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WRITTEN CONTRACTS AND THE STATUTE OF LIMITATIONS

BY JAMES V. IRVING, ESQUIRE

Business people prefer written to oral contracts for many reasons. Among them, the terms of a written contract are less susceptible to misconstruction or misunderstanding, and some oral agreements – including real estate transactions and contracts not to be performed within a year – may not be enforceable at all if they are not in writing. Another important distinction is the statute of limitations. In Virginia, an action on a written contract must be commenced within five years of signing the contract or the accrual of the cause of action. For an oral contract, the limitations period is three years. The distinction became very important to Gerald T. Dixon when he realized he had a cause of action against his surveyor more than three years after the date of their agreement.

In 2003, Dixon retained Hassell & Folkes, P.C. ("H&F") to survey and mark the boundary lines of a property he owned in Chesapeake. Relying on the survey, Dixon constructed a foundation slab on the parcel and then conveyed it to Brat Development, LLC in March 2006. Not long after, Brat began construction on the property, but that process came to a sudden halt when A&G Partnership sued to stop the construction because the office building being constructed by Brat encroached on A&G's property. Brat wasn't happy, but they had a remedy. They sued Dixon for constructive fraud and breach of the warranty deed from Dixon to Brat. Dixon wasn't happy either, and his remedy was not as clear, because it was August 2009 before Dixon realized he had a claim against H&F for the inaccurate survey that he had relied on. This was more than three years after the date of the agreement and the completion of the survey.

Because the work under the H&F contract concluded by March 2006, Dixon had a statute of limitations problem unless he could rely on a written agreement. His lawyers came up with an artful theory to circumvent his problem. Dixon produced a letter, written and signed by Grey Folkes, resident of H&F. The letter set out the terms of the arrangement and was signed by Mr. Folkes. Dixon claimed that the letter embodied an agreement between the parties which had been fully performed by both sides and thus constituted a written contract sufficient to invoke the longer statute of limitations. Disagreeing, H&F argued the letter was merely an unsigned contract proposal and that the three years limitations period that is applicable to oral contracts applied.

H&F noted that the letter specifically stated in two places that the proposal would become an executed agreement only when endorsed by Dixon and returned. Dixon, who acknowledged he never signed it, claimed the absence of his signature was a mere formality, since the letter contained the terms of an agreement that had been fully performed by the parties. Dixon also pointed to the statute (Code of VA § 8.01-246(2)) setting out the necessary criteria for the application of the longer limitations

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period and argued the three critical elements had been met: 1) the contract specified no alternative statute of limitations, 2) it was in writing, and 3) it was signed by the party to be charged with breach.

Both the trial court and the Virginia Supreme Court disagreed. Ultimately, the result might have been different had H&F not performed at all and Dixon relied on the letter to demand performance. However, the question was whether H&F could be held liable for a deficient performance more than three years earlier. Mr. Folkes was correct – Dixon had not protected his own interest by fulfilling the precondition of signing the letter, which was clearly stated in the offer letter.

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WEBSITE OWNERS: WHO IS LIABLE FOR THIRD PARTY POSTINGS ON YOUR WEBSITE?

BY RACHELLE E. HILL, ESQUIRE

A recent Fairfax County defamation case involving a consumer's scathing postings against a contractor on Yelp and Angie's List raises the issue as to who can be held liable for postings made by third parties.

Can the party who owns the website be liable? If a website owner lets people post content (photos, videos, ratings, comments, articles, etc.), does the owner need to be concerned about liability for infringing on intellectual property or other rights, such as defamation or privacy? In most situations the answer is no, however, there are some gray areas where website owners should take note, and they should put in place certain policies and procedures for addressing this issue.

In most situations involving third party postings, such as Yelp and Angie's List, a federal law called the Communications Decency Act (CDA) affords the provider of interactive computer services, or what we commonly refer to as the website owner, immunity for third party postings. Congress enacted the CDA to ensure the free sharing of information and prevent stifling the exchange of information on the internet due to fears of potential liability.

When faced with this issue, the courts have consistently provided that the CDA affords immunity to website owners against suits seeking to hold the owner liable for third-party content. For this reason, website owners such as Yelp cannot be named as a party in a defamation suit, only the third party who posted the review can be held liable. The immunity applies to claims involving defamation, tortious interference with contracts, and breach of contract. In the majority of situations involving online postings, a provider cannot be held liable for third-party postings that consist of reviews.

However, when does the CDA not provide immunity to website owners? Are there circumstances when website owner can be liable for third-party postings? Specifically, the CDA does not apply to cases involving federal intellectual property claims. In those cases, website owners must turn to Federal law for a possible safe harbor and follow the specific procedures indicated.

What about cases not involving intellection property claims? Can a website owner be liable? The answer to this question is yes. When a website owner edits contents or filters the material or postings that are published, it will not have immunity. While the information may have originated with a third party, the website owner will be held liable. Specifically, for the immunity to apply, the courts conduct a three-part test consisting of:

1. Whether the Defendant is a website owner who provides access to multiple users on a computer server, such as Yelp, Angie's list, etc.;
2. Whether the Defendant is responsible for the creation or development of the information provided on the Internet, this occurs where a party filters or edits posts; and
3. Whether the Plaintiff is seeking to treat the Defendant as the publisher of the third party posting.

