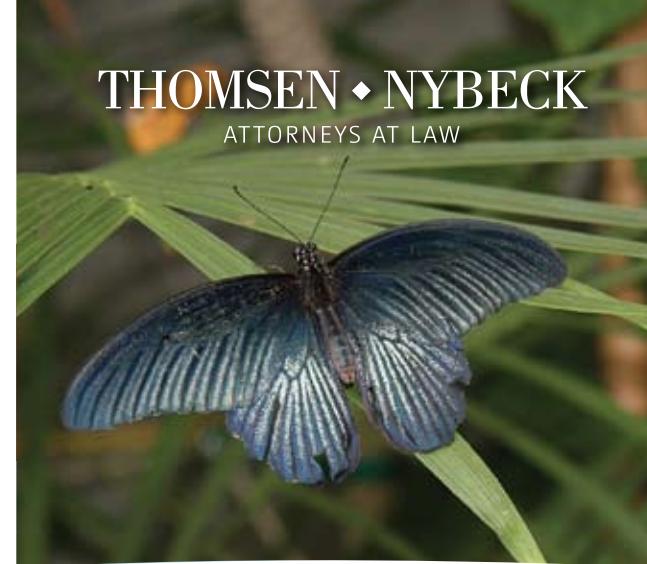


# Briefings

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## TN TOP 5

### *Benefits of Trademark Registration*

A trademark is a key business asset because it serves as an identifier of a company's overall brand promise in every market in which it operates or may operate. Federal registration of a trademark provides a business with many advantages in protecting this important asset. Here are five primary benefits:

**1. Nationwide Priority.** Federal registration provides a business nationwide priority in the trademark even though the business may not actually be using the trademark in a particular geographic region. Because rights in a trademark are acquired by use, a business that first uses a mark will have the rights to the mark in the geographic regions in which it is using the mark. However, registration would prevent further expansion of a business that is using a mark that is not registered.

**2. Notice to the Public.** A business can only use the registered trademark symbol, ®, for those trademarks that have federal registration. The registered trademark symbol provides constructive notice of the business' claim of ownership of the trademark and deters others from using the mark.

**3. Legal Advantages.** A business with a registered trademark has the automatic right to commence a trademark infringement action in federal court. In addition, use of the registered trademark symbol essentially takes away a defendant's claim of innocent infringement, which would otherwise allow the defendant to avoid monetary damages.

**4. Incontestability Status.** After a business continuously uses its registered trademark for five years, the business can apply for incontestability status. Incontestability status of a trademark provides conclusive evidence of the validity of the mark and of the business' exclusive right to use the mark.

**5. Foreign Countries and U.S. Customs Service Benefits.** For a business that is contemplating expanding internationally, the date of U.S. registration serves as the priority date for obtaining registration in the foreign country. A business can also record its registration with the U.S. Customs Service to prevent infringing goods from being imported.

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Natalie R. Walz contributed to this article. Natalie practices in the areas of Intellectual Property, General Civil Litigation, Real Estate Litigation and Construction Litigation.  
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### *Handling a Department of Commerce Claim with a Plan — Not Panic*

If you're in the real estate business, finding out the Department of Commerce (DOC) is pursuing an investigatory action against you is a little like navigating your way through a fire – if you are prepared and have an action plan, the event can be far less overwhelming. Don't panic - an unhappy client or misstep can happen, but being prepared, appropriately responsive and diligent is your best plan of action. Hopefully you'll never have to put your fire escape plan into action, but knowing what to do in such an event gives you the best chance of coming out with the least amount of harm possible.

When you discover a complaint has been made against you with the DOC or they are pursuing an investigation, inform those who can help you and need to know. Talk to your broker or office manager to see if you need to seek outside counsel or if there is in-house counsel available. Call your errors and omissions insurance representative to identify what is occurring and determine if coverage for the defense in such an action is provided. Also speak with your own attorney to see what advice they can provide.

A DOC investigation often starts with a complaint. Typically the DOC either sends an initial letter or places a phone call to the agent, person or company being investigated. They consider each side of the story and determine whether there is sufficient merit to proceed with the investigation. Sometimes an investigation may be resolved without a disruptive investigation. Since the DOC regulates multiple industries (including insurance, real estate, appraisals, etc.) and reviews a great many matters, how quickly the investigation proceeds may vary based upon the severity of the alleged offense.

During an investigation, having a close working relationship with your attorney is crucial. Go through the complaint or any DOC documentation together methodically to determine if the claims have merit. Collaborate on how you can present the information to the DOC to help them see the positive and not just the unfortunate. Typically the DOC will not suspend your license during an investigation (absent significant wrongdoing), although

this can vary depending upon the severity and foundation for any allegations.

The DOC may send a letter demanding information or issue an order for you to "show cause" why the alleged violation did not occur, or why the complaint does not have merit. When the DOC requests information, be prudent. Give them only the information they request. If they interview you, be a willing participant and respond truthfully without divulging information they aren't asking about. In rare cases, they may show up at a brokerage office and start requesting files, electronic records and whatever else they deem necessary. In some instances, they may bring a subpoena to ensure they receive what they are seeking.

Most investigative actions won't go to a formal hearing. Instead, you and your attorney may negotiate a consent agreement with the DOC that outlines the allegations against you, and the sanctions, penalties or resolution that you agree to in such a consent agreement. Typically the results will appear on the public Department of Commerce website.

If your matter does go to a hearing, your case will be heard by an Administrative Law Judge. Potential sanctions include penalties of up to \$10,000 per violation, suspension of license or revocation of your license, as well as assessing the cost of investigation to the licensee. The role of the DOC is to identify whether a licensing violation occurred and what penalty or sanction is merited.

