Public Policy

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Developments in Association Law 2015–2016

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The Nonprofit Organizations Practice at Pillsbury has prepared this summary of significant legal and policy developments that have occurred in approximately the past year. All of these developments have potential impacts upon nonprofit membership organizations. Citations are included for those desiring additional details.

Antitrust

***Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 832 F.3d 1 (1st Cir. 2016).**

The plaintiff, a converter of polystyrene products, argued that the defendants violated Section 1 of the Sherman Act by conspiring to sabotage its recycling model involving commission payments by rejecting agreements that involved commissions and by blocking access to customers. The plaintiff was required to produce evidence that "tends to exclude the possibility" that the defendants acted independently. The court concluded that the plaintiff failed to provide evidence sufficient to raise a reasonable inference of unlawful action. The court found no genuine issue of material fact as to whether a conspiracy existed.

***Kleen Products LLC v. International Paper Co.*, 831 F.3d 919 (7th Cir. 2016).**

Containerboard purchasers sought to recover treble damages under Section 1 of the Sherman Act. The purchasers alleged that defendant companies increased prices by restricting "the supply of containerboard by cutting capacity, slowing back production, taking downtime, idling plants, and tightly restricting inventory." The circuit court ruled that the district court properly certified a nationwide class of purchasers. The prerequisites for certification were satisfied: There were common methods of proof to show the existence of the alleged collusion and the effect it had on prices, the collusion predominated over other factors that could affect an individual purchaser's damages, and releases signed by some members would merely limit their recovery period to purchases made after that time.

***In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015).**

The plaintiffs, purchasers of guitars and guitar amplifiers from the largest retail seller of musical instruments in the United States, claimed that the defendants violated Section 1 of the Sherman Act by conspiring to fix prices. The circuit court rejected the plaintiffs' argument that it is plausible to infer a price-fixing conspiracy based only on allegations that certain guitar manufacturers each adopted similar advertising policies ("parallel conduct") under circumstances that suggest the manufacturers agreed among themselves to adopt these policies ("plus factors"). The court found that the plus factors were consistent with rational and competitive business strategies and did not suggest an illegal agreement.

Attorney/Client

***Sowell v. DiCara*, 127 A.3d 356 (Conn. App. Ct. 2015).**

A nonprofit mental health services board of directors was represented by counsel in an underlying wrongful termination action brought by a former employee against the corporation. The former employee's attorney violated a rule of professional conduct when he sent notice of claim letter to board members, in which the attorney stated his view of the applicable law and what he believed would be the legal consequences of the board's dismissal of his client's employment. Although the corporation had been dissolved, the chairperson of the board still had authority to retain counsel to represent the corporation's interests, counsel had filed a certificate of representation of the corporation, the corporation's bylaws indicated that its business affairs were managed by the board, and the attorney acknowledged that he sent the letter to the board members without the prior knowledge or consent of their counsel.

Bankruptcy

***Ring v. Elizabeth Foundation for Arts*, 136 A.D.3d 525 (N.Y. Sup. 2016).**

Elizabeth Foundation for Arts (EFA), a nonprofit corporation, purchased the assets of another nonprofit corporation, Printmaking Workshop, Inc. (PMW). The asset purchase agreement included a clause stating that EFA had no legal obligation to pay past debts of PMW. A creditor brought suit to collect from the acquiring nonprofit under theories of mere continuation and *de facto* merger. The court affirmed the dismissal of the mere continuation claim because PMW was still registered as an active corporation in New York State and had not been extinguished by the asset purchase. The court then found there was a material issue of fact as to whether a *de facto* merger had occurred. Summary judgment was denied because a material issue of fact existed.

