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Annual Survey of Virginia Law: Corporate and Business Law

Peter E. Broadbent Jr.

John E. Russell

CORPORATE AND BUSINESS LAW

*Peter E. Broadbent, Jr.**
*John E. Russell***

I. INTRODUCTION

Virginia corporate and business law changes in the last year continue to challenge the practitioner to stay abreast of such developments in order to provide accurate advice to clients. This article summarizes the developments in the law in Virginia occurring from June 1999 through May 2000, with the legislative changes described based on Virginia General Assembly action in the 2000 session. Part II examines those legislative changes in corporate and business law (excluding public service corporation/public utility law issues). While many of the legislative changes are not significant, three new uniform laws (revised Article 9 of the Uniform Commercial Code ("UCC"), dealing with secured transactions, the Uniform Electronic Transactions Act, and the Uniform Computer Information Transactions Act) are likely to have a major impact on significant areas of business law practice and business conduct. Part III reviews judicial decisions on commercial law and business entity issues during the year, including a controversial decision on the duty of directors.

II. LEGISLATIVE DEVELOPMENTS

The 2000 General Assembly enacted three major pieces of leg-

* Partner, Christian & Barton, L.L.P., Richmond, Virginia. B.A., 1973, Duke University; J.D., 1976, University of Virginia School of Law.

** Associate, Christian & Barton, L.L.P., Richmond, Virginia. B.S., 1990, University of Oregon; J.D., 1999, University of Virginia School of Law.

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islation with an impact on business law: (1) the Uniform Electronic Transactions Act ("UETA");[1] (2) the Uniform Computer Information Transactions Act ("UCITA");[2] and (3) a revised Article 9.[3] The General Assembly also made minor revisions to numerous other statutes. The new legislation can be loosely characterized as dealing with corporate and business governance, commercial law issues, and electronic commerce. While a number of changes were made to statutes governing public service corporations and public utilities, they are not included within this review.

A. *Corporate and Business Governance*

1. Limited Liability Company Clarifications

The 2000 General Assembly adopted legislation containing a number of minor clarifying changes to the Virginia Limited Liability Company Act.[4] These changes provide that: (1) the domestication in Virginia of a business entity as a limited liability company ("LLC") organized outside the United States does not require dissolution of the foreign entity in its jurisdiction of creation;[5] (2) a person may be admitted to membership in an LLC without making a contribution to the LLC or acquiring an (existing) membership interest in the LLC;[6] (3) the status of an LLC and a former member's membership interest are preserved once a member dissociates;[7] (4) an LLC's articles of organization may require the last remaining member of an LLC to continue the LLC by admission of a personal representative or a designee;[8] and (5) an LLC has a six-month window after the last member's dissociation in which to admit a new member.[9]

1. VA. CODE ANN. §§ 59.1-479 to -497 (Cum. Supp. 2000).
2. *Id.* §§ 59.1-501.0 to -509.2 (Cum. Supp. 2000).
3. *Id.* §§ 8.9A-101 to -709 (Cum. Supp. 2000).
4. *Id.* §§ 13.1-1000 to -1073 (Cum. Supp. 2000).
5. *Id.* § 13.1-1010.3 (Cum. Supp. 2000).
6. *Id.* § 13.1-1038.1 (Cum. Supp. 2000).
7. *Id.* § 13.1-1040.2 (Cum. Supp. 2000).
8. *Id.* § 13.1-1046 (Cum. Supp. 2000).
9. *Id.*

2. Limited Partnership Clarifications

The LLC legislation noted above also added a provision to the Revised Uniform Limited Partnership Act to codify existing law that, except as otherwise provided in writing in the partnership agreement, no partner (general or limited) has a right to receive a distribution on account of the partner's withdrawal or any other event that ceases to make him a partner.[10]

3. Registered Limited Liability Partnerships

Another piece of 2000 General Assembly legislation made technical corrections to Virginia Code provisions on registered limited liability partnerships ("RLLPs") involving the timing of the annual reports and payment of fees. In particular, the first annual continuation report (and fees) for an RLLP are due by July 1 of the year *after* the year in which the RLLP is first registered.[11]

In addition, the General Assembly separately authorized law firms organized as RLLPs to serve as the registered agent of a corporation,[12] LLC,[13] limited partnership,[14] or RLLP.[15] Previously, only individual attorneys and law firms organized as professional corporations or professional LLCs could serve as registered agents.[16]

4. Registered Agents

In addition to the expansion of authority of law firms organized as registered limited liability partnerships noted above, the General Assembly also expanded the permissible categories of nonlawyer registered agent eligibility to add, for LLCs, a trustee of a trust that is the member of the LLC;[17] for RLLPs, a trustee of a

10. *Id.* § 50-73.39:1 (Cum. Supp. 2000).
11. *Id.* § 50-73.134 (Cum. Supp. 2000).
12. *Id.* § 13.1-833 (Cum. Supp. 2000).
13. *Id.* § 13.1-1015 (Cum. Supp. 2000).
14. *Id.* § 50-73.4 (Cum. Supp. 2000).
15. *Id.* § 50-73.132 (Cum. Supp. 2000).
16. *Id.* § 50-73.4 (Repl. Vol. 1998).
17. *Id.* § 13.1-1015 (Cum. Supp. 2000).

trust that is a general partner of the RLLP;[18] and for limited partnerships, an individual who is a trustee of a trust that is a general partner of the limited partnership.[19]

The consequences of failing to appoint a new registered agent promptly, once a former registered agent has resigned, have been toughened for corporations, LLCs, and limited partnerships. Previously, if an entity failed to timely appoint a new registered agent, a rule to show cause had to be issued by the State Corporation Commission ("SCC"), followed by an opportunity for a hearing.[20] Under the new legislation (effective for entities whose agents file a certificate of resignation on or after January 1, 2000), if an entity fails to appoint a new registered agent within thirty-one days after a statement of resignation is filed, the SCC mails a notice of impending termination of corporate existence or cancellation (for domestic entities) or revocation of certificate of authority (for foreign entities).[21] If the entity fails to file a statement of change of registered agent with the SCC within two months after the month in which the notice is mailed, then the SCC's regulatory sanction occurs automatically.[22]

5. Professional Corporations and Professional LLCs

Certified interior designers were added to the list of professionals entitled to form professional corporations and professional LLCs.[23] Such entities must register with the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects.[24] The new legislation also provides that at least two-thirds of the entity's ownership interest must be owned by individuals who hold a license in the service (or one of the combined services).[25]

Another bill adopted provides that the articles of incorporation of a professional corporation and the articles of organization of a

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18. *See id.* § 50-73.135 (Cum. Supp. 2000).
19. *See id.* § 50-73.4 (Cum. Supp. 2000).
20. *See id.*
21. *Id.* §§ 13.1-930, 50-73.69 (Cum. Supp. 2000).
22. *Id.*
23. *Id.* § 13.1-544 (Cum. Supp. 2000).
24. *Id.* § 13.1-549 (Cum. Supp. 2000).
25. *Id.*

professional LLC must set forth a sole and specific purpose which is permitted by the professional services statutes.[26] The same legislation also clarifies that the provisions of the Virginia Nonstock Corporation Act shall apply to a nonstock professional corporation, except to the extent that it would conflict.[27] This mirrors existing law in the relationship between stock professional corporations and the Virginia Stock Corporation Act.[28]

Finally, perhaps reflecting the growing expansion of accounting firms into a wide variety of business services and the need to provide ownership incentives to non-accountants, the General Assembly allowed accounting firms that are professional corporations or professional LLCs to issue up to forty-nine percent of their stock or membership interests to employees who are not authorized to provide accounting services.[29]

6. Articles of Merger

The 2000 General Assembly cured a previous error in two Virginia statutes dealing with the merger process for corporations. The statutes incorrectly referred to a plan of merger being adopted by shareholders as an "amendment" adopted by shareholders.[30]

7. SCC Document Changes and Enforcement Powers

Two pieces of new legislation deal with the rôle of the SCC in relation to business entities. One piece of legislation consists of a series of technical or housekeeping changes that (1) provide that SCC mailings to LLCs, limited partnerships, and RLLPs have the same presumption of delivery as SCC mailings to corporations;[31] (2) provide that LLC documents filed at the SCC may be signed by not only a member or manager, but by any other person to whom the right and power to manage the business have been

26. *Id.* §§ 13.1-543, -1102 (Cum. Supp. 2000).
27. *Id.* § 13.1-556 (Cum. Supp. 2000).
28. *See id.* §§ 13.1-601 to -800 (Cum. Supp. 2000).
29. *See id.* §§ 13.1-549.1, -1112 (Cum. Supp. 2000).
30. *See id.* §§ 13.1-720, -896 (Cum. Supp. 2000).
31. *Id.* § 12.1-43 (Cum. Supp. 2000).

delegated;[32] (3) correct two incorrect statutory cross-references in the Virginia Uniform Partnership Act;[33] and (4) permit a RLLP to change its office of record as part of changes made to its annual report form, rather than requiring a separate amendment to its statement of registration.[34]

The second piece of legislation significantly enhanced the dollar amounts of fines that the SCC may impose. The penalty for failure to obey SCC rules, injunctions, or orders has increased from a maximum fine of $1000 per day to a maximum fine of $5000 per day for an individual or $10,000 per day for a business entity.[35]

B. *Commercial Law Developments*

1. Secured Transactions

The 2000 General Assembly adopted a new and revised Article 9 of the Uniform Commercial Code which is effective July 1, 2001.[36] This is a sweeping revision based on a uniform model adopted by the National Conference of Commissioners on Uniform State Laws.[37]

While an analysis of the new Article 9 is beyond the scope of this survey, it generally broadens the scope of the old Article 9 by including several new kinds of property and transactions, reflecting changes in electronic commerce, simplifying rules for security interests, and adding consumer transaction protections.[38]

Some examples of the changes covered in revised Article 9 include: (1) software imbedded in goods are "goods;"[39] (2) both payment obligations arising from the sale, lease, or license of all types of property and credit card receivables are "accounts;"[40] (3) creation of a "payment" intangible as a type of "general" intangi-

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32. *Id.* § 13.1-1003 (Cum. Supp. 2000).
33. *Id.* § 50-73.128 (Cum. Supp. 2000).
34. *Id.* § 50-73.136 (Cum. Supp. 2000).
35. *Id.* § 12.1-33 (Cum. Supp. 2000).
36. *Id.* § 8.9A-101 (Cum. Supp. 2000).
37. *See* U.C.C. §§ 9-101 to -708 (amended 2000), 3 U.L.A. 13 (Supp. 2000).
38. *See id.*
39. VA. CODE ANN. § 8.9A-102(a)(44) (Cum. Supp. 2000).
40. *Id.* § 8.9A-102(a)(2) (Cum. Supp. 2000).

ble;[41] (4) promissory notes are included within "instruments;"[42] and (5) health care insurance receivables are now within its scope.[43]

Security agreements will be able to be authenticated, rather than signed.[44] "Control" of investment property will qualify as a method of perfecting a security interest in such property.[45] Automatic perfection will apply to sale of payment intangibles and promissory notes.[46] There will be a single filing place (the debtor's "location," which for a business entity means its state of organization) for all kinds of collateral.[47] An "all assets" filing in a financing statement (though not a security agreement) will be permissible, and no signature of a debtor will be required to file a financing statement.[48] Filings in Virginia will be with the SCC only.[49] No local filings (except fixture filings) will be required.[50]

Virginia business lawyers, particularly those involved in financing transactions, will need to become familiar with the intricacies of Revised Article 9. In operation, however, the new Article 9 may help resolve many uncertainties under existing law and simplify future secured transactions.

