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BEAN KINNEY & KORMAN PC
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Business Law Newsletter

ARBITRATION AWARDS

by James V. Irving

The Supreme Court of Virginia handed down the case of *Cacote v. Fraser Forbes Company LLC* on November 4, 2005. *Cacote* reminds us that arbitration agreements extend broad decision making power to the arbitrator, and that his or her award is subject to only limited review in the courts of Virginia.

Cacote worked as an independent contractor - real estate broker with the Fraser Forbes Company ("Fraser"). He was to be paid on the basis of a commission structure set out in the parties' agreement. After Cacote terminated his contract, Fraser refused to pay certain commissions that Cacote claimed were his under the contract. The contract also contained an agreement to arbitrate all disputes.

At issue were commissions on transactions that had not closed prior to Cacote's termination. The arbitrator ruled that the parties had adopted the industry practice of "pay when paid" and awarded commissions totaling $100,525.00 on properly executed contracts delivered prior to termination that had closed thereafter. The arbitration also set out a method for calculating commissions on other fully executed contracts that had not closed as of the date of the arbitration.

The DC Superior Court confirmed the award without objection from either party, but when *Cacote* attempted to domesticate the judgment in Fairfax County, Fraser appealed in DC and filed an emergency motion to suspend enforcement of the judgment in Virginia. The Virginia trial court exercised jurisdiction, and several months later, Fraser paid the Cacote the amount awarded in DC, plus costs and attorneys fees, and the parties agreed to dismiss the DC matter with prejudice.

Thereafter, two more transactions closed, and Fraser paid Cacote in accordance with the commission payment terms included in the contract between the parties, but Cacote returned to Court, claiming he had been significantly underpaid. In essence, the problem was that the formulation for payment established by the arbitrator was different than that set out in the contract – and much more beneficial to Cacote.

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SANCTIONS FOR UNSUPPORTED PLEADINGS

by James V. Irving

In 1987 Virginia enacted Code of Virginia §8.01-271.1. Based generally on Federal Rule 11, this statute provides, among other things, that litigants must have a good faith basis for all allegations contained in a law suit. The familiar formulation is that, to the best of the litigant's "knowledge, information, and belief, [each allegation] is formed after reasonable inquiry, is well grounded in fact, and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law."

Consistent standards of enforcement are still emerging on a circuit by circuit basis, but courts have often shown willingness to impose economic sanctions not only for frivolous lawsuits, but for unsupported allegations contained within otherwise appropriate pleadings. In June of 2005, Judge Jonathan C. Thacher of the Fairfax County Circuit Court imposed economic sanctions against a Defendant's counsel for filing a pleading containing unsubstantiated allegations.

In *Benitez v. Ford Motor Co.*, the Plaintiff claimed significant injuries caused by a defective airbag installed in her car. The automobile dealer's Answer included the generic allegations that plaintiff was contributory negligent; had assumed the risk of injury; that the auto dealer was not responsible for the negligence or breach of duty of a third-party over which they had no control; and that the plaintiff failed to mitigate her damages (the "Generic Defenses"). Ultimately, the Court allowed certain affirmative defenses with some arguable basis in fact to stand, but counsel for the automobile dealer was unable to supply any facts supporting the Generic Defenses. Instead, he argued that the Court should allow the facts to be fully developed before determining the propriety of the Generic Defenses and whether or not they could be substantiated.

The Court pointedly noted that the Plaintiff had specifically stated that these affirmative defenses lacked a factual foundation and should be stricken, and that substantial discovery had been conducted before a previous iteration of the case had been dismissed without prejudice. As a result, the Court concluded that the defense was guilty of "serious gamesmanship" by trying to preserve the Generic Defenses for the purpose of improperly shifting the burden of proof on these issues to the Plaintiff. The Court further found that the frivolous pleadings were intended gain an unfair advantage in the litigation, and sanctioned Defendant's counsel in the amount of $2,000.

Benitez reminds us that litigation is a closely regulated process. Litigants are not free to make casual overstatements in pleadings for the purpose of increasing leverage or risk to the other party. The requirement that all parties thoroughly investigate the facts before any pleading is filed can increase the cost of litigation, but *Benitez* reminds us that litigants in our system must embrace that responsibility.

