

THE JURIS DOCTOR SMALL BUSINESS WATCH

A NEWSLETTER FOCUSING
ON PLANNING FOR THE
SMALL BUSINESS

Daniel H. McKinney & Associates
Small Business Planning Group

Daniel H. McKinney

Certified by the Ohio State Bar Association:
Estate Planning, Trust, & Probate Law



September, 2005

VIOLATE FEDERAL TELEPHONE DO NOT CALL LAW AND PAY MINIMUM DAMAGES OF \$500.00 PER OCCURRENCE.

Gregory Reichenbach received a call on his home phone from Precision Windshield Repair stating:

"Hi, this is a message from Precision Windshield Repair. Do you have a crack or chip in the windshield of your car. In most cases the repair is absolutely free. If you would like to speak to a repair specialist, please press 1, if you would like to leave a message, please press 2. If you would like to give us a call, call us at 1-877-244-7349."

Reichenbach pressed the number requesting a call back and within the hour he received a call from Keith Armbruster of Precision. Reichenbach asked to be placed on the company's do not call list. At this point, Armbruster put Corey Chung, who identified himself as the owner, on the phone. Reichenbach asked again to be on the company's do-not-call list and also requested that Chung send him a copy of the company's do not call policy. When he didn't receive the

policy, Reichenbach sent a letter to Chung asking him again for a copy of the policy and also demanding \$700.00 for violation of the federal Telephone Consumer Protection Act.

After Reichenbach filed suit, the trial court, without explanation, awarded summary judgment to Precision but, undaunted, Reichenbach appealed.

The Telephone Consumer Protection Act makes it unlawful to place a call to any residential telephone using artificial or prerecorded voice without the prior express consent of the person called* and allows a person to sue for actual monetary loss or for \$500.00 in damages for each violation, whichever is greater.

Another part of the law, which incorporates almost identical language, provides for damages if a person has received more than one telephone call within any 12 month period. Precision hung its hat on this section, maintaining that since there weren't two calls in a twelve month period, there was no violation. But the Toledo

Court of Appeals said no dice.

The section referring to only one violation, applied to prerecorded message calls; the other section, requiring more than one call in a 12 month period, applied to live calls. Precision's call advertised the availability of services so it fit the statutory definition of an unsolicited advertisement. Finally, Precision did not have a written policy, available on demand, for maintaining a do-not-call list at the time the call was made**.

After finding that Precision had violated the Telephone Consumer Protection Act, all that was left was for the trial court to determine how much Precision would pay.

* *Certain exceptions exist for emergencies, nonprofit organizations etc.*

** *Certain exceptions exist for persons having an established business relationship, tax-exempt nonprofit organizations, etc.*

RIGHT OF BUSINESS TO REPURCHASE SHARES MUST BE IN WRITING

During her employment with Callos, Inc.*, Lillian Greco bought seven shares of stock for \$350.00. After leaving the company Callos demanded that Greco sell her shares back for \$700.00 according to the oral agreement Greco purportedly made when she purchased the stock. Greco maintained she did not have to sell the stock because there was no written buy-sell agreement nor were terms of repurchase noted on the stock certificate. Although each party asserted a different legal theory, both the trial and the appellate court, agreed with Greco.

Ohio Revised Code Section 1701.23(A) states that shares may be redeemable at the option of the corporation upon the conditions, price, and notice as provided in the express terms. [emphasis added]

Although the stock certificates had carried the notation, "The transfer of these shares is restricted by agreement of the shareholders and the corporation" and the buy-sell agreement was reflected in the minutes of a shareholders' meeting, the court said that won't do. A nonspecific restriction on the stock certificate and the shareholders' meeting minutes are not the kind of writing required by the Revised Code as

interpreted by the Supreme Court.

Many times, the last thing an owner of a small business wants is to be in business with a former employee. If you want your company to be able to redeem stock under certain conditions, the express terms of the agreement should be memorialized in a written buy - sell agreement drafted by an experienced attorney who can advise you on financing, valuation, tax, and other issues. Also, the stock certificates should state the express terms; or should contain a summary of the express terms; or should contain a statement that the corporation will mail a copy of the express terms on written request.

This case is pending before the Ohio Supreme Court. However, the court accepts jurisdiction in a very, very few cases and, from a purely statistical standpoint, is, therefore, unlikely to accept this case.

Callos Professional Employment v. Greco (2005), Mahoning County

* Now Callos Professional Employment, LLC following a merger between Callos, Inc. and Callos Professional Employment, Inc.

IRS PLAYS SCROOGE AGAIN!

Employers are finding employees a diverse group, so instead of giving a "one-size-fits-all" gift basket for birthdays, holidays, or special business occasions, many would like to give employees a gift coupon. A coupon gives employees more choices and greater convenience as well as reducing costs for the employer.

One company, which we shall refer to as ABC Inc., instead of gift baskets provides employees with a \$35.00 coupon which lists stores where the coupon is redeemable for grocery products and is shaped like a check.

