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Corporate and Business Law

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CORPORATE AND BUSINESS LAW

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I. INTRODUCTION

The Virginia Stock Corporation Act ("VSCA") was substantially modified in 2005, and changes to the VSCA since the last survey of Virginia corporate and business law in 2007[1] have been fairly targeted. Part II of this article addresses some of the changes that have taken place since 2007 and highlights a few changes to the Virginia Nonstock Act ("Nonstock Act").

Most of the activity in 2008 and 2009 involved conforming the language and substance of the various business entity statutes to the VSCA. Part III discusses changes to the Virginia Limited Liability Company Act ("LLC Act"), the Virginia Revised Uniform Limited Partnership Act ("RULPA"), the Virginia Business Trust Act ("BTA"), and the Virginia law affecting limited liability limited partnerships.

Several other changes to business and corporate law occurred in 2008 and 2009. Part IV addresses a handful of amendments that affect professional corporations and professional limited liability companies, such as providing a uniform definition of "professional business entity." Part V addresses changes to the Virginia Securities Act—namely, increasing the amount of civil penalties from $5,000 to $10,000 and permitting the Virginia State Corporation Commission ("VSCC") to require rescission and restitution. Finally, Part VI reviews four cases in 2008 and 2009 in which the Supreme Court of Virginia addressed laws related to Virginia business entities.

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1. *See generally* Gregory R. Bishop & Laurence V. Parker, Jr., *Annual Survey of Virginia Law: Corporate and Business Law*, 42 U. RICH. L. REV. 273 (2007).

II. CERTAIN STATUTORY CHANGES RELATED TO CORPORATIONS

In 2008 and 2009, the General Assembly continued to refine the VSCA by revising parts of the original act and its 2005 amendments. The amendments over the last two years touched on shareholder voting, amendments to articles and bylaws, remedies in the event of certain significant transactions (such as mergers and share exchanges, or the sale of substantially all assets), claims against dissolved corporations, mergers, indemnification, shareholder information and information requests, annual fees, corporate names, and record correction. Virginia also incorporated certain federal immigration laws into its business entity statutes in 2008 and 2009.[2]

A. *Illegal Aliens*

In 2008, the General Assembly passed Senate Bill 782 and House Bill 926, linking certain business entities' authority to operate in Virginia with their compliance with federal immigration laws.[3] Upon a business entity's conviction for hiring illegal aliens in violation of 8 U.S.C. § 1324a(f), the VSCC may terminate the legal existence of a domestic or foreign corporation, nonstock corporation, limited liability company, business trust, or limited partnership.[4]

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2. *See* Act of Mar. 27, 2008, ch. 770, 2008 Va. Acts 1357 (codified as amended in scattered sections of VA. CODE ANN. tit.13.1 (Cum. Supp. 2008)); *id.* tit. 50 (Cum. Supp. 2008)); Act of Mar. 12, 2008, ch. 588, 2008 Va. Acts. 873 (codified as amended in scattered sections of VA. CODE ANN. tit. 13.1 (Cum. Supp. 2008)); *id.* tit. 50 (Cum. Supp. 2008)).

3. H.B. 926, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 588, 2008 Va. Acts 873); S.B. 782, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 770, 2008 Va. Acts 1357).

4. *See* VA. CODE ANN. §§ 13.1-753(A), 13.1-769(A)(5), 13.1-915(A), 13.1-931(A)(5), 13.1-931(A)(5), 13.1-1046(B), 13.1-1056(C), 13.1-1234(B), 13.1-1246(C) (Cum. Supp. 2009); *id.* §§ 50-73.52:6(A), 50-73.58(C) (Repl. Vol. 2009).

