

OHRENSTEIN & BROWN

OMNIBUS

INSIGHTS INTO THE DECISIONS THAT MOST IMPACT YOUR BUSINESS



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Vicarious and Contractual Liability in an Outsourced World

If a company hires an agent to recruit, supply, screen and pay an employee, and the employee harms someone in the course of that employment, which “employer” should be responsible? At common law, a borrowed servant became the sole responsibility of his or her temporary master, who thereafter assumed vicarious liability for all acts of the servant undertaken in the course of his or her employment. Today, as staffing agencies enjoy ever increasing popularity in white collar and other service industries that fall beyond the traditional scope of workers compensation laws, these erstwhile simple questions of who retained control over the borrowed servant, or “special employee,” have been complicated by plaintiffs’ attorneys who may now see two deep pockets for every injury.

“Given the disputes over control and screening the employee, the Court could not dismiss those claims without a jury trial.”

The black letter rules are still as simple as they were 100 years ago: the employer who directs and retains control over the offending employee should bear liability. However, there is an increasing trend to rely wholly on staffing agencies to not only refer, but to also recruit, screen and actually pay employees. In what could rise to a principal-agent relationship between the hiring company and staffing agency, the plaintiffs’ bar has found fertile ground to sow seeds of fact to keep as many defendants in the case as long as possible.

continued on page 2

Industry Watch

The New Indoor Environmental Toxins: Are You Prepared?

Join us for this half-day conference and learn about the growing number of new environmental toxins that pose a threat to your business. Industry leaders will provide practical tips to help you protect your business and avoid future litigation. In just one morning you’ll learn:

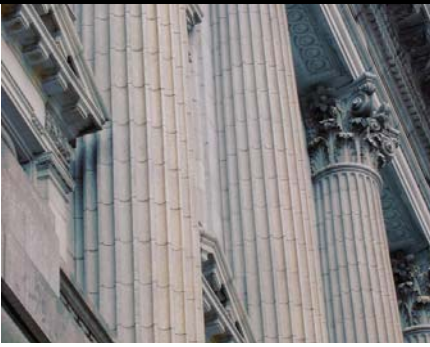
- What the new toxins are and why you’re at risk
- Recent legislation & decisions that impact environmental cases
- Best practices in prevention, remediation & managing risk
- How to insure against indoor pollution liabilities

See page 4 for registration information.



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Outsourcing Liability *continued from page 1*

Great Northern Ins. Co. v. Paino Associates, a recent case from Massachusetts where property insurers, the owner, tenants and a staffing agency litigated for more than three years over who was responsible for arson damages caused by a tenant’s temporary employee, provides a timely example of the potential conflagration these cases possess. In *Great Northern*, a building tenant, “Transcore,” contracted with a staffing agency to provide an employee who later burned down the building. The insurers and another tenant sued the owner and Transcore for negligently providing security. Transcore impleaded its staffing agency and both disputed who had control over the offending employee and whether the staffing agency had been required to conduct a background investigation. The Court explained that negligent hiring, supervision and retention can impose direct liability on an employer for “failing to adequately respond to information known or reasonably available” about the employee -- even where the acts were well beyond the scope of employment. Given the disputes over control and screening the employee, the Court could not dismiss those claims without a jury trial.

A few simple steps can be taken to protect companies seeking to outsource human resources.

First, standardize your contracts to place affirmative duties on the staffing agency. At a minimum, the agency should agree to defend and indemnify the company for any and all acts of the special employee and the acts or omissions of the staffing agency in properly screening the employee.

Second, require the staffing agency to name the company as an additional insured under the appropriate policies, enumerate the required limits and demand the right to

endorse those policies before the job starts. These policies may include CGL, automobile liability, employers’ liability and workers compensation to name a few. It is important to remember that where workers compensation benefits apply, both the company and the staffing agency can be protected by the exclusivity of the statutory remedy.

Third, require the staffing agency to conduct background investigations on all candidates and certify, preferably by boilerplate referral form, that no adverse information was revealed. It is important to note that if the company requires the results of the background investigation to be furnished, it may be creating a duty to inspect them. In some cases, a better precautionary measure is to simply run a background check for sensitive positions — the standard for negligence is as low as “should have known”.

Finally, because “control” over employees remains a central factor in liability analyses, particularly where workers compensation laws are at issue, it is important not to overly complicate the contract. For example, a non-standardized contract that delineates which employer has control over which aspects of the employee’s job, training or work-site could actually create questions of fact regarding control that a clever attorney could use to preclude dismissal. A simple rule is that if it doesn’t need to be in the contract, don’t put it there.

Not only will these clauses aid in clarifying liability for courts and attorneys, they will also discourage third-party actions between staffing agencies and companies by imposing additional contractual liability on the staffing agency that tries to pass the buck. Whether you are sued by an injured plaintiff or your former business partner, the high costs of litigation are the same.

