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Your Grandmother Doesn't Work for Free: Volunteer and Intern Positions Under Closer Scrutiny

Wesley C. Redmond, 205.250.8319, wredmond@bakerdonelson.com
Kathryn Hinton, 404.223.2216, khinton@bakerdonelson.com

Rhea Lana Riner, owner of children's clothing consignment franchise Rhea Lana's, has sued the U.S. Department of Labor (DOL), alleging that the department harmed her consignment franchise business when it arbitrarily classified her volunteers as employees under the Fair Labor Standards Act (FLSA). Her suit has put the minimum wage debate front and center.

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Excessive Celebration – Penalty Declined

Harrah's Casino Successfully Overturns Personal Injury Verdict Arising from Super Bowl Victory Celebration

Benjamin West Janke, 504.566.8607, bjanke@bakerdonelson.com

In a fact-intensive case, the Louisiana Appellate Court has reestablished clearer guidance in the area of premises liability and noted an important distinction between the role of security personnel as a protection against criminal activity – and not necessarily a guard against accident and injury.

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Four Crisis Management Lessons from the Disappearance of Flight MH370

Sara M. Turner, 205.250.8316, smturner@bakerdonelson.com

The disappearance of Malaysia Airlines Flight MH370 is no doubt a tragedy that will live in our collective memories for years to come. It is also an important example of crisis management in a world addicted to the speed of information that only social media can provide. This article will cover the top four lessons every company can learn from the airline's handling of this crisis and how these lessons can be implemented on even a much smaller scale.

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Greetings From Hospitalitas

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first-class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

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Hilton Avoids Class Certification over Timeshare Telemarketing

Ted C. Raynor, 423.209.4166, traynor@bakerdonelson.com

According to the plaintiffs, Hilton Grand Vacation made approximately 37 million calls to more than six million cell phones during a four-year period covered by the Telephone Consumer Protection Act (TCPA). In order to establish a claim under the TCPA, plaintiffs must show that (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent. Most cases turn on the issue of "express consent."

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Wait, *You're* Not Housekeeping!

The Expectation of Privacy in Hotel Rooms Under the Fourth Amendment

Kris Anderson, 205.250.8324, kanderson@bakerdonelson.com

A dozen police SWAT team members in full body armor, with weapons at the ready, stampede into a hotel guest room with hotel management's assistance in opening the door. They find a cache of guns and drugs, and arrest the occupants. However, the officers lack a warrant, probable cause or even exigent circumstances. Under longstanding Fourth Amendment protection against unreasonable search and seizure, evidence obtained through an unlawful search is most often excluded from admission to prove the guilt of the person from whom it was unlawfully obtained, effectively dismissing the charges. Whether the search was illegal under the Fourth Amendment, and whether the hotel could incur liability due to the search, depends on the occupants' expectation of privacy in the room.

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Terminated Auto Dealers Revenge – Were the GM/ Chrysler Dealer Terminations Unconstitutional?

Joel R. Buckberg, 615.726.5639, jbuckberg@bakerdonelson.com

Readers may remember the dramatic restructuring of the GM and Chrysler dealer networks as part of the bankruptcy proceedings for each auto maker in 2009. The state auto dealer franchise statutes and their protection against dealer terminations were summarily preempted by the bankruptcy proceedings and the pre-condition of dealer network reduction for the necessary loans from the federal government to the debtors in possession.

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Your Grandmother Doesn't Work for Free: Volunteer and Intern Positions Under Closer Scrutiny, *continued*

According to Bloomberg News, the DOL opened an investigation into Rhea Lana's volunteer policy in January 2013, after the Arkansas Department of Labor took a similar action. In August, the federal government jumped in to inform the franchise company that it was in violation of minimum wage laws for not fairly compensating its volunteers. The volunteers are mostly stay-at-home moms and retired grandmothers who help staff Rhea Lana's consignment sales all over the country through franchisees. Instead of getting paid, the volunteers are given an opportunity to shop early at the consignment sales, giving them the opportunity to get the best used toys and clothes for themselves.