8 U.S.C. § 1324a(f) sets forth the penalties for persons who have violated subsections (a)(1)(A) and (a)(2) of § 1324a.[5] Subsections (a)(1)(A) and (2) state:

> (a) Making employment of unauthorized aliens unlawful
> (1) In general
> It is unlawful for a person or other entity—(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment,
>
> . . . .
>
> (2) Continuing employment
> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.[6]

Thus, it is a federal crime to knowingly hire or continue to employ an illegal alien. Under 8 U.S.C. § 1324a, a business entity may assert an affirmative defense by stating it has established a program that complies with the federal employment verification system; the employer must either (1) require a United States passport, resident alien identification card, or other document designated by the attorney general; or (2) require both a state-issued identification card and a social security card or other document designated by the attorney general.[7] The employer also must provide an attestation that it has completed step (1) or (2)

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5. The statute states:
> (f) Criminal penalties and injunctions for pattern or practice violations
> (1) Criminal penalty
> Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.
> (2) Enjoining of pattern or practice violations
> Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

8 U.S.C. § 1324a(f) (2006).

6. *Id.* § 1324a(1)(2).

7. *Id.* § 1324a(a)(3), (b).

on a form designated by the attorney general, and the employee must provide an attestation on a form designated by the attorney general that he or she is "a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment."[8] Since it is virtually impossible for an employer to otherwise confirm the citizenship of its employees, an employer who does not fully implement and document a verification program that complies with 8 U.S.C. § 1324a(b) runs the risk of being convicted of a federal crime.

With Senate Bill 782 and House Bill 926, the General Assembly adopted the federal policy of placing the burden on Virginia businesses to determine whether the persons they hire entered the United States legally, and it criminalized the failure to carry that burden.[9] However, the General Assembly has taken federal law a step further by allowing the VSCC to terminate a business entity's legal existence for at least one year when that entity repeatedly violates 8 U.S.C. § 1324a(b).[10] Continuing to operate during the one-year termination period could cause the officers, managers, general partners, directors, shareholders, members, or limited partners of any terminated entity to be personally liable for the entity's ongoing operations.[11] Additionally, persons carrying on the business could be convicted of a Class 1 misdemeanor, and the business could face penalties between $500 and $5,000.[12] Foreign entities, however, would not face personal liability for their officers, managers, general partners, directors, shareholders, members, or limited partners.[13]

8. *Id.* § 1324a(b)(1)(A), (2).

9. H.B. 926, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 12, 2008, ch. 588, 2008 Va. Acts 873; S.B. 782, Va. Gen. Assembly (Reg. Sess. 2008) (enacted as Act of Mar. 27, 2008, ch. 770, 2008 Va. Acts 1357).

10. *See* Act of Mar. 27, 2008, ch. 770, 2008 Va. Acts 1357 (codified as amended in scattered sections of VA. CODE ANN. tit. 13.1 (Cum. Supp. 2008); *id.* tit. 50 (Cum. Supp. 2008)); Act of Mar. 12, 2008, ch. 588, 2008 Va. Acts 873 (codified as amended in scattered sections of VA. CODE ANN. tit. 13.1; *id.* tit. 50 (Cum. Supp. 2008)).

11. *See, e.g.*, VA. CODE ANN. § 13.1-613 (Repl. Vol. 2006).

12. *Id.*

13. *See* VA. CODE ANN. § 13.1-758(D) (Repl. Vol. 2006).

B. *Shareholder Voting*

In 2005, Virginia substantially overhauled the provisions of the VSCA related to shareholder votes by written consent. One of the changes allowed a corporation to provide in its articles of incorporation that shareholders may act with less than unanimous written consent.[14] After the 2007 amendments and until the 2008 amendments, if a Virginia corporation's voting shareholders acted by unanimous written consent, the action could not be effective until fifteen days after notice of the action was provided to shareholders who were not entitled to vote.[15] Similarly, until the 2008 amendments, where a Virginia corporation's shareholders were empowered in its articles of incorporation to act by less than unanimous written consent, such action could only be effective fifteen days after notice of the action was provided to shareholders who did not consent.[16] In 2008, the General Assembly removed the fifteen-day advance notice requirement so that the votes taken by written consent of voting shareholders can become effective on the date specified in the consent, which presumably includes dates before the signature date, provided that the consent indicates the date it was signed by each shareholder.[17] These amendments better conform with the law prior to 2007 and will enhance a corporation's flexibility in obtaining shareholder approval of transactions, especially in closely held corporations. Finally, throughout section 13.1-657, the General Assembly removed "authorize" and added "adopt" to clarify that shareholders can take any action by written consent that they could otherwise take at a meeting.[18]

C. *Voting on Amendments by Shareholders*

In 2008, the General Assembly eliminated an exception as to when shareholders may vote by class on an amendment to a corporation's articles of incorporation that increases or decreases the

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14. Act of Mar. 26, 2005, ch. 765, 2005 Va. Acts 1219, 1237–38 (codified at VA. CODE ANN. § 13.1-657(A)(2) (Repl. Vol. 2005)).

