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Non-Profit Corporations' Names

*Sheila M. Kahoe**

A NON-PROFIT ORGANIZATION, like its counterpart, the profit-seeking corporation, must have a name if it is to exist as a legal entity.¹ Most states impose statutory restrictions on the selection of a name, with little or no distinction between the rules governing the business corporation and the non-profit corporation. For example, in Ohio the two sections of the Revised Code relating to corporate names are virtually identical.²

The Ohio statute serves to illustrate the policy reasons for the state's policing of the selection of a corporate name. Two important considerations are set forth in the statute: first, that the name selected shall not mislead the public, and second, that a name selected not be so similar to that of an existing corporation as to cause confusion.³

Certain exceptions to this last provision are noted. If the previously incorporated group files a written consent with the Secretary of State the name may be approved.⁴ Also, when dealing with the merger or consolidation of two or more groups, the name of the surviving or new corporation may be the same as or similar to that of any constituent corporation.⁵ A similar statutory exception is provided when a merger takes place between a domestic and a foreign corporation.⁶

The state's authority to refuse authorization of a name extends to a foreign corporation (profit or non-profit) wishing to do business in the state. This power is considered necessary to protect the public. It has been held that it is not an abuse of discretion to withhold authorization even though the businesses of the two parties are so dissimilar that they could not be confused.⁷

Just how extensive the state's discretion is can be seen in the following example. A domestic corporation filed a written consent with the Secretary of State indicating its willingness to allow the use of a similar name by an incoming corporation. When the Secretary refused to authorize the use of the selected name, a mandamus action was brought. The appellate court reversed a judgment issuing the writ, reasoning that the purpose of the statute was to protect the

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¹ *American Steel Foundries v. Robertson*, 269 U. S. 372 (1925).

² OHIO REV. CODE ANN. §§ 1702.05, 1701.05 (Page 1964).

³ *Id.* § 1702.05 (A) (Page Supp. 1970).

⁴ *Id.*

⁵ *Id.* § 1702.41 (B) (2).

⁶ *Id.* § 1702-45.

⁷ *Jervis Corp. v. Secretary of State*, 43 Misc. 2d 185, 250 N. Y. S. 2d 544 (Super. Ct. Nassau County 1964).

public as well as the domestic corporation. In this case, the court felt that because of the nature of the business, the public might be harmed by confusing the two corporations. So, despite the consent of the domestic corporation, the foreign corporation was not permitted to do business in the state under the selected name.⁸

Protecting the Public

Courts have consistently held that it is the duty of the state to protect the public from deception. This consideration is of prime importance and will be weighed very heavily.⁹ Further, it has been held that the action of the Secretary of State in refusing to authorize a selected name will be reviewed by the court only when there is clearly an abuse of discretion.¹⁰ One court in viewing the policy reasons for protecting names has stated, "If there is no possibility that corporate names will tend to confuse the public or mislead them in any way, there is no reason for protection of that name."¹¹ However, it has also been held that it is not necessary to show actual confusion; if persons of ordinary intelligence would likely be confused, that is enough.¹²

This last interpretation is not the rule in every jurisdiction. In a 1967 case decided in the Tenth Circuit, the court held that the determination as to whether corporate names are confusing is a question of fact.¹³ The court cited as support for their position a 1961 opinion from the same court.¹⁴ Their reasoning was based on the theory that a "greater similarity of names is allowed when the customers are capable of close discrimination."¹⁵

This more sophisticated attitude, however, is not being accepted universally. Courts continue to apply the "likely to cause confusion test", giving less weight to evidence of lack of actual confusion.¹⁶

⁸ *Investors Syndicate of America v. Hughes*, 378 Ill. 413, 38 N. E. 2d 754 (1941).

⁹ *Barber Co. v. Department of State*, 277 N. Y. 55, 12 N. E. 2d 790 (1938).