The DOL contacted the volunteers and told them that they have the right to sue the franchisor for back wages. The DOL found Riner's company to be in violation of the FLSA, concluding that moms and families who volunteer up to 15 hours for an early shopping pass are classified as employees and should be paid minimum wage.

Riner's lawyer claims that the entire consignment industry, including Riner's franchise, would be affected negatively by this ruling. The ruling may also have an impact on unpaid internships, which have been more closely scrutinized after a judge found that two Fox Searchlight production interns were not compensated legally. Countless companies, large and small, open the doors to their offices, welcoming interns eager to add experience to their resumes for little or no pay. But as a result of the multitude of new lawsuits challenging the practice, the unpaid internship is under assault.

The State of New York is leading the way, with employment lawyers filing lawsuit after lawsuit against media companies over unpaid internships. On June 11, 2013, the U.S. District Court for the Southern District of New York ruled in favor of interns Eric Glatt and Alexander Footman finding that they did not fall within the FLSA's unpaid "trainee" exception.

Judge William H. Pauley, applying the DOL criteria, found the interns did not receive training similar to that in an educational environment, as they performed routine tasks that otherwise would have been performed by paid employees. The court also held that Fox Searchlight was the "primary" beneficiary of the internships. Although both Glatt and Footman understood that their internships would be unpaid, the court reiterated that FLSA "does not allow employees to waive their entitlement to wages."

On the heels of the victory in *Fox Searchlight*, plaintiffs' firms have filed suit against companies such as NBC Universal, Warner Music Group Corp. and Gawker Media LLC with the same or similar allegations related to unpaid interns.

The threat of multi-plaintiff/class litigation is not just a problem for employers operating in New York state, as the FLSA is federal law and applies nationwide. Unpaid intern plaintiffs have also been winning significant battles on critical issues such as classification and class action status, thus creating new federal law, which can be a persuasive authority in the jurisdictions in which a business operates.

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Your Grandmother Doesn't Work for Free: Volunteer and Intern Positions Under Closer Scrutiny, *continued*

Many employers may not be aware that it is fairly difficult to meet all of the legal requirements for an unpaid internship. According to the DOL, an unpaid internship is only lawful in the context of an educational training program, when the interns do not perform productive work and the employer derives no benefit. Boiled down, there are six criteria handed down from the DOL, all of which an unpaid internship must meet in order to be legal:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.
2. The internship experience is for the benefit of the intern.
3. The intern does not displace regular employees, but works under close supervision of existing staff.
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.
5. The intern is not necessarily entitled to a job at the conclusion of the internship.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

In recent years, a wave of lawsuits brought by unpaid interns seeking compensation for their work has spurred businesses to take a hard look at their internship programs to ensure they are compliant with federal and state wage and hour laws. Some large employers, such as publishing company Conde Nast, have already made the decision to eliminate their intern programs altogether in the face of such suits. However, the question of whether an intern is in fact an employee – and thus entitled to minimum wage and overtime – has not been an easy one to answer. Courts have applied both the six-factor test promulgated by the DOL, as well as a more general test that asks simply whether the internship program benefits the employer or the intern, in resolving this question. Because courts have not approached the issue in a consistent manner, the law remains unclear.

However, that may soon be changing. On November 27, 2013, the Second Circuit Court of Appeals granted petitions for interlocutory appeal in two intern cases, *Glatt v. Fox Searchlight Pictures, Inc. and Wang v. The Hearst Corp*. By doing so, the Second Circuit will likely be the first court of appeals since the recent wave of suits began to consider how these cases should be evaluated.

The *Fox Searchlight* case involves two unpaid interns who worked on the film set of "Black Swan." U.S. District Judge Pauley held that the interns, who allegedly ran errands, photocopied documents and made coffee, among other menial tasks, should have been classified as employees under the FLSA. He also certified under state law a class of interns who worked in five Fox Entertainment Group units in New York, and granted conditional certification to a national class of interns from the five units under the FLSA. In *Hearst*, U.S. District Judge Harold Baer denied certification of a class of former Hearst interns who sought to bring claims under state wage law. The Court of Appeals will hear both cases together.