Although avoiding a claim in the first place is the best defense, having a plan in place if a claim does come, can lessen the stress of the situation and improve the outcome. Working closely with your attorney to go through the process step by step will give you the best chance of navigating out of the fire with the least possible harm.

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## Older Workers and Employers Should Carefully Assess Age-Related Claims and Policy Language

As the baby boomer generation continues to age, cases regarding the laws against discrimination on the basis of a person's age affect a greater number of employees. As a result, the United States Supreme Court decision in the last year that appeared to make proving such a claim more difficult for employees has garnered significant attention.

In *Gross v. FBL Financial Services, Inc.*, the Supreme Court decided that an employee making a claim under the Age Discrimination in Employment Act ("ADEA") must prove that "but for" age bias, the employer's action would not have been taken. Previously, a plaintiff had only been required to prove that bias was a "motivating factor" in the decision, at which point it would be the employer's burden to show that the same action would have been taken regardless of the person's age. The decision caused quite a stir, including in Minnesota, because courts often interpret the state age discrimination law — the Minnesota Human Rights Act ("MHRA") — under a similar framework as the ADEA.

What does that mean for employers and employees alike as the largest generation enters into the final decade of their careers? The decision has likely not changed the landscape of age discrimination cases as significantly as was discussed when the decision was first handed down. The protections for people over 40 provided by the ADEA, and the MHRA, continue to be in place. As to the proof that's required to succeed in such a claim, the lower courts that have since applied the *Gross* decision have restricted its reach to direct evidence cases only. They have refrained from applying it to indirect evidence cases.

In other words, the "but for" requirement only applies in a case where there are specific statements by the employer, documents from the employer, etc., that actually state

age as a factor in the decision (a "direct evidence" case). However, in indirect cases (where there are no such admissions, but the discrimination is inferred by a number of events and circumstances), there so far has not been a change to "but for" as the level of proof required. It's fair to say that most cases regarding an allegation of an ADEA violation involve indirect evidence; sufficient direct evidence is hard to come by.

Therefore, for a majority of cases, an employee or former employee is still only required to establish that age bias was a "motivating factor" in the employer's decision. Then the burden shifts to the employer to give non-discriminatory reasons for its action. This could change if a case involving indirect evidence and the *Gross* decision is put to a federal appellate court or the U.S. Supreme Court, which has not yet occurred.

However, in the minority of cases where the employee is making a claim using direct evidence of discrimination, the required proof has been greatly elevated and the claims will be more difficult to make.

While the limited effect of the *Gross* decision to date won't likely significantly change the number of age discrimination claims, employers should carefully assess their employment policy language and avoid any statements (even casually) regarding employment decisions based on age.

Employees contemplating an age discrimination claim would also be wise to carefully analyze the evidence they have with an attorney to determine the likelihood of success in this ever-changing landscape of the ADEA.

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Chris Renz contributed to this article, and also blogged on the 8th circuit court decision at <http://tnupdate.wordpress.com>. Chris practices in the Litigation group and concentrates on general civil litigation, real estate litigation, construction litigation, criminal law, employment law and real estate law. [crenz@tn-law.com](mailto:crenz@tn-law.com)

### Working Towards a Greener Future

Thomsen Nybeck looks forward to distributing certain information and notices electronically. Please be sure we have your correct address on file by sending an email to Angela Flagg at [aflagg@tn-law.com](mailto:aflagg@tn-law.com) (subject line "Electronic List"). Please include your name and phone number.

Thomsen Nybeck held its 17th Annual Association Seminar in March, which was well attended and a successful event for all involved. If property managers are interested in the results from last year's survey regarding homeowner expectations, please contact us.

**Dave McGee (1)** presented on a variety of topics related to the management of community associations at the 2010 Spring Conference for the Community Associations Training Services (CATS).

**Gretchen Schellhas (2)** has been invited to speak at the May Manager's Luncheon for the Community Associations Institute of Minnesota on the topic of delinquencies and foreclosures.

Paralegal **Bridget Peterson** and her husband gave birth to a new baby girl.

**Brad Boyd (3)** presented at continuing education seminars across the state in March and April on the topics of fraud and the real estate marketplace, including co-presenting with the FBI, U.S. Attorneys' Office and the Minnesota Department of Commerce.

**Matt Drewes (4)** was quoted in several articles appearing on notable Internet sites, including Yahoo! Finance and Bankrate.com. The articles addressed the best way for buyers to hold title to their home and the options available for community association members who are "upside down" on their homes.

**Deb Newel (5)** was nominated for reappointment as a member of the board of directors for the non-profit organization Missions, Inc.

**Natalie Walz (6)** ran the 2010 Boston Marathon and finished with a time of 3:29:11.

Thomsen Nybeck will again be fielding a team in the Twin Cities 1 Mile Race in May.



## ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen Nybeck:

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**Brad Boyd**

## PRACTICE AREAS

Thomsen Nybeck has in-depth experience and knowledge in the following practice areas. For a complete list, visit [www.tn-law.com](http://www.tn-law.com). Call us at (952) 835-7000 to discuss your concerns or to determine if you have a case.

Business Law  
Civil Litigation  
Construction Defect Litigation  
Corporations & Partnerships  
Criminal Law  
Employment Law  
Estates, Wills and Trusts

Family Law  
Financing  
Personal Injury  
Real Estate  
Taxation  
Townhome & Condominium Law  
Wind Energy

“Large enough to be effective.  
Small enough to care.”