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BK&S ADVISOR

A FULL SERVICE LAW FIRM PROVIDING CREATIVE SOLUTIONS TO THE BUSINESS COMMUNITY

Businesses Must Dispose of Sensitive Data

by Ira L. Blank

A new federal rule requires each business that obtains a consumer report or information derived from a consumer report to appropriately dispose of consumer information. The rule was adopted as part of the battle against identity theft and consumer fraud.

The rule covers consumer reports and information derived from consumer reports, including personal information such as someone's address, telephone number, or Social Security number. The rule does not include information that does not identify individuals, such as aggregate information or blind data.

The rule applies to employers, consumer reporting agencies, resellers of consumer reports, lenders, insurers, landlords, government agencies, mortgage brokers, automobile dealers, waste disposal companies, utility and telecommunication companies, small entities within the finance and insurance industries, and other businesses that obtain consumer reports.

Covered businesses must appropriately dispose of any documents — whether paper, electronic, or in another format — that contain consumer information derived from a consumer report. The rule does not specify how or when information must be disposed of, but it says that reasonable measures must be taken to protect against unauthorized access to or use of the information. Appropriate disposal methods could include shredding, burning, or pulverizing paper records so any consumer information is unreadable. A personal shredder could be used. If a large volume of records require disposal, an outside records-shredding service could be used. For information stored electronically, such as computer discs or hard drives, overwriting it or wiping it clean could accomplish appropriate disposal.

Reasonable measures also include establishing policies and procedures for disposing of information properly.

Failure to comply with this new disposal rule can result in liability for actual damages and attorneys' fees, and, in the case of willful noncompliance, punitive damages. ■

Ira L. Blank is a principal in the BKS Labor and Employment Law Group.

The New Look Of Written Tax Advice

by Alan J. Ratchford

If you've received written communications from BKS since June 20, 2005, you may have already noticed disclosure statements emblazoning letters, memorandums, and even e-mails. The disclosure is to comply with new rules that the Treasury Department ("TD") has implemented regarding written tax advice from tax practitioners under Circular Number 230. Although the revised rules were implemented primarily to prevent taxpayers and their advisors from participating in and promoting abusive tax shelters, the rules cover a much broader spectrum, and include most forms of written advice that addresses federal tax matters.

The disclosure you will see on many communications regarding federal tax issues and almost all emails from BKS typically will be in the following or similar format:

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Take it to the Limit: An Analysis of Kelo v. City of New London and Its Effect on the Use of Eminent Domain for Economic Gain

by Eric S. Schmitt

I. INTRODUCTION

In a recently decided U. S. Supreme Court case styled Kelo v. City of New London, the Court ruled that economic development is a legitimate government or public interest that satisfies the "public use" requirement of the Fifth Amendment's Takings Clause. The result of the case affirmed the Connecticut Supreme Court's ruling and upheld the City of New London, Connecticut's ("City") development plan that included the use of eminent domain to acquire properties in an area of the City designated for revitalization and redevelopment.

II. FACTUAL BACKGROUND OF KELO v. CITY OF NEW LONDON

In the late 1990s the City found itself in need of an economic boost, something to bring residents and jobs back to the area. In an effort to jumpstart economic redevelopment, the City reactivated a private nonprofit entity established years earlier to assist the City in planning economic development named the New London Development Corporation ("NLDC"). A bond issue was also passed by the Connecticut State Legislature to support the NLDC's activities and toward the creation of the Fort Trumbell State Park ("Park") in the Fort Trumbell area of the City. Shortly thereafter, Pfizer, Inc. announced its desire to build a $300 million dollar research and development facility adjacent to Fort Trumbell. Local planners hoped to capitalize on this momentum as an economic catalyst for the City.

To that end, the NLDC created a development plan for the Fort Trumbell area and obtained all applicable state agency approvals. The development plan focused on seven parcels that would be developed to include a small urban village, shops, restaurants, new housing, a riverwalk, and a museum. After following the procedures set forth under the City code, the City approved the NLDC as its development agent to execute and implement the approved development plan. Importantly, the City also authorized the NLDC to purchase property or acquire property by way of eminent domain in the City's name.