All employers should be aware of these recent rulings when considering whether an unpaid intern program is right for their organizations.

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Excessive Celebration – Penalty Declined, *continued*

The stage was set: an outdoor party, next to the Harrah's Casino in New Orleans, on the parade route moments before the newly-crowned Super Bowl Champions, the New Orleans Saints, were scheduled to make their way through the streets of downtown in a first-ever victory parade. It was the middle of Carnival season and a week before Mardi Gras. With all of the excitement, there was of the potential for accidental injury.

As detailed in *Beverly K. Zacher et al v. Harrah's New Orleans Management Company*, one injury resulted in a verdict against Harrah's, which was reversed on appeal. In *Zacher*, a seventy-year-old guest of the Harrah's hotel adjacent to the casino found herself in the wrong place at the wrong time when, as she alleged, an unknown bystander fell onto her as the bystander jumped up to grab a promotional white t-shirt that had been thrown into the promenade area. The plaintiff sued Harrah's, as the provider of the venue for the event and the souvenirs, as well as the beer distributing company that had co-hosted the event and provided stage entertainment and an emcee.

For Harrah's specifically, the plaintiff alleged that the company "used an air gun/cannon designed specifically for ejecting the t-shirt into crowds as a means of disbursing the t-shirts and in the process, created a chaotic, uncontrolled environment that resulted in your petitioner being stampeded by fellow patrons." The plaintiff also alleged that Harrah's was negligent in, *inter alia*, "creating a dangerous and hazardous condition on its premises; and allowing a dangerous and hazardous conditions/event (sic) to occur on its property."

The factual inconsistencies in the various accounts of the incident were manifold: the plaintiff recalled the emcee throwing white, rolled-up t-shirts from a stage for 10 to 15 minutes, and Harrah's introduced evidence that it only handed out black towels printed with its logo, the date of the Super Bowl, and "We are the Champions"; the plaintiff recalled that there were 500 people in the crowd, but Harrah's testified that there were only 200 people present; and the plaintiff's own petition, amended petition and testimony provided three different locations for where the accident occurred. The plaintiff's counsel even acknowledged that the allegation of a t-shirt cannon or air gun in the petition was a misstatement.

However, the trial court regarded these inconsistencies and others as issues of credibility, and irrelevant to the issue of causation in any event, because "[w]hether the items being passed out were T-shirts or towels is of no matter, rather there was some method of distribution that caused another patron to reach over [the Plaintiff], lose his balance, and fall back on her." As to causation, the trial court concluded that "Harrah's actions were certainly a cause-in-fact of her injuries and within the scope of protection afforded under the law."

Following the Louisiana "duty-risk" analysis,[1] and analyzing whether Harrah's breached its duty to the plaintiff, the trial court focused solely on whether Harrah's failed to provide adequate security. Relying on testimony by Harrah's that it occasionally brought in additional security officers for larger events, but that no extra security was provided for this event based on how quickly it came together, the trial court found that "Harrah's should have expected a large turnout due to the enthusiasm of the Saints' victory, as well as planning the event immediately before the parade." Critically, the trial court concluded that "Harrah's breached their duty to provide reasonable care to their patrons when they did not provide adequate security officers for the event . . . ."

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[1] Under Louisiana's "duty-risk" analysis, the plaintiff must establish the following five elements by a preponderance of the evidence to prevail: (1) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (2) the defendant owed a duty to the plaintiff; (3) a breach of the duty; (4) the defendant's substandard conduct was the legal cause of the plaintiff's injuries; and (5) damages. *See Perkins v. Entergy Corp.*, 782 So. 2d 606, 611 (La. 2001).

Excessive Celebration – Penalty Declined, *continued*

The trial court awarded the plaintiff $150,000 in general damages and nearly $17,000 in special damages,[2] but it allocated[3] only 10 percent of the fault to Harrah's, 15 percent to the distributor/co-sponsor of the party and 75 percent to the unknown patron who fell on the plaintiff. As to Harrah's, the court held that "[i]t was reasonably foreseeable that failure to provide adequate security in the presence of such a large crowd could cause injury if a triggering event not properly managed occurred. That is what transpired here."

