

BUSINESS REPORT

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Put the Lawsuit Next To The Garage

As the Twin Cities real estate market continues to thrive, the suburbs of both Minneapolis and St. Paul swell with new construction. Homeowners increasingly assist in the design of their homes, glean ideas from countless house plans available on the Internet and in magazines and by touring model homes.

But when does using an idea seen on the Internet, in a magazine or in a model home become architectural copyright infringement? One United States Federal District Court recently weighed in on that question in a case involving two Twin Cities builders.

In *Kootenia Homes v. Reliable Homes, Inc.*, 2002 WL 15594 (D. Minn. Jan. 3, 2002), United States Federal District Court Judge Ann Montgomery considered the question of whether Kootenia Homes, Inc. could protect the idea of placing a home office off the

kitchen of a residential home under the United States Copyright Act. The case involved a married couple who planned to move to the Twin Cities. Prior to their move, they toured a number of homes in the Wedgewood Development located in Woodbury, including a home built by Kootenia Homes. In addition, they reviewed numerous magazines to gather ideas that they intended to incorporate into their new house plan.

Ultimately, the owners chose Reliable Homes, Inc., another authorized builder, to design and construct their home. Shortly after the home was built, Kootenia Homes sued Reliable Homes, alleging that Reliable Homes had "copied" some unique aspects of the Kootenia Homes model which the couple had toured, including the location of the home office.

Following completion of the discovery process, the parties brought cross-motions for summary judgment. Felhaber, Larson,

Fenlon & Vogt attorneys, Bob Bach and Dan Kelly, represented Reliable Homes. The Court granted Reliable Homes' Motion for Summary Judgment, rejecting Kootenia Homes' claim, and holding that the house plan Reliable Homes designed did not violate Kootenia's copyright.

In doing so, the Court considered the United States Copyright Act, which was amended in 1990 to protect architectural plans and architectural works, including residential homes. In its opinion, the Court explained the dichotomy between protecting an idea and protecting the expression of that idea, holding that: "Although there are similarities between the [Reliable] home and the [Kootenia] home, the similarities do not go beyond the concepts and ideas contained in the Kootenia home plan."

In addition to the idea/expression dichotomy, the Court applied a three-part analysis to determine whether the two homes in question were substantially similar. First, the Court analyzed the objective similarities in the details of the homes based upon the expert testimony provided by both parties. The Court found that, "a close scrutiny of the objective similarities in the details of the home office reveals distinguishable characteristics" and that "any overall general similarities between the [Kootenia] home and the [Reliable] home extend only to unprotectable concepts or ideas."

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Felhaber Larson Fenlon & Vogt

Plaintiff's Attorneys - 1 Medical Plan - 0

It is common for most insured and self-insured medical plans to have provisions ("subrogation clauses") permitting the plan to require its participants to repay the dollar amount of the medical benefits paid by the plan out of any third-party recovery received by the plan participant. An example of a situation that frequently occurs is when a plan participant is injured in an automobile accident and eventually sues the driver of the other vehicle. While that case is pending, the medical benefits plan may have paid anywhere from \$5 to \$500,000 in medical expenses to cover the cost of putting the plan participant back together.

Under the laws of many states, it is very difficult (if not impossible) for a medical insurance company to assert a claim against the recovery received by the plan participant. Under Minnesota law, an insurance company cannot get its money back unless and until the plan participant has been "made whole." If you have ever talked to anyone who was injured in an automobile accident, you will have a tough time concluding that anyone injured in an automobile accident is ever made whole even if they are put back together.

Part of the reason for this problem is that the plan participant needs to hire an attorney to pursue the claims resulting from the accident. Attorneys don't work for free. Most medical insurance plans do not pay the participant's attorney to pursue a claim even if the recovery ends up in the plan's pocket.

However, self-insured plans have been protected from these problems under the Employment Retirement Income Security Act (ERISA). ERISA is a federal statute and it preempts any inconsistent state laws which interfere with the operation of medical or

other benefit plans. For this reason, federal courts traditionally have held that self-insured ERISA medical plans are not required to contribute to the cost of a plan participant's attorney pursuing a claim against a third-party. The federal courts have also regularly held that a self-insured plan is entitled to pursue and keep a subrogation interest against a plan participant to recover the dollar amount of the interest the plan spent on healing the participant.

