



Weekly Wright Report (7/24/17)

Contractual Indemnity Provisions for Attorney's Fees Are Enforceable

On July 18, 2017, the Maryland Court of Appeals held that contract language containing a prevailing party attorney fees clause could indemnify the non-breaching party for its legal fees, including the fees expended to recover the legal fees themselves. In Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Group Limited Partnership, LLLP, Bainbridge was formed to oversee the construction and management of a 17-story building in Bethesda. To construct the building, Bainbridge needed to access the neighboring property owned by White Flint. The parties entered into an easement agreement that provided, among other things, for Bainbridge to indemnify White Flint from all claims, including attorney's fees, arising from any breach of that agreement.

When Bainbridge breached the easement agreement, White Flint terminated the agreement. White Flint asked the court to declare that the indemnity obligations survived termination of the agreement. The trial court held that such obligations did survive termination and awarded White Flint more than \$3.5 million in attorney's fees based on the prevailing party attorney fee provision in the easement agreement. Bainbridge appealed, but two appellate courts disagreed, holding that where the indemnity provision expressly includes the right to recover attorney's fees, such fees are recoverable – even in a first party action. The Court of Appeals also made clear that, in its view, the easement agreement clearly intended to compensate the parties to that agreement in the event one of the parties breached the agreement, and that such compensation included attorney's fees. Ask Jason jpotter@wcsllaw.com

Complaining Employee Not Protected From Termination For Fabricated Complaint

Finally, some comfort to employers concerned about terminating an employee who they believe, in good faith, has made a false complaint of discrimination. In Villa v. CaveMezze Grill, the Fourth Circuit ruled that a Company who fired an employee based on a good faith belief she engaged in misconduct is not liable for retaliation even if it later turns out that the employee had not, in fact, engaged in such misconduct. The court reasoned that where the employer lacked a retaliatory motive because it genuinely believed the employee had fabricated the report, there is no liability. “[I]t is not our province,” the court said, “to decide whether the [employer’s] reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff’s termination.” The court drove that point home: “because the statute’s focus is the employer’s

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subjective motivation for the action, the facts the decision-maker actually perceived matter. If an employer, due to a genuine factual error, never realized that its employee engaged in protected conduct, it stands to reason that the employer did not act out of a desire to retaliate for conduct of which the employer was not aware.” Ask Laura LRubenstein@wcsllaw.com

When Companies Waive Their Right to Arbitrate

In *Cain v. Midland Funding, LLC*, 2017 WL 1101804 (Md. 2017), the Court of Appeals held that when a lender chooses to pursue an action in small claims court it waives any later right to enforce its arbitration provision if the claims are related. In *Cain*, the lender pursued its collection action against the credit card holder in small claims court in 2009. It obtained a default judgment for \$4,520. In 2013, that same credit card holder filed a class action complaint against the lender, asserting that the lender had been an unlicensed collection agency. The lender moved to compel arbitration. Under Maryland case law, participating in a judicial proceeding can constitute a waiver of the right to arbitrate issues raised in that proceeding and with respect to related issues. Thus, the Court looked at whether the lender could have arbitrated its collection action, and if so, whether that was related to the licensing issue raised in 2013. The Court found that the language in the arbitration provision gave the lender the choice to litigate or arbitrate the collection issue. The Court also found the 2009 and 2013 claims were sufficiently related to apply the waiver doctrine. Finally, the Court refused to require a showing of prejudice for applying the waiver.

E-Verify

The E-Verify system is voluntary for employers unless mandated under state or local law or federal contractors under an existing federal contract. Congress is considering legislation to mandate E-Verify for all employers, require a status check of all current employees not electronically verified within the three preceding years, and require termination of all employees determined unauthorized to work.