



Business Law Newsletter

NEW DEADLINE FOR CREDIT CARD COMPLIANCE

By Christopher Glaser

The nationwide fear of identity theft has prompted reforms in credit card information processing that have broad implications for retailers and restaurants. Governor Mark Warner signed into law amendments to Section 11-33.2 of the Virginia Code providing that no credit card receipt is to be printed with more than the last four digits of the credit card number. The new law also prohibits printing the expiration date of the credit card.

The law recognizes that most new devices already comply with these regulations, while establishing a grace period for replacing older machines or bringing them into compliance. For printers placed into service on or after July 1, 2003, immediate compliance is mandatory. The provisions do not apply to older machines until July 1, 2005. Older non-electronic imprint devices may still be used provided that only the original signed receipt containing the information is retained by the business—all other copies, including carbons, must be returned to the card holder.

Penalties can be stiff for any business found to be in violation of the new provisions. As with several other consumer protection rules, any business in violation may be liable for the attorneys' fees of both the credit card holder and the credit card issuer.

Given the growing number of identity thefts employing some form of credit card fraud—indeed the Federal Trade Commission reports in excess of 1,600 such thefts in Virginia in 2003—and the costs associated with cleaning-up a consumer's credit report, many defrauded consumers are looking for third parties to shoulder some of the costs. Retailers, restaurateurs, and others taking credit cards should make updating their credit card printers a priority.

STATE DEPARTMENT GREEN CARD LOTTERY

Every year the U.S. State Department conducts a lottery to award 50,000 permanent resident visas ("green cards") to persons from countries with low rates of immigration to the U.S. The application period this year is November 5, 2004 to January 7, 2005. Registration must be done on line through the designated State Department site. Selection of winners is by a lottery.

The State Department notice concerning the lottery and the registration procedures can be accessed through the following web site:

<http://www.state.gov/r/pa/prs/ps/2004/36613pf.htm>

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OBLIGATIONS OF NURSING HOMES AND ASSISTED LIVING FACILITIES

By James V. Irving

As our parents age and as we grow old ourselves, we are increasingly faced with the prospect of providing quality care for those with decreasing ability to look after themselves. The aging of the population is reflected by the growth in the number of assisted living facilities in the metropolitan area and the Virginia legislature's adoption of strict and detailed regulations governing their operation.

Because residents of assisted living or nursing home facilities are often vulnerable, the law identifies certain rights and protections that may not be abridged. Anyone considering the admission of a loved one to such a facility should be aware of these rights, which are set out at Virginia Code § 63.2-1808. They include, among other things:

- A resident's right to be fully informed of all rules and expectations governing the resident's conduct and responsibilities, as well as the services available at the facility and their cost. The resident must be provided with this information in writing, and the facility must maintain a written record of the notice in the resident's file;

- Unless a conservator has been appointed, the resident must be allowed freedom to manage his or her personal finances and must be given to access

his or her personal account statements reflecting any financial transactions made on or behalf of the facility. If a written delegation of responsibility to manage their affairs is made to the facility, the resident must be given at least quarterly accountings;

The resident's personal affairs and records are confidential and must be treated that way;

- The resident may not be transferred or discharged except when provided with a statement of reasons or for non-payment. In either case, the resident must be given reasonable advance notice and afforded reasonable assistance to ensure an orderly transfer or discharge;

- No resident may be required to perform services to the facility, except pursuant to a voluntary written agreement;

- Each resident remains free to select healthcare services from reasonably available sources, is free to refuse to participate in human experimentation or to be party to research in which his or her identity may be ascertained.

These rights are notable for their codification; that the legislature deems it necessary to specifically legislate against involuntary labor and human experimentation emphasizes the nature of the risks posed by unscrupulous care providers.



MEET OUR LAWYERS Frederick R. Taylor

Frederick R. Taylor was born in Newark, New Jersey. He came to northern Virginia in 1963 after graduating from the University of South Carolina with a B.S. in business. He remained in the area to attend The Catholic University School of Law where he served on the Law Review.

After obtaining his J.D. in 1970, Fred oversaw government contracts for the Navy Department before moving on to private practice in Springfield, Virginia, where

he began practicing in the area of real estate law. The law firm he founded in 1975 merged with Bean, Kinney and Korman in 1988.

In furtherance of his specialization in real estate, land acquisition and zoning law, Fred received a Master's Degree in Urban Planning from the University of Virginia School of Architecture in 1991. He is a member of the American Institute of Certified Planners, the American Planning Association, and the Virginia and Maryland bars.

Fred and his wife, MaryAnn have been married since 1964. His extra-curricular activities include recitals, scouts, soccer, football, baseball, wrestling, lacrosse and the many other activities associated with raising five children. Two of his children are also Virginia attorneys.

