# ACCORD AND SATISFACTION

*BY: James V. Irving, Esq.*

Accord and satisfaction is the legal theory by which the full amount of a debt may be discharged through the creditor's acceptance of payment of a lesser amount. Business men and women who accept checks in payment of debts should be aware of Code of Virginia Section 8.3A-311, since ignorance of this statute may result in the unintended discharge of the full amount of a debt and in some cases may lead to a successful claim for violation of the Fair Debt Collections Practices Act.

Of particular interest is the provision of 8.3A-311 which deals with effect of a payor writing "payment in full" on a check and offering it in satisfaction of a debt. 8.3A-311 makes it clear that the common practice of striking out the "payment in full" language prior to cashing the check does not protect against a claim of discharge if the check is cashed. According to the cited section, payment tendered "in good faith on an unliquidated amount or an amount subject to bona fide dispute will be deemed fully satisfied if the payor demonstrates that the instrument or an accompanying written communication contain a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim".

In a circumstance in which the creditor mistakenly accepts and cashes a check marked "paid in full", he may be able to escape discharge by demonstrating that the check was tendered in bad faith, that the amount was liquidated or not subject to bona fide dispute, or that the language "payment in full" was inconspicuous.

Additionally, if the creditor is an "organization", it may send a "conspicuous statement" to its debtor stating that any tender in full satisfaction of the debt must be sent to a designated person, office or place. If that step is taken, an instrument designed to affect an accord and satisfaction is not effective unless it was received by the designated person, office or place.

Finally, the claimant, whether or not an organization, may avoid discharge if it re-tenders payment of the instrument to the party asserting the accord and satisfaction within 90 days after payment. This provision has no application where an entity has designated a person, office or place to receive full satisfaction and communications

Because the Fair Debt Collection Practices Act provides debtors with an effective remedy against those seeking to improperly collect a debt, inadvertent accord and satisfaction followed by an attempt to collect the full amount of the debt may result in a successful lawsuit being brought against the creditor (or its representative) by the former debtor.

Business owners must carefully instruct their accounts receivable personnel to flag any and all checks accompanied by or marked with language suggesting the check is intended in full satisfaction of a debt, and be careful that they are handled in accordance with this statutory requirement. ⟐

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*"In a circumstance in which the creditor accepts and cashes a check marked "paid in full", his only recourse will be to demonstrate that the check was tendered in bad faith, that the amount was liquidated or not subject to bona fide dispute, or that the language "payment in full" language was inconspicuous.*

# RESPONDEAT SUPERIOR

*BY: James v. Irving, Esq.*

Under the theory of Respondeat Superior, a business may be found liable for the wrongful acts of its employees. Strictly speaking, the theory holds that the employer is responsible for the wrongful acts of its employees or agents in the regular course of business. The practical effect of the doctrine is broader and more onerous as even baseless allegations of employer liability can drive up settlement amounts in business cases. The apparent increase in the filing of respondeat superior claims against businesses and business owners may be attributable to this circumstance.

Virginia is usually recognized as a business-friendly jurisdiction, and its Courts have wrestled with the reality of frivolous lawsuits balanced against the right of a claimant to have his day in court. Virginia judges may not dismiss a case in a preliminary stage if the lawsuit "states a claim". Under current law, the balance favors the claimant. In Cooper v. Hansbury decided on June 18, 2001, an Arlington County circuit judge wrestled with this issue, ruling that the plaintiff had "pled sufficient facts" to permit a jury to decide whether or not the defendant was acting within the scope of his employment when the wrongful acts occurred.

Cooper involved allegations of sexual assault by an employee against a patient at a laboratory. Plaintiff sued the employee and the laboratory. Before refusing to discuss the claim against the laboratory, Judge William Newman, Jr. described the recent history of similar claims and cited the growing tendency of Virginia courts to allow them to go to trial. Judge Newman noted that until the case of CBS v. BellSouth Servs., Inc., (1995) judges were permitted to determine as a matter of law whether the employee was acting within the scope of his employment and when clear evidence showed that the employee's deviation from his employer's business was "great and unusual", the Court was justified in dismissing the case. Beginning with BellSouth, however, the law changed in favor of Plaintiffs.