Civil Procedure

***Sampson v. Sisters of Mercy of Willard, Ohio*, No. 3:12 CV 824, 2016 WL 614019 (N.D. Ohio Feb. 16, 2016).**

An employee who was terminated from a nonprofit association brought action against the association for age discrimination. The former-employee sought an order prohibiting the association from referencing or presenting any evidence in court that it was a nonprofit organization or charitable institution, because it was "not relevant to the claims at issue and, even if it were relevant, allowing this type of evidence would unfairly prejudice jurors because they may misunderstand the terms 'nonprofit' and 'charitable' and then be reluctant to hold [the association] liable." The court held that "[The association's] nonprofit or charitable status is not relevant information for the jury and raises a substantial possibility of undue prejudice. This status is extraneous to the claims the jury will be asked to decide and will not be admitted. While it is possible some jurors will know of the connection between Mercy hospitals and the Catholic faith, or that many hospitals are considered nonprofit entities, the members of the jury will be instructed before opening statements and following the close of evidence that they may not permit bias, sympathy, or prejudice influence their verdict."

***NorCal Tea Party Patriots v. Internal Revenue Service*, 2016 WL 223680 (S.D. Ohio 2016).**

A coalition of "Tea Party" affiliated advocacy groups applied to the IRS for federal taxation exemption under 501(c)(3) and (c)(4), and alleged that the IRS targeted them and other "dissenting groups" by segregating their applications and requiring additional information that was not relevant to the application process. Plaintiffs sued the agency, alleging violations of the Privacy Act, First and Fifth Amendments, and

26 U.S.C. Section 6103, which protects confidentiality of tax information, and sought class certification in this suit, as well as designation of two subclasses. The court found that the targeting criteria alleged by the plaintiffs was sufficient to make the proposed class and subclasses ascertainable, that the Rule 23(a) numerosity, commonality and typicality requirements were satisfied, and that NorCal qualified as an adequate representative for the class and subclasses. The court also found that the plaintiffs satisfied Rule 23(b)'s requirement that the common issues in the suit predominate over individual issues, and that the class action was a superior method of adjudication to lower litigation costs and conserve judicial resources, even if the class action was not necessary to adjudicate the plaintiffs' claims. Accordingly, the court rejected the IRS's arguments and certified the principal class and subclasses.

Constitutional

***Protect My Check, Inc. v. Dilger*, 2016 WL 1306200 (E.D. Ky. 2016).**

Protect My Check (PMC), a nonprofit corporation advocating for right-to-work protections, challenged Kentucky's ban on corporate contributions to political candidates for violating its First Amendment rights. It also challenged the ban on 14th Amendment grounds because the limitation on contributions did not apply to unincorporated groups like unions and LLCs. PMC requested a preliminary injunction declaring the Kentucky statutes unconstitutional and enjoining the defendants from enforcing the contribution ban against corporations. The court reasoned that the restriction on speech would be analyzed under strict scrutiny, and found that the defendants had not demonstrated a compelling state interest in the disparate treatment of corporations and unincorporated groups, and therefore, held that the statute was overbroad and unconstitutional to the extent that it treated corporations differently from LLCs and unions. On the First Amendment issue, the court found that even after *Citizens United*, the state did have a legitimate interest in limiting corporate contributions to prevent *quid pro quo* corruption, and found that the ban was closely drawn to achieve that legitimate end, because corporations could still make contributions through Political Action Committees. Based on these findings, the court declined to extend the holding of *Citizens United* into the realm of direct corporate political contributions, and denied PMC's motion with respect to its First Amendment claims.

***National Abortion Federation v. Center for Medical Progress*, 2016 WL 454082 (N.D. Cal. 2016) (on appeal).**

Plaintiff National Abortion Federation (NAF) sought a Temporary Restraining Order against defendants to prohibit them from publishing surreptitious recordings taken at NAF Annual Meetings. Access to the meeting was obtained using false identification and a phony corporation, in violation of confidentiality agreements. The court concluded that the history of violence against abortion providers, the evidence of threats and harassment prompted by previous videos released by the defendants, and the circumstances around the recordings of the videos outweighed the defendant's First Amendment rights and the public's interest in the debate over abortion rights that would be furthered by releasing the recordings, and thus granted the plaintiff's motion for a preliminary injunction protecting the confidentiality of the recordings. The court based its holding on NAF's showing of likely success on the merits of its breach of contract claims against the defendants for violating the confidentiality agreements, and the likelihood of irreparable injury due to anticipated harassment and threats that might follow the release of the recordings.