2. Credit Unions

The 2000 General Assembly passed legislation granting credit unions the same protection and authority with respect to fiduciary share accounts and issuance of shares now possessed by other financial institutions.[51] Administrators, executors, custodians, conservators, guardians, trustees, or other fiduciaries for a named beneficiary may obtain such shares and maintain such accounts.[52] The payment of funds to such a fiduciary relieves the credit union from any liability for payment or delivery.[53]

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41. *Id.* § 8.9A-102(a)(42) (Cum. Supp. 2000).
42. *Id.* § 8.9A-102(a)(65) (Cum. Supp. 2000).
43. *Id.* § 8.9A-102(a)(2) (Cum. Supp. 2000).
44. *See id.* § 8.9A-102(a)(7) (Cum. Supp. 2000).
45. *See id.* § 8.9A-106 (Cum. Supp. 2000).
46. *See id.* § 8.9A-313 (Cum. Supp. 2000).
47. *See id.* § 8.9A-501 (Cum. Supp. 2000).
48. *See id.* § 8.9A-504 (Cum. Supp. 2000).
49. *See id.* § 8.9A-501 (Cum. Supp. 2000).
50. *See id.*
51. *See id.* § 6.1-225.50:1 (Cum. Supp. 2000).
52. *Id.*
53. *Id.*

If a fiduciary or agent purchases shares in a credit union in his own name, but with instruments indicating a fiduciary capacity, the credit union need not inquire into whether there is any breach of fiduciary duty. However, if the credit union has actual knowledge of a breach of fiduciary duty, or such knowledge that issuing the shares or paying a withdrawal amounts to bad faith, then the credit union has no protection under the statute.[54]

3. Debt-Counseling Agencies

Amendments to the legislation governing licensed nonprofit debt counseling agencies now authorize such agencies to be reimbursed for certain out-of-pocket costs and permit a monthly fee increase from five dollars to twenty dollars.[55] Persons outside the Commonwealth are prohibited from offering debt-counseling services to persons within the Commonwealth without SCC qualification and license fees.[56] Agencies must also separately advise debtors in writing that the agencies' debt pooling and distribution services may have a derogatory effect on the debtor's credit rating.[57]

4. Enterprise Zones

New legislation effectively permits the creation of additional enterprise zones without removing the present cap of sixty areas, with no more than three zones in any county, city, or town.[58] One enterprise zone in any single jurisdiction could already consist of two noncontiguous zone areas; the new legislation authorizes a joint enterprise zone to consist of both two noncontiguous zone areas in a single jurisdiction and one more noncontiguous zone area in each adjoining jurisdiction that submitted the application for the zone.[59]

54. *See id.* § 6.1-225.50:2 (Cum. Supp. 2000).
55. *See id.* § 6.1-363.1 (Cum. Supp. 2000).
56. *Id.*
57. *Id.*
58. *See id.* § 59.1-274 (Cum. Supp. 2000).
59. *See id.*

5. Securities Law and Franchising

Violations of the Virginia Securities Act and Virginia Retail Franchising Act are presently punishable by SCC penalties imposed after notice and a hearing.[60]

The 2000 General Assembly amendment clarified that any SCC penalties so imposed are civil penalties, rather than criminal ones.[61]

C. *Electronic Commerce*

1. Uniform Electronic Transactions Act

The Uniform Electronic Transactions Act ("UETA") is a uniform law, proposed by the National Conference of Commissioners on Uniform State Laws, that generally seeks to avoid any invalidation or penalties on electronic transactions merely because they are not in paper form.[62] The 2000 General Assembly adopted this legislation to provide rules and procedures for using electronic records and electronic signatures in commercial and governmental transactions.[63] In addition to a new stand-alone Uniform Electronic Transactions Act, numerous existing Virginia Code sections were amended or repealed to reflect the new framework. There are certain exceptions in the legislation, and the types of electronic signatures and authentication criteria are left to the private parties (or the public body) to determine.[64] How quickly each public body in the Commonwealth develops the necessary security and confidentiality protections and criteria to implement electronic transactions generally is likely to vary widely. Between private parties, each must agree to conduct a particular transaction by electronic means, and each has a nonwaivable right to refuse to conduct other transactions by electronic means.

From a conceptual standpoint, one of the most interesting features is the approval of automated transactions in which a con-

60. *See id.* § 13.1-521 (Repl. Vol. 1999).
61. *See id.* § 13.1-521 (Cum. Supp. 2000).
62. *Id.* § 59.1-479 (Cum. Supp. 2000).
63. *See id.* §§ 59.1-479 to -497 (Cum. Supp. 2000).
64. *See id.* § 59.1-480 (Cum. Supp. 2000). Wills, for example, and court filings are still governed by the Rules of the Supreme Court of Virginia.

tract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms of an agreement.[65]

2. Uniform Computer Information Transactions Act

The Uniform Computer Information Transactions Act ("UCITA"),[66] another uniform law proposed by the National Commissioners on Uniform State Laws, establishes a uniform contracting regime for licenses of computer information, much as UCC Article 2 does for goods.[67] The 2000 General Assembly legislation that adopted UCITA constituted the first adoption of UCITA by any state; however, it was given a July 1, 2001 effective date to permit lingering objections to be addressed, if necessary, by an intervening study and possible further legislation in 2001.[68]

The new UCITA legislation provides a progressive framework for electronic commerce by ensuring the enforceability of licenses of computer information that fall within its rules. In particular, UCITA addresses the enforceability of "shrinkwrap" contracts (or, more appropriately, "clickwrap" contracts) along with reasonable restrictions on a licensor's exercise of electronic "self-help."

UCITA is necessary because Article 2 of the UCC governs only the sale of goods. Licensing of information involves significantly different issues. For example: the title to the licensed information remains with the licensor and does not pass to the licensee; the delivery form of the licensed information is irrelevant (whether online transfer, CD-ROM or disc, etc.); there is a continuing relationship between the licensor and licensee (raising self-help issues if the license is breached or not renewed by the licensee); and the nature of computer information, typically proprietary, often confidential and easily reproducible, creates extraordinary possibilities for injury to the licensor.

UCITA permits parties to contract freely for computer information licenses within a commercial framework of state contract law

65. *See id.* § 59.1-492 (Cum. Supp. 2000).
66. *Id.* §§ 59.1-501.1 to -509.2 (Cum. Supp. 2000).
67. *See id.*
68. *See id.*

that recognizes federal intellectual property law concerns. While a detailed analysis of UCITA is beyond the scope of this article, it is worthwhile to note a few essentials.

First, it is necessary to examine some of the definitions of UCITA. "Computer information" is information in electronic form that is obtained from or through the use of a computer or that is in digital or similar form capable of being processed by a computer.[69] "Computer information" includes a copy of information in that form and any associated documentation or packaging.[70] A "computer information transaction" is an agreement, and the subsequent performance of that agreement, to create, modify, transfer, or license computer information or informational rights in computer information.[71]

Second, UCITA has numerous exclusions, including: (1) financial services transactions; (2) contracts related to television or motion picture programming or sound recordings; (3) compulsory licenses; (4) employment contracts (except for independent contractors); (5) hardware portions of software/hardware contracts, unless the hardware is a computer or computer peripheral with embedded software; (6) subject matter within the scope of Articles 3, 4, 4A, 5, 6, 7, and 8 of the UCC; and (7) certain *de minimis* transactions.[72] Where a conflict arises between UCITA and Article 9, Article 9 governs.[73]

The parties to a computer information transaction can opt out of UCITA or selectively utilize other contract provisions; but UCITA provides default rules if the parties have not agreed otherwise.

Like UETA, UCITA provides that electronic agents (or an electronic agent and an individual) may form contracts.[74] UCITA also provides express and implied warranties similar to UCC Article 2 with respect to typical computer information issues such as infringement and integration.[75]

69. *Id.* § 59.1-501.2(a)(10) (Cum. Supp. 2000).
70. *Id.*
71. *Id.* § 59.1-501.2(a)(11) (Cum. Supp. 2000).
72. *Id.* § 59.1-501.3(d) (Cum. Supp. 2000).
73. *Id.* § 59.1-501.3(c) (Cum. Supp. 2000).
74. *Id.* § 59.1-501.7 (Cum. Supp. 2000).
75. *Id.* § 59.1-504.1(a) (Cum. Supp. 2000).

"Clickwrap" contracts are approved if the licensee has had an opportunity to see all of the terms of the contract and has "manifested assent."[76] If the licensee does not have the opportunity to see all of the terms before paying, the license must provide for a full refund, reimbursement of reasonable expenses related to its return, and compensation for foreseeable losses caused by installation and removal of the information.[77] Electronic "self-help" (to which a licensee must separately manifest assent) is permitted only after forty-five days notice, so long as no substantial injury occurs to public health or safety or no grave harm occurs to the public interest.[78]

Unless the further study authorized by the General Assembly produces changes, UCITA will become effective July 1, 2001 and should truly position the Commonwealth as a national leader in electronic commerce.

III. JUDICIAL DECISIONS

A. *General Corporate Law*

1. Closely Held Corporation—Sale—Directors' Duty

In *Willard v. Moneta Building Supply, Inc.*,[79] the minority shareholder of a closely held corporation operating a building-supply business sued the majority shareholders/directors, a husband and wife, to overturn the sale of the corporation to the majority shareholders/directors' son.[80] The son, a former shareholder of the corporation, had started a competing business.[81]

The Supreme Court of Virginia affirmed the decision of the Bedford County Circuit Court, upholding the transaction in which the majority shareholders accepted a purchase offer from their son's company over a higher offer from the minority shareholder.[82] The court reached this conclusion even though the mi-

76. *Id.* § 59.1-502.9 (Cum. Supp. 2000).
77. *Id.*
78. *Id.* § 59.1-508.16 (Cum. Supp. 2000).
79. 258 Va. 140, 515 S.E.2d 277 (1999).
80. *Id.* at 143-48, 515 S.E.2d at 280-83.
81. *Id.*
82. *Id.* at 143, 515 S.E.2d at 280.

nority shareholder claimed that the majority shareholders failed to maximize the sales price, authorized a transaction tainted by conflict of interests, and failed to follow statutory procedures for selling the company's business.[83]

In connection with the plaintiff's allegation that the defendants failed to maximize the sales price for the company, the minority shareholder argued that the circuit court erred by ruling that the two majority shareholders/directors did not have a duty to maximize the price received for the sale of the company's assets and that they also discharged their duty in accordance with Virginia Code section 13.1-690.[84] The minority shareholder argued that the proper standard in judging the directors' decision to sell the company's assets to their son's company was the test articulated by the Supreme Court of Delaware in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[85]

However, the circuit court concluded that section 13.1-690 did not require a director to maximize profits by accepting the highest bid when selling the assets of a corporation.[86] Instead, the court concluded that a director is required to act in accordance with his good faith business judgment for the best interests of the corporation.[87] Under the foregoing standard, the circuit court found that a director might consider both the quantity and the quality of an offer to purchase corporate assets.[88]

In affirming the rationale offered by the circuit court, the Supreme Court of Virginia observed that Virginia Code section 13.1-690(A) does not abrogate the common law duties of a director.[89] Rather, this section establishes the standard by which a director must discharge the requisite director duties.[90] Therefore, if a director acts in accord with the applicable standard, section 13.1-

83. *Id.*

84. *Id.* at 149-50, 515 S.E.2d at 283.

85. 506 A.2d 173 (Del. 1986). "The *Revlon* court held that the duty of a board of directors changed from one of preserving the corporate entity 'to the maximization of the company's value at a sale for the stockholders' benefit' when it becomes apparent that the sale of the company is inevitable." *Willard*, 258 Va. at 150, 515 S.E.2d at 283-84 (quoting *Revlon*, 506 A.2d at 182).

86. *Willard*, 258 Va. at 150, 515 S.E.2d at 284.

87. *Id.*

88. *Id.*

89. *Id.* at 150-51, 515 S.E.2d at 284.