The assemblage of property and the development was ultimately held up by a group of property owners who liked their homes, they liked their views, and did not want to sell. They eventually filed suit to prevent the taking of their properties.

The petitioners based their lawsuit on the notion that the taking of their properties violated the "public use" limitation of the Fifth Amendment's Takings Clause. Upon review, the Connecticut Supreme Court ruled in favor of the City because the takings were authorized by the state's municipal development statute, and in the court's view, economic development qualified as a goal that was in the public interest; thus, satisfying the public use requirement of the Takings Clause.

The U.S. Supreme Court was faced with the central question: Can the state use its power of eminent domain to effectuate economic development?

III. THE COURT'S DECISION

In Kelo, the U.S. Supreme Court was faced with the central question: Can the state use its power of eminent domain to effectuate economic development? The Court answered in the affirmative. In an opinion authored by Justice Stevens, the Court held that promoting economic development has long been a function of government and because the City's development plan served a public interest, the public use requirement of the Takings Clause was, indeed, satisfied.

To be clear, the Court did acknowledge that property cannot be taken from one individual for the purpose of conferring a benefit to another private party without a public benefit. The Court also warned against a city making such a transfer under the pretext of a public use. Notwithstanding such limitations, the Court pointed out that the government's pursuit of a public purpose will often benefit a private party.

In settling competing notions of what should or should not qualify as a public use or benefit and the judiciary's role in state or local governments' utilization of the tool of eminent domain, the Court succinctly stated:

"Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs."

The Court's ruling in Kelo avoided a "rigid formula and intrusive scrutiny" of exactly when a taking was authorized under the Constitution in favor of allowing legislatures discretion in determining what public needs or priorities justify the takings power.

The dissenting Justices disagreed with what they perceived was a blank check written by the majority for local government takings. Justice Thomas declared, "Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not." Justice O'Connor wrote, "Today the Court abandons this long held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another property owner."

In the end, the five Justice majority felt the City's actions in Kelo were authorized under the Connecticut economic development statute. As a result, the Court refused to second-guess the City's judgments of the efficacy of the development plan, just as it refused to second-guess what lands were required to effectuate the project. In this highly anticipated decision, the Court ultimately decided not to meddle in state and local legislative decisions or discretion. In doing so, the Court framed the Kelo debate and its decision as one centered on issues of federalism and the separation of powers, rather than those involving true loss of liberty and property as the petitioners argued.

IV. LOOKING AHEAD

In the wake of the Kelo decision, one might wonder what the future may hold for homeowners, developers and other interested parties. Currently, the halls of the Missouri legislature are controlled by Republicans who will face difficult political decisions in the next session regarding land use questions. As a party that has attempted to position itself as one championing economic development and reform, but also having a constituency that overwhelmingly values property rights of the individual, difficult choices will need to be made in 2006 and beyond. This political balancing act may prove to be a difficult one.

In the weeks following the Kelo decision, many states have pledged to curtail the government's ability to condemn land for the purpose of economic development. No doubt, such changes will need to pass constitutional muster, but one thing is clear: the Kelo decision has mobilized a groundswell of groups and individuals who wish to curb the perceived abuses of the role of eminent domain in private developments. In Missouri, Governor Blunt has already announced the formation of a task force that will review Missouri laws regarding economic development and eminent domain. It is likely that while existing tools for developers and city planners may be tweaked, the financial stakes are simply too high to do away with the current statutory scheme in its entirety.

V. CONCLUSION

In sum, the Kelo Court held government takings of property must be for public use and that economic development was a legitimate public use under the Fifth Amendment's Takings Clause. Moreover, the Court afforded states and local government the discretion to determine when the takings power can or should be used for development projects so long as they are authorized by law. ■

Eric S. Schmitt (Associate) is a member of both the Litigation and Zoning and Land Use Planning Practice Groups.

