

# LEGAL

# UPDATE CLIENT NEWSLETTER OF **CARR, MORRIS & GRAEFF, P.C.**

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AUGUST - SEPTEMBER 2002

## **ELECTRONIC COMMERCE** **“DOING BUSINESS” ON** **THE INTERNET**

Most businesses utilize the Internet to some degree on a daily basis. The internet is a powerful tool that enables companies to reach potential clients or customers in virtually every state. The incredible reach of the internet has challenged traditional legal rules regarding court jurisdiction. Generally, a company could be sued in the state where the company was incorporated or the state where it actually conducted its business. But the internet has forced us to reconsider these basic legal tenets. For example, does a California court have jurisdiction to hear a case against a Virginia corporation simply because California is the place where the corporation's website was downloaded by the internet user? U.S. courts are now faced with these exact questions, and they are finding that traditional rules of jurisdiction are adaptable and able to adjust to new technology. Generally, courts hold that operation of an active website is sufficient to subject the corporation to all lawsuits of any sort, whether related to the website activities or not. The theory behind these holdings is that the defendant is *constructively present* in the state.

The District of Columbia recently addressed this very issue. In *Gorman v.*  
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## **RAYMOND C. JONES JOINS CM&G**

We are very pleased to announce that Raymond C. Jones has joined Carr, Morris & Graeff in an “Of Counsel” capacity.

Ray Jones is already well known to a number of CMG clients. With over 15 years of experience in all aspects of intellectual property law, Ray is a welcome addition to the firm's business and technology representation practice.

Ray is a graduate of the U.S. Naval Academy and George Mason University Law School. A former Naval Officer, he was a clerk at the U.S. Court of Appeals for the Federal Circuit. Ray was also previously affiliated with the intellectual property law firms of Finnegan, Henderson, Farabow, Garrett & Dunner in Washington, D.C., and Jones Volentine, LLP in Reston, Virginia.

Preferring the genteel life, Ray lives with his wife, Monica, in Leesburg, Virginia.

## **EMPLOYMENT** **MANDATORY EMPLOYEE** **ARBITRATION – BENEFITS** **AND PITFALLS**

In an effort to curb the costs of employment related lawsuits, many employers have been instituting mandatory arbitration agreements with employees. Employers have favorably viewed mandatory arbitration for many reasons. First and foremost, arbitration agreements can be written to limit time consuming and costly discovery. Arbitrations also result in a much quicker resolution of the underlying dispute.

It is not uncommon for an employer-employee dispute to be resolved within four months of the filing of the initial claim in arbitration, while a similar claim in a judicial forum may not be resolved in less than 18 months. Here is the difference: In arbitration, after a claim is filed, the arbitration forum typically provides the respondent a brief period of time to file a counter-claim and any defenses which the respondent would like to assert. If no defense is filed, the claim is deemed to be denied and limited discovery proceeds. Normally, the discovery period will last for 30 to 60 days. Upon conclusion of discovery, a hearing is typically scheduled within 30 days, and a decision is issued

within two to three weeks of the hearing.

In a judicial forum the defendant has 20 to 30 days to answer or otherwise respond to the complaint, depending on the jurisdiction. In many situations, though, defendants elect to file a motion to dismiss the claim instead of an immediate answer. This typically results in at least a two to four month delay while the court reviews the motion. Even if such a motion is successful, the court will usually grant the plaintiff leave to file an amended complaint, to attempt to correct deficiencies which resulted in the initial dismissal. After such an amended complaint is filed, the defendant files an answer (or seeks dismissal of the amended complaint) and discovery begins. It is not unusual for the discovery period to last four to six months or more. Discovery will normally include written questions to the parties (interrogatories), requests for production of documents and depositions. The discovery period is usually followed by a period of a several months during which dispositive motions (motions seeking dismissal of some or all of the claims asserted) can be filed, oral argument on such motions are presented and then rulings issued. Trial is frequently scheduled three to six months or more after the ruling on dispositive motions.

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**ESTATE PLANNING****A U.S. ALIEN'S DOMICILE SHOULD BE SELECTED, NOT ACCIDENTAL**

The taxing jurisdiction of the U.S. is not uniform. The concept of income tax *residence* is governed by very specific, objective tests having to do with citizenship, "green card" status, and physical presence. There is rarely any question as to who is a U.S. income tax resident. On the other hand, for purposes of the estate tax, the test, except for U.S. citizens and residents, is subjective.

For estate tax purposes a U.S. "domiciliary" is a person who has lived in the U.S., even for a very short period of time, without any intent to leave. Conversely, a person can be in the U.S. for a lifetime without becoming a U.S. domiciliary if he or she never formed a subjective intent to become one. One retains one's original domicile until one forms the requisite *intent* to change it, and one cannot become a U.S. domiciliary, even after forming the intent, if one does not come to the U.S.

This subjective test for domicile has given rise to a great deal of elucidating litigation. For example, the courts have held that both undocumented aliens and G-4 visa holders can and may form the requisite intent to acquire domicile. This seems counterintuitive since undocumented aliens have no right to be here, whereas G-4 visa holders are by definition temporary residents of the U.S. This elasticity in the domicile test can be used for taxpayer advantage, so long as fraud is not committed upon the government.

