



Business Law Newsletter

Business Torts

by Jim Irving

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On January 14, 2009, The Honorable Glen E. Conrad of the U.S. District Court for the Western District of Virginia handed down his opinion in *All Business Solutions, Inc. v. Nationsline, Inc.* While not a final decision on the merits, Judge Conrad's opinion contains a clear statement of the standards for enforcement of claims for Statutory Business Conspiracy and Misappropriation of Trade Secrets, as well as a non-binding but illuminating assessment of the enforceability of contractually-agreed upon limitations of liability.

In 2005, ABS contracted (among other things) to sell Direct Inbound Dialing numbers ("DIDs") on behalf of NationsLine, a telecommunications consultant. ABS sold DIDs to Prestige Business Solutions ("PBS"), who, in turn, transferred them to USA Locksmith ("USA"). Access to the DIDs afforded direct customer access to USA. All parties profited from this arrangement.

The Second Amended Complaint alleged that in October of 2007, NationsLine entered into a separate contract with A Certified Locksmith, a competitor of USA, whereby A Certified was given access to the same DIDs. ABS further alleges that when PBS learned of A Certified's competition, they decided to destroy them. Ultimately, according to the Complaint, PBS decided to destroy ABS as well.

In November of 2008, NationsLine suddenly and unexpectedly terminated its contract with ABS and accused ABS of diverting DID's that had been reserved for A Certified to USA. NationsLine threatened to take legal action against ABS unless ABS abandoned its claim for commissions. As a result, ABS sued NationsLine and PBS, alleging conspiracy to deprive ABS of its earned commissions and misappropriation of Trade Secrets.

In evaluating the sufficiency of PBS's pleadings, the Court restated the required elements for these torts.

Claims for business conspiracy under 18.2-500 require proof of a "concerted effort" by two or more parties, legal malice, and causally related injury. "Legal malice" refers to conduct that is intentional, purposeful, willful or malicious. A successful pleading must contain more than mere conclusory allegations and the factual content of the pleadings must support these conclusions.

In order to state a claim under the Virginia Trade Secrets Act, a claimant must allege sufficient facts to establish that the information at issue constituted a trade secret and that the defendant misappropriated it. More specifically, a Trade Secret refers to "information" (broadly defined) that derives independent economic value,

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actual or potential, from not being generally known or readily ascertainable and is subject to reasonable efforts to protect its secrecy. “Misappropriation” refers generally to acquisition of a trade secret by someone who does not have a right to the information and knows or should know it, or disclosure or use of a trade secret by someone who improperly acquired it. The Court concluded that the Plaintiff’s complaint did not contain sufficient factual allegations to substantiate this claim.

The Court then considered the enforceability of language contained in the Parties’ contract limiting NationLine’s contractual liability to claims for commissions. The Parties agreed that the contract stated: “In no event shall NationsLine be liable for special, indirect, incidental, punitive or consequential damages, including loss of profits arising through the relationship or the conduct of business contemplated herein.” NationsLine argued that limitation was a negotiated contract term and was enforceable as written; ABS essentially acknowledged the enforceability of the provision but argued that “statutory and common law duties may exist independently of agreed-upon contractual duties.”

In refusing to enforce the limitation on liability appearing in the contract, the Court took another approach, finding that Virginia public policy does not permit the parties to a contract to negotiate away liability for intentional, conspiratorial misconduct.

Nothing in the Court’s opinion suggests that negotiated limitations on liability are per se unenforceable, since the court’s reasoning would not apply to all liability claims. However the Court’s statement that the Parties may not agree to exempt a party from liability for “future intentional misconduct” appears in accord with Virginia law.

EMPLOYMENT TERMINATION

by James V. Irving

Many businesses protect their confidential information by including detailed terms and conditions in their employment contracts governing use, maintenance and treatment of this critical business material. The case on

Wallinger v. BB&T Insurance Services, Inc., decided upon Summary Judgment in the United States District Court for the Western District of Virginia on June 17, 2009, demonstrates the importance of such protections.

In 2001, Donald Wallinger took a job with BB&T Insurance Services, Inc. (“BBT”), identifying and providing services to existing and potential new customers. Wallinger’s written contract included language permitting BBT to terminate Wallinger’s employment for cause for “failure to adhere, after Employee has received written notice of such failure, and been given 30 days in which to cure such failure (if such failure can be cured), in any material respects to written policies, procedures, and the Code of Ethics established from time to time” by the Company. The contract specifically incorporated the Code of Ethics of BBT’s parent company, BB&T Corporation, which provided, in essence, that “all proprietary information about BB&T [including] information about existing clients must be protected by each employee.”