Avoid Being Sued for Trademark Infringement—Choose a Business Entity Name with Care

by Laila S. Wolfgram

Most business owners do not realize that when they choose a name for their business entity they may open themselves to liability for trademark infringement. When selecting a name, you must avoid choosing a term in which another party has a protectible interest, such as a trademark or even a recognized trade name. A quick search of the records of the Missouri Secretary of State will not suffice. If you inadvertently choose a name that is being used as a trademark or trade name by another entity, you may be found liable for trademark infringement and the monetary damages assessed against you could be devastating.

The name of a corporate, professional or business entity is recognized as what is termed a trade name. A "trade name" represents the reputation of the organization itself. On the other hand, "trademarks" identify and distinguish the various products and services sold by that entity. The distinction between trademarks and trade names is murky because there is a single purpose behind both—to identify the source of the goods or services sold by an entity while protecting the goodwill associated with the reputation of the organization and the quality of its products and services.

So how do you know if someone has a protectible interest in the name you want to use? The best way to proceed is to have a professional who specializes in trademark law conduct a search to reveal whether any potentially conflicting names are being used by other parties. Many business owners attempt to conduct these searches on their own. However, analyzing the results of the search is not as simple as it may seem. There are several subtle nuances in trademark law that escape the untrained eye.

> Choosing the right name at the onset can save you from wasting resources invested in a name that you have to change at a later date. While it may seem costly to have an attorney perform searches for you, it could be a small price to pay to minimize the possibility of being involved in expensive litigation in the future.

A less-than-well-known fact is that a party develops rights through use of its trademarks and trade names. While federal and state trademark registrations may bolster these rights, use of a name is the basis for obtaining exclusionary rights. In other words, the best way to protect your name, whether it is a trademark or trade name, is to get out there, advertise and sell your products and services.

However if you haven't done your homework, this can be a double-edged sword because consumer recognition of your entity's name is the key to whether or not you can be liable for trademark infringement. Whether or not the public associates the products you sell or the services you offer with your entity can either save or sink you. Problems arise if your publicly recognized name is similar to another party's previously established and publicly recognized name. In this circumstance, your entity may be liable for trademark infringement. The extent of public recognition of your entity's name can depend on how you structure your entity and whether you market your goods or services in connection with your entity's name or whether you focus on the brand names of your goods or services. If your entity's name is not recognizable in the general marketplace, you are at less risk of being liable for trademark infringement.

However, there is more. If you discover that another party has rights to a name similar to the one you want to use, you must determine whether the public is likely to be confused between the two. The test used to determine whether a name infringes upon another trade name or trademark is "likelihood of confusion". Several factors are considered when determining likelihood of confusion, including the similarity of the names; similarity of the nature of the goods or services; similarity of the channels of trade;

and the conditions under which, and buyers to whom sales are made. These rights prevent a party from riding the wave of an entity's established good will in the marketplace and benefit from it by confusing consumers. It is important to note that likelihood of confusion is determined on a case-by-case basis and the analysis considers all relevant factors. The best way to avoid creating confusion is by choosing a distinctive, unique name that is not used by another party for similar goods and services.

Choosing the right name at the onset can save you from wasting resources invested in a name that you have to change at a later date. While it may seem costly to have an attorney perform searches for you, it could be a small price to pay to minimize the possibility of being involved in expensive litigation in the future. ■

Laila S. Wolfgram (Associate) is a member of the Intellectual Property, Information Technology and E-Commerce Law Group at Blumenfeld, Kaplan and Sandweiss, P.C.

Firm News CASES OF NOTE

1. The firm successfully defended a distributor of industrial carpet and floor covering products in a products liability case filed in the Circuit Court of the City of St. Louis. Four individual plaintiffs and their spouses sought damages in excess of $15,000,000 alleging physical injuries and cognitive disorders from exposure to a chemical-tributilyntin-contained in a carpet cleaning product. After a four week trial, the client received a defense verdict on all counts.