***Life for Relief & Development v. Bank of America, N.A.,* 2015 WL 5729082 (E.D. Mich. 2015).**

Life for Relief & Development, a charity founded by Arab Americans that maintained multiple accounts with defendant Bank of America, was the subject of an Anti-Money-Laundering investigation by defendant's Global Financial Crimes Group, which recommended that the plaintiff's accounts be closed. Following the closure of the accounts, the plaintiff brought an action against Bank of America alleging discrimination based on race or ethnicity. Bank of America moved for summary judgment, arguing that the plaintiff neither identifies any direct evidence that it was discriminated against, nor did it present evidence that a similarly-situated entity was treated more favorably than the plaintiff.

The court analyzed the plaintiff's claims under the McDonnell Douglas burden-shifting framework for discrimination claims, and found that the plaintiff had presented enough evidence to indicate that Bank of America was aware of the organization's Arab American affiliation and presented evidence demonstrating that a similarly-situated charitable organization not run by Arab Americans did not have their account closed. This evidence was sufficient to make a prima facie case asserting that Bank of America's reason for closing the accounts was a pretext, making summary judgment improper, because inconsistency in the treatment of similar groups presents a genuine issue of fact in discrimination cases. Accordingly, the court denied Bank of America's motion for summary judgment on plaintiff's Section 1981 discrimination claim.

***Delaware Strong Families v. Denn*, 136 S.Ct. 2376 (2016).**

In 2012, Delaware Strong Families, a tax-exempt nonprofit organization, produced a "General Election Values Voter Guide" for Delaware citizens. As Delaware Strong Families prepared to produce a similar voter guide for the 2014 election cycle, it filed this federal suit challenging Delaware's newly enacted disclosure requirements that would require it to reveal many of its donors if it disseminated the voter guide. The Delaware Election Disclosures Act requires "[a]ny person other than a candidate committee or political party" who spends more than $500 on "third-party advertisements ... during an election period [to] file a third-party advertisement report" with the State Commissioner of Elections. Del. Code Ann., Tit. 15, Section 8031(a) (2015). The Third Circuit upheld the statute, overturning the District Court. Delaware Strong Families filed for cert, but cert was denied. Justice Alito dissented from the denial of cert.

***Americans for Prosperity Foundation v. Harris*, 2016 WL 1610591 (C.D. Cal. 2016).**

Americans for Prosperity Foundation (AFP), a California nonprofit charitable organization, brought action against the Attorney General of California alleging state law requiring charitable organizations to file with the state a copy of their IRS Form 990, including Schedule B which included the names and addresses of certain individual donors, violated its First Amendment speech and association rights. AFP sought a declaratory judgment and injunctive relief. To obtain injunctive relief AFP "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." The court's analysis using this four-factor test established that injunctive relief was appropriate to bar the Attorney General from demanding Schedule Bs from AFP as part of their annual filing. The case has been appealed to the 9th Circuit.

***Cohen v. Kabbalah Centre International,* 2016 WL 174335 (Cal. 2nd Ct. App. 2016).**

California's anti-SLAPP statute authorizes a defendant to sue in furtherance of the defendant's right of petition or free speech in connection with a public issue to pursue a special motion to strike. In this case, Cohen made contributions to a charitable organization for a specific purpose. The organization ultimately did not pursue that purpose, but it did not return Cohen's donations. Cohen then sued the organization and several individuals associated with it, alleging fraud, breach of contract and related causes of action. The issue raised by the appeal is whether the claims brought by Cohen do, in fact, arise from acts of the organization in furtherance of its right to free speech in connection with a public issue. The court concluded that the claims do not and therefore affirmed the denials of the anti-SLAPP motions in both cases.