This may have been the law for the last 20 years. However, the United States Supreme Court turned that world on its head last month when it held that a self-insured medical benefits plan cannot sue a plan participant in federal court under ERISA to recover the dollar amount of the medical benefits already spent by the plan on its participant. (*GreatWest Life & Annuity Insurance Co. v. Knudson*)

The *GreatWest* case was not unique. The case involved an automobile accident which resulted in the plan participant suffering severe medical injuries and a life time disability. It also resulted in the plan spending almost \$500,000 on medical expenses to treat the plan participant.

When the plan participant recovered \$750,000 from the car manufacturer and insurers, the plan submitted its bill for \$450,000. The response of the plan participant was to give all \$750,000 to the plan participant's attorney. That attorney then wrote a check to the self-insured medical plan for \$15,000, wrote themselves a check for \$300,000, and put the rest into a trust to care for the plan participant.

This upset the insurance company. They sued in federal court to recover their money. For several different reasons, the federal trial and appeals court turned down the insurance company and said the plan participant

and her attorney were entitled to keep the money.

In a surprise decision, the U.S. Supreme Court agreed that the plan participant's trust and her attorney should keep the money. The U.S. Supreme Court said that ERISA does not permit an ERISA plan to sue a participant for damages. It only permits an ERISA plan to bring an injunctive action to stop someone from violating the plan, not to recover money. The Court said this obviously was a case where the plan was seeking to recover money, so it was not permitted under ERISA and must be dismissed.

The *GreatWest* case was decided 5-4 with several vigorous dissents. Since it overruled how parties have been acting for 20 years, it will take a while to see how this decision will be interpreted by the lower courts and how plans will respond to plaintiffs and their attorneys ending up with money that the plan had been counting on to refuel the plan.

We will keep you apprized of any changes. If you have any questions, contact Terry Cullen in our Minneapolis office or Ed Cassidy in our St. Paul office.



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Corporate Formalities:

Keeping Adequate Records and Minutes

Every action taken on behalf of a corporation is essentially subject to review. In order to keep the corporation in good standing with state and federal rules and regulations, you must create minutes that record every major transaction made by the corporation. Failure to prepare corporate minutes can result in personal liability of the shareholders, directors and officers, and mean a loss of protection of the corporate shield.

As the owner of a corporation, you are required to hold shareholders' and directors' meetings, maintain corporate records and document major corporate decisions. Neglecting these formalities, in essence, ignoring your corporation's separate existence, can mean that if your business runs into legal trouble, your corporate status may be similarly disregarded by a court.

Even though the Minnesota Business Corporation Act (MBCA) does not make it mandatory to keep annual minutes, failure to take the simple step to create the minutes can impact your status. Since corporate minutes are all that a corporation has as proof of existing as a corporation, a lack of these records is used to discredit a corporation's status.

While you don't need to document routine business decisions, you should prepare written minutes or consent resolutions for events or decisions that require formal board of director or shareholder

participation and approval. Examples of such decisions include the following:

- Proceedings of annual meetings of directors and shareholders
- Issuance of stock to new or existing shareholders
- Purchase of real property
- Approval of a lease
- Authorization of a significant loan amount or substantial line of credit
- Adoption of a stock option or retirement plan
- Adoption of employee benefit plans
- Making of important federal or state tax decisions
- Election of corporate officers and directors

This list is by no means exhaustive, but is just a sample. If you document important corporate decisions, whether through formal written minutes or less formal consent resolutions, you will protect your limited liability status. By keeping accurate records of the actions approved and taken by the board of directors, you will have solid documentation if key decisions are later questioned by creditors, the courts, the IRS or members of your organization. In addition, keeping good corporate records allows you to note the reasons for making critical decisions and why actions were taken. The more detailed the minutes, the better chance you have of

preventing disputes and dissension among the members of your organization.

While this article stresses the importance of corporate formalities, it is important for every organized business to prepare and file annual minutes, whether the business is a corporation or a limited liability company. Owners and managers of limited liability companies can apply this general advice to their company for all the same reasons.