On appeal, the appellate court criticized the trial court's disregard for the various inconsistent factual accounts of the accident to establish causation. The appellate court distilled the contested and uncontested evidence to find that, "[a]t best, the plaintiff's testimony regarding the t-shirts established that the M.C. threw three to five t-shirts into the crowd in a ten to fifteen minute interval before the accident. . . . The question presented thus becomes whether Harrah's breached any duty it owed [the plaintiff] based on the M.C., [an employee of the beer distributor], throwing a handful of t-shirts."

The appellate court acknowledged that Harrah's owed the plaintiff, as a patron, a "duty to protect her from the harm of 'fellow guests' or third party patrons." The appellate court reasoned that, "while the proprietor of a public place is not the guarantor of a patron's safety, it owes the duty to exercise reasonable care to protect the patron from harm at the hands of a fellow guest or an employee and to protect the patron from insult, annoyance, and danger," and that "once a business voluntarily assumes a duty to protect, the duty has to be performed with due care."[4]

However, the appellate court disagreed with the trial court's reasons for finding that Harrah's breached its duty to the plaintiff. After restating ample authority for the proposition that "a business owner's duty to provide security focuses on the prevention of crime, not the prevention of accidents," and that "it would take a quantum leap to find that a business is required to provide security to prevent an unforeseeable accident from occurring,"[5] the appellate court held that, "[t]o the extent the trial court's finding of liability is based on Harrah's duty to provide adequate security, we find the trial court erred legally and factually. Legally, . . . there is no duty to provide security to prevent an accident. Although . . . Harrah's had security present, Harrah's presumptively provided security to prevent or monitor criminal activity on its casino and hotel premises, not to prevent an accident."[6]

The *Zacher* case does not lower the duty of care that a proprietor of a public place has to protect its patrons from injury; however, it restates an important distinction between the role of a proprietor's security personnel and the proprietor's duty to its patrons in general.

2 The Trial Court also awarded the plaintiff's husband (a co-plaintiff) $25,000 in loss of consortium damages.

3 By allocating only 10 percent of the fault to Harrah's, Harrah's would have only been liable for 10 percent of the judgment.

4 *Zacher*, 2014 La.App. LEXIS 357, at *24, n.17 (citing *Luckette v. Bart's on the Lake, Ltd.*, 602 So. 2d 108 (La. App. 4 Cir. 1992); *Anderson v. Clements*, 284 So. 2d 341 (La. App. 4 Cir. 1973)).

5 *Id.* at *47 (citing *Fleming v. Hilton Hotels Corp.*, 774 So. 2d 174, 177 (La. App. 4 Cir. 2000)).

6 Factually, the Court also observed that there was ample and adequate security for the party in any event.

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Four Crisis Management Lessons from the Disappearance of Flight MH370, *continued*

1. It's not just what you say, it's how you say it.
Adopt a "Cringe Test" with respect to any communications you make after an incident. If a proposed communication makes anyone on your team cringe, don't send it. A good example of this is when Malaysia Airlines sent a text message to the MH370 family members informing them that they believed all had been lost. This communication may have met every item on their checklist – timing, direct communications with the families, etc. – but it wasn't the right thing to do. Designate at least one person on your team to review everything that goes out before it does and have them apply the Cringe Test. Sometimes even when something appears to meet your criteria, it is just the wrong approach and appears to the outside world as insensitive or inappropriate.

2. Timing is everything.
Communicate what you know quickly (as soon as you know it) and comprehensively. In a situation like an airline crash, waiting an hour to communicate once you find out might be too long. In today's social media culture, time races by. In this instance, Malaysia Airlines was able to communicate that they had lost contact with the plane right away. Even if they didn't have any additional details about where or why, it was important to get the information they did have out right away. Getting out what you know, as soon as you know it, is very important so that you are able to set the storyline and control the message. If you wait even an hour or more, and social media is already going rampant, you will be struggling to catch up and will have lost any opportunity to set the tone – the storyline will be set for you. If the information you release later turns out to be incorrect, you need to be ready to change that release on the spot as well. It is important not to release information that is pure speculation, but once facts are known, get them out. Usually rumors created on social media are far more damaging than the truth.