2. The firm successfully prosecuted a case for clients seeking damages against a brokerage firm for breach of fiduciary duty in handling investment funds. The claim involved issues including churning of accounts, recommending and purchasing Class B Mutual Shares, purchasing of annuities and ultimately, the depletion of a substantial portion of assets meant for retirement. The case was settled for a confidential amount.

3. The firm successfully prosecuted a claim of accountant malpractice on behalf of a client. The case was brought in The Circuit Court of St. Louis County. The client had been victimized by embezzlement. The suit alleged that the company accountant was negligent in failing to perform monthly bank reconciliations which would have exposed the embezzlement. The case was settled for a confidential amount.

4. The firm served as trial counsel in a personal injury case in the Circuit Court of the City of St. Louis seeking compensation for a fan who was injured at a Rams football game at the Edward Jones Dome. The case raised difficult legal and factual issues as to under what circumstances the owners/operators of sports facilities may be liable for injuries to the fans who attend games. The case received press coverage as the trial began and the case was settled for a confidential amount.

5. The firm successfully prosecuted a breach of contract case for a client serving as a distributor for the manufacture of a medical management software package. The client had a five year distribution agreement and it was terminated after approximately two years. There were numerous allegations of breach on the part of the manufacturer, including breach of exclusivity provisions in the agreement and the termination itself. °The case was settled for a confidential amount.

LEONARD VINES

- Selected for inclusion in current edition of "The International Who's Who of Franchise Lawyers."
- Spoke at the International Franchise Association Annual Legal Symposium in Washington, D.C. in May 2005 on "Underreporting."

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Disclosure Under Treasury Department Circular No. 230. This communication (including any attachments) (a) was not intended or written to be used, and it cannot be used, by the recipient or any other taxpayer, for the purpose of avoiding penalties that may be imposed, under the Internal Revenue Code of 1986, as amended, on the taxpayer, and (b) cannot be used or referred to by anyone in promoting, marketing, or recommending a partnership or any other entity, investment plan or arrangement, to one or more taxpayers. Under Circular No. 230, practitioners are permitted to provide written tax advice for one of these purposes only if certain stringent requirements are met. If you would like us to provide this type of written tax advice, please contact us and we will be pleased to discuss the matter with you.

To understand the purpose of the disclosure, let's examine the new rules. The revised rules divide written advice from tax practitioners regarding federal tax issues into two categories: covered opinions and other written tax advice. A covered opinion includes any written tax advice, including electronic communications, that concern certain transactions that the Internal Revenue Service ("IRS") has determined are abusive tax shelters ("listed transactions"); transactions which have as their principal purpose to avoid or evade tax; and transactions that have as a significant purpose to avoid or evade tax if the written advice is a reliance opinion, a marketed opinion, subject to conditions of confidentiality, or subject to contractual protection.

The BKS disclosure references two types of covered opinions: reliance opinions and marketed opinions. The reliance opinion, which is the broadest category of covered opinion, is written advice that can be relied on in avoiding penalties under the Internal Revenue Code of 1986, as amended ("Federal Tax Penalties"), and that concludes at a confidence level of more likely than not (a greater than 50 percent likelihood) that one or more significant federal tax issues would be resolved in the taxpayer's favor. The written advice will not be considered a reliance opinion, however, if the tax practitioner prominently discloses that the advice is not intended to be used, and cannot be used, to avoid Federal Tax Penalties. A good deal of written tax advice would likely be considered a reliance opinion unless the tax practitioner discloses that it is not. Written tax advice is a marketed opinion, and therefore a covered opinion, if the tax practitioner knows, or has reason to know, that the written advice will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with or employed by the practitioner's firm) in promoting, marketing or recommending a transaction to one or more taxpayers.

Because of the potential for abuse, and because a client may be able to rely on the covered opinion in avoiding Federal Tax Penalties related to the advice, the new rules provide heightened standards for practitioners to follow in preparing covered opinions.

