GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

NEWSLETTER
SPRING 2009

Always Look for the Flagpole

Editor's Note: This is an update to an article from the November 1985 edition of our newsletter. It tells the story of how our firm first became involved in municipal financing work. Today, our bond attorneys are nationally recognized as leaders in this field.

When young lawyers ask how to find the town hall in a small community or county seat, I advise them: "Always look for the flagpole."

Since before statehood, Gust Rosenfeld has played a part in Arizona's development. Our firm has acted as bond counsel for many school, city, town and county issues. Bonds and other forms of municipal borrowings have formed the basis of this municipal development—and have financed many municipal flagpoles in Arizona.

WHAT IS A BOND LAWYER?

A bond attorney provides legal services to municipalities, permitting them to issue bonds and thus finance capital improvements ranging from small street-paving projects to multimillion dollar water and sewer projects. A bond lawyer's principal service is, first, to draft legal documents so that the resulting government obligation will withstand legal attack and, second, to issue a legal opinion that the bonds are legal and binding obligations.

Bond work covers a variety of subspecialties such as election law (because an election is a prerequisite for the sale of many bonds), tax law (because almost all municipal bonds are "tax exempt"), public records laws, open meeting laws, conflict-of-interest

SEE **FLAGPOLE** ON PAGE 6

Obama Administration's Estate Tax Plans

Several bills affecting the federal estate tax have been introduced in Congress. These bills closely track President Obama's pre-election proposals to:

- extend the estate tax to 2010 and indefinitely into the future;
- maintain the $3.5 million exemption equivalent with a 45 percent top rate;
- make the exemption "portable" so that married couples may take advantage of the full $7 million exemption without incorporating in their estate planning documents the by-pass or credit shelter trust for the survivor; and
- eliminate the proposed carry-over basis rule and continue the existing law of giving a decedent's assets a new or stepped-up (or stepped-down) basis equal to their value on the date of death.

It is estimated that the $3.5 million exemption equivalent will shelter roughly 99.5 percent of all estates from the federal estate tax. It should be noted that for several years Arizona has had no estate tax.

We expect the President will be signing such legislation into law later this year or in early 2010.

Richard H. Whitney 602.257.7424
rwhitney@gustlaw.com
Richard's practice includes estate planning.

GUST ROSENFELD

NEW FACES

Karl H. Widell


KARL H. WIDELL

Karl practices in the areas of employment litigation and education law, primarily representing the interests of public school districts. He is an experienced trial attorney, having counseled and represented numerous clients before judges and juries in several Arizona trial courts. He has also acted as appellate counsel in the Arizona Court of Appeals. Before joining Gust Rosenfeld, Karl practiced corporate bankruptcy law in Boston and commercial litigation and criminal defense in Phoenix.

Thomas M. Murphy


THOMAS M. MURPHY

Working from our Tucson office, Thomas practices general corporate and commercial law with an emphasis on healthcare law for both physicians and hospitals. He works with healthcare clients on a wide range of matters including formation, contract issues with other providers and insurance companies, regulatory issues, and general business transactions. During his career, he has played important roles in forming various joint ventures between physicians and among physicians and hospitals. He has expertise in Stark laws and regulations, Anti-kickback regulations, Fraud & Abuse provisions, HIPAA and EMTALA.

Prior to joining Gust Rosenfeld, Thomas served as General Counsel for Carondelet Health Network. While there, he was instrumental in helping grow that business to four hospitals, one primary care physician group, a healthcare foundation, and various other facilities. Before that, he spent 22 years practicing healthcare law, business law and transactions, and nonprofit corporation law in Tucson.

Amendments to the Americans with Disabilities Act

The recently enacted amendments to the Americans with Disabilities Act ("ADA") significantly change employers' obligations under the ADA.

The high-level effects include:

- Expanded definition of "disability," leading to more individuals being protected under the law and possibly more successful discrimination claims.
- The need for employers to use extra caution in applying the law. Employers should be prepared to expand accommodation practices to a greater number of employees.
- The likelihood that employers will find it more difficult to obtain summary judgment, despite showing legitimate non-discriminatory reasons for employment action.

To read a more comprehensive summary of the ADA changes, please visit www.gustlaw.com and click on News & Events. If you have immediate questions, please contact any of our firm's Employment Law attorneys below.

Robert D. Haws 602.257.7976
rhaws@gustlaw.com

Jennifer N. MacLennan 602.257.7475
jmaclennan@gustlaw.com

Steven M. Guttell 602.257.7499
sguttell@gustlaw.com

Karl Widell 602.257.7671
kwidell@gustlaw.com

ET·Y·MOL·O·GY COR·NER

What's In A Name?