15. VA. CODE ANN. § 13.1-657(E) (Supp. 2007).

16. *Id.* § 13.1-657(F) (Supp. 2007).

17. Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 122–23 (codified as amended at VA. CODE ANN. § 13.1-657(E), (F) (Cum. Supp. 2008)).

18. *Id.* (codified as amended at VA. CODE ANN. § 13.1-657 (Cum. Supp. 2008)).

number of authorized shares of that class.[19] Now, if an amendment increases or decreases the number of authorized shares of a class of shareholders, even if that class typically does not have voting rights, the class is entitled to vote on the amendment unless the articles of incorporation provide otherwise.[20]

D. *Remedies*

In 2007, the General Assembly amended the VSCA to limit the remedies available to shareholders after they approve certain fundamental transactions—mergers, share exchanges, asset sales, or amendments to a corporation's articles of incorporation.[21] Prior to the 2008 amendment, the limitation on remedies seemed to imply that fundamental corporate actions of the type described under section 13.1-741.1(B) could be enjoined, set aside, or rescinded in a legal proceeding by a shareholder even after the shareholders approved such fundamental corporate action.[22] In 2008, the General Assembly amended section 13.1-741.1 to clarify that, following shareholder approval, except in specific instances identified in section 13.1-741.1(B) of the VSCA, remedies for the fundamental transactions described in section 13.1-730(A) of the VSCA are limited to only the remedies available under section 13.1-614.[23] These shareholder remedies are limited to filing a petition with the VSCC to set aside the certificate giving effect to the merger, share exchange, or amendment, if filed within thirty days of the effective date of the certificate.[24] Shareholders also have a right to appeal any finding by the VSCC to the Supreme Court of Virginia.[25] Under this amendment, the proper remedy for a sale of substantially all assets is unclear following shareholder approval of the sale, given that no certificate is issued by the VSCC in connection with such sale and that section 13.1-741.1(A)

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19. *Id.* at 123 (codified as amended at VA. CODE ANN. § 13.1-708 (Cum. Supp. 2008)).

20. VA. CODE ANN. § 13.1-708 (Cum. Supp. 2009).

21. Act of Mar. 9, 2007, ch. 165, 2007 Va. Acts 232, 242, 245–46 (codified at VA. CODE ANN. § 13.1-741.1 (Supp. 2007)).

22. *See* VA. CODE ANN. § 13.1-741.1 (Supp. 2007).

23. Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 123 (codified as amended at VA. CODE ANN. § 13.1-741.1(A) (Cum. Supp. 2008)).

24. Both section 13.1-614 of the VSCA and section 13.1-813 of the Virginia Nonstock Act were revised in 2008 to extend the period to file a petition with the VSCC from ten to thirty days. *See* Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 122 (codified as amended at VA. CODE ANN. §§ 13.1-614, 13.1-813 (Cum. Supp. 2008)).

25. *See* VA. CODE ANN. §§ 13.1-614(B), 13.1-741.1(A) (Cum. Supp. 2009).

of the VSCA implies that asset sales may not be enjoined, set aside, or rescinded.[26]

E. *Claims Against Dissolved Corporations*

In 2008, section 13.1-746(C)(2) of the VSCA was amended so that known, mature claims against a dissolved corporation are barred if the claimant does not commence a proceeding to enforce the claim within ninety days of the effective date of notice[27] from the corporation stating that it does not admit the claimant's claim.[28] Previously, the bar for a known, mature claim arose ninety days from the date the claimant delivered confirmation of its claim.[29] In addition, section 13.1-746.1(C)(3) was revised in 2008 to clarify that the procedure for resolving unknown or immature claims against dissolved corporations outlined in section 13.1-746.1 disposes of all matters other than a "claim" as defined in section 13.1-746.[30]

