



# Business Law Newsletter



## TAX TRAP FOR REALTORS

by James V. Irving

Real Estate agencies almost universally treat their agents as independent contractors. This practice is consistent with 26 US Code §3508. This IRS regulation establishes an exception to the general test as to whether an individual is to be classified as an independent contractor or an employee.

While the regulation presumes that the individual is an independent contractor and is drafted in a manner to facilitate that arrangement, it does contain a trap. Subsection (b)(1) provides that an individual who is licensed as a real estate agent and employed by an agency is to be considered an independent contractor if “substantially all their remuneration...for the services performed by such an individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked and ...the services performed by the individual *are performed pursuant to a written contract between such individual and the person for whom the services are performed* and such contract provides that the individual will not be treated as employee with respect to such services for Federal Tax purposes.”

Thus, while the intention of the legislation is to facilitate the traditional arrangement by which a real estate agency avoids the employer’s tax burden, many agencies may risk re-attribution as an “employer” unless they have completed written contracts with their agents.

Realtors should take a careful look at their business practices to make certain that they are in compliance with this important tax provision.

## BUSINESS CONSPIRACY REMEDIES LIMITED

by James V. Irving

In September of 2003, the Supreme Court of Virginia handed down the case of Andrews v. Ring, an opinion containing a significant statutory interpretation of Virginia Code §18.2-499 and 500, (the Business Conspiracy Statute).

The Business Conspiracy Statute provides for substantial penalties, including treble damages, to be awarded against those who conspire to willfully or maliciously injure another in his “reputation, trade, business, or profession.” Andrews involved the claims of Andrews and Cox, two Grayson County, Virginia employees, who had been subject to criminal complaints filed by Ring and Bolt arising from a county construction project. When the criminal charges were dismissed, Andrews and Cox brought conspiracy claims against Ring and Bolt.

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“Getting It Done”

## LLC'S: REMEDIES FOR DEADLOCK

by James V. Irving

LLC's owned by two members equally can be a recipe for disaster unless an effective dispute resolution mechanism is included in the operative documents. Should the owners become adversaries, as happens with unfortunate regularity, management can become deadlocked. That circumstance, and the related difficulties, came before the Supreme Court of Virginia in the case of The Dunbar Group, LLC v. Tignor. The opinion of Justice Barbara Milano Keenan establishes important law on the options available to a circuit court presiding over a dispute over control of an LLC.

In 2000, Tignor and Robertson, (who was operating through an LLC called The Dunbar Group), combined to form XpertCTI, a limited liability company providing certain computer services.

XpertCTI entered into an agreement with Samsung to supply software driven security devices over a period of thirty-six months at \$20,000.00 per month. Eighteen months later, Tignor and Robertson were at odds and Robertson filed a Bill of Complaint under Virginia Code 13.1-1040.1 seeking to expel Tignor from XpertCTI, alleging acts of misconduct and commingling of XpertCTI funds with those of another business owned by Tignor. Tignor filed for dissolution of XpertCTI under Code of Virginia 13.1-1047 on the grounds that it was no longer reasonably practical to carry on the business of the company.

The circuit court concluded the Tignor had deposited XpertCTI checks into the account of another company owned by him, and had used XpertCTI money to make his other company's payroll.

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## BUSINESS CONSPIRACY REMEDIES LIMITED

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The trial court granted summary judgment for Ring and Bolt, ruling that the conspiracy statute "is limited to injury to business interests and does not extend to injury to personal reputation even in the context of employment." The Supreme Court affirmed, holding that the word "reputation" appearing in the Conspiracy Statute "requires exclusion of personal reputation and interest in employment from the scope of the statute's coverage." Thus, the Supreme Court drew a critical distinction between "trade, business, and profession" on one hand and "employment" on other, the first being covered by this very powerful statute and the second being excluded. Since Andrews, judges and practitioners have wrestled with this distinction.

In March of 2004, Judge James H. Chamblin of the Loudoun County Circuit Court took the unusual step of reversing his earlier ruling in an on-going case called Fitzgerald v. Farrell. Relying on Andrews, he dismissed Fitzgerald's claim for damages arising from the alleged violation of the Business Conspiracy Statute by Raymond and Tamara Farrell.

Fitzgerald was a Fairfax County police officer who held a part-time job building homes in the Loudoun County area. His relationship with the Farrells deteriorated after he contracted to build them a home in Loudoun County. According to Fitzgerald's allegations, the Farrells conspired to provide false, misleading, and incomplete information to the Loudoun County Sheriff's Department which formed the bases of a felony indictment brought against Fitzgerald. The felony charges were

dismissed in February 2001 and Fitzgerald's arrest record was expunged. However, the Fairfax County Police Department had terminated Fitzgerald's employment in the mean time and refused to reinstate him upon dismissal of the charges. Fitzgerald sued the Farrells, claiming that they specifically intended to harm him in his capacity as a police officer.