90. *Id.*

690(C) provides a "safe harbor" that shields the director from liability for any action taken as a director (or for any failure to take action).[91] After finding the *Revlon* test did not apply under Virginia law, the supreme court concluded that a director's discharge of duties should not be measured in Virginia by "what a reasonable person would do in similar circumstances or by the rationality of the ultimate decision."[92] Instead, the court held that a director must "act in accordance with his/her good faith business judgment of what is in the best interests of the corporation" and in so doing, his/her actions fall within the "safe harbor" protection under section 13.1-690(C).[93]

In applying the foregoing rationale, the supreme court found that the two directors (who owned the majority share of the business) were entitled to consider the quantity and quality of the competing offers to purchase the business assets and that they were not "required to accept an offer merely because it maximized the purchase price."[94] The court also noted that a contrary determination might erode the deference afforded a director's discharge of duties under section 13.1-690 because "only one offer, among many, [would be] in the best interests of a corporation."[95]

The supreme court also affirmed the circuit court's finding that the two majority shareholders engaged in an informed decision-making process in deciding to sell the company to their son.[96] Moreover, the majority shareholders were justified in their fear that the value of the company's assets might decline significantly if they waited while their son opened a competing business during the thirty-day period requested by the minority shareholder to evaluate more fully the company's financial records.[97] Consequently, the court held that the directors discharged their duties in accordance with section 13.1-690, and as such, they were entitled to the "safe harbor" protection afforded under that statute.[98]

The minority shareholder also alleged a conflict of interest and

91. *Id.* at 151, 515 S.E.2d at 284.
92. *Id.*
93. *Id.*
94. *Id.* at 151-52, 515 S.E.2d at 285.
95. *Id.* at 152, 515 S.E.2d at 285.
96. *Id.*
97. *Id.* at 153, 515 S.E.2d at 285.
98. *Id.*

a breach of a director's duty of loyalty as a result of the directors' decision to sell the business to a corporation owned by their son.[99] The supreme court responded to this argument by noting that aside from the familial relationship as son and parents, plaintiff offered absolutely no evidence of a "direct personal interest in the transaction."[100] Moreover, the evidence before the circuit court demonstrated a contrary conclusion—that the son's "resignation as an officer and director [of his parents' business] and his new business plans had caused considerable discord" with his parents.[101] Consequently, the court affirmed the circuit court's alternative finding that the transaction was "fair," and declined to address whether the majority shareholders had conflicts of interest merely because their son owned the corporation that purchased the company's assets.[102]

The court noted that the record established that the shareholders were presented with two options when they met in connection with a proposed sale.[103] They could either accept the offer from their son's company, or they could forego a certain opportunity to sell the company's assets and wait for an uncertain outcome of an asset evaluation conducted by the minority shareholder (while their son opened a competing business).[104] Therefore, the court concluded that the transaction was open, fair, and honest at the time it was executed and that the plaintiff was not entitled to void the transaction under Virginia Code section 13.1-691.[105]

Finally, in upholding the circuit court's judgment that the majority shareholders' conduct was not illegal, oppressive, or fraudulent under Virginia Code section 13.1-747, the supreme court held that the two directors "were entitled to exercise their rights as the majority stockholders by voting to approve the sale of assets" to their son's company.[106]

In a terse dissenting opinion, several justices recommended the reversal of the circuit court's judgment and a remand to deter-

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99. *Id.* at 153, 515 S.E.2d at 286.
100. *Id.* at 154, 515 S.E.2d at 286 (quoting VA. CODE ANN. § 13.1-691(C) (Repl. Vol. 1999)).
101. *Id.*
102. *Id.* at 154-55, 515 S.E.2d at 286.
103. *Id.* at 155-56, 515 S.E.2d at 287.
104. *Id.*
105. *Id.* at 156, 515 S.E.2d at 287.
106. *Id.* at 157, 515 S.E.2d at 288.

mine what damages, if any, the minority shareholder might establish at a trial specifically limited to the damages issue.[107] Further, the dissent observed that the majority opinion substituted form over substance in upholding a judgment that the minority shareholder failed to carry his burden of proof of establishing that the directors/majority shareholders did not discharge their duty of loyalty in compliance with Virginia Code section 13.1-690.[108]

Finally, at least one commentator in Virginia has sternly criticized the outcome obtained by the majority opinion in *Willard* because it embodies "the profound misunderstanding of [section 13.1-]690's role in Virginia's law of director duties."[109]

2. Fiduciary Duty—Shareholder/Director Suit

A case in the United States District Court for the Eastern District of Virginia, *Byelick v. Vivadelli,*[110] involved a multi-count action asserting "claims of insider trading, securities fraud under state and federal law, common law fraud, breach of fiduciary duty, conspiracy, aiding and abetting, and breach of an employment contract."[111]

Although somewhat complex, the facts of the case involved a suit between the two principal shareholders of a closely held corporation incorporated in Virginia.[112] The plaintiff paid $4800 for a

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107. *Id.* at 162, 515 S.E.2d at 291 (Koontz, J., dissenting).

108. *Id.* at 159, 515 S.E.2d at 289 (Koontz, J., dissenting).

109. Lyman Johnson, *Misunderstanding Director Duties: The Strange Case of Virginia,* 56 WASH. & LEE L. REV. 1127, 1130 (1999). Professor Johnson, a professor of law at the Washington & Lee University Law School, argues that in order

> to honor the sound policy rationales underpinning the duty of loyalty and to preserve integrity in Virginia corporate law, the *Willard* court should have held that an asset sale to the son of the only two directors, conducted solely by directors who were unwilling to consider a rival topping bid, to disclose it to an absent shareholder, or to seek an expert revaluation of an earlier bid, constitutes unfair dealing and an egregious breach of director loyalty.

Id. at 1157.

Moreover, the court should have either nullified the transaction under Virginia Code section 13.1-692 or held the parent-directors/shareholders liable to the minority shareholder for the approximately twenty-percent difference between a "fair price" (at a minimum, the rival bid) and the actual sale price. *See id.*

110. 79 F. Supp. 2d 610 (E.D. Va. 1999).

111. *Id.* at 613.

112. *Id.* The parties incorporated the company as a vehicle for developing and selling computer software for "hoteling"—the practice of managing limited office space by coordinating the schedules of employees and other users of space with the space available in a

forty-percent share, and defendant paid $1800 for a sixty-percent share of the company's stock.[113] The defendant served as the company's president while the plaintiff served as secretary, treasurer, and chief financial officer until he quit working for the company.[114] The board of directors, consisting of the plaintiff and the defendant, set annual salaries, but the plaintiff never received any payments while he worked for the company.[115] After leaving the company, the plaintiff transferred 900 shares of stock to the defendant.[116] Each party disputed the facts surrounding the transfer, with the plaintiff alleging that the defendant demanded return of all stock, while the defendant contended he merely purchased the plaintiff's stock.[117] The board of directors (with the plaintiff abstaining) voted to remove the plaintiff as a director and replaced him with the defendant's wife.[118]

The plaintiff and the defendant engaged in at least two dozen telephone conversations during which, the plaintiff contended that the defendant made five allegedly fraudulent representations that the plaintiff relied upon in selling his stock to the defendant.[119] The defendant's allegedly fraudulent representations formed the basis for the plaintiff's claim for breach of fiduciary duty.[120] Further, the plaintiff alleged that the defendant and his wife failed to disclose certain financial information that they were required to disclose.[121]

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particular office or building. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 614. The plaintiff alleged that the defendant made the following representations: (1) the corporation's proprietary software was not working; (2) the company's engineering staff was working desperately to re-write the source code of the software to get the product to work; (3) the company's old customers were refusing to pay the corporation's invoices and were refusing to extend past initial, small-scale pilot programs, and they had no new customers; (4) the company was experiencing extreme cash flow problems and a continuing liquidity crunch; and (5) the defendant expected the company to be forced out of business in the near future. *Id.*

120. *Id.*

121. *Id.* at 614-15. The plaintiff alleged that the defendant failed to disclose the existence of certain contracts that increased the value of the company's stock and that the company received a written offer from a venture fund to invest $2,000,000 in exchange for twenty-five percent ownership, based on an independent valuation of the company at $6,000,000. *Id.* at 615.

The plaintiff based his breach of fiduciary duty claim upon two specific actions taken by the board of directors, including the board's consent to (1) the company's waiver of its right of first refusal to purchase the plaintiff's stock before the defendant or anyone else (i.e., the board's acts causing the company to waive the right of first refusal created a conflict of interest because it permitted the defendant, a director, to purchase the plaintiff's stock) and (2) the company's sale to the defendant of an additional 50,000 shares of stock (i.e., the board's acts causing the company to sell the additional stock to the defendant in effect diluted the plaintiff's ownership interest in the company).[122] Ultimately, the plaintiff's ownership interest in the company was reduced from ten percent to one percent.[123]

In connection with the plaintiff's first contention, the district court granted summary judgment in favor of the defendant.[124] The court held that the plaintiff's theory failed for lack of a statutory predicate because the plaintiff's sale of stock was made to the defendant in his capacity as a private individual, and not as a sales transaction with the defendant representing the company.[125]

In connection with the plaintiff's second contention, the district court observed that it was unsettled in Virginia whether a director may be held liable to an individual shareholder for a breach of a duty of loyalty, especially in the context of a small or closely held corporation.[126] If faced with the question of whether a minority shareholder of a closely held corporation maintains a cognizable claim against an inside director for breach of fiduciary duty with respect to a corporate transaction benefiting an inside director, the district court opined that the Supreme Court of Virginia would reasonably hold in the affirmative, particularly under facts involving only one minority shareholder.[127]

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122. *Id.* at 622.

123. *Id.*

124. *Id.* at 623.

125. *Id.* Virginia Code section 13.1-691(A) defines "conflict of interests transaction" as a "transaction with the corporation in which a director of the corporation has a direct or indirect personal interest." VA. CODE ANN. § 13.1-691(A) (Repl. Vol. 1999).

126. *Byelick,* 79 F. Supp. 2d at 623.

127. *Id.* at 623-25. Interestingly, the district court clearly acknowledged that the focal legal issue remained unsettled under Virginia law. *Id.* However, the trial judge opted to make a so-called "*Erie*-guess" to resolve the issue, rather than seeking to certify the issue for resolution as a matter of Virginia law by the Supreme Court of Virginia. *Id.* at 623.

Furthermore, the district court concluded that a dilutive transaction could be challenged under the Virginia common law of fiduciaries.[128] The court found that a shareholder could challenge an interested director transaction in a closely held corporation under Virginia Code section 13.1-691, but that the liability of a director with a conflict of interest was controlled by Virginia Code section 13.1-690.[129]

Thus, the plaintiff was required to proceed under section 13.1-690 to the extent that he sought to hold the defendants liable on the interested director transaction involving the issuance of 50,000 shares and a subsequent sale of such shares to the defendant, and under section 13.1-691 to the extent he sought to void the interested director transaction.[130]

Finally, the supreme court determined that the defendants were required to establish that the board's consent in approving the company's sale of additional stock to the defendant, as well as the actual sale itself, were fair to the corporation.[131] The district court concluded that the determination of fairness clearly reflected disputed issues of material fact, and, therefore, it denied summary judgment and held that the plaintiff was entitled to a trial on his claim that a breach of fiduciary duty occurred as a result of the defendant's involvement in the company's allegedly dilutive sale of stock to the defendant.[132]

3. Nonstock Corporation—Derivative Action

In *Richelieu v. Kirby*,[133] the Fairfax County Circuit Court held that under the Virginia Nonstock Corporation Act, specifically Virginia Code sections 13.1-828 and 13.1-870.1, a derivative action may be maintained on behalf of a Virginia nonstock corporation (including a section 501(c) organization) where either allegations that a corporation has acted ultra vires or allegations of

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128. *Id.* at 627.

