

CUMMINGS, McCLOREY, DAVIS & ACHO CONTINUES TO GROW...

JULY, 2001

If you have not been in contact with an attorney from Cummings, McClorey, Davis & Acho lately, you will be amazed at the changes that have taken place recently. We grew by hiring several dedicated and highly skilled attorneys, merging with a firm in Northern Michigan and creating an entirely new department.

Since March, 2000 twelve highly skilled attorneys have joined our firm. Eugene W. Pyatenko rejoined our firm in March, 2000 as a partner and brought with him a wealth of experience in debtor/creditor rights, bankruptcy, business and corporate transactions involving banking, real estate, mergers and acquisitions, as well as international ventures. He works in our Livonia office.

In April, 2000, Patrick Moritz rejoined our firm in our Livonia office. Patrick concentrates his practice on personal injury defense, municipal law, civil rights and insurance coverage analysis.

Anne McClorey McLaughlin rejoined our firm in May, 2000. She works in our Livonia office and concentrates her practice on personal injury defense, municipal law, municipal liability and defense, appellate law and insurance coverage analysis.

In July, 2000 W. Gregory Shanaberger joined, and Eileen K. Husband rejoined, our firm as partners. Greg, who works in our Farmington Hills office, concentrates his practice on corporate and commercial litigation, employment and labor, domestic relations and business/commercial transactions. Eileen, who works in our Livonia office, is in charge of our Employment and Labor Law Division and concentrates her practice on employment and labor law, commercial litigation, gaming law, commercial transactions and franchise law.

We welcomed James Acho and Patrick Sturdy as associates to our firm in January, 2001. Jim, who works in our Farmington Hills office, focuses his practice on employment and labor law, personal injury defense and sports law. Patrick, who works in our Livonia office, focuses his practice on municipal law, personal injury defense, corporate law and business transactions and securities law.

In February, 2001 Sam Ayyash joined our firm and brought with him an abundance of experience in workers' compen-

sation. Sam, a former Workers' Compensation Magistrate, is in charge of our Workers' Compensation Division. He works in our Livonia office, and, in addition to workers' compensation, his practice areas include personal injury defense and business litigation.

In April 2001, Linda Davis Friedland and Sharon Linenfelter joined our firm as associates in our Livonia office. Linda focuses her practice on general civil litigation, municipal law, estate planning and family law. In addition to practicing in Michigan, she is also licensed to practice law in Wisconsin and Virginia. Sharon focuses her practice on personal injury defense, insurance coverage disputes and municipal law.

New, and returning, employees are not the only news at our firm. In October, 2001 Cummings, McClorey, Davis & Acho merged with The Crowley Noorman Law Firm in Traverse City, Michigan. Philip Crowley joined our firm as a partner, and although he is in the process of moving to Tampa, Florida, he will remain of counsel to our firm and our firm's clients. Jeff Noorman joined our firm as an associate. Their practice areas include municipal and governmental entity law, professional liability defense, employment and labor law, insurance and general tort defense.

To ensure that our newsletters and press releases are sent out in a timely manner, Cummings, McClorey, Davis & Acho added the newest department to our firm in April, 2001. The Marketing and Client Relations Department is responsible for creating our monthly newsletter, press releases, proposals to potential clients, attorney biographies, keeping our web site updated and other marketing and client relations responsibilities. Check out our new logo, which is being introduced in this newsletter!

At Cummings, McClorey, Davis & Acho our focus has always been on finding ways to better serve our clients. That was our firm's vision when we were founded in 1965, and it continues to be our vision in 2001. Adding twelve qualified and dedicated attorneys to our firm, merging with a firm and creating the Marketing and Client Relations department are all steps we have taken to ensure that our clients continue to receive the best possible service.

Timothy Young, Managing Partner

in this issue

Developing E-Commerce Strategies	2
Areas of Practice	2
Attorney Profile	3
Updates in Probate Law	3
Office Locations	4

DEVELOPING E-COMMERCE STRATEGIES FOR FRANCHISE SYSTEMS

The Internet presents a limitless channel of distribution for franchise systems. In theory no market is unreachable. In order, however, to successfully harness the full power of E-Commerce, the franchisor's expansion rights and the franchisee's legal right to an exclusive territory must be carefully balanced.

Franchise agreements that predate cyberspace technology most likely do not specifically address E-Commerce sales. Courts in some jurisdictions fill this gap in the agreement by imposing a covenant of good faith and fair dealing upon the franchisor regarding such sales. Some franchise systems have addressed this issue by sharing with the franchisee the revenue from Internet sales to customers within a franchisee's protected territory. In some situations franchisees have sued claiming lost sales from encroaching Internet sales.

