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"The highest reward for a person's toil is not what they get for it, but what they become by it."

-- John Ruskin

Building Value - A Case In Point

Sometimes you have to fight for your company's future. And that's when litigation can be a lifeline.

A successful software development company made a six-figure investment into a partner company that had developed a new related product. With Nicolai Law Group's help, the investment created a long-term strategic relationship.

A few months into the relationship, the partner's major competitor sued, claiming the new product resulted from stolen trade secrets and contract breaches. Suddenly, your start-up partner faces major litigation and the real prospect of being wiped out. One of the world's largest intellectual property law firms has a gun to your partner's head. If you don't stand by them, everything goes down the drain.

Using its contacts, Nicolai Law Group puts a team of experts on the ground within hours. By the end of a week, probable results and a strategy to get there are mapped out. You know your opportunities and risks, and that you are looking at two to three years of long-distance litigation. You decide to stick with the investment.

Shortly after, the other side gets a copy of the your source code. Nicolai Law Group leads the fight to stop them from seeing it and coordinates the battle to get it back.

The other side brings two more lawsuits, four more law firms and new venues across the country. And then you are named in the case. Each time, Nicolai Law Group integrates and coordinates new players. And gets the case against you dismissed -- twice.

At last, one court was ready to go to trial. Thanks to Nicolai Law Group's positioning, all of the other side's claims had been thrown out. The jury only had to consider your partner's claims against the other side. Your claims are waiting in the wings. The other side has already appealed twice.

The phone rings. The negotiations start. By Monday morning, everything is settled. Nicolai Law Group lawyers and the team had worked around the clock. Your management team was in the loop wherever they were -- at parties, on the soccer field, in the car. The settlement pays the bills and leaves you and your partner free to grow market share. All went according to the plan mapped out two and half years earlier -- no big surprises and your original investment left intact.

More information on any of these subjects is available by calling. This material is for information and education purposes only.

It is not legal advice or a legal opinion.

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Our Mission: Build Your Value

Those familiar with us know that Nicolai Law Group is not your "typical" law firm in many ways. The biggest difference is we understand our mission is to build value – yours, not ours.

Most of our customers have a long-term plan for their operation and a long-term relationship with us. They know calling here means a solid answer with advice, counsel and an explanation. Many times the answer is not legal; always, the answer is what is best for the customer. Nicolai Law Group has many opportunities to make sales. It only has one opportunity at a time to build value for customers. If the best solution is not a legal one, that's what we recommend. And often, we have a connection to the solution we will suggest to customers.

When the best solution is legal, we want the most effective solution for the customer. Frequently this means a deal or policy, sometimes negotiation. There are times it means a war. We understand that balance and the role dispute resolution, whether in court or a hearing room, plays in building customer value.

Our last *Nicolai Law Letter* included an article about how a course of administrative proceedings and court cases helped build a business that ultimately sold for multiples of what similar businesses sold for. The course of litigation created a unique product set that the buying competitor just had to have. The return on the litigation investment measured in thousands of percent.

This *Nicolai Law Letter* carries an article about how a sophisticated legal battle (a war, really) fought simultaneously in several states over several years allowed a growing business to continue growing.

In both scenarios, the driving focus was building the customer's value. That's why our logo says "Business Law & Litigation." While we never litigate for the sake of litigating, there are times when litigation builds business value. When it does, it's part of our mission.

- Paul Nicolai

Why This Is Important ...

The court used the "Restatement Second of Torts," a growing general rule both in Massachusetts and other states. This trend could see similar rules applied in those states.

ELECTRONIC VERSION NO SECRET

A New York trial court ordered the defense to produce electronic versions of an auditor's work papers and quarterly financial statement reviews. They had previously produced hard copy versions of the documents. Producing electronic versions required proprietary software and thus considered them trade secrets. The court held the electronic versions were kept in the usual course of business and therefore discoverable.

Why This Is Important...

It is irrelevant whether proprietary software is involved with the production of electronic documentation in determining whether the documentation is a trade secret. It is the documentation itself that matters, not the source.

COLLECT ONLY WHAT YOU PAID

Once terminated, a plaintiff did not actually commute. It was an error to include compensation for commuting in an employment discrimination case, a court found. Even though the employer had paid for commuting, the value of lost employment benefits are recoverable only if the employee incurred out-of-pocket expenses for the same or equivalent benefits following their unlawful termination.

Why This Is Important...

In an employment discrimination case, plaintiffs may only recover out-of-pocket expenses incurred for acquiring equivalent benefits.

MAILBOX MIXUP WAIVES PRIVILEGE

An employee suing a company found a copy of another employee's memorandum to the company's lawyer, marked "attorney-client privilege" in her mailbox. The court held the attorney-client privilege had been waived, saying the company had not taken reasonable measures to protect the confidentiality of the document.