— By Matthew Bryant

By the Numbers

(stats from industry-related source*)

Age Matters: What Workers Want on the Job

PRIORITY

35 and Younger

- 1 Work/life balance
- 2 Compensation/pay
- 3 Job security
- 4 Benefits

36 to 55

- 1 Benefits
- 2 Compensation/pay
- 3 Work/life balance
- 4 Job security

56 and Older

- 1 Feeling safe
- 2 Benefits
- 3 Job security
- 4 Compensation/pay

Workplace benefits
interest grows with time.



Commercial RICO Claims Based on Fraud Reigned In

— By Matthew Bryant

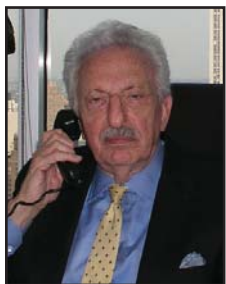
In *Anza v. Ideal Steel Corp.*, (Slip Op.) No. 04-433 (Jun. 5, 2006), the Supreme Court reversed a Second Circuit holding that could have opened the floodgates on the use of civil RICO claims as an ad hoc business tort between market competitors. This case involved a local business dispute between Ideal Steel (“Ideal”) and National Steel Supply (“Anza”), both of which sold steel mill products and services as primary competitors in the Bronx and Queens. Ideal alleged that Anza engaged in a scheme to wrongfully deprive Ideal of market share by not charging sales tax to cash customers, thereby reducing prices but not profit. Plaintiff claimed that this resulted in a pattern of racketeering activity by filing false tax returns via mail and wire fraud and stated claims under §§ 1962 (c) (prohibiting conducting interstate

commerce via racketeering activity) and (a) (prohibiting investing racketeering income in interstate commerce).

Judge J. Berman of the Southern District dismissed the complaint holding that proximate cause could not be shown because: (1) RICO violations based on fraudulent statements require reliance; and (2) Ideal could not show reliance on the statements made to the state. A Second Circuit panel reversed, holding that where the pattern of racketeering activity was intended to, and did, aid the competitor, proximate cause under § 1962(c) is met even if the fraudulent statements were made to a third party. Likewise, § 1962(a) required only that funds used in interstate commerce that were “traceable” to the predicate acts.

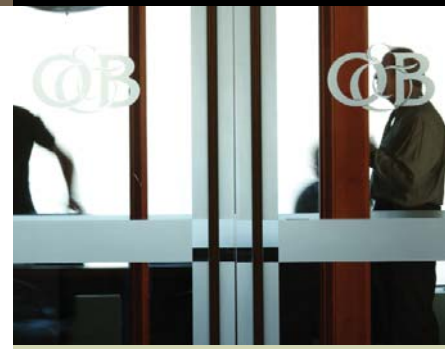
Log onto www.OandB.com to read more of this article.

Catching Up with Senator Ohrenstein



Fred Ohrenstein, O&B founder and former New York State Senator, has been actively consulting and lobbying on behalf of for-profit and non-profit organizations and other clients of the firm. His recent projects have included his consultation with the Metropolitan Transportation Authority on their five-year capital plan; representation of the wine industry in their efforts to legalize Internet sales across state lines; and appearances in front of state agencies on behalf of

companies whose objectives include doing business in New York City, particularly lower Manhattan. Fred has also advocated on behalf of corporate and healthcare concerns before the New York State Insurance Department, the New York State Banking Department, the New York State Legislature and the U.S. Congress. Fred also devotes time to the Museum of Jewish Heritage of which he is Vice Chairman, and to the Baruch School of College Affairs of which he is a member of the advisory committee. Fred can be reached via email at manfred.ohrenstein@oandb.com.



O&B NEWS

On August 13th, O&B proudly sponsored the Sprint for the Arts, a 5K race to benefit the Nassau County Museum of Art. Hundreds of participants joined together to have fun, compete for prizes, and raise much needed funds for the museum.



Racers awaiting the start of the Sprint for the Arts

Mike Brown's efforts on behalf of Jamaica Hospital in its dispute with Oxford Health Plans received nationwide coverage in an article in The New York Times' Metro Section (5/30/06). To read a summary of the article, visit: www.oandb.com/newsroom-news.html

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Join Us at these Events:

10/23 **ACCA Annual Conference**

Topic: Insurance Claims and the Board of Directors: Is There a Conflict of Interest?

Time: 2:30 - 4:00 p.m.

Location: Manchester Grand Hyatt, San Diego, CA

Registration: www.acca.com/am/06/

11/2 **The New Indoor Environmental Toxins:
Are You Prepared?**

Time: 8:30 a.m. - 2:30 p.m. (buffet lunch included)

Location: Association of the Bar of the City of New York

Registration: www.nycleanbuildings.com

**Early bird discounts! Save \$50 if you register by
October 2nd!

Information contained in this publication should not be construed as legal advice or opinion, or as a substitute for the advice of counsel. The enclosed materials may have been abridged from other sources and are provided only for educational and informational purposes.

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