The General Assembly in 2008 revised section 13.1-746.2 of the VSCA to clarify that only a dissolved corporation that has fully complied with the notice requirements of sections 13.1-746.1 and 13.1-746.2 may avail itself of the proceeding to dispose of unknown or immature claims by providing security for such claims as determined by the appropriate circuit court.[31] In addition, all known claimants holding claims intended to be disposed of by such a proceeding are entitled to receive notice within ten days of the dissolved corporation filing its application with the appropriate circuit court.[32] Finally, unknown and immature claims covered by the court's order may not be enforced against shareholders who receive a distribution from a dissolved corporation that has provided for security in accordance with the determination of the circuit court.[33] Previously, paragraph D could have been read

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26. *See id.* §§ 13.1-730(A)(3), 13.1-741.1(A) (Cum. Supp. 2009).

27. *See id.* § 13.1-610 (Cum. Supp. 2009) (defining when notice is effective).

28. Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 123–24 (codified as amended at VA. CODE ANN. § 13.1-746(C)(2) (Cum. Supp. 2008)).

29. VA. CODE ANN. § 13.1-746(C)(2) (Repl. Vol. 2006).

30. Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 124–25 (codified as amended at VA. CODE ANN. § 13.1-746.1(C)(3) (Cum. Supp. 2008)).

31. *Id.* at 125 (codified as amended at VA. CODE ANN. § 13.1-746.2(A) (Cum. Supp. 2008)).

32. VA. CODE ANN. § 13.1-746.2(B) (Cum. Supp. 2009).

33. *Id.* § 13.1-746.2(D) (Cum. Supp. 2009).

to limit only claims against shareholders for known but immature claims.[34]

F. *Merger*

In 2009, the General Assembly clarified that where a merger involves a domestic corporation whose shareholders are required or permitted to approve plan of merger, the merger plan cannot be amended once approved by the shareholders to alter the consideration to be received by the shareholders of any party, to change the articles of incorporation or similar governing document of the surviving entity, or to include any other provision that would adversely affect the approving shareholders in a material respect.[35] In addition, it appears that after this year's changes, any amendment of the type described above to a plan of merger that was approved by the shareholders of a Virginia corporation must be conditioned on unanimous shareholder approval.[36] Typically, holding another shareholder meeting to approve modification to terms of a deal is impractical for a widely held corporation. However, before this amendment, it appeared that a party considering a second vote to approve a change in the terms of a deal had to obtain a two-thirds vote or the vote otherwise specified in its articles of incorporation.[37] Under these revisions, a second shareholder vote may be even more unrealistic for a widely held corporation because attaining a *unanimous* vote from a diverse shareholder base is highly unlikely.

The 2009 amendments also require parties to add to articles of merger or share exchange the date the plan of merger or share exchange was adopted by each domestic corporation that was a party to the merger or share exchange.[38] In the case of mergers or share exchanges approved by a corporation's board without the approval of its shareholders, the articles of merger or share exchange should include a statement that the merger or share exchange was approved by the board and the reason shareholder

34. *See id.* § 13.1-746.2(D) (Repl. Vol. 2006).

35. Act of Mar. 27, 2009, ch. 216, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §13.1-716(E) (Cum. Supp. 2009)).

36. *Id.*

37. *See* VA. CODE ANN. § 13.1-718(D) (Cum. Supp. 2008).