"Trademark," first used in 1838, is an interesting word combination. "Trade," dating back from the late 1300s, from the Dutch, German and Old English ("tread") has maintained a consistent meaning—one's path, track or business. "Mark," on the other hand, is more interesting. There are the usual derivations—Old English "mearc" for trace or impression or Dutch "merk" for mark or brand. In combination, we have a business mark. There is also the slang for "mark"—victim of a swindle. Anyone recently in the stock market might have a preference for this one.

Richard B. Hood 602.257.7470
rhood@gustlaw.com
Rick, our etymologist, practices in the areas of commercial law and commercial litigation.

How Lone Star Steaks Lost Its Mark

(and How to Protect Yours)

However true the saying, *A rose by any other name would smell as sweet*, it offers little consolation to a business that has spent large sums of money and time to promote its company name or product names only to have to later change them as a result of a trademark infringement claim.

PROTECT YOUR MOST PRECIOUS ASSET

A company's name is arguably its most precious asset, yet many businesses fail to recognize the importance of obtaining federal trademark registrations and taking action to protect their trademarks. This oversight can lead to harsh consequences as experienced by Texaz Grill, a well-regarded, north-central Phoenix steakhouse that was known as Lone Star Steaks for several years before a trademark infringement claim arose.

OVERSIGHT CREATES BIG PROBLEM

In 1985, Lone Star Steaks opened up a steakhouse on the corner of 16th Street and Bethany Home Road. Lone Star Steaks continued to build its reputation in the Valley until a competitor, Lone Star Steakhouse & Saloon, Inc. ("Lone Star Steakhouse"), a Midwestern chain, decided to open up a location in Arizona in 1995. This presented a problem for Lone Star Steaks because Lone Star Steakhouse had obtained a federal trademark registration with the United States Patent and Trademark Office ("USPTO") for "Lone Star Cafe" in 1981.

As the owner of a federally registered trademark, Lone Star Steakhouse generally had the right to use the trademark nationwide. Further, its registration constituted nationwide notice that it owned the trademark and allowed it the right to bring an infringement suit in federal court.

A NAME CHANGE THAT COULD HAVE BEEN AVOIDED

Consequently, Lone Star Steakhouse, the owner of the trademark, demanded that Lone Star Steaks change its name. In order to avoid a lawsuit, Lone Star Steaks complied with this demand by becoming "Texaz Grill"—this, after 10 years of building goodwill under its original name.

Unfortunately for Lone Star Steaks, this whole conflict could have been avoided if it had performed some due diligence before picking a restaurant name. A simple search through the USPTO records in 1985 would have revealed that the trademark "Lone Star" was already being used as a restaurant's name.

IMPORTANT LESSONS

There are several lessons to be learned from Texaz Grill's misfortune.

Lesson #1: Start-up companies and companies wishing to expand nationally should always research potential company and product names to make sure that there are no conflicting trademarks already registered. A simple search can be done online at the USPTO website (www.uspto.gov), and there are trademark search companies that can conduct more comprehensive searches.

Lesson #2: Once a name is chosen, it should be immediately registered as a trademark on the USPTO principal register.

Lesson #3: The owner of a federally registered trademark should continually monitor new and existing businesses to ensure that others are not infringing.

Lesson #4: Trademark owners must file an affidavit after six years of registration and renew the trademark every 10 years or else they can lose their trademark registration.

At Gust Rosenfeld, we counsel and assist clients in trademark matters. Please contact our Intellectual Property attorneys John Hay, Christina Noyes or Jennifer Larson with your trademark concerns.

End Note: Gust Rosenfeld did not represent any of the parties identified in this article.

John Hay 602.257.7468
jhay@gustlaw.com
John practices intellectual property, corporate and franchise law.

Jennifer Larson 602.257.7992
jlarson@gustlaw.com
Jennifer practices intellectual property, corporate and franchise law.

PERSONAL NOTES

Tim Barton and **Scott Malm** spoke on the subject of title insurance at the Colorado Bar Association National Conference in Vail in January.

Kent Cammack now serves on the board of the J. Reuben Clark Law Society. In addition, he spoke to the facilities management group at Brigham Young University in February.

Peter Collins, Jr., James Kaucher, Magdalena Osborn, Matt Goldstein and **Thomas Murphy** gave a day-long seminar in January on Healthcare Law Risk Management topics.

Marty Jones spoke in February at the 5th Annual Gatekeeper Regulatory Roundup, one of the preeminent environmental conferences in Arizona.