***Parks v. Commissioner of Internal Revenue*, 145 T.C. No. 12, 2014 WL 7280916 (U.S. Tax. Ct. 2015).**

A 501(c)(3) nonprofit foundation paid to air broadcast radio ads in support of Oregon ballot measures over several election cycles. The IRS determined that the production and broadcast of the ads were taxable expenditures. The foundation challenged the IRS's determination that the foundation's excise taxes were deficient and challenged the statute and regulations under which the determination was made as unconstitutionally vague and in violation of the foundation's First Amendment rights. The court found that because the radio messages did not include basic information, presented positions unsupported by facts, and were not aimed at "developing an understanding on the part of the intended audience," they were not educational, and thus were not entitled to a tax exemption. Further, the court found that the excise taxes easily passed rational basis scrutiny, and thus did not violate the First Amendment. It also found that the rules were not unconstitutionally vague because the wide use of the terms of the statute and general content and effect of the language were sufficiently objective to give the petitioners notice of the proscribed conduct.

Employment & Labor

U.S. Department of Labor, Final Rule amending the Fair Labor Standards Act, 29 CFR 541.

The new overtime rule in the Fair Labor Standards Act states that all salaried employees guaranteed to make less than $47,476 annually will qualify for nonexempt status and will be eligible for overtime pay. This salary threshold will be increased every three years beginning in January 2020. Associations wishing to avoid or mitigate the impact of the rule can make adjustments such as increasing salaries, reorganizing workloads to shifting work weeks, expecting exempt employees to shoulder more of the workload, and trimming activities that do not add sufficient value. On November 22, 2016 the District Court in Texas blocked the overtime rule from going into effect on December 1. The Department of Labor is likely to appeal the injunction.

Freedom of Information/Public Records Act

***Walker I Investments, LLC v. Sunpeak Ass'n, Inc.,* 359 P.3d 675 (Utah Ct. App. 2015).**

Walker I Investments, LLC appealed the district court's order denying its request for access to the Sunpeak Association's members' email addresses and phone numbers maintained by the association. Walker argued the list constituted "any record of the Association" that Walker had a "proper purpose" to inspect and copy under the law. The court found that the law specifically sets forth the scope of a member's right to inspect a nonprofit corporation's records of its members. That right to inspect the nonprofit corporation's records regarding its members is satisfied if the nonprofit corporation "furnish[es] to the ... member a list of directors or members that ... complies with Subsection 16–6a–1601(3)," which requires a nonprofit corporation to "maintain a record of its members in a form that permits preparation of a list of the names and address of all members." Thus, the association could not be compelled to furnish anything more than "a list of the name[s] and address[es] of all [its] members." For that reason, the appellate court upheld the district court's ruling regarding email and phone records.

***State ex rel. Slatery v. SeniorTrust of Florida, Inc.,* 2015 WL 9437305 (Tenn. Ct. App. 2015).**

The Tennessee State Attorney General filed suit to dissolve two nonprofit public benefit corporations formed to serve the elderly for abandonment of their charitable purposes. The Attorney General asserted that the Tennessee Nonprofit Corporation Act (TNCA) vests him with "wide discretion and broad powers" to regulate public benefit corporations for the public good. He further argued: "Given the wide latitude granted the Attorney General by the Tennessee General Assembly in this field, any decision made by the Attorney General in the exercise of these statutory duties is reviewed by a court under the 'abuse of discretion' standard." The court agreed with the Attorney General that the TNCA vests him with wide discretion to regulate nonprofit corporations and to make sure they act for the public good. However, the court did not agree that the Attorney General's broad discretion necessarily results in judicial review under the deferential abuse of discretion standard. Based on this finding, the court upheld the judicial dissolution of the nonprofit and the district court's award of the nonprofit's assets to a substantially similar purpose.