¹⁰ *Motor Club of America v. Curran*, 193 Misc. 157, 83 N. Y. S. 2d 733 (Sup. Ct. 1948), *aff'd*, 274 App. Div. 1083, 85 N. Y. S. 2d 552, *aff'd mem.*, 299 N. Y. 776, 87 N. E. 2d 678. *See also* *National Shoe Stores Co. v. National Shoes of N. Y.*, 213 Md. 328, 131 A.2d 909 (1957).

¹¹ *Pilgrim Holiness Church v. First Pilgrim Holiness Church*, 115 Ill. App. 2d 448, 252 N. E. 2d 1, 4 (1969).

¹² *First Congressional Dist. Democratic Party Org. v. First Congressional Dist. Democratic Org., Inc.*, 22 Mich. App. 386, 177 N. W. 2d 224 (1970).

¹³ *General Adjustment Bureau, Inc. v. General Ins. Adjustment Co.*, 381 F. 2d 991, 992 (10th Cir. 1967).

¹⁴ *Beatrice Foods Co. v. Neosho Valley Coop. Creamery Ass'n.*, 297 F. 2d 447 (D. Okla. 1961).

¹⁵ *General Adjustment Bureau, Inc. v. General Adjustment Co.*, 381 F. 2d 991, 992 (10th Cir. 1967). *See also* *Lawyers' Tire Ins. Co. v. Lawyer's Title Ins. Corp.*, 109 F. 2d 35 (D.C. Cir. 1939). Here the court points out that the more sophisticated and discerning the customers likely to use the services of the organization, the less reason there is for protection.

¹⁶ *First Congressional Dist. Democratic Party Organization v. First Congressional Dist. Democratic Organization, Inc.*, 22 Mich. App. 386, 177 N. W. 2d 224 (1970). *See also* *General Adjustment Bureau, Inc. v. Fuess*, 192 F. Supp. 542 (S.D. Tex. 1961), relying on *Abramson v. Coro, Inc.*, 240 F. 2d 854 (5th Cir. 1957) and *Pure Foods v. Minute Maid Corp.*, 214 F. 2d 792 (5th Cir. 1954).

Use of Family Name

Ordinarily one may use his own name for business purposes. However, in some cases the courts have been called upon to balance the natural right of one to use his own name against the right of an established corporation against unfair competition. The laws governing unfair competition usually involve the passing off of goods or services as the goods or services of another.¹⁷ The courts have taken this idea and formulated some restrictions on the use of family names.

An individual may not use his own name with the fraudulent intent of passing his name off as that of another and thus taking advantage of another's good reputation.¹⁸ In some cases that deal with this problem, the courts have extended this rule and presumed fraud even without evidence of an actual intent to deceive, when the effect of the use of the name has created confusion in the mind of the public and thus has been a cause of deception.¹⁹ One Tennessee court has gone even further. They held that it is enough to show that the ordinary or unwary purchaser might be confused.²⁰

In addition, if one has a name which has already been made famous by another family (i.e., J. P. Morgan, Rockefeller, etc.) it may be prima facie deceptive to use that similar name because of the possibility of confusion.²¹

Secondary Meaning

Whether the use of a family name is proper may also depend on whether the prior use has acquired a secondary meaning because of long use or extensive publicity. For instance, permission to use the name "Bacardi" was refused since the name had been used so long and had become so closely identified with the product as to be almost synonymous.²² Other examples of this sort of usage are readily available.

Rights Extended to Charitable Corporations

With the emphasis of the statutes and the court decisions now primarily concerned with avoiding confusion and deception of the public, the criteria governing the selection of a corporate name now clearly include charitable or eleemosynary corporations.²³ Even without the concept of profit-making, the good will of an organization is deemed worthy of protection. This is especially true when the selected

¹⁷ Griesdieck Western Brewing v. Peoples Brewing Co., 56 F. Supp. 600 (D. Minn. 1944).

¹⁸ Annot., 44 A. L. R. 2d 1156, 1159 (1955).