The tax code says gross income is income from whatever source. But gross income does not include any de minimis fringe benefit that is so small to make accounting for it unreasonable or impractical. The regulations provide examples of de minimis fringe benefits that are excludable from an employee's gross income. These include birthday or holiday gifts of property (not cash) with

a low fair market value, occasional theater or sporting event tickets, flowers, fruit, books, or similar property provided to employees under special circumstances.

Well, nothing like the IRS to act the Scrooge as ABC, Inc. discovered. The IRS said a gift coupon operates in essentially the same way as a cash benefit. It is not impractical to account for gift coupons: they have a face value of \$35.00 making the value of the coupon includable in gross income. So, gift baskets and holiday dinners are excluded from gross income of the employee but cash type gift coupons are not, though both are deductible by the employer. Since this determination was communicated by a technical advice memo which cannot be cited in court as legal authority, it remains to be seen if the tax court will support the conclusion. (*Technical Advice Memorandum 200437030*)

2005 BANKRUPTCY ACT EXTENDS PROTECTION FOR RETIREMENT FUNDS

The 2005 Bankruptcy Act * enacted to prevent what some, particularly credit card issuers, perceived as abuse of the Bankruptcy laws, actually extends protection available for a debtor's retirement funds.

Prior to the Act a debtor could protect retirement funds from creditors either through use of an exclusion or an exemption. If the funds were in an ERISA plan they were excluded from the bankruptcy estate. A debtor's interest in IRAs and Sep-IRAs, 403(b) plans, 457 tax-exempt organization plans, government plans, and plans that covered working owners, but not common law employees**, were not eligible for the exclusion. But even if a debtor's funds didn't qualify for an exclusion, the funds could potentially be protected through the use of an exemption.

Exempt property is property that is not subject to creditors' claims. The Bankruptcy Code permitted debtors to choose either the federal exemptions or the state exemptions but it also permitted states to "opt out" of the federal exemptions leaving only state exemptions available. Additionally, even if the federal exemption was applicable, the exemption only permitted the debtor to protect payments from the plan because of illness disability, death, age, or

length of service and which were reasonably necessary for the support of the debtor. Some courts interpreted this provision to require that the debtor must have a right to immediate payment in addition to the other requirements.

With the 2005 Bankruptcy Act, all debtors can exempt IRS statutory retirement funds including defined benefit and contribution plans, 401(k) plans and 403(b) annuities. However, retirement funds in "non-qualified" accounts, such as IRAs, SEP-IRAs, Roth and SIMPLE IRAs, and government plans are subject to a cap of \$1million.

The exemption is available without regard to the prior requirements of illness, age, disability, and necessary support. Additionally, the exemption is available to all individual debtors regardless of whether their home state has opted out of the federal exemptions.

** Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

***generally sole proprietors, partners and sole shareholders*

IF MAKING A PROFIT KEEP IT IN YOUR POCKET

The National Federation of Independent Businesses offers the following suggestions to maximize profits by cutting taxes:

- If you are a sole proprietorship or partnership and producing a net profit in excess of reasonable compensation, incorporate as an S corporation. Only the amount of reasonable salary should be subject to payroll and income taxes
- Own real estate and lease it back to your corporation
- If you work from home explore home

office deductions - but it is imperative to keep good records.

- Establish a qualified retirement plan or IRA. Explore all options with a knowledgeable professional who can guide you to the plan best for you to maximize tax benefits
- Explore tax credits created by congress for you business
- Keep good records including travel, meal and entertainment expenses

DANIEL H. MCKINNEY & ASSOCIATES SMALL BUSINESS PLANNING GROUP

15 E. 8th St.
Cincinnati, OH 45202
(513)721-0200
dhmck@msn.com
www.TheMcKinneyGroup.com

Daniel H. McKinney is the founding attorney of McKinney & Namei, Co., LPA and head of the Daniel H. McKinney & Associates Small Business Planning Group. He is a native of Cincinnati and a graduate of the Ohio State University and Harvard Law School. Mr. McKinney represents many small businesses and individuals in corporate, tax, real estate, immigration, pension and probate matters. He is board certified by the Ohio State Bar Association in estate planning, trust & probate law and lectures widely. He was named an Ohio Super Lawyer by Cincinnati Magazine in 2004 and again in 2005.

Linda S. Bolin practices Medicaid, long term care, business, probate, health, and elder law. She has served as vice-chair of the elder law committee of the Cincinnati Bar Association, vice president of the Chase Women's Law Caucus, president of the Dallas Metro Counseling Association and trustee of the Cincinnati Arts Consortium, the Sarah Center, and the Terrace Guild. Previously, she was a city planner and director of planning for the City of Cincinnati Health Department.

Robert Herzog is a 2002 graduate of the Salmon P. Chase College of Law and a member of the Ohio, Cincinnati, and American Bar Associations. Mr. Herzog's focus is in the area of small business, probate and estate planning. He is also a correspondent for WB64 TV.

**DANIEL H. MCKINNEY & ASSOCIATES
MCKINNEY & NAMEI, CO., LPA
15 E. 8TH ST.
CINCINNATI, OH 45202**