In BellSouth, the Court found that even if the employee was acting out of his own self interest, if his willful and malicious acts were committed while performing the employee's duties, the claim presented a jury question as to whether or not the employee had acted within the scope of his employment. Judge Newman concluded: "By removing the employee's motive for his act from the scope of his employment, Supreme Court prevents a trial judge from deciding, as a matter of law, whether the employee's act was done with the intent to further the employer's interest. Instead the issue is whether the service of the employee itself, in which a tortious act was done, was within the ordinary course of business."

Judge Newman's language suggests he was ill disposed toward the claim but found his hands tied by the Commonwealth of Virginia law. He noted, however, that the alleged facts, if proved at trial, would entitle the Plaintiff to prevail against the employer. Plaintiff's allegation was that the individual defendant, a medical collection specialist, administered a blood test within the ordinary course of the employer's business; that thereafter he sexually assaulted the plaintiff; and that the Plaintiff's injury was caused by the willful and wrongful act the employee committed in the regular course of the employer/employee relationship and within the scope of his employment.

The Plaintiff must still prove her case at trial in order to recover damages against either the individual or the corporation, however, the laboratory is faced with the

**RESPONDEAT SUPERIOR** *(continued)*

cost of defending the claim, as well as the risk that the jury may side with the Plaintiff.

The lesson for business owners is that they cannot insulate themselves from potential liability for employee's conduct by closely defining the permitted activities of their employees. Virginia employers now find themselves to some extent guarantors of their employees' conduct. They therefore must be diligent in their hiring practices and in policing their employees' activities. It goes without saying that an employer who retains an employee with knowledge of a history or tendency toward wrongful conduct only increases chances of liability or even award of punitive damages against it . ◈

# INTELLECTUAL PROPERTY

*BY: James v. Irving, Esq.*

Despite the recent slowdown, dot.com proliferation continues to make Virginia state and federal courts leading jurisdictions for Intellectual Property disputes.

On September 7, 2001, Virginia U. S. District Court Judge, James H. Michael, Jr. of the United States District Court for the Western District of Virginia ruled on a Motion for an Award of Costs to the "prevailing party" in an Intellectual Property matter. Judge Michael denied the Motion for Costs and his reasoning offers a window into the thought process of at least one Federal Judge.

In *Virginia Panel Corporation v. MAC Panel Company*, the Federal Court entered a permanent injunction against MAC Panel Company on May 29, 1996, enjoining MAC from infringing upon Virginia Panel's patent rights. In December of 1999, Virginia Panel asked the court to hold MAC in contempt, charging MAC had violated the injunction by selling and offering for sale the very products found to infringe "as well as the redesigned product, that due to a failed engineering effort, does not avoid infringement." Nearly two years after the application, the Court denied Virginia Panel's petition. Thereafter, the Court considered MAC's Motion for an Award of approximately $23,000 in costs incurred in defending the contempt action.

Federal Rule 54(d) establishes that Court costs are to be awarded to the prevailing party "unless the Court otherwise directs". Related case law strengthens the presumption: costs should be awarded "absent good reason for doing so".

The court opined that the matter was a "close case" and that closeness, while insufficient in itself as a basis to deny the petition, was a factor to be considered. Judge Michael pointed out that the Petition for Contempt was denied largely because of insufficient evidence to demonstrate that MAC's customer actually made use of Virginia Panel's Intellectual Property — even though MAC had attempted to induce their customers into doing so.

The Court was faced with equitable factors favoring Virginia Panel and a defendant that had narrowly escaped sanction.

Citing other Fourth Circuit precedent, the Court determined that Plaintiff had had a good faith basis for seeking the injunction making it unfair to shift the financial burden to Virginia Panel.

The subtext of the case suggests that the Court recognized MAC Panel as a party with a bad case of unclean hands, and it invested considerable effort in setting out a rationale that avoided the financial benefit to which MAC was arguably entitled to. Virginia Panel demonstrates that even within the Federal system, where the distinction between law and equity is not as clear cut as it is in Virginia state courts, some judges will continue to attempt to do equity where the award of costs and fees is at issue. ◈

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*This paper was prepared by James V. Irving of Bean, Kinney and Korman, P.C. as a service to clients and friends of the firm. Mr. Irving is a member of the D.C., Maryland, Virginia and Massachusetts State bar associations. 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.* *© James V. Irving, 2001*

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