The news cycle has changed – it used to be that a business would have to get its press statements out on a "next business day" basis. This meant communicators generally had at least 24 hours and perhaps until the next business day to think about the form, style and substance of what they wanted to say before getting out materials for the news media. This time frame has dramatically changed in the world of the internet, the 24/7 news cycle and social media. A business has to be communicating constantly to stay ahead of the relentlessly updating news cycle.

3. Use the tools you have.
Almost every business today has a website. When a serious or tragic event strikes, one of the action items ought to be to remove potentially offensive items from your website. The same goes for canceling any scheduled advertising campaigns. In this case, Malaysia Airlines took all of the advertisements off their website, including items advertising new routes. This can be implemented even on a much smaller scale when, for instance, a certain product line or a specific location is impacted. You can also significantly reduce commentary on topics you would prefer not "go viral" by shutting down the comment feature on your Facebook pages, websites and other social media presences as soon as an incident occurs. From a legal perspective, you will also want to use your resources to begin monitoring and conducting research related to social media immediately to identify any possible witnesses or any potential plaintiffs. The information available in the hours following an accident may not be accessible forever and collecting what you can in real time is important.

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Four Crisis Management Lessons from the Disappearance of Flight MH370, *continued*

4. Your legal team should be part of the response team from day one.
At what point should you bring in your legal team? Many businesses either have an in-house public relations specialist or will hire an outside public relations firm right away. Often, however, bringing in the legal team won't happen until later in the game. This can be an expensive decision. As we have seen in the Malaysia Airlines case, one lawsuit has already been filed (and subsequently dismissed).

Even in a much smaller scale crisis, plaintiffs' lawyers are quickly thinking about lawsuits that exploit family members while the grief is fresh and raw, so they will file the suits and conduct discovery right away. Be sure to get your defense team involved before the first complaint is filed, as evidence gathering must start immediately after the tragedy. Your attorneys can advise you on hiring an accident investigator and can review proposed public statements from a different point of view. Otherwise, you might disclose information in a manner that is not appropriate or risk taking actions that would negatively impact your defense strategy later in an inevitable lawsuit.

You can also use your legal team to help you reach out to claimants in situations where a lawsuit is inevitable. Sometimes you can prevent a lawsuit from ever getting filed. In this case, Malaysia Airlines put the victims' families up in hotels and assisted in their travel to the locations where they could wait for news of their loved ones. Overtures such as this can make a big difference in how potential plaintiffs and juries respond later. Most importantly, the public image of the business suffers less when it does the right thing for the families of its affected customers.

Hilton Avoids Class Certification over Timeshare Telemarketing, *continued*

In the motion papers concerning class certification, the parties differed about the importance of the means by which consent was provided to Hilton Grand Vacation or its parent Hilton. On one hand, Hilton Grand Vacation stressed that the means of consent for the persons on its call list was varied and, therefore, not suitable for class action treatment. They indicated that consent had been provided by persons who signed up for Hilton's HHonors loyalty program over the phone, online or by filling out a paper application. Consent was also provided by Hilton guests who reserved rooms online, over the phone, at the front desk or through third parties and/or travel agencies. Thus, Hilton Grand Vacation argued that the factually different scenarios involving consent would make a class-wide trial on the merits unworkable.

On the other hand, the plaintiffs argued that such trivial details do not defeat the commonality required under Rule 23 of the Federal Rules of Civil Procedure. They tried to frame the issue as whether a guest who provides a cell phone number during reservation or check-in or when enrolling in the loyalty program automatically consents to future telemarketing.

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Hilton Avoids Class Certification over Timeshare Telemarketing, *continued*

Ultimately, District Judge Janis Sammartino found that the context of class members' interactions with Hilton was "sufficiently varied to provide dissimilar opportunities for the expression of consent." For example, some class members may have provided consent over the telephone while discussing a non-scripted reservation request, while others may have indicated consent as part of a scripted experience. In either instance, the amount of information the individual received about how their cell phone number might be used for future telemarketing efforts could be varied and would need to be evaluated under the TCPA individually. Under Rule 23, class action claims must be "cohesive" and subject to relief to the class as a whole.