The issue becomes less concrete when determining whether a state cause of action for privacy or publicity would fall under the intellectual property exemption. Many states, such as Virginia, provide for a private cause of action for the unauthorized use of name or picture of any person for advertising purposes without obtaining written consent. The majority of states, like Virginia, also provide for an award of punitive damages which can be significantly larger than any actual damages. The privacy claims most commonly involve websites where third parties sell items, such as Craigslist or eBay, and post pictures of individuals or use their names without permission (or in the case of a minor, without their parent's permission). What happens in these cases and whether the CDA will apply is not clear. The Federal Circuit Courts have split on the issue of whether a state cause of action would fall under the CDA exemption and there is no 4th circuit case on this issue. Therefore, website owners must be cognizant of this issue.

So what should a website owner do in order to reduce liability?

All website owners should require all posters to confirm he or she has permission to use an image or information prior to posting. Website owners should be careful to not edit or filter posts. Additionally, while most cases will not involve a copyright issue, the policies established in the Digital Millennium Copyright Act (DMCA) provide a reasonable framework for website owners to follow.

Under the DMCA, website owners are provided a safe harbor when they do not have knowledge of the infringement; were unable to control the content; did not profit from the content; and acted promptly to remove the material after being notified of the possible infringement. While the DMCA provides very specific requirements for a notification to qualify as a proper notification, website owners should act promptly to remove or disable access to the posting upon receiving any notification that a party is making unauthorized use of a photo or name. The website owner should then contact the party who posted the information to notify them of the report, which allows that party to make a counter-notice that the material was removed or disabled as a result of a mistake or do nothing.

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BUSINESS TORT SUIT BRINGS SANCTIONS

BY JAMES V. IRVING, ESQUIRE

Virginia's business-friendly laws and precedents provide employers with powerful remedies and employees with effective deterrents against wrongful conduct in business affairs. As a Fairfax Circuit judge has recently demonstrated, good faith standards still apply and those who casually ignore such standards will soon learn that the law is not a vehicle to express animus or to exact personal vengeance. The case of *Applied Training Solutions, LLC v. Pillsbury* also reinforces the importance of ascertaining the precise terms of the deal before completing the acquisition of a business or its assets.

Douglas Pillsbury was one of two individuals who invented a geo-spatial software program called RDCA. Pillsbury and his co-inventor licensed RDAC to an entity owned by the two co-inventors. In 2010, as a result of a series of transactions, Applied Training Solutions, LLC ("ATS") acquired the assets of Pillsbury's company and Pillsbury went to work for ATS pursuant to an October 2010 employment contract that required him to "devote all of [his] professional time, attention and energy to the performance of Employee's duties."

In the spring of 2011, Pillsbury actively asserted his personal ownership to RDAC, contending that his interests had not been included in the assets acquired by ATS. Tensions increased until August 2011, when Pillsbury resigned. ATS then learned that Pillsbury had formed Pulzar Tech LLC in January 2011, and some of Pulzar's employees had worked with Pillsbury, prior to his the resignation from ATS, to develop a medical efficiency software program called Landskape.

Looking into the facts, ATS concluded that Landskape might have some of the same functionality as RDAC and that Pillsbury was personally claiming the licensing rights to ESRI, a software program used by ATS. ATS sued Pillsbury and Pulzar for breach of contract, violation of the Trade Secrets Act and conversion. In his defense, Pillsbury contended that he worked on Landskape exclusively during off-hours, as did the ATS employees who helped him. He claimed that he did not use RDAC at all after leaving ATS, and he was the licensee of the ESRI software, which was not included in the assets sale to ATS.

After the defendants deposed William Bewley and Christopher Byrne – ATS's principal and in house counsel – Pillsbury filed a Motion for Sanctions, alleging that the claim was brought in bad faith in violation of Code of Virginia §8.01-271.1. ATS non-suited their claim, but the Honorable Jane M. Roush of the Circuit Court of Fairfax retained jurisdiction to hear the defendant's sanctions motion.

Based upon a bare recitation of the allegations, several of ATS's claims seemed to have merit. There was reason to believe Pillsbury had breached his fiduciary duty and the terms of his employment contract that required him to devote "all of his professional time, attention and energy" to ATS. There also appeared to be a good faith dispute over the assets acquired by ATS in the initial transaction. However, when put to the test in deposition, ATS failed to supply object support for these and other claims. The testimony provided by Byrne and Bewley proved to be riddled with assumptions and unsubstantiated allegations. Bewley "assumed" there had been an inappropriate use of RDAC; "could not recall" the factual basis of the claim that Pillsbury used ATS's confidential information; and relied on a "pattern" of behavior to reach his conclusions. He admitted that he didn't know "specifically anything" that Pillsbury had done in violation of ATS substantive rights and could come up with no basis to

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support the $1,000,000 he sought in compensatory damages, but that he "figured we could find out later" through discovery.

Bewley's testimony was particularly harmful because it seemed to provide an inappropriate motive for the lawsuit. Bewley testified that he was angered by what he regarded as Pillsbury's betrayal and "outraged" when he learned that Pillsbury had formed another company. Byrne testified that they felt "violated," that Pillsbury "made us look like idiots," and it was like "someone's spouse cheating on him."

Had ATS spent the time to develop facts supporting the claim before filing suit, the result might have been different. While it is probably true that in most business lawsuits, bruised feelings and heated personal relationships lie just below the surface, it's a losing strategy to present them as the basis for a claim.

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