38. Act of Mar. 27, 2009, ch. 216, 2009 Va. Acts ___ (codified at VA. CODE ANN. § 13.1-720(A)(3) (Cum. Supp. 2009)).

approval was not required.[39] The General Assembly also made changes to the Nonstock Act similar to those described in this paragraph.[40]

G. *Indemnification*

In 2009, the General Assembly inserted a relatively important "or" in the definition of director or officer in Article 10, which relates to indemnification.[41] The change clarified that a director or officer entitled to indemnification under the VSCA includes either

> an individual who is or was a director or officer, respectively, of a corporation *or* who, while a director or officer of the corporation, is or was serving at the corporation's request as a director, officer, manager, partner, trustee, employee, or agent of another foreign or domestic corporation, limited liability company, partnership, joint venture, trust, employee benefit plan, or other entity.[42]

Because of this omission in the previous language, the definition could have been interpreted to exclude directors and officers who were not also acting in some other capacity at the corporation's request. Similar changes were made to the Nonstock Act.[43]

H. *Shareholder Information and Information Requests*

In 2008, the General Assembly revised the language of section 13.1-770 of the VSCA to clarify that unless a corporation has adopted a procedure to maintain a list of beneficial owners, a corporation only needs to keep a list of shareholders of record; it does not need to maintain a list of beneficial owners when the shares are held by a nominee.[44] Additionally, the General Assembly clarified section 13.1-771 of the VSCA so that both a beneficial owner

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39. VA. CODE ANN. § 13.1-720(A)(5) (Cum. Supp. 2009).

40. Act of Mar. 27, 2009, ch. 216, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-896(A)(5) (Cum. Supp. 2009)).

41. Act of Mar. 27, 2009, ch. 587, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-696 (Cum. Supp. 2009)).

42. *Id.*

43. *Id.* (codified as amended at VA. CODE ANN. § 13.1-875 (Cum. Supp. 2009)).

44. Act of Mar. 2, 2008, ch. 91, 2008 Va. Acts 121, 125 (codified as amended at VA. CODE ANN. § 13.1-770(c) (Cum. Supp. 2008)).

or a record owner can make a request to inspect a corporation's records.[45]

I. *Annual Fees for Converted Entities*

A 2009 change to section 13.1-615 of the VSCA allows a foreign corporation not to pay an annual registration fee when it has converted to another entity type before its annual report was due, so that converted entities are now treated similarly to terminated, withdrawn, or merged entities.[46]

J. *Use of "Redevelopment" in Corporate Names*

The 2009 revisions to the VSCA included a prohibition on the use of the word "redevelopment" in a corporation's name unless the entity is organized as an urban redevelopment corporation.[47]

K. *Correcting Records*

The VSCA was revised in 2008 to allow a corporation to correct articles that were not properly authorized or that were defectively executed.[48] The VSCC may also act upon petitions to correct clerical errors or filings made by persons without authority to act on behalf of the corporation.[49] Parallel changes were made to the Nonstock Act.[50]

III. CERTAIN STATUTORY CHANGES RELATED TO LIMITED LIABILITY COMPANIES, LIMITED PARTNERSHIPS AND BUSINESS TRUSTS

In 2008 and 2009, the General Assembly made a number of revisions to the LLC Act, RULPA, the BTA, and the law affecting limited liability limited partnerships in order to conform these

45. *Id.* at 125–26 (codified as amended at VA. CODE ANN. § 13.1-771(C)(1) (Cum. Supp. 2008)).

46. Act of Mar. 27, 2009, ch. 216, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-615(C) (Cum. Supp. 2009)).

47. *Id.* (codified at VA. CODE ANN. § 13.1-630(B)(2) (Cum. Supp. 2009)).

48. Act of Mar. 2, ch. 91, 2008 Va. Acts 121, 121 (codified as amended at VA. CODE ANN. § 13.1-607(A) (Cum. Supp. 2008)).

49. VA. CODE ANN. § 13.1-614(C) (Cum. Supp. 2008)).

50. Act of Mar. 2, ch. 91, 2008 Va. Acts 121, 126 (codified as amended at VA. CODE ANN. §§ 13.1-807(A), 13.1-813(C) (Cum. Supp. 2008)).

business entity statutes to VSCA. Additional changes to the LLC Act addressed domestication to another jurisdiction, the ability of a limited liability company to change its principal office by filing an application instead of amending its articles of organization, and the binding nature of an operating agreement on a Virginia limited liability company.

A. *Conforming Provisions of the LLC Act, BTA, RULPA, and Limited Liability Limited Partnership Statute to the VSCA*

In 2008 and 2009, the General Assembly made multiple changes to the LLC Act, the RULPA, and the BTA to make their provisions more uniform.