The court also found that because the circumstances of consent might be varied, so too the claims for individualized damages could not be efficiently handled on a class action basis.

The plaintiffs appealed this ruling and now the matter will be taken up by the Ninth Circuit Court of Appeals. The plaintiffs' brief is due on June 26, 2014, and Hilton's brief will be due on July 28, 2014, with oral argument to follow sometime later in the summer.

Wait, *You're* Not Housekeeping!, *continued*

Courts have examined similar situations where rooms were registered under an alias, registered to a third party, procured by an agent and obtained with a fraudulent credit card. Other cases have involved lengthy stays, stays a few minutes or hours past checkout time, and hotels with lax or poorly enforced checkout policies. These cases have resulted in unpredictable holdings, leaving hotel management guessing as to how to cooperate with police investigations.

The U.S. Supreme Court has held that the "Fourth Amendment protects people, not places," but has modified this statement by stating that "the extent to which the Fourth Amendment protects people may depend upon where those people are." For example, "an overnight guest in a home may claim the protection of the Fourth Amendment," but those "essentially present for a business transaction" may not. The court's Fourth Amendment jurisprudence has also been guided by societal expectations and what is "permitted by society." Lower courts' disagreement and resulting legal unpredictability has been based on what courts decide society expects or allows.

With this baseline of Supreme Court precedent and varying lower court attitudes as to societal expectations in mind, a circuit split has evolved on the issue of whether a guest must be a registered guest who has not overstayed a checkout time to enjoy Fourth Amendment protection. A recent Eleventh Circuit case, *Mays v. Davenport*, widened this divide by holding that a hotel room occupant who was not a registered guest and was present to engage in a purely commercial transaction did not have a reasonable expectation of privacy while in a hotel guest room after consensual admission by the registered guest, thereby not implicating the protection of the Fourth Amendment.

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Wait, *You're* Not Housekeeping!, *continued*

The Mays court examined three factors in reaching its decision:

- whether the subject of the search had a preexisting relationship with the registered occupant;
- whether the subject of the search was present for the accepted social purpose of staying the night or solely for the purpose of engaging in a commercial transaction; and
- whether the search subject was a registered guest.

Answering all three of these questions in the negative, the court easily resolved the case in favor of the government. The court did not discuss whether any one factor was dispositive, but focused on the commercial nature of the transaction and the status of the search subject as a non-registered business invitee.

What does this holding mean for hoteliers seeking to avoid liability for assisting in police searches? Law enforcement frequently relies upon hotel management consent and assistance to enter hotel rooms without warrants and with less resistance, in order to avoid Fourth Amendment problems in certain cases. Hoteliers do not want to obstruct a law enforcement investigation or stand in the way of a lawful search as a matter of possible criminal liability for obstruction and negative local public relations. Unfortunately, hoteliers are forced to weigh the risk of civil action from the offended guest whose privacy is violated by the search, or worse if the guest is injured by the police entry. The sovereign immunity for police action does not typically extend to the cooperating hotelier.

In order to avoid such liability, as a general rule, hoteliers would be advised to facilitate police entry to a hotel room if a valid warrant is presented or hotel management is aware of occupants violating the law or a published hotel policy that would warrant eviction. While certain jurisdictions tolerate more expansive searches if, for example, a hotel guest has overstayed checkout time, the unpredictability of court resolution on that issue make the requirement of a warrant or a known hotel policy violation advisable.

Terminated Auto Dealers Revenge – Were the GM/Chrysler Dealer Terminations Unconstitutional?, *continued*

Dealers challenged this action in the Court of Claims, and by an April 7, 2014 decision in *A&D Auto Sales, Inc. et al. v. U.S.*, the Court of Appeals for the Federal Circuit upheld the denial of the government's motion to dismiss the complaint and granted the plaintiff dealers leave to amend the complaint.