129. *Id.* at 625-28. The trial judge made this determination after considering the fiduciary duties in a closely held corporation, the legislative history of the Virginia statute bearing on interested director transactions, and dictum from the United States Supreme Court in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991). *See id.*

130. *Id.* at 628.

131. *Id.* at 629.

132. *Id.*

133. 48 Va. Cir. 260 (Cir. Ct. 1999) (Fairfax County).

willful misconduct on the part of corporate officers and directors exist.[134]

The case involved certain allegedly aggrieved members ("complainants") of the Humane Society of Fairfax County, a nonstock corporation, who sought to maintain a derivative action as plaintiffs on behalf of the corporation.[135] The complainants alleged that certain named directors, officers, members, and employees ("respondents") of the corporation had conspired to defraud the corporation through the purchase of a farm owned by one of the respondents, who was also a member and the daughter of another respondent.[136] Further, the complainants alleged that the director respondents engaged in a pattern of willful misconduct and breached their fiduciary duties.[137]

The respondents demurred on the issue of whether members of a nonstock corporation were entitled to bring a derivative action on behalf of the corporation.[138] The Humane Society demurred and also filed a plea in bar arguing that the complainants were not entitled to maintain a derivative action against the corporation because the complainants failed to plead that demand was made on the corporation to institute proceedings in its own right against the officers and directors who allegedly breached their fiduciary duties through mismanagement and commission of misdeeds.[139]

First, the circuit court determined that, under the Virginia Nonstock Corporation Act, aggrieved members of a Virginia nonstock corporation were entitled to maintain a derivative action on behalf of a corporation (including a section 501(c) organization) in at least two circumstances, including (1) allegations that a corporation acted ultra vires or (2) allegations of willful misconduct on the part of corporate officers and directors.[140]

Next, the circuit court rejected the respondents' contention that the only party with authority to act on behalf of the public in matters involving charitable assets was the Attorney General of

134. *Id.* at 262.
135. *Id.* at 260.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 263.
140. *Id.* at 261-62 (citing VA. CODE ANN. §§ 13.1-828, -870.1 (Repl. Vol. 1999)).

Virginia.[141] The court found that respondents failed to cite any Virginia authority, statutory or otherwise, establishing a suit brought by the Attorney General as the exclusive remedy in the event of a breach of a fiduciary duty by a nonprofit corporation, or by its officers or directors.[142] Therefore, a suit filed by the Attorney General was not the exclusive means for aggrieved members of a Virginia nonstock corporation to seek relief; rather, the members were entitled to maintain a derivative action under Virginia law in the event of a breach of a fiduciary duty.[143]

Further, since the plaintiffs failed to allege either that a demand was made of the respondents to bring an action on behalf of the corporation or that, if given a demand, the corporation would have refused to bring such a suit, the circuit court granted the Humane Society's plea in bar and sustained the Humane Society's demurrer.[144] In support of the foregoing determinations, the court noted that a failure to make the requisite demand (or an allegation of demand or futility) was fatal under Virginia law in connection with asserting derivative claims against a corporate body.[145]

Finally, the circuit court also dismissed the derivative claims asserted against each of the individual respondents because the complainants were not entitled to assert such claims absent evidence or an allegation that the complainants made the requisite demand (or an allegation that such a demand would have been futile).[146]

4. Shareholder Derivative Action—Fraud Remedy

In *Mardula v. Shamshiry, Inc.*,[147] the Fairfax County Circuit Court denied a corporation's plea in bar to a shareholder's motion for judgment asserting personal and derivative claims.[148] The defendant corporation filed the plea in bar questioning whether the

141. *Id.* at 262.
142. *Id.*
143. *Id.*
144. *Id.* at 264.
145. *Id.* at 263-64.
146. *Id.* at 264.
147. 49 Va. Cir. 55 (Cir. Ct. 1999) (Fairfax County).
148. *Id.* at 56.

plaintiff was a proper shareholder under either a Security and Pledge Agreement or a Stock Transfer Agreement.[149] The plaintiff and the same shareholder were parties to both agreements.[150]

According to stipulated facts, the plaintiff relied on a waiver-of-notice provision in the Security Agreement to conduct a private sale of the corporation's stock without following the notice provisions applicable under Virginia Code section 8.9-504(3).[151] However, the circuit court noted the Supreme Court of Virginia's holding in *Woodward v. Resource Bank*[152] that the notice provisions of section 8.9-504(3) may not be waived before an occurrence of default.[153] Therefore, since the plaintiff admitted reliance upon a waiver that was signed one and one-half years before the occurrence of default, the circuit court invalidated any alleged transfer made to the plaintiff under the terms of the Security Agreement.[154]

In response to the plaintiff's argument that he was a shareholder under the Transfer Agreement, the circuit court acknowledged that, pursuant to the express terms of the agreement, the shareholder transferred the stock certificates to the plaintiff at the time of execution of the agreement.[155] The defendants responded by arguing that the shares of stock transferred to the plaintiff were restricted from transfer.[156] The circuit court concluded that, under Virginia Code section 13.1-649, a restriction on the transfer or registration of shares of corporate stock was valid and enforceable against the holder or transferor only if the restriction was conspicuously placed on either the front or back of each stock certificate.[157] Further, the court observed that a transfer restriction was specifically enforceable against a holder who had knowledge of the restriction.[158] Based on the foregoing, the court held that the defendants failed to satisfy the requisite burden because the shares of stock attached to the motion for judg-

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149. *Id.* at 56-57.
150. *Id.*
151. *Id.* at 56.
152. 246 Va. 481, 436 S.E.2d 613 (1993).
153. *Mardula*, 49 Va. Cir. at 56.
154. *Id.* at 56-57.
155. *Id.* at 57.
156. *Id.*
157. *Id.*
158. *Id.*

ment did not contain a conspicuously located restriction on transfer.[159]

Finally, the circuit court concluded that, although the defendants alleged that the plaintiff knew about the restriction on stock transfers, the evidence in the record was insufficient to sustain the defendant's plea in bar.[160] However, the court reversed the defendant's right to raise the issue again at trial based upon a more fully developed record.[161]

5. Officer Liability—Yellow Pages Ad—Privacy Statute

In *Buckman v. PTS Corp.*,[162] the Virginia Beach Circuit Court overruled two defendants' demurrers to a suit complaining that the defendants, two owners and officers of a bail bond company, allegedly violated Virginia Code section 8.01-40 by placing an advertisement with the plaintiff's name in the Yellow Pages and by telling or implying to prospective customers that the plaintiff continued to work for the company.[163]

The defendants argued that (1) since section 8.01-40 was in derogation of common law, it must be strictly construed, and thus, the court must dismiss the defendants as parties if they did not "use" the plaintiff's name in contravention of the statute, and (2) directors are liable for their tortious conduct only if they commit a common law tort because statutory torts are expressly limited by their terms.[164]

In rejecting the defendants' first argument, the circuit court determined that the Supreme Court of Virginia had not addressed whether officers of a corporation that allegedly violated section 8.01-40 might be personally liable for "using" a plaintiff's name.[165] In responding to the defendants' citation to New York's privacy statute (because the Supreme Court of Virginia cited to it in the past as instructive), the circuit court observed that even under New York's interpretation of the term "use," the defendants, as

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159. *Id.*
160. *Id.*
161. *Id.*
162. 50 Va. Cir. 327 (Cir. Ct. 1999) (Virginia Beach City).
163. *Id.* at 329.
164. *Id.* at 327.
165. *Id.* at 328.

corporate officers, could be personally liable for "using" the plaintiff's name.[166] Furthermore, the court distinguished a cited New York case by noting that the plaintiff in the case before the court alleged that both of the defendants exercised control over the placement of the plaintiff's name in the advertisement and, as owners, they derived a direct benefit from the continued use of the plaintiff's name.[167]

In rejecting the defendants' second argument, the circuit court observed that the express terms of section 8.01-40 "provide that an injured plaintiff may maintain a suit in equity against 'the person, firm or corporation so using such person's name.'"[168] Thus, the court concluded that the broad language used in the statute did not indicate that the General Assembly desired to alter as a tenet of corporate law the common law rule that corporate officers may be liable for their tortious conduct.[169] Rather, the General Assembly's inclusive use of the terms "corporation, firm or person" indicated a clear desire to continue holding corporate officers liable for their tortious conduct.[170]

B. *Commercial Law*

1. Assignment of Promissory Note—Lack of Consent

In *Apartment Investment and Management Co. v. National Loan Investors, L.P.*,[171] the Supreme Court of Virginia determined that the Richmond Circuit Court erred in awarding judgment based on a promissory note that was assigned without the consent of the maker in violation of an express requirement stated in the note.[172]

In acquiring apartment complexes, Winthrop Southeast, L.P. ("Winthrop") borrowed the purchase money from Investors Savings Bank, F.S.B. ("Investors") under a promissory note ("Note")

166. *Id.*
167. *Id.*
168. *Id.* at 328 (quoting VA. CODE ANN. § 8.01-40 (Repl. Vol. 1992)).
169. *Id.*
170. *Id.* at 328-29.
171. 258 Va. 322, 518 S.E.2d 627 (1999).
172. *Id.* at 329, 518 S.E.2d at 631.

requiring Winthrop to repay the loan in installments.[173] The Note defined the term "Noteholder" as including Investors' successors and assigns, but it precluded any transfer or assignment "by Noteholder without the prior written consent of [Winthrop]."[174] It also contained a non-recourse provision limiting available remedies in the event Winthrop defaulted.[175] Winthrop failed to make any payments under the Note.[176]

Ultimately, the Resolution Trust Corporation ("RTC") was appointed receiver for Investors and provided written notice to Winthrop that the loan was in default.[177] RTC subsequently assigned its interest in the Note to RTC Commercial Loan Trust (the "Trust").[178] After filing an action in circuit court against Winthrop for, among other things, judgment in the full amount due under the Note, the Trust assigned its interest in the Note to National Loan Investors, L.P. ("NLI").[179] The circuit court awarded judgment under the Note to NLI.[180]

Winthrop appealed, alleging that the circuit court erroneously based its judgment upon NLI's purported status as a holder of a negotiable instrument—the Note.[181] Since the evidence was uncontested that Winthrop did not provide prior written consent to the assignment from the Trust to NLI, Winthrop argued that NLI failed to establish that it was a valid holder of the Note by assignment.[182]

However, since the Note did not explicitly prohibit or invalidate assignments made without the requisite consent, NLI argued that, at most, the assignment from the Trust to NLI, without Winthrop's prior consent, operated as a breach of the Note.[183] Additionally, NLI argued that, under *Hurley v. Bennett*,[184] Winthrop

173. *Id.* at 325, 518 S.E.2d at 628.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 326-27, 518 S.E.2d at 628-29.
180. *Id.* at 327, 518 S.E.2d at 629.
181. *Id.*
182. *Id.*
183. *Id.* at 327, 518 S.E.2d at 629-30.
184. 163 Va. 241, 176 S.E. 171 (1934). The court stated that "the party who commits the first breach of a contract, is not entitled to enforce it . . . against the other party for his subsequent failure to perform." *Id.* at 253, 176 S.E.2d at 175.

was precluded from attacking NLI as a purported "Noteholder" because Winthrop breached the contract first by defaulting under the Note.[185] Finally, NLI argued that federal law preempted the Note's restriction on assignment.[186] Therefore, as a subsequent transferee of a holder in due course, NLI contended that it was entitled to the same statutory rights of the Trust to receive an assignment of the Note without the prior written consent of Winthrop.[187]

The Supreme Court of Virginia first concluded the evidence was uncontested that both the Trust and NLI failed to obtain written consent before acquiring the Note.[188] Moreover, NLI's failure to obtain prior written consent was not merely a breach of the terms under the Note; rather, it was a condition precedent to any assignment of the Note.[189] Therefore, since the condition was not satisfied because neither the Trust nor NLI obtained the requisite consent, the court held that the purported assignment to NLI was invalid, and NLI was precluded thereby from pursuing causes of action based upon the incorrect assertion that it was a valid "Noteholder."[190]

Furthermore, since the unsatisfied precondition—obtaining consent to assign—prevented formulation of a valid contract between NLI and Winthrop, Winthrop was not precluded under *Hurley* by its initial breach of the Note from asserting as a defense that NLI failed to establish itself as a "Noteholder" entitled to sue under the Note.[191] The court observed that applying NLI's rationale under the facts would, in effect, allow a stranger to the Note, NLI, to enforce the Note against Winthrop, a party thereto, simply because Winthrop had defaulted under the Note.[192]

The supreme court also rejected NLI's preemption argument because, as a non-recourse obligation, the Note lacked negotiability because it did not constitute an unconditional promise to pay a

185. *Nat'l Loan Investors*, 258 Va. at 328, 518 S.E.2d at 630.