1. Articles of Amendment; Amended and Restated Articles

In 2008, subsections 13.1-1014.1(D) through 13.1-1014.1(F) of the LLC Act, which address articles of restatement and the procedures to file restated or amended articles of organization with the VSCC, were revised to conform with sections 13.1-711(D) through 13.1-711(F) of the VSCA.[51] Similar changes were made to section 13.1-1217 of the BTA.[52]

The General Assembly made a change to the LLC Act in its 2008 Session, so that an LLC may delete the registered agent name from its articles or omit the name of its registered agent in amended and restated articles of organization if a change of registered agent form has already been filed.[53] Similar changes were made to the RULPA and the BTA.[54]

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51. *Compare* Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 157 (codified as amended at VA. CODE ANN. § 13.1-1014.1 (Cum. Supp. 2008)), *with* VA. CODE ANN. § 13.1-711 (Cum. Supp. 2009).

52. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 142–43 (codified as amended at VA. CODE ANN. § 13.1-1217) (Cum. Supp. 2008)).

53. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 157 (codified as amended at VA. CODE ANN. § 13.1-1014.1(B) (Cum. Supp. 2008)).

54. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 142 (codified as amended at VA. CODE ANN. §§ 13.1-1216(A), 13.1-1217(B) (Cum. Supp. 2008)); Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865 (codified as amended at VA. CODE ANN. §50-73.12(E) (Cum. Supp. 2008)).

2. Dissolution; Cancellation; Reinstatement

The events triggering dissolution and provisions related to judicial dissolution were revised in 2008 and made more uniform throughout the LLC Act, the RULPA, and the BTA, with the primary difference among the three acts being the additional event of dissolution associated with the withdrawal of a general partner from a limited partnership.[55]

In addition, the General Assembly added sections 13.1-1050.2, 13.1-1050.3, and 13.1-1050.4 of the LLC Act in 2008, which address automatic cancellation, involuntary cancellation, and reinstatement of a limited liability company and mirror sections 13.1-752, 13,1-753, and 13.1-754 of the VSCA.[56] In 2008, the General Assembly revised the RULPA so that a Virginia limited partnership must file a certificate of cancellation after it has wound up its affairs, similar to the certificate of cancellation filed by Virginia LLCs.[57] In 2008, the General Assembly also added automatic cancellation, involuntary cancellation, and reinstatement provisions for limited partnerships similar to those under the LLC Act.[58] Similarly, in 2008, automatic cancellation and involuntary cancellation provisions for business trusts were added to the BTA,[59] and the BTA's reinstatement provisions were revised to conform to the VSCA, the LLC Act, and the RULPA.[60]

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55. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 143 (codified as amended at VA. CODE ANN. §§ 13.1-1234(A), 13.1-1235 (Cum. Supp. 2008)); Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 157 (codified as amended at VA. CODE ANN. §§ 13.1-1046, 13.1-1047(B) (Cum. Supp. 2008)); Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865 (codified as amended at VA. CODE ANN. §§ 50-73.49(A), 50-73.50 (Cum. Supp. 2008)).

56. *See* Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 158–59 (codified at VA. CODE ANN. § 13.1-1050.2, 13.1-1050.3, 13.1-1050.4 (Cum. Supp. 2008)); VA. CODE ANN. §§ 13.1-752, 13.1-753, 13.1-754 (Repl. Vol. 2006 & Cum. Supp. 2008). In addition, section 13.1-1064 was revised to delete provisions related to cancellation of domestic and foreign entities in connection with the failure to pay annual fees because those provisions were moved to sections 13.1-1050.2 and 13.1-1056.1. *See also* Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 871–72 (codified as amended at VA. CODE ANN. § 50-73.69 (Cum. Supp. 2008)); Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 147–48 (codified as amended at VA. CODE ANN. § 13.1-1254 (Cum. Supp. 2008)).

57. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 868 (codified at VA. CODE ANN. § 50-73.52:4 (Cum. Supp. 2008)).