Although the case is in the early stages of discovery and a number of arguments have yet to be raised, the Justice Department was unsuccessful in defeating the claim that the property rights associated with the intangible property represented by the dealer agreements with the manufacturers were entitled to constitutional protection against either "regulatory takings" or "categorical takings" under Supreme Court decisions dealing with government action affecting real property and tangible personal property. Citing these cases represented by *Lucas v. S.C. Coastal Council*,, a categorical taking occurs where regulations "compel the property owner to suffer a physical invasion of his property" or "prohibit all

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Terminated Auto Dealers Revenge – Were the GM/Chrysler Dealer Terminations Unconstitutional?, *continued*

economically beneficial or productive use." A regulatory taking occurs when government action is so unduly burdensome as to be tantamount to a physical invasion or taking. Three factors have "particular significance" in the regulatory taking analysis: (1) "the character of the governmental action," (2) "the extent to which the [action] has interfered with distinct investment-backed expectations," and (3) "[t]he economic impact of the regulation on the claimant."

At the heart of the issue: was the government loan pre-condition of dealer network reduction a taking? The Court of Appeals ruling allows the plaintiff dealers to develop the case in discovery based on the court's findings that the intangible property rights represented by dealer agreements were compensable protected property interests. The court observed a distinction between inchoate rights of parties that exist at the time the agreements are created, such as the power of a debtor in bankruptcy to reject executor contracts, and government action after the formation of the contract that gives rise to actions adverse to the property rights of the property owner. The court noted that "[G]overnment action directed to a third party does not give rise to a taking if its effects on the plaintiff are merely unintended or collateral." The court cited another line of its cases that hold no taking occurs if "the challenged government action was of general application and the plaintiff was but one member of an affected class of persons." The plaintiffs must amend their complaint to satisfy a number of other criteria, including more detailed economic loss and diminution of value. The theory of liability may turn on whether the plaintiffs can prove some manner of coercion by the federal government against the manufacturers because of their inability to survive bankruptcy without the financing to which the condition was attached.

The fascinating opportunity represented by the decisions in this case is whether the rulings will determine if the recent attempts by state legislatures to enact franchise relationship laws applicable to existing contracts and existing trademarks will pass constitutional muster. The relationship laws serve no public purpose other than to rebalance private property rights between the commercial contract parties, and to limit the discretion reserved by one party and presumably priced into the bargain by both sides. The initial finding of the Court of Appeals that the intangible contract rights are compensable property interests to which government action may create either a regulatory taking or a categorical taking is a huge step in advancing the argument that these relationship laws are unconstitutional takings of the property rights associated with the trademarks and other intellectual property licensed as part of the franchise agreement. In the auto dealer termination case, the government action coerced the manufacturers into termination of valid pre-action contracts between private parties for commercial purposes, an action they may or may not have taken in the bankruptcy case on the economic merits. Is it a stretch to say that the same principles apply to government action coercing franchisors not to terminate pre-action contracts between private parties for commercial purposes? Baker Donelson will continue to monitor this case and report on developments as they occur.

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Quick Takes

Joel Buckberg Named "Legal Eagle" Eighth Consecutive Year

Joel Buckberg, co-leader of the Firm's Hospitality and Franchise Industry Service Team, has been named a "Legal Eagle" for the eighth consecutive year by *Franchise Times*, a national publication for franchisors and multi-unit franchisees. This annual listing recognizes franchise law attorneys on the basis of input from their peers and clients and the criteria of the *Franchise Times* editorial panel. Buckberg was also named a Baker Donelson shareholder in March.

New Members of Hospitality Group

Several new attorneys have joined Baker Donelson and the Firm's Hospitality Industry Service Team. Nashville attorneys Julie Boswell (of counsel) and Steve K. Wood (shareholder) focus their practices on federal taxation, estate planning and administration, mergers and acquisitions, and general corporate matters, while Washington, DC Shareholder John McJunkin represents and protects creditors' rights in loan workouts, business bankruptcies, foreclosures and commercial litigation.

Julie Boswell

Steve K. Wood

John McJunkin

High Five to Five Years

For the fifth consecutive year, Baker Donelson has been named to FORTUNE'S "Top 100 Companies to Work For." At 31st place, the Firm achieved its highest-ever ranking this year.

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