186. *Id.* at 329, 518 S.E.2d at 630. NLI cited 12 U.S.C. § 1821(d)(2)(G)(i)(II) as authorizing the RTC to ". . . transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer." *Id.*

187. *Id.*

188. *Id.* at 328, 518 S.E.2d at 630.

189. *Id.*

190. *Id.*

191. *Id.* at 328-29, 518 S.E.2d at 630.

192. *Id.*

fixed amount of money.[193] Thus, RTC's assignment to the Trust, although permitted under federal law, did not confer upon the Trust the status of a holder in due course of a negotiable instrument.[194] Consequently, because the Note was nonnegotiable, the court held that neither NLI, nor the Trust, was entitled to assert any right that a holder in due course may have had under applicable federal law.[195]

2. Contract—Promissory Notes—Promise to Forebear

Hamm v. Scott[196] involved a case where a plaintiff loaned $16,080 under a promissory note to a printing and graphics company operated by the two defendants, an attorney and her father-in-law.[197] The defendant borrowers defaulted on the first note, but the plaintiff agreed to forebear collection of the first note against the father-in law and loaned the company an additional $16,000 under a second note.[198] The second note provided that the borrower's complete payment in accordance with the terms of the second note would extinguish all of the company's debts to the plaintiff.[199] Moreover, the parties agreed that if the borrowers failed to make payments as required under the second note, the plaintiff was entitled to collect under both of the notes.[200]

The defendant defaulted under the terms of the second note, and the plaintiff filed suit seeking to enforce both notes.[201] Following a bench trial, the Hampton Circuit Court found that the second note was provided as forbearance, and therefore, the plaintiff was precluded from collecting his money a second time under the second note.[202] On the basis of the foregoing, the circuit court entered judgment in favor of the plaintiff on the first note and denied judgment on the second note.[203] The plaintiff noted an

193. *Id.* at 329, 518 S.E.2d at 630-31.
194. *Id.*
195. *Id.* at 329, 518 S.E.2d at 631.
196. 258 Va. 35, 515 S.E.2d 773 (1999).
197. *Id.* at 36, 515 S.E.2d at 773.
198. *Id.* at 37, 515 S.E.2d at 773.
199. *Id.*
200. *Id.*
201. *Id.* at 38, 515 S.E.2d at 774.
202. *Id.*
203. *Id.*

appeal contesting the circuit court's refusal to enforce the second note.[204]

The Supreme Court of Virginia cited prior Virginia authority for the propositions that a promise to forebear the exercise of a legal right establishes adequate consideration to support a contract[205] and an agreement to forebear does not require a writing, but may be implied from the parties' conduct and the nature of the transaction.[206] The court then noted that the circuit court, in ruling for the borrowers, determined as a factual matter that the parties, by their words and by their conduct, entered into an agreement whereby the plaintiff agreed not to enforce the first note against the father-in-law if the defendant attorney executed a second note in the plaintiff's favor.[207] Therefore, because the evidence fully supported the circuit court's ruling on forbearance, the court rejected the defendant's arguments that no evidence established a meeting of the minds between the parties as to a forbearance, and nothing surrounding the conduct of the parties implied a forbearance.[208]

Additionally, the supreme court concluded that the second note was an independent contractual obligation, valid on its face, under which the plaintiff agreed to a forbearance only if he was entitled to enforce both notes in the event of a default under the second note.[209] Therefore, because the defendants defaulted under the second note, and the plaintiff's obligation to forbear enforcement terminated upon such default, the plaintiff was entitled to enforce the second note according to its express terms.[210]

In responding to the plaintiff's unjust enrichment claim, the court observed that by fulfilling his agreement not to collect the debt due under the first note from the father-in-law, the plaintiff agreed to forego an opportunity to invest approximately $20,000 due under the first note during the succeeding two years.[211] Thus, the plaintiff's enforcement of the second note pursuant to the un-

204. *Id.*
205. *Id.* (citing Greenwood Assoc., Inc. v. Crestar Bank, 248 Va. 265, 448 S.E.2d 399 (1994)).
206. *Id.* (citing Troyer v. Troyer, 231 Va. 90, 341 S.E.2d 182 (1986)).
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 38, 515 S.E.2d at 775.
211. *Id.* at 38-39, 515 S.E.2d at 775.

derstanding between the parties (i.e., if the defendant failed to pay the second note as required, the plaintiff was entitled to collect under both notes) did not unjustly enrich the plaintiff; rather, the plaintiff was merely receiving the benefit of the bargain for which he had contracted.[212] Consequently, the supreme court reversed the circuit court's judgment denying the plaintiff a recovery under the second note and remanded the case for computation of the amount due under the second note and entry of a judgment award in that amount for the plaintiff.[213]

3. Virginia Commercial Code—Finance Lease—Warranties

In *One Stop Pet, Inc. v. Eastern Business Machines, Inc.*,[214] an equipment supply company demurred to a pet store owner's suit filed in the Fairfax County Circuit Court complaining about a new cash register system purchased under a finance lease and installed by the equipment supplier.[215] The store owner complained that the supplier agreed to install a specified system capable of performing certain designated functions.[216] Instead, the supplier installed another system from the same manufacturer that the supplier promised would perform better.[217] The store owner alleged the system did not meet the represented specifications and the supplier failed to correct the deficiency.[218]

The supplier demurred, asserting the store owner was not entitled to implied warranties of merchantability and fitness for a particular purpose under the finance lease with the manufacturer.[219] The court determined that the store owner conceded in an amended complaint that its causes of action were based upon a "finance lease" with the manufacturer and that the supplier was a "supplier" under the Virginia Commercial Code.[220] Further, under Virginia Commercial Code sections 8.2A-212 and 8.2A-213, the circuit court concluded that implied warranties of merchant-

212. *Id.* at 39, 515 S.E.2d at 775.
213. *Id.*
214. 49 Va. Cir. 221 (Cir. Ct. 1999) (Fairfax County).
215. *Id.* at 223.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 222.
220. *Id.*

ability and fitness apply in lease contracts "except for a finance lease."[221] Consequently, because the store owner's counts based upon implied statutory warranties were insufficient as a matter of law to state a cause of action, the court granted the supplier's demurrer and dismissed each of the store owner's implied statutory warranty claims without leave to amend.[222]

The supplier also demurred on the ground that it acted under the finance lease merely as a supplier of goods to the store owner and not as a party to the contract.[223] Thus, the supplier argued that the lack of any contractual relationship with the store owner (i.e., lack of privity of contract) precluded any claim under the lease against the supplier for breach of express warranties or negligent misrepresentation.[224] The court overruled the supplier's argument after citing Virginia Commercial Code section 8.2-209 in support of the finding that the store owner "may have a cause of action against the [supplier] for breach of express warranties under the finance lease."[225] Finally, the court found that the store owner clearly alleged in the complaint "the relationship, knowledge, express warranties, and provisions" to assert an express warranty claim against the supplier.[226]

C. *Contract Law*

1. Consulting Agreement—Indemnity

The propriety of awarding attorney's fees to the prevailing party in a warrant in debt suit was addressed in *Coady v. Strategic Resources, Inc.*[227] The defendant corporation retained the plaintiff to perform consulting services under a written consulting agreement.[228] The agreement included a broad indemnity provision under which the plaintiff agreed to hold the defendant harmless for all liabilities (including court costs and attorney's fees) from "any and all claims, suits, proceedings, costs, losses,

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 223.
226. *Id.*
227. 258 Va. 12, 515 S.E.2d 273 (1999).
228. *Id.* at 14, 515 S.E.2d at 273-74.

expenses, damages and liabilities . . . caused by or arising out of, or in connection with [the plaintiff's] performance or nonperformance under this Agreement."[229]

The plaintiff submitted an invoice for services rendered.[230] The defendant rejected the invoice and delivered a check for approximately one-half of the invoice, noting in a side letter that payment was a settlement of all accounts.[231] The plaintiff accepted the check and deposited it in his bank account marked as "partial payment of account."[232] After the defendant refused the plaintiff's second demand for payment of the alleged balance due on the defendant's account, the plaintiff filed a warrant in debt in the General District Court of Fairfax County.[233]

The defendant counterclaimed for breach of contract and breach of warranty.[234] On the defendant's motion, the district court dismissed the claims of both parties based on an accord and satisfaction under Virginia Code section 8.3A-311.[235] With leave of the district court, the defendant then sought to recover attorney's fees from the plaintiff pursuant to the indemnity provision.[236] The district court awarded the defendant $3228 in attorney's fees.[237] On appeal, the Fairfax County Circuit Court awarded the defendant the same amount for attorney's fees.[238]

On appeal, the Supreme Court of Virginia upheld the award of attorney's fees.[239] The court first rejected the plaintiff's argument

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229. *Id.* at 14, 515 S.E.2d at 274.
230. *Id.*
231. *Id.*
232. *Id.* at 14-15, 515 S.E.2d at 274.
233. *Id.* at 15, 515 S.E.2d at 274.
234. *Id.*
235. *Id.* In pertinent part, Virginia Code section 8.3A-311 provides that:

> if a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument . . . the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

VA. CODE ANN. § 8.3A-311(a)–(b) (Cum. Supp. 2000).

236. *Coady,* 258 Va. at 15, 515 S.E.2d at 274.
237. *Id.*
238. *Id.*
239. *Id.* at 19, 515 S.E.2d at 277.

that, because neither party obtained a judgment award against the other in the underlying proceeding, neither party was entitled to an award of costs against the other.[240] The court determined that the outcome of an award of costs and fees was controlled not by the statutes cited by the plaintiff or "Anglo-Saxon jurisprudence," but by the language of the indemnity provision agreed to by the parties in the consulting agreement.[241]

Further, the supreme court rejected the plaintiff's contention that the original warrant in debt related to the defendant's non-performance in rendering payment rather than to a proceeding connected to the plaintiff's performance under the agreement.[242] The court labeled the plaintiff's argument "pure sophistry," noting that the plaintiff sought recovery for his performance under the agreement, and the defendant's answer denied liability based on the plaintiff's failure to perform.[243] Therefore, since all of the claims asserted by the plaintiff related to the plaintiff's performance or non-performance under the agreement, the court held that the indemnification clause governed the award of attorney's fees to the defendant.[244]

Finally, the supreme court rejected the plaintiff's claim that the award of attorney's fees was excessive.[245] Instead, the court concluded that, based on the attorney's time sheets, expert testimony, and lack of countervailing evidence submitted by the defendant, the circuit court did not abuse its discretion in making the award of attorney's fees to the defendant.[246]

Two justices dissented by arguing that the indemnification clause did not apply under the facts, and even assuming that the clause did apply, it was clear from the record that the circuit court abused its discretion in awarding an excessive fee.[247]

240. *Id.* at 16, 515 S.E.2d at 275.
241. *Id.*
242. *Id.* at 17, 515 S.E.2d at 275-76.
243. *Id.*
244. *Id.* at 17-18, 515 S.E.2d at 276.
245. *Id.* at 18, 515 S.E.2d at 276.
246. *Id.* at 18-19, 515 S.E.2d at 276.
247. *Id.* at 19-20, 515 S.E.2d at 277 (Kinser, J., dissenting).