BBT provided Wallinger with a laptop and access to a docking station connected to BBT’s network files. On April 30, 2008, Wallinger followed his usual practice of synchronizing his laptop with the information contained on BBT’s network. That night, he left his laptop in his car in a hotel parking lot. The next morning, it was gone, and with it access to BBT’s proprietary files and confidential information. Thirty-one days later, after spending \$24,000 to mitigate the damages caused by the theft, BBT terminated Wallinger for cause because he had downloaded confidential information on to his laptop and then failed to properly secure it.

For cause termination strictly limited Wallinger’s termination package and he was paid only vested compensation and thirty days pay. Thereafter, Wallinger sued BBT alleging breach of his employment contract because his termination was contrary to the Company’s written policy and because BBT should have given him thirty days to cure the defect.

BBT moved for Summary Judgment, arguing that leaving a laptop containing confidential material unattended overnight in a car parked in hotel lot clearly violate his obligation to the company. Wallinger replied that BBT had breached their agreement by terminating him because his actions did not violate the company’s written policies, and in any event, BBT should have given him thirty days to cure.

The court had little difficulty ruling that “Wallinger’s actions violate the plain language of his employment

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agreement” and that the thirty day cure period was inapplicable because “it is self-evident that his violation was incurable.”

While Wallinger’s suit seems a frivolous exercise, it is worth noting that the Court did not rule that his conduct was negligent, reckless, or otherwise so wrongful as to give rise to for cause grounds: The Court ruled that he violated the terms of his agreement with his employer. The lesson is that it is much easier to convince a Court to enforce the express terms of a written contract than it is to convince the Court that harmful conduct is per se improper. In order to protect your company’s trade secrets and proprietary information, do it clearly and as part of a written, contractual agreement.

INTELLECTUAL PROPERTY

by James V. Irving

Intellectual property registration can be a complex, time consuming, and therefore costly chore. Since certain protections arise irrespective of registration, some copyright holders feel sufficiently secure without formally registering their material. For example, provided a copyrightable document bears the proper notice, the owner of the copyright maintains the exclusive right to reproduce, prepare derivative works, distribute copies, and to publicly perform the copyrighted material. Additionally, an infringer of material bearing a copyright notice will not be able to claim innocent mistake. These remedies are vastly enhanced upon registration with the copyright office and in the case of an actual dispute, the limited protections afforded by notice alone may prove a very weak reed.

In *Balzer & Associates, Inc. (“Balzer”) v. Union Bank & Trust Co. (“Union”)*, decided in the United States District Court in Richmond on June 15, 2009, an engineering firm failed in its effort to convince the Honorable Henry Hudson that its intellectual property, bearing a copyright notice, was sufficiently protected.

In 2006, Saymor Custom Homes retained Balzer to provide the Site Plan for a new residential development in King William County. The planned subdivision was financed by Union. In October of 2008, Union foreclosed on the project and obtained the services

of another engineering firm to complete the development.

Thereafter, Balzer brought suit against Union alleging that Union and its new engineers were using Balzer’s Site Plan without permission and without compensation, a position the Union did not seriously dispute. Instead, Union argued that Balzer could not prosecute a suit for copyright infringement because they had not registered the Site Plan.

Balzer argued that even though the copyright had not been registered under §411 of the Copyright Act, they were entitled to enjoin Union’s unauthorized use under Section §502 titled “Remedies for Infringement”. However, as Judge Hudson pointed out in his Memorandum Opinion, while §502 provides broad remedies including injunctive relief, those remedies are only available to plaintiffs who can demonstrate infringement under §501. §501 specifically requires registration under §411.

By way of a back-up position, Balzer sought damages for conversion of its Site Plan on the grounds that Union had physically taken the plan. Union responded by arguing that the conversion claim was preempted by the Copyright Act, requiring the Court to dismiss both claims. Judge Hudson, however, reached a different conclusion. Noting that the federal court had no independent jurisdiction over the conversion claim, he remanded Count II to the King William Circuit Court to be heard and decided in that forum.

The glimmer of hope provided by Judge Hudson’s remand was probably cold comfort to Balzer, but most likely they will be careful to register their copyrightable material in the future.

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