Governance

***Lubell v. Lubell*, 2015 WL 7068559 (Tenn. App. 2015).**

In a divorce proceeding in which the parties were both employed by the nonprofit corporation they had co-founded, the wife alleged that the nonprofit was the alter ego of her husband and should be classified as a marital asset. The trial court found that the nonprofit could not be classified as a marital asset and the Tennessee Court of Appeals affirmed. The wife argued that the court should pierce the corporate veil of the nonprofit to assess the husband's interest as marital property, because it served as the husband's alter ego. The court determined that the wife had not alleged facts that would support a finding that the nonprofit was not a legitimate nonprofit corporation, because the wife did not address several factors necessary to determine whether piercing the corporate veil was justified, and those that she did address (the ones related to the "alter ego" allegation) were not addressed with enough specificity to show that the corporation was a mere instrumentality of the husband.

***Matthews v. Island Landmarks*, 2016 WL 1306655 (Wash. App. 2016).**

Two groups each claimed to be the rightful board of directors of a nonprofit corporation, and one, the Kritzman group, brought suit seeking to declare it the rightful board. After an initial grant of summary judgment and a reversal on appeal, the trial court on remand granted summary judgment for the Kritzman group. The Matthews group appealed on the grounds that the court considered inadmissible evidence and misinterpreted the nonprofit's bylaws. The court of appeals first rejected the Matthews group's evidentiary argument, finding that the statement by a drafter of the bylaws was relevant as extrinsic evidence of their meaning. As to the meaning of the bylaws, the Matthews group argued that the rules of a voluntary membership organization may only be interpreted by that organization, and that the court should have deferred to the interpretation of the incumbent directors. The court rejected this argument, finding that the plain language of the bylaws' membership provision, the context of the bylaws as a whole, and the extrinsic evidence allowed only one reasonable interpretation, and the board's contrary interpretation was not entitled to deference. The court found no abuse of discretion and thus affirmed the trial court's denial of the Matthews group's motion to reconsider.

***Matahen v. Sehwail*, 2016 WL 1136602 (N.J. Super. 2016).**

The parties were members of the general assembly of a mosque incorporated under the New Jersey Nonprofit Corporation Act. The plaintiffs accused defendants of misuse of mosque funds, and the defendants moved to dismiss the claims on the ground that a clause in the mosque bylaws required that the claims be submitted for arbitration. The trial court refused to grant the motion to dismiss, finding that the plaintiffs presented cognizable claims concerning a corporate shareholder dispute with regard to board conduct. The New Jersey Superior Court reversed, finding that the arbitration clause should be enforced because nonprofit associations are given the "utmost latitude in their regulation and management of intercorporate affairs." The court found that the bylaws, and by extension the arbitration provision, were part of a contract that bound the members, and found that there was no public policy rationale that required the court to intervene in the inner workings of the organization. Thus, the court found that the "private law" of the mosque governed and ordered that the plaintiff's claims be referred to arbitration.

Taxation

***True the Vote, Inc. v. IRS*, 831 F.3d 551 (D.C. Cir. 2016).**

The IRS targeted several conservative advocacy groups for additional scrutiny while processing their 501(c)(3) and 501(c)(4) applications. The circuit court concluded that the district court properly dismissed plaintiff's claims and that the case was mooted because the government stopped using discriminatory criteria. The circuit court reversed this decision and remanded for further proceedings because the government had not taken sufficient steps to address its “admittedly improper” discriminatory criteria.

