \$250,000 in emotional distress damages. The commission noted that the employer's lies and deceit in the case compounded her distress and nearly caused the commission to close it.

### **Why This Is Important . . .**

Employer actions during an employment discrimination claim can impact the damages awarded to the employee.

### **ORAL PROOF NOT ENOUGH TO DEFEAT IRS**

A couple that owned a small business was liable for Social Security taxes on employees they had incorrectly characterized as independent contractors, according to the IRS. The only

evidence the couple offered was their own testimony that one worker was a partner and others were casual labor. A United States District Court judge found the testimony alone was insufficient.

### **Why This Is Important . . .**

Business owners must document the status of those they claim are not employees. Testimony alone may not be enough to defeat the IRS.

### **Law Information Available**

Active Nicolai Law Group clients receive monthly legal memoranda which discuss subjects affecting business. You can get them by:

- faxing a request to 413-272-2010
- EMAILing [info@niclawgrp.com](mailto:info@niclawgrp.com)
- visiting [www.niclawgrp.com](http://www.niclawgrp.com)

Recent memoranda address: HIPPA & THE HR DEPARTMENT - EMPLOYEE RIGHTS UNDER THE EUROPEAN UNION DIRECTIVE - CHANGING GIFT CERTIFICATE LAWS and a special report on WHAT THE PROPOSED FEDERAL OVERTIME REGULATIONS MEAN FOR YOUR BUSINESS. If you receive the electronic Nicolai Law Letter, you can get each memo by pointing and clicking on the name. That will automatically open the memo on your computer screen.