(Continued on page 3)

NO JURY, NO MONEY FOR ADA CASE

A court dismissed an employee's Americans with Disabilities (ADA) case, leaving only her retaliation claims. Since compensatory and punitive damages are not allowed for retaliation claims under the ADA, the employee was not entitled to a jury trial.

Why This Is Important . . .

An employer facing only a retaliation claim stands an improved chance of disposing of the claim altogether since the employee can expect little to no compensation for proceeding further.

STATE SUITS FOR JUNK FAXES

Individuals may sue for receiving junk faxes in Massachusetts state courts under both state and federal law.

Why This Is Important . . .

Allowing suit in state court for sales contacts without permission is a growing trend in this area of the law.

FUN RIDES PROTECTED, NOT WORK

A bicyclist using a park path on his commute home was injured and filed a negligence claim. But his use of the land was for transportation, not for recreation, a court ruled. Landowners willing to make property available for public recreation without compensation are generally protected against ordinary negligence claims. There was no protection here.

Why This Is Important . . .

The recreational use statute does not give landowners blanket liability protection; the nature of the injured person's use will govern whether there is protection.

LAWYER LIABLE FOR SENSELESS SUIT

Despite evidence that definitively showed a case had no merit, an attorney persisted in litigating. The court concluded an attorney may be liable when a properly commenced lawsuit is continued despite learning that it has no probable cause.

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Why This Is Important...

For the attorney-client privilege to apply, the client must take reasonable measures to ensure the confidentiality of the "privileged" information.

WHISTLEBLOWER ERISA-PROTECTED

A director of human resources and administration was a fiduciary and trustee of the 401(K) employee benefit plan governed by ERISA. After raising concerns about a discrepancy involving underpayment of overtime to non-exempt employees, she was fired. She was allowed to sue her former employer for retaliation under ERISA. The court found that the requirement of an "inquiry" under ERISA was satisfied even if there was no external agency involved.

Why This Is Important...

ERISA protects employees who participate in an inquiry or proceeding. This decision says this applies regardless of whether an external agency is involved.

ONLY YOUNGER FACE MAKES CASE

An employee was laid off but not replaced by a substantially younger person. His claim for age discrimination was dismissed by the court, which ruled there was no evidence that the replacement was not a member of the protected class, or that the employer did not treat age neutrally in its decision to layoff the plaintiff.

Why This Is Important...

Age discrimination claims involving layoffs will likely be unsuccessful if someone substantially younger did not replace the plaintiff.

LATE FILING LIABLE FOR LEAKING

A licensed site professional was hired to oversee the cleanup of leaking gasoline storage tanks and file the necessary documentation to get reimbursement from a state fund. The professional failed to meet filing deadlines in replacing gasoline storage tanks. The delay cost the station owner \$45,000. A Massachusetts Appeals Court decision found the professional liable for damages.

Why This Is Important...

Negligent third parties may be liable for time-limited reimbursements for clean-up costs.

CARELESS CORPORATE CHARGES OKAYED

A business with a corporate credit card account repeatedly paid the unauthorized charges of an employee without protest. The court said this created apparent authority for use of the card, so the company could not sue the card issuer under the Truth in Lending Act for refusing to reimburse unauthorized charges. The company could not avoid liability for the charges because it repeatedly paid the account in full, leading the issuer to reasonably believe the employee was authorized to use the card.

Why This Is Important...

Pay careful attention to corporate credit card bills for unauthorized use. If you do not, the courts will not allow you to avoid the charges.

IMPROVED SECRET USE STILL STEALING

Even if a user modified or improved on a secret, the use of another's trade secret is improper. As long as the substance of the process is derived

from someone else's trade secrets, the use of those modified secrets is considered misappropriation.

Why This Is Important...

Modifying someone else's trade secret is still misappropriation.

SECRETS AREN'T IN OPEN FILES

A company sued its bank for unjust enrichment and conversion of trade secrets. The bank had accessed customer lists and other trade secret information. The court ruled that since the loan documents gave the bank the right to access and examine all of the company's information at any time, all of the information lost its trade secret status.

Why This Is Important...

Granting access to information destroys the ability to claim the information is a trade secret unless the agreement has provisions which protect the status.

**NEWSWORTHY****Nicolai & Nicolai Publish on Fee Splitting**

Attorneys Paul Nicolai and Caroline E. Nicolai published an article on attorney fee-splitting in the most recent issue of the Massachusetts Bar Association's *Section Review* journal. They examined a recent Supreme Judicial Court ruling that clients must provide written consent for any attorney fee-sharing arrangements. The authors included draft language incorporating this new ruling for standard fee agreements.

Mass. Lawyers Weekly Features Nicolai

Massachusetts Lawyers Weekly featured attorney Paul Nicolai as a fee arbitration expert in an article on lawyers collecting client fees. The January 30 cover story, "At What Cost?" examined whether lawyers should sue clients to get paid. Nicolai is Chair of the Massachusetts Bar Association's Fee Arbitration Board, which decides attorney fee disputes. The panel's binding decisions determine whether a fee is reasonable.

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