¹⁹ *Id.*

²⁰ Neuhoff, Inc. v. Neuhoff Packing Co., 167 F. 2d 459 (D. Tenn. 1948).

²¹ H. OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS 143 (2d ed. 1965).

²² *Compania "Ron Bacardi" S. A. v. American Bacardi Rum Corp.*, 63 N. Y. S. 2d 610 (Sup. Ct. 1934).

²³ *American Gold Star Mothers v. National Gold Star Mothers*, 191 F. 2d 488 (D.C. Cir. 1951).

name is so similar to another as to induce membership in the latter or to cause in any way treatment of one as the other.²⁴ Careful consideration may be given the conduct of the newcomer. If this organization attempts to palm itself off as the earlier one or makes no conspicuous effort to disclaim identification with the former, use of a similar name will certainly be prohibited.

The courts have been explicit in pointing out that the selection of a name is restricted to prevent fraud in dealing with the public.²⁶ They are no longer solely concerned with the same as a property right.²⁷ However, the protection will not be extended indefinitely. In *Pilgrim Holiness Church v. First Pilgrim Holiness Church*²⁸ the plaintiff church sought to enjoin the defendant from using the words "Pilgrim Holiness" in its name. In this case, the plaintiff church had previously merged with another church and was now known as the Wesleyan Church. Because a considerable amount of property (in trust) was held for the plaintiff, it was argued that the defendant should not be allowed to use the name, despite the fact that the plaintiff no longer used the name. The Court of Appeals of Illinois found that nothing in the record indicated that the plaintiff in any way retained the use of the name. This, concluded the court, was an effective abandonment of the name and thus the defendant could not be enjoined from using the designation "Pilgrim Holiness" as a part of its name.²⁹

Geographic, Generic and Descriptive Names

Ordinarily, exclusive rights to a name which is geographic, generic or descriptive will not be given.³⁰ In 1888 the United States Supreme Court set forth this basic proposition of law.³¹ Mr. Justice Field, writing for the Court, reasoned that "no one can claim protection for the exclusive use of a trade-name or trade-mark which would practically give him a monopoly."³² This same case also prohibited the exclusive use of geographic names. As of the date of this writing, this decision rendered in 1888 is still good law.

There are exceptions to this general rule, however. By special statutory provision some names are restricted from general use.³³

²⁴ *Most Worshipful Jiram of Tyre v. Most Worshipful Sons of Light*, 94 Cal. App. 2d 25, 210 P. 2d 34 (1949).

²⁵ *American Gold Star Mothers v. National Gold Star Mothers*, 191 F. 2d 488 (D.C. Cir. 1951).

²⁶ *Pilgrim Holiness Church v. First Pilgrim Holiness Church*, 115 Ill. App. 2d 448, 252 N. E. 2d 1 (1969).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 7.

³⁰ 18 AM. JUR. 2d *Corporations* § 148 (1965).

³¹ *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598 (1888).

³² *Id.* at 603, citing *Canal Co. v. Clark*, 13 Wall. 311 (1871).

³³ H. OLECK, *supra* n. 21 at 145.

Names such as United Nations, Mason, Bank, Insurance, Union and numerous others, may be restricted in toto or made available only with the permission of the appropriate authority.

A further exception applies to the use of generic or geographic terms if an intent to deceive can be shown.³⁴ In *Lincoln Center for the Performing Arts, Inc. v. Lincoln Center Classics, Record Society, Inc.*³⁵ it was held that despite the argument that "Lincoln Center" is a geographical location, the name would be protected since the evidence showed that the name was adopted "with intent to acquire or obtain for personal or business purposes a benefit or advantage."³⁶