Fred continues to focus on real estate, real estate development and land use issues principally in the northern Virginia jurisdictions.

THE DUTY OF LOYALTY

By James V. Irving

The law of business torts in Virginia continues to evolve as the Supreme Court and Circuit Court judges explore the range and limits of civil remedies.

Virginia law distinguishes between tortious interference with another's contract, and with his business expectancy. Rights memorialized in contracts that are not terminable at will are vigorously protected while a party's reasonable expectation of future business (including terminable contracts) is only protected against intentional interference if the tortfeasor employs "improper methods" in undermining the relationship. Fraud, duress, misuse of confidential information and breach of fiduciary duty are among the improper methods that have been recognized by the Supreme Court.

Because Virginia's public policy presumes free competition, the threshold question in many business tort cases is not whether the Defendants committed the wrongful act alleged, but whether or not their duty to the plaintiff makes the interference legally impermissible. In April of 2004, a Fairfax Circuit Court Judge rendered a business tort verdict for the Plaintiff in the case of Managed Concepts, Inc. v. Kraemer and Harris. The Court's letter opinion is notable because it recognizes that independent contractors owe a fiduciary duty to their principal, and that a violation of this duty can constitute the "improper methods" required to support a claim of tortious interference with a business expectancy. Judge Jonathan C. Thacher's opinion letter was issued on April 26, 2004.

Kraemer and Harris signed a Professional Services Agreement ("PSA") with Management Concepts, Inc. ("MCI") through which they were to service MCI's contract to provide certain leadership instruction to CACI, a local government contractor. Kraemer and Harris were independent contractors, and not employees of MCI. The Plaintiff alleged that thereafter, the Defendants assisted a company called Claremont in bidding against MCI for further instructional work with CACI. MCI claimed that the course that Kraemer and Harris contracted to teach on behalf of Claremont was virtually identical with that previously offered by MCI. Claremont won the contract.

MCI claimed that Kraemer and Harris had used MCI's trade secrets in supporting the Claremont bid; that they had breached their non-competition obligations under the PSA; that they had conspired to injure MCI in its business; and had tortiously interfered with MCI's business expectations. MCI claimed that as a result, they lost a four year relationship with CACI.

Kraemer and Harris defended by arguing that the non-compete agreements they signed with MCI were unenforceable; that as independent contractors they were not prohibited from offering their own proposals to CACI for future training programs; and that they had not misused MCI's trade secrets. The Court found the non-competes enforceable, but ruled that the materials used by Kraemer and Harris in the Claremont bid had not been sufficiently protected to be considered trade secrets. Judge Thatcher then turned to the business expectancy issue.

Judge Thatcher had little trouble finding that by breaching their PSAs and deceiving MCI in their efforts on behalf of Claremont, the Defendants had engaged in "improper methods." Breach of the PSAs alone might have been insufficient to establish wrongful methods, but Judge Thatcher specifically found that Kraemer and Harris had breached the fiduciary duty they owed to MCI.

The Court awarded MCI \$44,000.00, the amount that Claremont charged CACI for the courses taught by Kraemer and Harris. They also required the Defendants to pay \$20,000.00 in punitive damages as well as \$15,100.00 in attorney's fees.

While the monetary damages were not extensive, the award of punitive damages of almost 50% of the amount of the compensatory damages demonstrates the level of Judge Thatcher's dissatisfaction with the Defendants' conduct.

The scope of an independent contractor's fiduciary duty to his employer and whether mere breach of contract can constitute an "improper method" appear to be excellent appellate issues, however the case has not been appealed and the time to do so has expired. Judge Thatcher's ruling provides a non-binding precedent for future cases arising from similar facts.

“GETTING IT DONE”

OBLIGATIONS OF NURSING HOMES AND ASSISTED LIVING FACILITIES

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In addition to these and other specified rights, Virginia law guarantees a number of human rights protections, including freedom from mental, emotional, physical, sexual, economic abuse or exploitation; from isolation, threats or other degrading or demeaning acts. The law also requires courteous, respectful and considerate treatment and the availability of appropriate means to exercise the rights of citizenship and to voice grievances without fear of coercion, discrimination, threats or reprisals.

These basic but less specific rights are

sometimes difficult to police, but no less critical to the aging resident. Assisted living facilities are an appropriate residential option for many, and a necessary step for some. Unfortunately, recurrent reports of death or injury to elderly residents, and instances of financial improprieties committed against those with diminished physical and mental capacity make it important that those responsible for their care understand the rights guaranteed to residents. Those considering an assisted living facility for a loved one are encouraged to assure that all those rights are fully recognized and enforced.

This paper was prepared by Bean, Kinney and Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney and Korman, P.C. 2004.



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