***In re U.S.,* 817 F.3d 953 (6th Cir. 2016).**

In 2010, the IRS began to pay unusual attention to 501(c) applications from groups with certain political affiliations. As found by the Inspector General, the IRS “developed and used inappropriate criteria to identify applications from organizations with ‘Tea Party’ in their names,” targeted applicants “experienced significant delays and received requests for unnecessary information.” The plaintiffs, a coalition of nonprofits that fell victim to this scheme, asserted claims under the Privacy Act, 5 U.S.C. Section 552a, and under the First and Fifth Amendments. The IRS resisted discovery efforts of the coalition, including filing for a writ of mandamus. This case resolved the writ of mandamus. The IRS argued that the “names and other identifying information of” organizations that apply for tax-exempt status—along with the applications themselves—are confidential “return information” under 26 U.S.C. Section 6103. Additionally, the IRS argued that the district court lacked authority to order disclosure of those names under a statutory provision for disclosure in judicial proceedings where “the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding [.]” 26 U.S.C. § 6103(h)(4)(B). Ultimately, the court rejected the IRS’s arguments and mandated that it comply with the district court's discovery orders of April 1 and June 16, 2015—without redactions and without further delay.

Torts

***Waschle ex rel. Birkhold-Waschle v. Winter Sports, Inc*., 127 F.Supp.3d 1090 (D. Mont. 2016).**

Parents and the estate of a deceased foreign exchange student brought action against the student’s host family and resort where he had a ski accident that led to his death. The host family moved for summary judgment. The defendants argued that they are immune from suit, relying on federal and Montana statutes governing immunity for nonprofit volunteers. The Montana statute provides blanket protection for nonprofit volunteers acting within the scope of their responsibilities. The only exception from immunity is for willful or wanton misconduct. After determining that the Montana statute governed, the court found that the defendants were volunteers for a nonprofit organization acting within the scope of their capacity as volunteers. Moreover, the plaintiffs failed to present evidence controverting the defendants’ sworn testimony that they warned the boy of the dangers of tree wells and skiing alone. Given the protection afforded under Montana law, and the lack of evidence suggesting willful or wanton misconduct by the defendants, the court granted the defendants’ motion for summary judgment.

***Pantano v. Newark Museum*, 2016 WL 528771 (N.J. Sup. 2016).**

Plaintiff slipped and fell on the icy steps at the entrance of a nonprofit museum while attending a panel related to her work as an immigration attorney. The museum moved for summary judgment, arguing that the plaintiff’s claim was barred by the Charitable Immunity Act because the plaintiff was a direct beneficiary of the museum’s charitable programs. The plaintiff argued that she was directed to attend the event by her employer, and thus was not a direct beneficiary, and that the museum was not conducting charitable programs at the time because it was closed to the public while it hosted the event. The court first rejected the argument that the museum was not engaged in charitable activity at the time, finding that an organization did not lose its statutory immunity by charging money for its services, as long as it did not make a profit or collect fees for activities unrelated to its organizational pursuits. However, the court found that the plaintiff was not a beneficiary of the museum's charitable activities, because the employee of a third party beneficiary of a charity is not considered to personally be a beneficiary of the charity. The court thus reversed the trial court's grant of the museum's motion for summary judgment.

Trademark and Intellectual Property

***Authors Guild v. Google*, 804 F.3d 202 (2nd Cir 2015).**

The authors of published books under copyright brought a putative class copyright infringement action against Google, claiming that the search engine's project, which made digital copies of books submitted by major libraries, and allowed the public to search the texts of the digitally copied books and see displays of snippets of text, infringed on the authors' copyrights. Following the rejection of a proposed settlement and vacatur of class certification, the U.S. District Court for the Southern District of New York granted summary judgment to Google under the fair use doctrine. The authors appealed. The Second Circuit held that Google does not infringe the authors' copyright in their works by making digital copies of them, "where the copies are used to enable the public to get information about the works, such as whether, and how often they use specified words or terms (together with peripheral snippets of text, sufficient to show the context in which the word is used but too small to provide a meaningful substitute for the work's copyrighted expression)." The copyright resulting from the authors' works does not include an exclusive right to furnish the kind of information about the works that Google's programs provide to the public. The copyright that protects the plaintiffs' works does not include an exclusive derivative right to supply such information through query of a digitized copy. The Second Circuit held that the copyright that protects authors' works does not include an exclusive derivative right to supply such information through query of a digitized copy.