2. Liquidated Damages—Credit Card Late Fees

In *Perez v. Capital One Bank*,[248] the Supreme Court of Virginia responded to a question certified from the United States District Court for the Northern District of Illinois by holding that Virginia Code section 6.1-330.63 precluded a challenge, under the common law doctrine of unlawful liquidated damages, to late fees arising under contracts governed by Virginia law between credit card issuers and card holders.[249]

The plaintiff, a resident of Illinois, filed a class action suit in federal court in Illinois against the defendant, a limited-purpose credit card bank with its principal place of business located in Virginia.[250] In the complaint, the plaintiff alleged that late fees charged by the defendant against her credit card account constituted unlawful liquidated damages under the common law of Virginia.[251] The defendant's customer agreement provided that Virginia and federal law governed the agreement and that the defendant was entitled to impose a late charge when a customer failed to make a timely payment.[252]

Specifically, the plaintiff argued that section 6.1-330.63(A) did not preclude her from challenging the defendant's fee as unlawful liquidated damages because that section did not abrogate the common law of contracts in Virginia.[253] The plaintiff argued further that, absent language plainly manifesting intent to abrogate the common law, the common law remains intact and operative.[254]

The defendant responded that the General Assembly explicitly abrogated the common law by enacting Virginia Code section 6.1-330.80, which specifically authorizes lenders to impose a five percent late charge for failure to make timely payment of any installment due on a debt.[255] Further, the defendant argued that, in

248. 258 Va. 612, 522 S.E.2d 874 (1999).
249. *Id.* at 617, 522 S.E.2d at 876.
250. *Id.* at 614, 522 S.E.2d at 875.
251. *Id.*
252. *Id.* at 615, 522 S.E.2d at 875.
253. *Id.* at 616, 522 S.E.2d at 876.
254. *Id.*
255. *Id.* Virginia Code section 6.1-330.80 provides, in pertinent part, that:

> Any lender . . . may impose a late charge for failure to make timely payment of any installment due on a debt, . . . provided that such late charge does not exceed five percent of the amount of such installment payment and that the

enacting section 6.1-330.63, the General Assembly removed the five percent limitation established in section 6.1-330.80, thereby permitting parties to contract in a revolving credit agreement for fees in excess of the limit.[256]

The supreme court first concluded that section 6.1-330.80 specifically permitted a lender and a debtor to agree to a late charge that did not exceed five percent of the amount of a past due installment.[257] Thus, a lender could charge up to five-percent without being required to show that the actual damages were uncertain and difficult to determine and that the amount charged was not out of proportion to the probable loss.[258]

Further, the supreme court concluded that the General Assembly, in enacting section 6.1-330.80, clearly intended to abrogate the common law rule prohibiting a penalty.[259] Moreover, in enacting section 6.1-330.63, the General Assembly removed the five percent cap on charges imposed by banks and savings institutions under contracts for revolving credit, thereby allowing charges "at such rates and in such amounts . . . as may be agreed by the borrower."[260] Thus, as section 6.1-330.63 contained more specific language applicable to banks and revolving credit plans, the court held that this section perpetuated the abrogation of the common law rule, and therefore, the late fees charged by the defendant did not constitute unlawful liquidated damages.[261]

3. Oral Contract—City Amphitheater—Ownership Interest

In *Reid v. Boyle*,[262] the Supreme Court of Virginia held that although the plaintiff employee had a written agreement with the defendant and his entertainment company, the parties' oral contract concerning the plaintiff's role in developing a new amphitheater project in Virginia Beach, plus the parties' course of

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charge is specified in the contract between the lender . . . and the debtor.

VA. CODE ANN. § 6.1-330.80 (Cum. Supp. 2000).

256. *Perez*, 258 Va. at 616, 522 S.E.2d at 876.
257. *Id.* at 617, 522 S.E.2d at 876.
258. *See id.*
259. *Id.*
260. *Id.* (citing VA. CODE ANN. § 6.1-330.63 (Cum. Supp. 2000)).
261. *Id.*
262. 259 Va. 356, 527 S.E.2d 137 (2000).

dealing, modified that agreement.[263] The court determined that the plaintiff established sufficient evidence in the Virginia Beach Circuit Court to prove that the plaintiff held a one-third interest in the defendants' leasehold interest in the amphitheater (worth approximately $3,566,343) under the parties' modified agreement.[264]

The plaintiff began working for the defendant and his business in 1981 as a talent agent, booking entertainment for college campuses.[265] The plaintiff gradually took on more responsibility and ultimately asserted that under a contract with the defendant, the plaintiff held a one-third-ownership interest in an amphitheater built by the defendant's company and the City of Virginia Beach.[266]

On appeal, the supreme court determined that the plaintiff presented sufficient evidence to permit the chancellor to ascertain from the language the parties used, with reasonable certainty and in light of all the surrounding circumstances, that the plaintiff entered into an oral contract with the defendant and his company.[267] The court further found that pursuant to the terms of this contract, the defendants promised to give the plaintiff a one-third interest in the value of the company's leasehold interest in the amphitheater.[268]

Further, the supreme court found the record supported the chancellor's findings because the defendant asserted absolute control over his company, which owned the leasehold interest, but he admitted conducting the corporation's financial affairs with an "air of informality."[269] Moreover, the defendant promised the plaintiff that he would own one-third of the amphitheater project if the plaintiff "could bring his concept of an amphitheater in Virginia Beach to fruition."[270] The defendant also repeatedly assured the plaintiff that the plaintiff owned a one-third interest in the

263. *Id.* at 370, 527 S.E.2d at 145.
264. *Id.*
265. *Id.* at 361, 527 S.E.2d at 140.
266. *Id.* at 362-66, 527 S.E.2d at 140-43.
267. *Id.* at 367, 527 S.E.2d at 144.
268. *Id.* at 368, 527 S.E.2d at 144.
269. *Id.*
270. *Id.*

amphitheater project.[271] Finally, the defendant told a friend of thirty-five years, who testified for the plaintiff, that the plaintiff owned an interest in the amphitheater project.[272]

The supreme court also found that the plaintiff partially performed under an oral contract.[273] The court determined that the plaintiff permitted approximately $88,000 of compensation that he ultimately received from another of the defendant's companies to fund the initial operating costs incurred by defendant's company in developing the project.[274] Moreover, the plaintiff "signed a letter of credit and a [personal] guaranty which the City required before it would proceed with the construction of the amphitheater."[275] Finally, the defendants "admitted in their response to a request for admission that [plaintiff's] acts of signing the personal guaranty and letter of credit were 'above and beyond' his job responsibilities as president of [defendant company]" that employed the plaintiff.[276]

Additionally, the supreme court determined that the chancellor was entitled to consider the defendant's history of giving employees, including the plaintiff, ownership interests in corporations that the defendant controlled and the fact that defendant company's primary asset was its leasehold interest with the city.[277] The chancellor also considered the defendant's statement to the plaintiff that the defendant "had an agreement that would confer an ownership interest to [the plaintiff] in the amphitheater project, but that . . . [he had returned] it to the lawyers for simplification."[278]

Finally, the supreme court held that the parties' oral contract, combined with their course of dealing, modified the earlier written agreement because the plaintiff established by clear, unequivocal, and convincing evidence that the defendant, acting on behalf of himself and his company, promised the plaintiff that he would have a one-third interest in the amphitheater leasehold in return for the plaintiff's efforts in the project.[279]

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271. *Id.*
272. *Id.* at 365, 527 S.E.2d at 142.
273. *Id.* at 368, 527 S.E.2d at 144.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 369-70, 527 S.E.2d at 144-45.

4. Settlement Agreement—Enforceability

In *Power Services, Inc. v. MCI Constructors, Inc.*,[280] the United States District Court for the Eastern District of Virginia enforced a settlement agreement between two parties, despite the plaintiff's claim of revocation prior to defendant's acceptance.[281] The defendant, a general contractor, hired the plaintiff "to construct a Boiler/Chiller Plant at Reagan National Airport."[282] A dispute arose over amounts claimed by the plaintiff for extra work, changed orders and delayed costs.[283] After the defendant refused payment of the disputed amounts, the plaintiff proposed a counteroffer to settle the dispute for $60,000.[284] The parties agreed to settle the dispute.[285] The plaintiff's attorney signed a "Settlement Memorandum" on behalf of his client, and defendant's attorney faxed a signed copy to his client.[286] However, the plaintiff attempted to withdraw the counteroffer the next day.[287]

The district court held that a settlement agreement was reached *before* the parties signed the settlement memorandum.[288] Therefore, the memorandum was simply evidence of the prior oral agreement and not the actual agreement.[289] The court also found that each party manifested intent to compromise the dispute and acted in an affirmative manner in entering into settlement.[290] In particular, the court noted that the parties exchanged multiple drafts of the agreement and that the defendant's attorney verbally communicated the terms of the agreement to his client.[291] Under Virginia law, a compromise and settlement of a suit or disputed claim binds parties unless such settlement or compromise resulted from fraud, mistake, or undue advantage; therefore, the district court upheld the settlement entered between the parties.[292]

280. No. CIV.A.97-927-A, 2000 U.S. Dist. LEXIS 5311 (E.D. Va. Mar. 7, 2000).
281. *See id.* at *9.
282. *Id.* at *1.
283. *Id.* at *2.
284. *Id.* at *3.
285. *Id.*
286. *Id.* at *3-4.
287. *Id.* at *4.
288. *Id.* at *5-6.
289. *See id.*
290. *Id.* at *7.
291. *Id.*
292. *Id.* at *9.

5. Open Account—Nonconforming Goods

In *Micro Products, Inc. v. Sylvan Learning Systems, Inc.*,[293] the Fairfax County Circuit Court affirmed the right of a buyer to revoke acceptance of nonconforming goods, even after an extensive delay.[294] Micro Products ("Micro") filed suit seeking full payment in connection with videoconferencing software purchased by codefendants, Sylvan Learning Systems ("Sylvan") and Caliber Learning Network, Inc.[295] Sylvan counterclaimed for breach of contract and breach of warranty of fitness for a particular purpose.[296]

The circuit court found that Sylvan properly revoked acceptance by letter, despite a five-month delay from the date of delivery to the date of revocation.[297] Citing Virginia Code section 8.2-608, the court also found that revocation was made within a "commercially reasonable time," since any delay allowed Micro time to cure the system's deficiencies.[298] When it became clear that Micro would make no further repair efforts, Sylvan promptly gave notice of revocation.[299] Since the delay and use caused no substantial impairment to the value of the goods, Sylvan's revocation was deemed proper.[300]

Finally, the circuit court limited damages to a refund of the money Sylvan paid to Micro for the goods purchased.[301] The court reasoned that under Virginia Code section 8.2-714(2), Sylvan was not allowed damages based on the difference between the value of the goods accepted and as warranted because of insufficient evidence in the record for calculating accurate damages.[302] The court also denied Sylvan the cost of cover because the system it subsequently purchased did not represent a reasonable substitute, but an upgrade.[303]

293. 49 Va. Cir. 24 (Cir. Ct. 1999) (Fairfax County).
294. *Id.* at 27.
295. *Id.* at 24.
296. *Id.*
297. *Id.* at 27.
298. *Id.*
299. *Id.*
300. *Id.* at 26-27.
301. *Id.* at 29-30.
302. *Id.* at 29.
303. *Id.*

6. Settlement Agreement—Patent Ambiguity

Mehlman v. American Property Services, Inc.[304] serves as a vehicle for clarifying the distinction between patent and latent ambiguities within a contract. The Fairfax County Circuit Court concluded that a nondescript provision in a settlement agreement reciting merely "balance due" qualified as a patent ambiguity obvious on the face of a contract.[305]