The domicile issue is of more than academic importance. Nondomiciliaries are only taxed on U.S. assets but are allowed a small \$60,000 applicable exclusion amount. Domiciliaries, by contrast, are taxed on their worldwide estates but are allowed a \$1,000,000 applicable exclusion amount in 2002 and 2003. Therefore, when an alien dies in the U.S. holding some U.S. property, domiciliary status often becomes one of the most important issues in the estate's administration. Choosing the correct domicile can result in impressive estate tax savings, while picking the wrong one can be catastrophic.

The landmark case on domicile is *Estate of Paquette*, 46 T.C.M. 1400 (1983).

There the Tax Court held that a Canadian citizen who died in Florida and actually owned a home in Orlando was nevertheless not a U.S. domiciliary because the decedent had never intended to abandon his Canadian domicile. In reaching its conclusion the court relied on a number of facts that clearly indicated that most of decedent's significant contacts were with Canada: decedent died testate with a will executed in Canada; he maintained Canadian citizenship until his death and never acquired lawful permanent residence ("green card" status) in the U.S.; he only spent the winter months in Florida on a tourist visa, returning to Canada for the warmer part of the year; 86% of the value of his assets were in Canada, even though he did not own a Canadian home; during his life decedent had filed income tax returns in Canada, maintained a Canadian driver's license, used a Canadian passport, voted in Canada, and purchased, registered, and insured his automobiles in Canada.

The facts in *Paquette* were plainly favorable to decedent, but if he had had fewer significant contacts with Canada and more significant contacts with the U.S., the Tax Court might very well have reached the opposite conclusion. Thus, domicile should not be left to chance but carefully chosen as part of an integrated international estate plan. Moreover, the situs of assets should be consistent with the selection of domicile in order to completely avoid U.S. estate taxes. In this connection we would like to point out that it is a fundamental mistake for some G-4 visa holders working for international organizations in the United States to purchase a home here and to otherwise hold U.S.-situs assets directly. Such an asset distribution is an indicium of intent to change domicile to this country and, as discussed, domicile should be chosen, not attained accidentally.

Sometimes it is possible to use post-mortem techniques to obtain superior tax results, even in the absence of an estate plan. But, that is a second best alternative. After death options decline substantially. On the other hand planning during life gives the testator a wide menu to achieve good tax results and to arrange for intelligent succession of the estate to his or her loved ones. Please call Roy Morris or the author if you have any questions on domicile in international estate planning.

**NÉSTOR CRUZ**

**ELECTRONIC COMMERCE**

*continued from page 1*

*Ameritrade Holding Corporation*, 130 Wash. L. Rptr. 1377 (D.C. App. June 14, 2002), the U.S. Court of Appeals for the District of Columbia held that District of Columbia courts "may assert general jurisdiction over a defendant that is 'doing business' in the District through the medium of the Internet." Pursuant to D.C.'s long-arm statute, D.C. courts have always been able to exercise general jurisdiction over out-of-state corporations that conduct business in D.C. This ruling extended that basic premise to business conducted on-line. In so holding the Court looked at the contacts the Defendant internet business had with the District. District of Columbia residents actively used the Ameritrade website to engage in electronic transactions such as selling securities, opening accounts, paying brokerage fees and transmitting funds. In turn, Defendant Ameritrade responded to customers via email and website posting. The Court concluded that Ameritrade entered into contracts with D.C. residents that involved the "knowing and repeated transmission of computer files over the internet" and that these contacts were sufficient to establish jurisdiction in D.C.

Courts generally distinguish between active and passive websites. Passive websites, where the internet user does not provide any personal, identifying information and is simply accessing the website to read or browse posted information about the company and or its products and services, do not provide a basis for jurisdiction. Active or interactive websites have generally created a sufficient basis for a court to exercise jurisdiction over the company promoting the site, regardless of its location. The effect of these changing legal rules is that if you conduct an "active" business on-line you are submitting yourself to the possibility of having to defend lawsuits in remote jurisdictions.

**DANA THERIOT**

## **EMPLOYMENT ON THE HORNS OF A DILEMMA: EMPLOYEE HANDBOOKS**

We have devoted many past newsletter articles to discussing the benefits of an employment handbook in a business setting. Without creating a contract and reversing the presumption of employment at will, a well crafted employment handbook can be invaluable and instrumental in assisting a company in running its business and managing its workforce. The handbook can also be very beneficial to the employee in that it provides a roadmap of what is appropriate behavior and what is impermissible. Clarity in drafting a handbook is paramount. As a result, in a vast majority of cases, that which is impermissible and which might result in disciplinary proceedings, including possible termination of employment, is readily apparent.