***United States Do Moo Duk Kwan Fed'n, Inc. v. Tang Soo Karate Sch., Inc*., No. 3:12-CV-00669, 2015 WL 4920306 (M.D. Pa. Aug. 17, 2015).**

A nonprofit martial arts corporation, Tang Soo Karate School, Inc. doing business as the International Tang Soo Do Moo Duk Kwan Association, was accused of trademark infringement and unfair competition for using the plaintiff's name and logo. The plaintiff alleged that it owned the term "United States Tang Soo Do Moo Duk Kwan Federation" and the term "Moo Duk Kwan," and that the nonprofit association used the term "Moo Duk Kwan" (as this was the type of martial arts promoted by the corporation) and a "confusingly similar . . . fist-and-laurel-leaves design," which the plaintiff had trademarked as a symbol for its own organization. The court found for the plaintiff, stating that it demonstrated all of the elements of trademark infringement under the Lanham Act because: (1) the Tang Soo Karate School stipulated to the fact that the plaintiffs owned and continuously used a valid and legally protectable mark for the required period of time, which was five years; and (2) "the defendant's use of the mark to identify goods or services causes a likelihood of confusion" since "[t]he services of plaintiff and defendants are advertised and promoted through the same trade channels. Both are membership organizations. Both have internet cites [sic] promoting their services in a similar fashion. Both have exhibitions for member organizations. Both provide services to their members for their instruction and their conduct of their services… Both organizations provide certificates to members, using remarkably similar designs… Both organizations hold martial arts tournaments… At the most basic level, both organizations hold themselves out as teaching and practicing the arts of Tang Soo Do and Moo Duk Kwan." Accordingly, although the emblems were not identical, they created "the same overall impression when viewed separately" and when a "roving customer" viewed them, they "would most likely conclude that they share a common source." Similarly, use of the term "Moo Duk Kwan" was the dominant feature of each organization's name (the parties agreed that all other words used in the parties' names were generic), and "the fact that the dominant portions of both the plaintiff's and defendant's business names relies on the plaintiff's trademarked term 'Moo Duk Kwan' supports a finding of a likelihood of confusion.

***Alumni Ass'n of New Jersey Institute of Technology v. New Jersey Institute of Technology*, 2016 WL 2746068 (N.J. Super. Ct. App. Div. 2016).**

An alumni association brought action against a university after the university decided to disaffiliate itself from the association and preclude it from using its trade name "New Jersey Institute of Technology." First, the Court of Appeals upheld the district court's conclusion that NJIT permitted the association to use its distinctive name and to represent itself as the university's official alumni association, on the condition that it fulfill the functions of an officially-sanctioned alumni association. Those functions included creating goodwill for the university among its alumni, encouraging them to support it ("friendraising"), and arranging alumni events. When the association's board became "insular" and disconnected from the alumni, ceased planning alumni events, allowed most of the association's 59 local chapters to become inactive, and began attacking and undermining the university, NJIT was entitled to withdraw permission to use its name. Based on this finding, the court held that the plaintiff's continued use of the name "Alumni Association of New Jersey Institute of Technology" would create confusion by giving the impression that plaintiff was still NJIT's officially-sanctioned alumni association. Furthermore, universities, charities and other nonprofit organizations have a protectable interest in their ability to attract monetary contributions, and other forms of support, through the use of their protected trade names. Contrary to the plaintiff's argument, it was not necessary to prove that an infringer is using the name for a profit-making commercial purpose. A nonprofit entity that makes unauthorized use of the name for charitable purposes may be enjoined from trademark infringement. Thus, fundraising and alumni services are considered "commercial" services for the purposes of trademark protection.

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