Because of the potential for abuse, and because a client may be able to rely on the covered opinion in avoiding Federal Tax Penalties related to the advice, the new rules provide heightened standards for practitioners to follow in preparing covered opinions. These standards include: requirements regarding the format and content of the written advice; certain mandatory disclosures; rules regarding the identification and ascertainment of the facts; limitations on assumptions made in formulating the opinion; requirements regarding

conclusions drawn, and representations as to the practitioner's knowledge and competence in the specific area of tax law. When requesting written tax advice from a tax practitioner, clients should be prepared to balance the additional expense of obtaining a covered opinion with the benefit of avoiding potential Federal Tax Penalties by relying on such advice.

Even written tax advice other than a covered opinion from a practitioner continues to be subject to significant standards. A practitioner may not give such other written advice concerning one or more federal tax issues if the practitioner does any of the following: (a) bases the written advice on unreasonable factual or legal assumptions, including assumptions as to future events (it is unreasonable to assume that a transaction has a business purpose or that a transaction is potentially profitable apart from tax benefits); (b) unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person; (c) does not consider all relevant facts that the practitioner knows or should know, or (d) in evaluating a federal tax issue, takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.

As was true prior to implementing the revised rules, certain standards continue to apply if a tax practitioner signs a tax return as preparer or advises a taxpayer to take a position on a tax return. A tax practitioner may not sign a return as preparer or advise a taxpayer to take a position on a return that does not have a realistic possibility of being sustained on the merits, unless the position is not frivolous and is adequately disclosed on the return. A position is regarded as having a realistic possibility of being sustained on the merits if a reasonable and well informed analysis of the law and the facts by a person knowledgeable in the tax law would lead such a person to a conclusion that the position has approximately a one in three or greater likelihood of being sustained on the merits. A frivolous position is one that is patently improper. Additionally, if a practitioner advises a taxpayer on taking a position on a return, the practitioner must inform the taxpayer of the penalties reasonably likely to apply with respect to the position, and of any opportunity to avoid such penalty by disclosure, including the requirements for adequate disclosure. A practitioner may generally rely in good faith on information furnished by the taxpayer without verification, but must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Even written tax advice other than a covered opinion from a practitioner continues to be subject to significant standards.

As a result of the new standards, you will most likely notice a disclosure on almost all written communications regarding federal tax matters that you receive from BKS opting the communication out of reliance opinion status unless you specifically request a covered opinion. The new rules were not designed to discourage legitimate tax planning, so you should continue to consult BKS with all of your tax planning needs. If you have any questions regarding the revised rules, please contact your BKS advisor. ■

Alan J. Ratchford (Associate) is a member of the firm's Business Law Practice Group, where he concentrates his practice in taxation, general corporate and commercial law.

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ALAN RATCHFORD AND NICOLE ZELLWEGER

- Admitted to practice in the state of Illinois in May 2005.

ERIC SCHMITT

- Recently sworn in as an Alderman for the City of Glendale, MO.
- Recently appointed to the DeSmet Jesuit High School Board of Trustees.

SCOTT MALIN

- Admitted as a Fellow of the American College of Trust and Estate Counsel.

LISA POOL BYRNE

- Recently elected as the 2006 President of the St. Louis Chapter of Commercial Real Estate Women (CREW - St. Louis).

MATT ROSENBERG

- Has joined the firm as a principal and is a member in the firm's Intellectual Property, Information Technology & E-Commerce Law and Litigation practice groups, where he concentrates his practice in the area of intellectual property and litigation involving intellectual property or technology matters.

  Matt earned his J.D. in 1996 from Washington University, and received his B.S.M.E. from Washington University in St. Louis in 1993 after previously attending the Georgia Institute of Technology.

  Matt is licensed to practice law in the State of Missouri and before the U.S. Patent and Trademark Office. He is a member of the Bar of several federal courts, including the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit. ■

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