The recent financial scandals that have shaken the confidence of the American public and which have resulted in a number of congressional and related investigations, have highlighted a provision in many corporate handbooks which poses a risk that is not readily apparent. Specifically, a company's handbook might contain a policy provision which requires all employees to cooperate fully and be forthcoming in any government investigation or inquiry. Businesses that engage in ongoing activity with government agencies and are involved in government contracts see such a clause as necessary to assure government contracting officials that the company will provide assistance if it becomes necessary. However, it has recently become apparent that the company's objective in such a policy might be inconsistent with an employee's right to exercise his or her constitutional rights. The Fifth Amendment to the United States Constitution allows an individual to assert the right to not provide testimony that might result in self-incrimination. In broad-based Congressional investigations into

impropriety and possible criminal wrongdoing, most seasoned criminal defense attorneys, knowing the pitfalls that exist in providing testimony, even if the client is only not tangentially involved in possible wrongdoing, advise their clients to assert their Fifth Amendment privilege. By asserting this constitutional right, however, the employee may directly violate the company handbook provision requiring full cooperation. This puts the company in the position of either ignoring its policy or taking disciplinary action against the non-cooperating employee.

A better example of being "on the horns of a dilemma" can hardly be found. Either the employee, against advice of counsel, waives his right to invoke his Fifth Amendment privilege against self-incrimination, thereby subjecting him to possible criminal exposure, or the employee violates a policy of his employment manual subjecting him to discipline up to and including termination. It is often said that tough times make for tough choices. Certainly, for an employee in this situation, this is such a time.

**STEPHEN GRAEFF**

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### **EMPLOYMENT** *continued from page 1*

Legal fees incurred in a trial are always greater than the costs incurred in arbitration of a similar matter. Preparing and arguing multiple motions is a costly practice. The increased time period during which discovery can be conducted allows more discovery to take place. Additional discovery does not necessarily result in more or better information. Frequently, the approach to discovery in a judicial forum is to ensure that "no stone is left unturned" while discovery in arbitration often seeks the minimum facts needed to present one's claim or defense. If it is true that "work expands to fill the available time," the time restrictions of the arbitration process

simply limit the amount of work that *can* be done. Finally, actual arbitration proceedings take less time than actual trials.

While all this sounds great from an employer's perspective, there are some pitfalls to arbitration. First, the arbitration filing fee can be expensive. It is not unusual for a filing fee to exceed \$500, as the fee is normally based on the value of the damages sought. This can be a burden on employers, as recent court decisions have held that a mandatory arbitration agreement may be invalid if it creates a financial bar to asserting the claim that is greater than the costs which would be incurred in a judicial forum. As such, a valid arbitration agreement must include a provision which states that the employee's portion of the filing fee will not exceed the employee's filing fee if the claim were filed in a judicial forum. Another pitfall of arbitration is the propensity of some arbitrators to act as mediator. By this, I mean the arbitrator wants to give everyone something. There is an emerging school of thought that arbitrators may be more reluctant to award a defense verdict than a judge or jury. Thus, some arbitrators may *mediate* or look for a *compromise* decision that may not be supported by the evidence. The last apparent pitfall is that arbitration findings are rarely subject to appeal. That certain *finality*, of course, can also be a benefit of arbitration—if you win.

If a business elects to enforce a mandatory arbitration policy with its employees, the agreement must be in writing and must clearly state that the employee is waiving his or her right to a trial. The agreement should address the filing fee issue discussed above. And the agreement should spell out the specific limitations on discovery. For instance, an agreement could provide that discovery is limited to allow each side one deposition, and the agreement may limit or exclude written discovery (interrogatories) or document production.

**PHILIP SCHWARTZ**

## **CARR, MORRIS & GRAEFF, P.C.**

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions—the District of Columbia, Maryland and Virginia.

## **STAFF NOTES**

Néstor Cruz helped organize a Cornell Club of Washington event featuring a professor from the Graduate School of Management discussing the Enron-WorldCom-Arthur Andersen situation.

\* \* \*

Alan Bowden's wife, Kim, gave birth on August 27, 2002, to a bouncing baby boy—Christopher Bryan Bowden. Alan, of course, dreams of someday adding the “Hokie Parent” decal to his car. (*Nicknaming contest rules will be announced soon.*)

Meanwhile, Alfredo Caputo's daughter Andrea Rose gave birth to Sara Nicole on August 19. Sara is the Caputos' sixth grandchild.

\* \* \*

Insightful observation of the month: We can't help but observe that the trickling introduction (or re-introduction) of *motorscooters* into the D.C. metro traffic stream is becoming a flood. This may mark the end of civilization as we know it...these unlicensed, unregulated, untamed scooters are a menace to society. Otherwise, they're sort of cute. (*And if that doesn't persuade you that the end is near, how do you explain the popularity of reality TV?*)

\* \* \*

From the Sports desk: Coach Adam Wilk (just a *ball coach*) has his under-8 boys soccer team off to a rousing 2-2 start. Coach Wilk told reporters, “We're just going to kick it around a bit and—bein' as how they do keep score—try to get more balls in the net than the other fella.”

\* \* \*

We welcome Angela Barbour to our administrative staff. Angela is a Maryland native and a recent graduate of Bowie State University.

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