Ming Kang is a member of the board of directors of the Taiwanese American Association of Arizona. He also taught law student volunteers for the IRS Volunteer Income Tax Assistance Program (VITA) at the Sandra Day O'Connor College of Law at Arizona State University in January.

James Kaucher gave a presentation on EEO Compliance at a seminar sponsored by Lorman Educational Systems in January.

Jennifer Larson was elected as Secretary on the Board of Directors of the Phoenix Conservatory of Music in January.

Chris McNichol served as a judge at a Client Counseling Competition at ASU's Sandra Day O'Connor College of Law.

In January, **Christina Noyes** and **John Hay** hosted our firm's 2009 Franchise Seminar, an annual educational session for clients and friends.

Barbara U. Rodriguez-Pashkowski now serves on the Maricopa County Bar Association's Environmental & Natural Resources Executive Board and its Diversity Steering Committee.

Madeleine Wanslee is a Lawyer Representative to the Ninth Circuit Judicial Conference (2008-2011 term). In March, she spoke at a legal conference hosted by the National Council of Higher Education Loan Programs (NCHELP) in Charleston, South Carolina.

Our Herd Goes to the Heard

In March, our firm hosted a special event for all employees at the Heard Museum. More than 100 Gust Rosenfeld attorneys, staff and family members gathered to enjoy an afternoon tour of the museum's impressive Native American collections, including a new exhibit called *Mothers and Daughters: Stories in Clay*—featuring art pieces from acclaimed mother-daughter teams from Santa Clara Pueblo.

Richard Whitney, an estate planning attorney at our firm, serves on the Board of Directors at the Heard Museum.

New Filing Requirements Relating to Continuing Disclosure

The Securities and Exchange Commission ("SEC") recently amended its Rule 15c2-12 to change the filing location of any required continuing disclosure. By way of background, the Rule requires underwriters of municipal securities to obtain agreements from political subdivisions with outstanding bonds to file annual financial statements, updates to various operating data, and notice of material events with the four nationally recognized municipal securities information repositories ("Current NRMSIRs") or with the centralized post office, DisclosureUSA (www.disclosureusa.org).

Effective July 1, 2009, the Municipal Securities Rule Making Board's ("MSRB") Electronic Municipal Market Access System ("EMMA") will serve as the sole central repository where issuers of municipal securities will electronically file disclosure documentation for immediate public access. Electronic submissions to EMMA will be made at www.emma.msrb.org.

Most existing continuing disclosure agreements will likely not need to be amended to comply with the changes to the Rule provided that the definition of "national repository" in such agreements is not specifically limited to the NRMSIRs, but includes any NRMSIR acceptable for purposes of the Rule. Issuers of municipal securities should examine their continuing disclosure agreement and contact any Gust Rosenfeld public finance attorney with questions regarding compliance with the amended Rule.

James T. Giel 602.257.7495
jgiel@gustlaw.com
Jim practices in the area of public finance.

Are You Complying with the Arizona Prompt Payment Act?

The primary purpose of the Prompt Payment Act (A.R.S. § 32-1129) is to establish a framework for ensuring timely payments to those supplying labor and materials on a construction project. Absent changes to the construction documents, the Prompt Payment Act governs agreements regarding progress payments, length of billing cycles and the certification and approval of work.

BASIC GUIDELINES OF THE ACT

- Billing/estimate or invoice is deemed approved and certified 14 days after receipt. Payment by the owner to the general contractor is due within seven (7) days unless the owner objects, in writing, to the invoice.
- The general contractor or subcontractor must pay its subcontractors and suppliers within seven (7) days after receipt of funds from the owner or general contractor.
- An owner may withhold from a progress payment only an amount sufficient to pay the direct costs and expenses necessary to correct the item(s) identified in the written objection.

OBJECTING TO BILLING STATEMENTS

In the event that any of several conditions exist, the owner (or general contractor) may decline to approve an application for payment. The owner or general contractor must identify the specific condition, in writing, to properly object to the billing statement. The recognized grounds for objecting to a billing statement are set forth in A.R.S. § 32-1129.01(D). They include defective construction/materials, failure to comply with material contract provisions, unexcused delays, third-party claims such as a mechanic's lien, and the failure by the submitting party to pay subcontractors and/or material suppliers.

OPTING OUT OF BILLING CYCLES

The parties to a construction agreement may "opt out" of the statutorily prescribed billing cycle. However, in order for it to be effective, it is necessary to include a legend, in clear and conspicuous type, on each page of the plans describing the alternate billing cycle. A valid change can also be made by clearly stating that an alternate billing cycle is in place on the project and identifying the owner's agent having specific knowledge of the alternate billing cycle.