This idea of deliberate misrepresentation in the use of a generic term was explored recently in a New Jersey case. One Frank Grohman began operating an animal dealership under the name Humane Animal Shelter (Center) of New Jersey, Inc. Suit was brought by several local and national humane societies on the theory that the use of the word "humane" constituted a fraud upon the public at large since it deliberately misrepresented the true character and nature of the defendant's operation.³⁷ In this case, the court did not rely on the theory of unfair competition in fashioning its decision. Here it was dealing with a charitable (non-profit) corporation seeking to enjoin the use of a generic term, claiming that the defendant's use of the term damaged the reputations of the several plaintiffs (and all others similarly situated). Note that the damage claimed was to reputation, although the court commented that there was also a possibility of financial harm to the plaintiffs by way of decreased membership and/or contributions.³⁸

After exploring the meaning which the general public commonly places on the word "humane," the court found that the defendant's business did not conform to the concept of "humane" as understood by the public and upon which the public relies. The defendant was therefore found to be "through the use of the word humane in its title . . . foisting a fraud upon the public."³⁹ An injunction was granted because the court felt that the public would ultimately be damaged because of the misrepresentation inherent in the use of a generic term which normally would not be restricted.⁴⁰

Several states have provided for this type of situation by statute. New York and Massachusetts, for instance, impose criminal penalties for the fraudulent use of a name which so nearly resembles that of

³⁴ *Id.*

³⁵ 25 Misc. 2d 686, 210 N. Y. S. 2d 275 (Sup. Ct. 1960).

³⁶ *Id.* at 277, citing N. Y. PENAL LAW § 948 (McKinney 1967).

³⁷ National Catholic Society of Animal Welfare, Inc. v. Grohman, No. C-1842-70 (N. J. Super., April 6, 1971).

³⁸ *Id.* at 7-8.

³⁹ *Id.* at 7.

⁴⁰ *Id.*

a benevolent, charitable, humane or fraternal organization as to deceive the public.⁴¹

Reservation and Change of Name

Generally, a person may reserve a name for a proposed new corporation by submitting to the Secretary of State a written application for the exclusive rights to use such name. Some states have extended this statutory provision to allow this right to non-profit corporations as well.⁴²

When applying for reservation, if the Secretary of State finds the name is available, he will endorse the application. The applicant then has the exclusive rights to the use of the selected name reserved for 60 days. During this time the applicant may, if he chooses, transfer these rights by filing with the Secretary a written notice of the transfer including the name and address of the transferee.⁴³

Similar provisions are set forth for any corporation or non-profit corporation wishing to change its name.⁴⁴ General corporation law recognizes no power in the corporation to change or alter its name except through the formal procedures set forth in the controlling statutes.⁴⁵

There is some question as to the effect on the corporate existence in the event of an illegal or unauthorized name change or alteration. Some courts have held that the corporate identity is not destroyed, but rather becomes a partnership, with the officers and stockholders liable as partners.⁴⁶ The opposite conclusion has been reached in other jurisdictions following the theory that abandonment of the name is equal to the abandonment of the corporation itself.⁴⁷

An authorized change of name has the same effect as the name change of a natural person. It does not change the corporation's liabilities under the old name.⁴⁸ However, it allows the corporation to continue its operation under a new name.

Remedies

A general rule of law states that a corporation, profit or non-profit, chooses its name at its own peril.⁴⁹ A corporation having prior

⁴¹ MASS. ANN. LAWS ch. 266, § 71A (1966); N. Y. GEN. BUS. LAW, Art. 9-B § 135 (McKinney 1968). See also N. Y. GEN. BUS. LAW Art. 26 § 397 (McKinney 1968).

⁴² E. g., OHIO REV. CODE ANN. § 1702.05 (C) (Page Supp. 1970); CALIF. CORP. CODE § 310 (West 1955); ILL. ANN. STAT. ch. 32, § 157.10 (Smith-Hurd 1954); PA. STAT. ANN. tit. 15, § 1203 (1967).

⁴³ OHIO REV. CODE ANN. § 1702.05 (C) (Page Supp. 1970).

⁴⁴ *Id.*

⁴⁵ Pilsen Brewing Co. v. Wallace, 291 Ill. 59, 125 N. E. 714 (1919).