In a recent case, *Emporium Drug Mart, Inc. of Shreveport v Drug Emporium, Inc.*,¹ an Arbitration panel found Emporium's Internet site was a "virtual store" that infringed on the exclusive territory rights of its franchisees. The Shreveport franchise agreement provided Shreveport with the exclusive right to build and operate drug stores within Shreveport's territory. The agreement also stated Emporium's intent to expand strictly with brick-and-mortar stores. However, Emporium's web site referred to itself as a "full service on-line drugstore". The Arbitration panel observed the only difference between the Internet virtual store and the brick-and-mortar store was that a customer enters through a "window" instead of a door. Consequently the panel found the Internet sales constituted an unlawful encroachment and issued a preliminary injunction prohibiting the Internet sales.

While the Emporium arbitration decision is not binding on other cases,² the panel's decision is persuasive and provides a valuable learning experience for the development of an E-Commerce site. It also provides guidance for drafting future franchise agreements with respect to web site sales.

The optimum E-Commerce site is one that enhances system wide sales without stealing business from franchisee stores and is developed jointly by the franchisor and its franchisees. Usually franchisees act in an advisory capacity. Involving franchisees in market research of cyberspace sales should ease the perception by franchisees that the Internet market may cannibalize their store sales. Aside from the economic and logistical considerations, franchise systems should also review the following legal issues while developing an E-Commerce Plan:

- Do current franchise agreements reserve the right to the franchisor to sell products via alternative methods of distribution within a franchisee's alleged protected territory? Is the franchise business system defined as static or does it include future improvements?
- Do current franchise agreements grant exclusive territory to franchisees or are exclusive territories disclaimed? If a territory is granted, what is its scope (i.e. operation of a store or use of a trademark)?
- Do current franchise agreements grant franchisees the right to establish web sites and make Internet sales? If so, what are the ground rules? Is the franchisee's web site limited to advertising only to create brand awareness?
- Is there any communication and/or conduct between the franchisor and franchisees about Internet activities that may create a reasonable expectation that the franchisor will not compete with the franchisee via the Internet?
- In the event an Internet sale results in direct loss of a sale by a franchisee, how will they be fairly compensated? What is a fair price for peace? Who will determine that a direct loss of a sale has occurred, and how will it be determined?

¹ *Emporium Drug Mart, Inc. of Shreveport v Drug Emporium, Inc.*, AAA No. 71114012600 (September 2, 2000).

² Internet encroachment cases are pending in Missouri and New York, *Angel v H&R Block, Inc.* filed May 25, 1999 and *Kabex v Wedding Pages, Inc.* filed August 14, 2000.

Eileen K. Husband

Michigan's Premier Full Service Law Firm

Areas of Practice

Bankruptcy and Insolvency • Corporate and Business Law • Estate Planning • Franchise Law • Commercial Litigation • General Liability and Prevention • Workers' Compensation Defense • Employment and Labor Law • Environmental Law • Government, Municipal and Administrative Law • Insurance and Reinsurance Coverage, Defense and Subrogation • Mergers and Acquisitions • Personal Injury Litigation and Defense • Real Estate • Turnaround and Financial Consulting • Sports and Entertainment Law • Technology and Computers • Civil Litigation • Appeals • School Law • Public Official Liability • Domestic Relations

Attorney Profile

James R. Acho



James Acho focuses his practice on Employment and Labor Law, Personal Injury and Sports Law. Jim is a member of the Young Lawyer's Section of the American Bar Association and the State Bar of Michigan. He graduated from Thomas M. Cooley Law School in 2000. While there, he received the prestigious award of top litigator in his class in the Trial Advocacy Program.

Prior to attending law school, Jim was associate head coach of the men's basketball program at Madonna University in Livonia, Michigan. He also authored a critically-acclaimed book in 1997, *The Foolish Club*, which chronicled the history of the American Football League. He earned his Bachelor of Arts in English and Communication from St. Francis College in 1993. He can be reached at jacho@cmda-law.com or by calling 248.737.3333.

Eileen Husband



Eileen Husband started her legal career at Cummings, McClorey, Davis & Acho 15 years ago and has recently returned as a partner in charge of our Employment and Labor Law Division. Her practice areas include Employment and Labor Law, Franchise Law, Commercial Litigation, Gaming Law and Commercial Transactions. She graduated from Detroit College of Law in 1985.