The plaintiffs filed suit to enforce a settlement agreement entered with the defendants that provided a provisional payment schedule for settling a series of disputes relating to investments made by the plaintiffs with the defendants.[306] The agreement identified specific amounts due, methods for calculating such amounts, and the dates of payment for the first six scheduled payments.[307] However, the seventh and final payment indicated merely a "[b]alance due . . . on 4/30/98," providing neither a specific amount nor a method of calculation.[308] The defendants argued that the court was precluded from allowing the plaintiffs to admit parol evidence to explain the patently ambiguous terms of the final payment due under the agreement.[309]

The circuit court cited the Supreme Court of Virginia's holding in *Galloway Corp. v. S.B. Ballard Construction Co.*[310] that defined a patent ambiguity as an ambiguity that is "self-evident from the writing itself."[311] The supreme court also determined that the confusion arising in the settlement agreement was not latent, because the "balance due" was not subject to two meanings within the four corners of the agreement, but had one meaning, upon which the parties simply failed to agree.[312] Thus, the court rejected the plaintiffs' request to admit parol evidence in determining that the "balance due" for the final scheduled payment

304. 49 Va. Cir. 74 (Cir. Ct. 1999) (Fairfax County).
305. *Id.* at 79.
306. *Id.* at 74-75.
307. *Id.* at 76-77.
308. *Id.* at 77.
309. *Id.* at 75.
310. 250 Va. 493, 464 S.E.2d 349 (1995).
311. *Mehlman*, 49 Va. Cir. at 78. The court also observed that a latent ambiguity is not obvious to the parties and allows for the admission of parol evidence in determining the intent of the parties. *Id.* at 79.
312. *Id.* at 79.

under the agreement amounted to $400,000.[313]

The circuit court also found the plaintiffs' demand for such a significant sum troubling in view of the balance "cursorily referred to" by the parties in the settlement agreement.[314] Consequently, the court refused to enforce the final payment term against the defendants, leaving the plaintiffs to renew litigation against a third-party debtor.[315]

7. Employment—Noncompete Agreement—Roofing Contractor

In *Cliff Simons Roofing, Inc. v. Cash*,[316] the Rockingham County Circuit Court sustained a defendant's demurrer and held that a roofing contractor was precluded from enforcing a one-year noncompete agreement against a former employee because the agreement contained no geographic restriction.[317] After nine years of employment with the plaintiff, the defendant signed the agreement at the plaintiff's request just months before the defendant tendered his resignation.[318]

In his demurrer, the defendant alleged that the agreement prevented him from being employed by any company throughout the United States that conducted any business substantially similar to the plaintiff's business.[319] The defendant alleged further that the prohibition extended beyond the bounds of reason, particularly in light of the fact that the market area in which the defendant actually competed was limited to Virginia, specifically Harrisonburg, Rockingham County, and Augusta County.[320]

The circuit court concluded that the noncompete agreement was clearly unenforceable because it established absolutely no geographic boundaries and it also prevented the defendant from going to work for any roofing company in the United States.[321] Moreover, the agreement prevented the defendant from working

313. *Id.*
314. *Id.*
315. *See id.* at 80.
316. 49 Va. Cir. 156 (Cir. Ct. 1999) (Rockingham County).
317. *Id.* at 158.
318. *Id.* at 156.
319. *Id.* at 157.
320. *Id.*
321. *Id.*

for a roofing company located in the plaintiff's admitted market area even if the defendant obtained employment where he could not utilize confidential information or where he played no competing role against his former employer, such as a job as a janitor or a stock clerk for a local roofing company.[322]

Finally, the court specifically declined the plaintiff's request to edit by selective enforcement (i.e., apply the "blue pencil" to the restrictions) what would otherwise be an invalid restriction on competition.[323]

8. Reward—Alzheimer's Patient

Craig v. Scott[324] addressed the nature of liability under an offer of reward for a missing Alzheimer's patient.[325] The plaintiff sought to recover a reward upon finding the remains of a missing patient while hunting.[326] The Brunswick County Circuit Court considered two issues: (1) the nature of the offer of reward; and (2) the presence of any consideration upon which to establish a contract.[327]

Since the offer was characterized as "vague and general, without specific terms or conditions," the court looked to the offeror's intent to find that the most reasonable interpretation of the reward was for the safe return of the patient or information leading thereto.[328] Furthermore, in determining the issue of consideration, the circuit court held that the consideration necessary to support a promise was not the benefit to the promisor, but the trouble or inconvenience to the promisee in relying upon the promise.[329] Under the facts, the circuit court found no consideration because the plaintiff discovered the remains accidentally while hunting and not while actively searching for the missing person.[330]

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322. *Id.*
323. *Id.* at 158.
324. 49 Va. Cir. 263 (Cir. Ct. 1999) (Brunswick County).
325. *Id.* at 263.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*

9. Contract Termination—Jury Question—Good Faith Duty

The Fairfax County Circuit Court considered the rights and limits of "implied conditions" in *Vega Investments Corp. v. Rocky Gorge Enterprises, L.L.C.*[331] On reconsideration of a prior ruling, the circuit court upheld jury instructions that created an implied contractual condition requiring termination of a contract to be exercised within a "reasonable time."[332]

The dispute centered around a forty-five day "study" period provided to the defendant after which the defendant was required to decide whether to consummate the purchase of a parcel of land.[333] At the end of the period, the defendant held an option either to submit a cash deposit or to terminate the contract.[334] The court identified the controlling issue as the length of time the defendant had under the contract to render a decision following the end of the period.[335] The defendant appealed based upon a jury instruction that created an implied condition in the contract by asking the jury to determine whether the defendant provided notice of termination of the contract within a "reasonable period of time."[336]

The defendant argued that the contract was patently ambiguous, and therefore the admission of parol evidence was barred.[337] In rejecting this contention, the circuit court determined that while the contract was patently ambiguous, the jury did not have an opportunity to review parol evidence as an aid in its determination of the reasonableness of the defendant's delay.[338]

The court concluded that the intent of the parties established support for its holding that the nature of the contract (a sale of a specific parcel of land) implied a definite period for performance.[339] Though the contract did not include a "time is of the essence" clause, the court found that the plaintiff's actions, particularly in designating a specific time period for study and then

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331. 49 Va. Cir. 343 (Cir. Ct. 1999) (Fairfax County).
332. *Id.* at 343-44.
333. *Id.* at 343.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.* at 344.
339. *Id.* at 345.

refusing to extend that time, indicated that time was indeed of the essence.[340]

The circuit court also cited to section 204 of the Restatement (Second) of Contracts as establishing authority for implying contractual conditions.[341] Finally, the court also addressed policy concerns relating to fairness in determining that the defendant violated a duty of good faith and fair dealing owed to the plaintiff when he attempted to exercise the right of termination at a commercially unreasonable time.[342]

10. Employment—Fraudulent Inducement

In *Hiers v. Cave Hill Corp.*,[343] the Rockingham County Circuit Court held that a man who claimed his fixed-term employment contract was breached may sue for breach of contract, but not for "fraudulent inducement" based on misrepresentations that were covered by the allegations of breach of contract, nor for civil conspiracy or tortious interference with contract.[344]

In sustaining the defendants' demurrer to fraudulent inducement counts, the circuit court first observed that the Supreme Court of Virginia has clearly stated that a claim for fraudulent inducement does not lie where a mere breach of contract occurs.[345] Specifically, the plaintiff alleged certain "misrepresentations," including the defendants' statements that (1) the plaintiff would remain employed until 2003, (2) the employer would allow the plaintiff to approve and process all sales negotiations and contracts, (3) the company's general manager would be supervised by the plaintiff, and (4) the general manager would have all his sales negotiations and contracts approved and processed by the plaintiff.[346] However, because each of the foregoing "misrepresentations" was a material element in the employment contract, the circuit court ruled that the plaintiff failed to allege any "misrep-

340. *Id.*
341. *See id.*
342. *See id.* at 346.
343. No. CL99-117788, 2000 WL 145359 (Va. Cir. Ct. Jan. 6, 2000) (Rockingham County).
344. *Id.* at *5.
345. *Id.* at *2.
346. *Id.*

resentation" or "fraudulent inducement" lying outside duties already owed by the plaintiff under the contract.[347]

Next, the circuit court determined that the plaintiff "failed to timely void what he claim[ed was] a 'void' contract . . . ."[348] However, under Virginia law, a contract formed due to fraudulent inducement is "voidable" and not void ab initio.[349] Therefore, since the plaintiff did not timely disaffirm the "voidable" contract, the circuit court found that he accepted it and relied upon it, until the employer ultimately terminated his employment.[350] Therefore, the plaintiff was bound under its terms.[351]

Finally, after reciting the well-settled rule that a person cannot interfere with a contract to which he is a party, the circuit court also sustained the defendants' demurrer to counts for tortious interference with contract because the defendants were agents of the contracting company.[352]

11. Arbitration—Stockholder Agreement

In *Cohen v. Willies Inc.*,[353] the Richmond Circuit Court dismissed the plaintiff's complaint after concluding that a clause in a stockholders' agreement required arbitration of the plaintiff corporation's claim against the defendant stockholder.[354] The clause provided that "[a]ny dispute between parties relating to this Agreement shall be submitted to and determined by a panel of three arbitrators . . . ."[355] In *Cohen*, the defendant had failed to make a payment under a demand note for $65,000 executed in connection with the agreement.[356] The defendant sought to dismiss the complaint by alleging that the plaintiff had a contractual duty under the terms of the agreement to enter arbitration for the resolution of the payment dispute under the note.[357] The plaintiff

347. *Id.* at *3.
348. *Id.*
349. *Id.* at *2.
350. *Id.*
351. *Id.*
352. *Id.* at *4.
353. No. LE-1462-1, 1999 WL 1318836 (Va. Cir. Ct. Aug. 13, 1999) (Richmond City).
354. *Id.* at *2.
355. *Id.* at *1.
356. *Id.*
357. *Id.*

responded that collection of the note was beyond the scope of the arbitration clause in the agreement.[358]

In rejecting the plaintiff's argument, the circuit court first determined that the note obligated the defendant to make monthly installment payments "without deductions or offset, except as otherwise may be provided" in the shareholders' agreement.[359] Next, the court concluded that the shareholders' agreement clearly stated that any dispute relating to the agreement must be resolved by arbitration.[360] Thus, since the defendant argued that the agreement specifically provided for setoffs due to the circumstances by which the plaintiff terminated the defendant's employment with the corporation, the terms of the agreement were necessarily implicated in resolving the dispute. Furthermore, since the note was entered between the corporation and a shareholder and any allowed setoffs were expressly controlled by the shareholders' agreement itself, the court held that the dispute under the note clearly related to the agreement.[361] Therefore, because the arbitration clause controlled, the court dismissed the plaintiff's suit on the note.[362]

12. Fraud—Beanie Babies Investment

A quite speculative venture based upon joint investment in Beanie Babies landed in the Spotsylvania County Circuit Court. In *Ingalls v. Lance*,[363] the plaintiff sued the defendant on theories of merchandise not delivered, breach of contract and fraud relating to the purchase of $10,000 worth of Beanie Babies as part of an investment scheme hatched between two friends.[364]

Despite conflicting and rather unusual testimony concerning the nature of the business plan and the expectations of the parties,[365] the court rejected the plaintiff's claim for "merchandise not