In March 2003, Judge Chamblin had ruled that Fitzgerald's claim could go forward. After reviewing Andrews, however, he reconsidered. Chamblin stated that Andrews made it "clear that the Virginia Supreme Court has ruled that as a matter of law, an action under the conspiracy statute does not embrace claims for injury to personal reputation or employment interest."

In distinguishing a person's job from his profession, Chamblin identified a profession as a "vocation requiring extensive education in science or the liberal arts and often specialized training. A person can engage in a profession without being employed." He also noted that being a police officer is not a profession, since it is a status that is dependent upon employment by another. Judge Chamblin also ruled that the reputation element of the conspiracy statute applies specifically to reputation in business, trade, and profession and not to any personal or employment interest.

As a result of Andrews and Fitzgerald, professions, dependant upon licenses, remain protected by the conspiracy statute; jobs are not.

## Passage of HB 5018 heralds the repeal of Virginia's Estate Tax

By Jonathan C. Kinney

On April 27, 2004, the Virginia Legislature passed an amended HB 5018, a package of revenue measures designed to provide additional money to the state.

Although this measure has not received much publicity since its passage, the Bill heralds the repeal of Virginia's estate tax for the estates of those persons who die on or after November 1, 2004. The estates of these Virginia individuals would previously have paid as much as 16% in tax on non-exempt amounts. This shift in Virginia law means individuals with a large Virginia estate will only have to deal with the parameters of the federal estate tax.

With the current federal "exemption" for taxable estates at \$1.5 million, many individuals feel that they can afford to pursue a fairly straightforward ("non tax-based") estate plan, but since the valuation of an estate includes ownership of real estate and the value of life insurance policies, many residents of Northern Virginia do not realize that their estate exceeds the \$1.5 million threshold. Although the federal exemption is set to continue rising until 2009, and will be eliminated in 2010 for one year, the "exemption" amount is currently scheduled to return to \$1 million in 2011.

Anyone interested in how these changes may affect their specific circumstances, should contact Jonathan Kinney, Esq. at Bean, Kinney & Korman, P.C.

Here is a summary outlining some of the other changes to Virginia's tax structure that are the result of the passage of HB 5018:

### Income tax:

- Raises the filing threshold from \$5,000 to \$7,000 for individuals and from \$8,000 to \$14,000 for married couples, effective January 1, 2005.

### Delaware holding companies and pass-through entities:

- Requires pass-through entities' information returns to be filed with the Tax Department, effective for taxable years beginning on and after January 1, 2004.

Cigarette tax: Increases the state cigarette tax from 2.5 cents to 25 cents per pack from July 1, 2004 until June 30, 2005. Beginning July 1, 2005, the rate increases to 30 cents per pack.

Recordation tax: Increases the state recordation from 15 cents to 25 cents per \$100.

### Sales tax:

- Increases the state sales and use tax one-half percent from 3.5 percent to 4 percent, effective October 1, 2004
- Eliminates sales tax exemptions for certain public service corporations.
- Reduces the state sales tax on food by one-half cent, effective October 1, 2004, and an additional one-half cent effective July 1, 2005.

A full text copy of the bill can be found at <http://leg1.state.va.us/cgi-bin/legp504.exe?042+ful+HB5018EH1>.

## LLC'S: REMEDIES FOR DEAD LOCK

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Finding that Tignor had adversely effected XpertCTI's ability to carry out its business, Tignor was expelled from the LLC. The Court ordered Robertson to continue the company, providing a monthly accounting to the expelled member, who remained a passive investor. The Court also ruled that XpertCTI would be dissolved after the expiration of the Samsung Contract. Robertson appealed, arguing that since the record failed to show that XpertCTI could not carry on its business, the Court could not order its dissolution.

Noting that the standard for dissolution is a "strict one", requiring the Court to conclude "that present circumstances show that it is not

reasonably practicable to care on the company's business in accordance with its Articles of Organization and any Operating Agreement." Before dissolution can be ordered, Justice Keenan reasoned that with Tignor's expulsion and his continuation solely in the role of passive investor, Robertson could manage the organization in accordance with its governing documents.

Dunbar Group v. Tignor is a case of first impression in Virginia. It defines and limits important remedies available to LLC members.

*This paper was prepared by Bean, Kinney, & 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 & Korman, P.C. 2004.*



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