⁴⁶ *Id.* See also Richard v. Minnesota Savings Bank, 75 Minn. 196, 77 N. W. 822 (1899); Robinson v. First National Bank, 98 Tex. 184, 82 S. W. 505 (1904).

⁴⁷ Cincinnati Cooperage Co. v. Bate, 96 Ky. 356, 26 S. W. 538 (1894); Senn v. Levy, 111 Ky. 318, 63 S. W. 776 (1901); Stafford National Bank v. Palmer, 47 Conn. 443 (1880); Annot. 8 A. L. R. 583 (1920).

⁴⁸ Michigan Ins. Bank v. Eldred, 143 U. S. 293 (1891).

⁴⁹ American Order of Scottish Clans v. Merrill, 151 Mass. 558, 24 N. E. 918 (1890).

rights to a name may ask for an injunction against the new corporation to prevent its use of the name.⁵⁰ This protective remedy is equally available to non-profit corporations.⁵¹

The injunction, however, will issue only if the name is so similar as to cause confusion in the public mind. As discussed previously, the reason for the protection is twofold: first, to protect the public, and second, to protect the corporation from unfair competition.

Because the relief is equitable in nature, the courts have been careful to scrutinize the likelihood that the public will be misled and the extent to which the complaining party is likely to be injured.⁵²

A slightly different question of liability may arise in cases where the Secretary of State's office accepts and files a name which in fact conflicts with a presently existing and previously certified corporation. The New York court recently dealt with this problem.⁵³ An employee of the Secretary of State accepted and filed a certificate for Baron Decorator's, Ltd. This corporation was later informed that a corporation named Baron Decorating Service, Inc. had been incorporated (in compliance with all statutory requirements) some 31 years earlier. The new corporation was then required to go through the statutory name change procedures. This corporation tried to bring an action in negligence against the employee and the state. The New York Court of Appeals found that the accepting or rejecting of a corporate name is a quasi-judicial act requiring the exercise of discretion, and thus the state was immune from suit despite the damage to the party forced to change its corporate name.⁵⁴

Conclusion

The use of a corporate name has caused the courts some small problems in the past. With the rapid growth in the area of non-profit corporation law,⁵⁵ the likelihood is that even more judicial interpretation of the use of corporate names will soon be required. Because of the unique function of the non-profit corporation, the chances for abuse and misuse of names is great. It may be desirable to masquerade as a "charitable" organization. How simply this could be accomplished if one could freely select a name which implied "good deeds." Obviously the opportunity for misleading the public is present. "The danger is that non-profit corporations, partly because of their char-

⁵⁰ *American Gold Star Mothers v. National Gold Star Mothers*, 191 F. 2d 488 (D.C. Cir. 1951).

⁵¹ *Parma Democratic Club v. Democratic Club of Parma, Inc.*, 29 Ohio L. Abs. 30 (8th Dist. Ct. App. 1939).

⁵² 18 AM. JUR. 2d *Corporations* § 148 (1965).

⁵³ *Gross v. State of N. Y.*, 33 App. Div. 2d 868, 306 N. Y. S. 2d 28 (1969).

⁵⁴ *Id.*

⁵⁵ Leshner, *The Non-Profit Corporation—A Neglected Stepchild Comes of Age*. 22 BUS. LAW 951 (1967).

itable character, have a public image which can be usurped by being used as fronts for illicit interests."⁵⁶

If the general public relies on a name which implies a charitable purpose, and then discovers that the name is deceptive, faith of the public in all charitable organizations is undermined.⁵⁷

The name of a corporation, profit or non-profit, gives the organization a legal identity. This identity should be maintained with the highest degree of integrity possible, and that integrity should begin with the corporate name.

⁵⁶ *Id.* at 966.

⁵⁷ This is not to suggest that this writer is equating charitable and non-profit corporations, but is merely using the charitable corporation as an example of this class.