MEET OUR LAWYERS
Philip Winchester Jaeger

Mr. Jaeger is a shareholder of the firm. His areas of concentration include mergers, acquisitions, sales of privately held companies, leveraged management buyouts, debt restructurings, reorganizations, venture capital, investment banking, and private finance.

Mr. Jaeger's transactional experience arises from an extensive and blended background in law, business, engineering and technology. He received his Bachelor of Science from Cornell University in Ithaca, New York, in 1967 and Master of Engineering degrees in Operations Research and Computer Science from Cornell in 1968. He earned his law degree from Catholic University School of Law in Washington, D.C. in 1975.

Mr. Jaeger is a frequent speaker on mergers and acquisitions and leveraged management buyouts. He was recently elected to a four-year term to the Board of Directors for the Associated for Corporate Growth National Capital Chapter. He founded the CEO Mergers and Acquisitions Breakfast Forum in 1996 which brings together successful M&A buyers and sellers of businesses with CEO's and CFO's interested in learning about the M&A marketplace.

Phil lives in McLean, Virginia with Noemi, his wife of 22 years and their 4 children, Michael (19), Matthew (17), Brian (14) and Kelly (11). His extra-curricular activities include golf, fitness training, football, basketball, baseball, soccer, swimming and the many other activities associated with raising 4 children.

ARBITRATION AWARDS

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Judge Leslie Alden of the Fairfax Circuit Court ruled that Cacote had been paid in accordance with the deal struck by the parties and dismissed the claim. Cacote appealed, and the Virginia Supreme Court held that the terms of the parties' deal were no longer governed by the contract between the parties, but by the arbitrator's uncontested award, and that the method of calculation described by the arbitrator now formed the basis for determining future commissions.

The Supreme Court noted that the power to modify an arbitration award is very limited and once the award has been confirmed and is embodied in a judgment there is little that the trial court is entitled to do. Since the question of how future commissions were to be calculated was before the arbitrator and because the appropriate documents were submitted to allow the arbitrator to make his determination, those issues were resolved and were not subject to review by either the Virginia trial court or the Supreme Court.

Arbitration is an increasingly popular choice among parties entering into contracts largely because it is perceived as less expensive and more efficient than litigation. The *Cacote* case reminds us that the arbitrator's authority is effectively final, and litigants must approach arbitration with that reality in mind.

FAIR AND ACCURATE CREDIT TRANSACTION ACT OF 2003

by James V. Irving

The Fair and Accurate Credit Transaction Act of 2003 ("FACTA") was signed into law on December 4, 2003. It seeks to ensure that all citizens are treated fairly when they apply for a mortgage or other forms of credit. It also provides for expanded access to credit and other financial services and is intended to enhance the accuracy of financial record keeping while helping to prevent identity theft.

Uniform national credit reporting standards, adopted in 1996, established a clear set of rules governing the information credit agencies are entitled to include in individual credit reports. FACTA makes those national standards permanent and ensures that lenders make decisions on loans based upon full and fair credit histories.

Under FACTA, every consumer has the right to request a copy of his or her credit report free of charge once a year. The act requires merchants to leave all but the last five digits of a credit card number off store receipts in order to protect the financial information of their customers. FACTA creates a national system of fraud detection and fraud alerts for consumers, and requires regulators to help fight identity theft by creating a list of leading indicators to be circulated in the industry.

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Like many consumer protection laws, FACTA creates burdens and regulatory risks for unwary business entities. Effective June 1, 2005, employers must shred or otherwise destroy specifically described information defined in FACTA as "consumer reports". Employers are required to take "reasonable measures" to protect against unauthorized access or use of this information and are required to destroy it in accordance with specific statutory guidelines to assure that it does not fall into the wrong hands.

Failure to destroy the information in accordance with the statute could subject a business to liability for "negligent destruction." Negligent destruction can also include personal information that is merely lost. Once faced with a charge of negligent destruction, the burden of proof shifts to the company, which must prove that it did not destroy the information improperly. Employers may be liable for fines of up to $2,500.00 per occurrence and employees may recover actual damages suffered as a result of the improper disposal of their private information.

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