Before returning to the firm, she served as General Counsel for Little Caesar Enterprises, Inc. She is a member of the State Bar of Michigan and the American Bar Association. She was a contributing writer to "Employment Law in Michigan, An Employer's Guide" for the Michigan Institute for Continuing Legal Education in 1997. Eileen received her Bachelor of Arts in Economics from University of Michigan in 1982. She can be reached at ehusband@cmda-law.com or by calling 734.261.2400.

TIME TO UPDATE YOUR WILL?

IMPORTANT CHANGES IN MICHIGAN'S PROBATE LAW COULD AFFECT THE CONTENT OF YOUR WILL

In 2000, Michigan's new Probate Code went into effect. EPIC, the Estates and Protected Individuals Code, governs all estate planning in Michigan, including wills, trusts, guardianships and conservatorships. The previous law, which was last revised in 1979, had not kept up to pace with the public's demand for simpler estate procedures and cost of living increases.

One important aspect of the new law is that the changes apply to all estate planning documents, regardless of when it was drafted or executed. If you prepared a will prior to April, 2000, it should be reviewed to make sure it continues to be followed as you intended.

One significant effect the new Probate Code has on existing wills is the definition of "by representation" found in many wills that describe the way gifts of property should be divided in a will or trust. Under the new law, a gift by a person in a will to a child who predeceases the person is to be reallocated among any other children in equal shares, with grandchildren dividing the balance among them. The previous law had a different presumption that allocated shares equally among children, with grandchildren sharing any deceased parent's share.

Additional changes made in January 2001 to the guardianship law may affect health care directives and bond requirements. Upcoming estate tax changes, when finalized, require review of wills and trusts to ensure that appropriate language is included.

Other important highlights of EPIC are:

- The amount a surviving spouse or minor child receives as property, homestead and family allowances has been increased.
- If someone dies without a will, the amount the spouse receives from the estate, before it is divided among the spouse and other heirs, is raised from \$60,000 to \$150,000.
- Guardians may be appointed without a will by using other documents.
- Claims against a decedent's living trusts are subject to a four-month statute of limitations similar to the one covering wills. Previously, those trusts were vulnerable to claims for up to six years.
- Survivors can quickly settle the estate of someone who dies leaving less than \$15,000 without going through the probate process.

Wills and trusts are extremely important estate planning documents. With the new law, it is very important to state how you wish to have your estate divided. Otherwise, your estate may not be distributed the way you wished. To ensure that your will has not been altered by changes in the law, meet with an attorney from Cummings, McClorey, Davis & Acho soon.

If you have not yet designed your will or trust, contact an experienced attorney at our firm who can assist you with all your legal needs. Remember, wills need to be drafted in concert with professional financial and tax advice. Our firm has been helping clients draft wills, trusts, guardianships and conservatorships since 1965.

CUMMINGS, McCLOREY, DAVIS & ACHO
OFFICE LOCATIONS

MICHIGAN

Livonia

33900 Schoolcraft
Livonia, MI 48150
734.261.2400
Fax: 734.261.4510

Battle Creek

25 West Michigan Ave.
Suite 909
Battle Creek, MI 49017
616.963.7800
Fax: 616.963.4707

Farmington Hills

30555 Northwestern Hwy.
Suite 200
Farmington Hills, MI 48334
248.737.3333
Fax: 248.737.3330

Marquette

307 South Front Street
Marquette, MI 49855
906.228.8263

Roseville

25509 Kelly Road
Suite C
Roseville, MI 48066
810.775.5200
Fax: 810.777.6896

Traverse City

3939 M-72 East
Williamsburg, MI 49630
231.938.2888
Fax: 231.938.2988

ARIZONA

Phoenix

1850 North Central
Suite 1450
Phoenix, AZ 85004
602.207.2829
Fax: 602.207.6943

CALIFORNIA

Woodland Hills

21031 Ventura Blvd.
Suite 1200
Woodland Hills, CA 91364
818.884.6666
Fax: 818.884.8677

GERMANY

Berlin, Germany

Manquen, Lokau & Partner
Rechtsanwälte
Rheinstraße 45
12161 Berlin

Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

CUMMINGS • McCLOREY



DAVIS & ACHO, P.L.C.

ONLAW is a monthly publication from
Cummings, McClorey, Davis & Acho, P.L.C.

Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or comments to the editor should be addressed to the attention of Jennifer Sherman.

ONLAW

Cummings, McClorey, Davis & Acho, P.L.C.
33900 Schoolcraft
Livonia, Michigan 48150
www.cmda-law.com
E-Mail: cmda@cmda-law.com
1-800-865-7222 ext. 223

Editor-in-Chief/Graphic Designer:
Jennifer Sherman