The Prompt Payment Act only allows withholding the direct expenses the owner reasonably believes are necessary. Because this is a subjective standard, we recommend that the owner or general contractor obtain either a bid or an estimate from the project's design professional of the expected costs required to remediate or complete the item(s) identified in the written objection.

RECENT CASES GOVERN OBJECTIONS

Recent cases construing the Prompt Payment Act have held that an owner (or general contractor) cannot wait until a subsequent billing statement to disapprove and withhold payment for work previously completed and approved. The owner also may not withhold funds for allegedly defective work not covered in the applicable billing estimate/invoice. Accordingly, only a current invoice where a specific item enumerated in Section 32-1129.01(D) exists is validly subject to written objection.

CONSEQUENCES OF VIOLATING THE ACT

Finally, violating the Prompt Payment Act subjects the offending party to interest on the unpaid amount at the rate of 18% per annum. All invoices not properly objected to are presumed to be approved and certified. When an action is brought to collect payment or interest, the court (or arbitrator) is *required* to award legal costs and reasonable attorneys' fees to the successful party. As a result, the Prompt Payment Act provides a meaningful disincentive to owners (and contractors) who may consider withholding payment without cause or otherwise delay paying invoices submitted in compliance with its provisions.

Dean Robertson 602.257.7454
robertson@gustlaw.com
Dean litigates business, construction and other complex claims.

FLAGPOLE

FROM PAGE 1

laws, and even mortgage lending laws. Financial problems of large cities have required that bond lawyers become knowledgeable in the field of bankruptcy as well. The newly enacted federal stimulus legislation, for example, contains a plethora of bond-related material.

WHY DID THE NEED FOR BOND LAWYERS GROW?

Transcontinental railroads closely followed Western expansion after the Civil War. In the age of the "robber barons," cities commonly floated bonds to encourage a railroad to extend its main line through the city. In many cases, the railroad might not be built, but bond holders still expected to be repaid. Local political pressure became intense for cities to welch on their debts.

An extraordinary number of cases concerning railroad bond defaults reached the U.S. Supreme Court. One of the cases involved bonds issued by three territorial Arizona counties. All three counties refused to levy taxes to pay their bonds. The U.S. Supreme Court held the bonds invalid and Congress retroactively validated the bonds, but the counties still refused to pay, delaying Arizona's statehood. Holders of the unpaid bonds were reputedly friends of President Taft, who held up Arizona's admission until the defaulted bonds were refinanced. Arizona's enabling act contained a congressional grant of 500,000 acres of federal land to the new state to aid in paying the refinanced bonds. Litigation dragged on into the 1930s because the counties resisted paying.

Investors demanded that the country's foremost attorneys pass on the bonds before they were sold, resulting in a universal call for a "bond opinion;" thus, the rise of the bond attorney.

OUR FIRM'S ROLE AS BOND COUNSEL

In Arizona, this mantle fell on John L. Gust, who founded our firm's municipal bond practice before statehood. Mr. Gust's first project of magnitude was paving Washington Street in Phoenix. This was done on a quasi-public basis, with store owners collectively mortgaging their property. During the post World War I era, Mr. Gust became acquainted with the clerk in the City of Phoenix's Engineering Department who had the responsibility of drafting documents for local paving jobs that resulted in small bond issues. In 1923, the clerk, who had studied law on his own, took the bar exam, administered by Mr. Gust. After he passed the exam, Mr. Gust offered the clerk a position with Kibbey, Bennett, Gust and Smith (Gust Rosenfeld's name in 1923). That is how my father, Fred W. Rosenfeld, became a member of the firm.

This tradition continues today, as our firm is involved in much of the state's municipal development. So when I tell young lawyers to look for the flagpole, odds are we had a hand putting it there.

Fred H. Rosenfeld 602.257.7413
rosenfeld@gustlaw.com
A second generation member of the firm, Fred has practiced in the area of public finance for more than 45 years.

PHOENIX OFFICE
201 E. Washington St., Ste. 800
Phoenix, Arizona 85004-2327
Telephone: 602.257.7422
Facsimile: 602.254.4878

TUCSON OFFICE
One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

This newsletter is published twice a year by the law firm of Gust Rosenfeld P.L.C. as a service to our clients and friends. It is intended to provide general information only, not advice on specific legal questions. Portions may be reproduced with attribution. For change of address, additional copies, or a complimentary subscription, contact our receptionist. We invite your comments.
SPRING 2009, ISSUE NO. 55 *© 2009 Gust Rosenfeld P.L.C.* **www.gustlaw.com**

GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

201 E. WASHINGTON ST., SUITE 800
PHOENIX, ARIZONA 85004-2327

RETURN SERVICE REQUESTED