358. *Id.*
359. *Id.*
360. *Id.*
361. *See id.* at *1-2.
362. *See id.* at *2.
363. No. CL98-489, 1999 WL 1095354 (Va. Cir. Ct. Nov. 23, 1999) (Spotsylvania County).
364. *Id.* at *2.
365. The plaintiff argued that the defendant failed to follow through on their original plan to market the Beanie Babies at craft shows. *Id.* at *1. The defendant responded that

delivered."[366] Although the value of the "Babies" may have been below $5,000 (the plaintiff's actual share of the purchase price), the plaintiff failed to establish evidence that the defendant failed to deliver one-half of the merchandise purchased by the defendant as part of their joint investment.[367]

Additionally, the circuit court concluded that the absence of an express contract refuted the plaintiff's breach of contract claim and that the plaintiff failed to prove fraud by clear and convincing evidence.[368] The court also concluded that given the relationship of the parties and the context in which such conversations took place between the parties, the defendant's statements, if actually made, about the quality or value of the merchandise could not be construed as promises, warranties, or representations.[369]

The circuit court aptly described the relationship as the mere joint venture between two friends, each of whom lacked expertise in the subject matter, and both of whom concocted and entered into a "vague and imprecise arrangement" resulting in a frustration of expectations.[370] Finally, the court concluded that absolutely no liability was implicated under any legally cognizable theory.[371]

D. *Partnership Law*

1. Accounting—Damages—Dental Practice

Clark v. Scott[372] presented an appeal of a decree from the Fairfax County Circuit Court providing an accounting in the dissolution of partnership entered under an agreement between a dentist and an oral surgeon for operating a dentistry and oral

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she suffered a debilitating illness that left her unable to attend such shows. *Id.* The plaintiff also presented testimony of a Beanie Babies distributor who claimed most of the 117 Beanie Babies purchased by the plaintiff were valued under eight dollars. *See id.* The court termed this testimony "vague and unreliable." *Id.*

366. *Id.* at *2.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. 258 Va. 296, 520 S.E.2d 366 (1999).

surgery practice.[373] Specifically, the Supreme Court of Virginia was asked to determine whether the evidence supported the chancellor's award of damages in an amount less than the recommendation made by a commissioner in chancery.[374]

After approximately eight months of operation, the surgeon filed a complaint seeking dissolution of the partnership and payment from the dentist of sums allegedly due under the partnership agreement.[375] The chancellor referred the matter to a commissioner in chancery, who, after conducting an ore tenus hearing, concluded that the evidence supported the plaintiff's version of the events and recommended a judgment award of $74,507.[376] The chancellor rejected the commissioner's findings as not fully supported by the evidence and entered a final judgment of $18,263.[377]

In connection with the chancellor's holding rejecting the commissioner's finding that the defendant breached the partnership agreement by denying the plaintiff access to the office, the supreme court concluded that the evidence reasonably supported the conclusions made by either the commissioner or the chancellor.[378] The court stated that "since resolution of this factual dispute rests strongly on the credibility of the witnesses, we must defer to the commissioner's ability to evaluate the testimony and evidence given in his presence."[379] The supreme court reversed the chancellor's finding overruling the commissioner's determination that the defendant unilaterally breached the partnership agreement by denying the plaintiff access to the partnership's rented office after the defendant changed the locks.[380] Moreover, the court reinstated the judgment awarded by the commissioner to the plaintiff based upon the defendant's breach of the partnership agreement.[381]

Furthermore, the supreme court determined that the commissioner's recommendation that the defendant reimburse the plain-

373. *Id.* at 298-99, 520 S.E.2d at 367.
374. *Id.* at 298, 520 S.E.2d at 367.
375. *Id.* at 299, 520 S.E.2d at 368.
376. *Id.* at 299-301, 520 S.E.2d at 368-69.
377. *Id.* at 302, 520 S.E.2d at 369.
378. *Id.* at 302-03, 520 S.E.2d at 370.
379. *Id.* at 303, 520 S.E.2d at 370.
380. *Id.*
381. *Id.*

tiff for payments of partnership expenses that the plaintiff made while excluded from the office was based upon the finding that the defendant denied the plaintiff's use of the partnership's office.[382] Moreover, since the defendant did not contest the commissioner's finding that the plaintiff paid these amounts for partnership expenses related to the conduct of the partnership's business, the court also reversed the chancellor's determination denying the plaintiff reimbursement for such partnership expenses.[383]

However, even accepting the foregoing determinations, the supreme court concluded that the plaintiff failed as a matter of law to prove the "lost profit" portion of his damage claim.[384] The court noted that the evidence was undisputed that the partnership's dental practice operated for only eight months when the defendant breached the partnership agreement, and the partnership's business was "very light" in the early months of the practice and did not become "busy" until the last two months just before the defendant's breach.[385] Moreover, the record "fail[ed] to disclose evidence reasonably supporting a conclusion that the partnership's dental practice achieved the status of an established business" prior to the defendant's breach.[386] Consequently, "since the . . . practice was a new enterprise lacking an established earning capacity," the court held that "the evidence [did] not permit a reasonably certain estimate that [the plaintiff's] earnings [during the two months just before the breach] were a reasonable indicator of the amount he would have earned [in the three month period after the breach occurred]."[387]

Furthermore, the plaintiff's testimony regarding his earnings from a subsequent partnership with a new partner also failed to establish a reasonable basis for an "intelligent and probable estimate of the profits he would have earned" if the partnership with the defendant continued during the lockout period.[388] Therefore, because the evidence was insufficient as a matter of law to support the commissioner's recommendation for an award of lost

382. *Id.*
383. *Id.* at 304, 520 S.E.2d at 370.
384. *Id.* at 304, 520 S.E.2d at 371.
385. *Id.* at 304, 520 S.E.2d at 370.
386. *Id.*
387. *Id.*
388. *Id.*

profits to the plaintiff, the supreme court affirmed the chancellor's judgment rejecting the lost profit award recommended by the commissioner.[389]

2. Authority of General Partners—Dispute Resolution—Refinancing

In *Donnelly v. Donatelli & Klein, Inc.*,[390] the Supreme Court of Virginia interpreted a partnership agreement for a limited partnership that included a real estate appraisers' firm ("Donnelly") and the company that provided financial backing for an office and warehouse complex ("Donatelli") in Fairfax County.[391] The court held that the Fairfax County Circuit Court did not err in concluding that Donatelli was authorized under the agreement's "tie-breaker provision" to refinance the partnership property.[392]

The appeal involved a limited partnership formed to own and deal with a thirty-four acre tract of land containing office and warehouse facilities for lease in Fairfax County.[393] The affairs of the partnership were governed by a limited partnership agreement that authorized the general partners to act in relation to the partnership property, in favor of third parties, and provided that all decisions in managing the business affairs and assets of the partnership were governed by unanimous vote of the general partners.[394] The agreement also established a tie-breaker provision, included at the insistence of Donatelli, the financial backer, mandating that the general partner providing the financial backing was authorized to determine, in its sole discretion, any matter in dispute between the general partners that continued after consultation between the general partners.[395]

After ten years, the plaintiffs, the real estate appraisers, and the appraisers' firm filed a bill of complaint asserting derivative claims on behalf of the partnership, including breach of contract,

389. *Id.* at 304, 520 S.E.2d at 370-71.
390. 258 Va. 171, 519 S.E.2d 133 (1999).
391. *Id.* at 174-75, 519 S.E.2d at 134-35.
392. *Id.* at 186, 519 S.E.2d at 142.
393. *Id.* at 174, 519 S.E.2d at 134.
394. *Id.* at 174-75, 519 S.E.2d at 135.
395. *Id.* at 175-76, 519 S.E.2d at 135.

breach of fiduciary duty, tortious conversion, and conspiracy.[396] While the bill was pending, the defendant, the financial backer, sought the approval of the real estate appraisers' company to refinance the partnership property with a new lender in conjunction with a proposal to contribute that property and other commercial properties to the formation of an umbrella property real estate investment trust ("UPREIT"), in return for the issuance of units of limited partnership interest.[397] Although one of the appraisers objected to the proposal, the defendant proceeded to complete initial phases in conveying the property to the UPREIT.[398] In response, the plaintiffs filed several amended bills of complaint and also sought a preliminary injunction restraining the defendant from any further efforts to convey the property to the UPREIT.[399] In the second amended bill of complaint, the plaintiffs contended that the attempted conveyance to the UPREIT was without authority, and therefore, it should be rescinded.[400]

The chancellor denied the injunction, but in a stipulation and order approved by the chancellor, the defendant agreed to "exercise no authority as general partner [of the limited partnership] . . . without the express approval of the plaintiffs and that the status quo would be maintained pending trial."[401]

In connection with the plaintiffs' rescission claim, the chancellor found that the language of Sections 9 and 10 of the partnership agreement was unambiguous and must be construed according to the "plain meaning" rule.[402] The chancellor then proceeded to hold as a matter of law that: (1) the conveyance of the property by the defendant was authorized under the agreement and, therefore, was valid; (2) the cross-collateralization of a loan in connection with the conveyance was valid and enforceable; and (3) the related deed of trust, assignment and pledge agreement were authorized under the agreement and enforceable.[403] Furthermore, the chancellor held in favor of the defendant on the

396. *Id.* at 176, 519 S.E.2d at 135-36.
397. *Id.* at 176, 519 S.E.2d at 136.
398. *Id.* at 177, 519 S.E.2d at 136.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.* at 178, 519 S.E.2d at 137.
403. *Id.*

counts of the second amended bill of complaint involving conspiracy and on the counts involving rescission, removal of the defendant as a general partner, and appointment of a receiver.[404]

The plaintiffs appealed, arguing in essence that the defendant lacked authority under the agreement to effect the conveyance and, therefore, the chancellor should have awarded judgment in the plaintiffs' favor and rescinded the conveyance.[405]

In reviewing the rescission claim, the supreme court concluded that Section 10, by its express terms, "encompass[ed] decisions related not only to the management of the business but also to management of the 'affairs and *assets* of the Partnership'. . . ."[406] Moreover, the court determined that "the authority granted Donatelli . . . to make a decision in its sole discretion after consultation with Donnelly . . . extend[ed] to '*any* disagreement . . . as to *any* matter.'"[407] Finding that "[t]he parties could not have made their intention more explicit," the court affirmed the chancellor's conclusion that the agreement conferred power upon Donatelli to determine, in its sole discretion and after consultation with Donnelly, the dispute concerning the refinancing of the partnership and the subsequent conveyance of the partnership assets to the new entity.[408]

Furthermore, the supreme court observed that any doubt or uncertainty about the extent of the power granted to Donatelli by Section 10(A) was negated by the interpretation placed on that section by the parties themselves.[409] The court also concluded that the plaintiff failed to cite any legal principle that the chancellor allegedly violated in according great weight to the interpretation which one of the plaintiffs placed upon Section 10(A) in letters sent to the defendant regarding the resolution of other disputes.[410]

Consequently, the supreme court affirmed the chancellor's

404. *Id.*
405. *Id.* at 179, 519 S.E.2d at 137-38.
406. *Id.* at 180, 519 S.E.2d at 138.
407. *Id.*
408. *Id.*
409. *Id.* at 186, 519 S.E.2d at 142 (citing Dart Drug Corp. v. Nicholakos, 221 Va. 989, 277 S.E.2d 155 (1981) (reasoning that, under Virginia law, the interpretation of the parties to an agreement is entitled to great weight and will be followed if that may be done without violating applicable legal principles)).
410. *Id.*

finding that the agreement granted the defendant the authority to make the challenged conveyance of the limited partnership's property, and upheld the judgment award in favor of the defendant.[411]

IV. CONCLUSION

Despite the rapid changes in business entities and electronic commerce that have taken place in recent years, most of the disputes reaching Virginia courts remain focused on traditional issues of contract formation and interpretation and fiduciary duties. The actions of the Virginia General Assembly in constantly refining business entity legislation and in adopting progressive uniform legislation, particularly in the field of electronic commerce, may help minimize the risk that legal disputes focused on the nature of new business entities or electronic commerce will have to be resolved in the courts.

411. *Id.*