If you already have corporate minutes but they are not up to date, or if you have never kept corporate minutes at all, then your next step is to get your corporate minutes in order immediately. Please contact Betsy Kiernat or any one of the business attorneys at Felhaber, Larson, Fenlon & Vogt for advice on your corporate minutes. We can offer you a simple, dynamic and thorough way to keep your records up-to-date, which in turn can help protect your corporate status and allow you peace of mind.



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What would you like to read?

The Business Report is a service to Felhaber's clients and friends. Our goal is to write articles you find interesting, timely, and enjoy reading. Let us know what you would like to see us address in the next issue of Business Report.

Please contact Terry Cullen, editor, with your suggestions.

Business Report & Health Law Monitor Receive Top Award

We are delighted to announce the December/January 2002 issue of Law & Politics Magazine recognized Felhaber as a winner in their law firm marketing materials contest.

Felhaber received a 1st place award in the newsletter category for the Business Report and the Health Law Monitor. The judges made the following comments:

"Felhaber's versatile design and relevant writing make the most out of one of marketing's necessary evils."

Congratulations Terry Cullen, Business Report editor, and Janet Newberg, Health Law Monitor editor, for this outstanding accomplishment.



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Pension Plans Play Catch-Up With Tax Law Changes

When President George Bush signed the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), many employers and taxpayers were wondering what all the fuss was about that resulted in a tax law being passed, doomed to die ten years later. Regardless of its life expectancy, this tax law will impact individuals' plans and businesses in 2002, most notably with regard to 401(k) plans.

The following list highlights the impact of EGTRRA for the year 2002:

- The individual deferral limit for a 401(k) plan has been increased to \$11,000.
- Individuals aged 50 or over may be allowed to add an additional catch-up contribution of \$1,000 per year.
- Individuals who have had the misfortune of taking a hardship withdrawal from a 401(k) plan have been suspended from making new contributions to the 401(k) plan for one year. As a result of EGTRRA, that one-year hiatus can be shortened to as little as six months.
- Regardless of the 401(k) plan's vesting schedule, the maximum vesting schedule for employer matching contributions to a 401(k) plan also has been reduced to either a three-year cliff or six-year graded maximum vesting schedule.
- The annual compensation that can be used to calculate the amount of compensation to be considered for contributions to 401(k) plans has been increased to \$200,000.
- The annual limit on total employer and employee contributions to a participant's account is increased to the lesser of \$40,000 or 100% of compensation.
- The rules on roll-overs to pension plans have been modified so that a roll-over can now be made into a 401(k) plan from just about any pension, profit sharing, annuity, governmental plan or an IRA.

- It has gotten easier to take money out of a 401(k) plan. The tax rule formerly required that an employee had to terminate employment with the sponsoring 401(k) employer or successor employer ("termination of service") before receiving a distribution. That law has been replaced with a simpler rule that only requires that a distribution cannot be made unless there is a "termination of employment." Since a termination of employment almost always occurs when companies are purchased or merged, the fact that an individual continues to sit at the same desk after a corporate reorganization will end up simply creating a large group of much richer individuals sitting at the same desks. Almost all of these changes will require that the plans be amended before employees can use them.

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Corporate Formalities: Keeping Adequate Records and Minutes ■ *Continued from page 1*

Next, the Court evaluated the response of the "ordinary, reasonable person" when comparing the two homes. Again, the Court found in favor of Reliable Homes, stating that: "To the untrained eye, the exteriors of the homes are clearly distinct."

Finally, the Court considered whether Reliable Homes could demonstrate, as a matter of law, that Reliable Homes independently created the house plan. Again, the Court held in favor of Reliable, holding that Kootenia's "effort to manufacture a genuine issue of fact as to independent creation [was] unavailing."

Judge Montgomery's decision in *Kootenia v. Reliable* means people who are considering building a new home can continue perusing house plans and model homes in an effort to get "ideas" for their new home. Builders, on the other hand, can remain secure knowing that the

expression of their unique ideas, including specific house plans and actual homes, themselves, remain protected by the Federal Copyright Act.

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BUSINESS REPORT

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Business Report is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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