58. *Id.* at 868–69 (codified at VA. CODE ANN. §§ 50-73.52:4, 50-72.52:5, 50-72.52:6, 50-72.52:7 (Cum. Supp. 2008)).

59. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 143–44 (codified at VA. CODE ANN. §§ 13.1-1238.1, 13.1-1238.2 (Cum. Supp. 2008)).

60. *See id.* at 144 (codified as amended at VA. CODE ANN. § 13.1-1239 (Cum. Supp.

Under the 2008 revisions, if a Virginia limited liability company, business trust, or limited partnership fails to pay its annual registration fee on or before December 31 of the year assessed, the entity's legal existence is automatically cancelled as of that date.[61] If the registered agent of any Virginia limited liability company, business trust, or limited partnership resigns and is not replaced, the VSCC must deliver the entity a cancellation notice within thirty-one days, and if the registered agent is not replaced before the last day of the second month following the month in which the cancellation notice was mailed, the entity will be cancelled as of that day.[62] Upon automatic cancellation, the properties and affairs of a Virginia limited liability company, business trust, or limited partnership pass to a limited liability company's managers, members, or holders of interests; to a business trust's trustees; or to a limited partnership's general partner—in each case as trustees in liquidation.[63] Subsequently, the trustees should wind up the entity and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets—either in cash or in kind—among the members or interest holders of a limited liability company, the beneficial owners of a business trust, or the partners of a limited partnership, in all cases according to their respective rights and interests.[64]

Following the 2008 amendments to the LLC Act, the BTA, and the RULPA, if a Virginia limited liability company, limited partnership, or business trust is automatically terminated, its respective members, managers, partners, beneficial owners, or other agents have no personal liability solely by reason of the automatic cancellation, regardless of whether the entity is ultimately reinstated.[65] However, it appears that directors of corporations could be personally liable in the event of a corporation's automatic cancellation.[66] It also appears that by omitting similar language in

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2008)).

61. VA. CODE ANN. §§ 13.1-1050.2(A), 13.1-1238.1(A) (Cum. Supp. 2008); *id.* § 50-73.52:5 (Cum. Supp. 2008).

62. *Id.* §§ 13.1-1050.2(B), 13.1-1238.1(B) (Cum. Supp. 2009); *id.* § 50-73.52:5(B) (Repl. Vol. 2009).

63. *Id.* §§ 13.1-1050.2(C), 13.1-1238.1(C) (Cum. Supp. 2009); *id.* § 50-73.52:5(C) (Repl. Vol. 2009).

64. *Id.* §§ 13.1-1050.2(C), 13.1-1238.1(C) (Cum. Supp. 2009); *id.* § 50-73.52:5(C) (Repl. Vol. 2009).

65. *See id.* §§ 13.1-1050.4(C), 13.1-1238.1(D), 13.1-1239(C) (Cum. Supp. 2008); *id.* §§ 50-73.52:5(D), 50-73.52:7(C) (Cum. Supp. 2008).

66. *See id.* § 13.1-752 (Repl. Vol. 2006 & Cum. Supp. 2009); *id.* § 13.1-754 (Repl. Vol.

the provisions regarding involuntary cancellation, the General Assembly intended that when corporations, limited liability companies, business trusts, and limited partnerships are involuntarily terminated, their respective directors, managers, members, trustees, and general partners may incur personal liability.[67]

Under the 2008 amendments, the VSCC may involuntarily cancel the existence of a Virginia limited liability company, business trust, or limited partnership following a hearing if the VSCC finds that the entity has continued to abuse the authority conferred upon it by law, failed to maintain a registered office or a registered agent in the Commonwealth, or failed to file any required documents.[68] The 2009 amendments to the LLC Act, the BTA, and the RULPA made a conviction under 8 U.S.C. § 1324a(f), which relates to hiring illegal aliens, grounds for involuntary cancellation as opposed to a dissolution trigger.[69] Thus, members of the business entity may be personally liable if the entity continues operations after such a conviction.[70]

Under the 2008 amendments, unless terminated by a court order that did not provide for reinstatement or for continuing to exceed its authority under Virginia law, a Virginia limited liability company, business trust, or limited partnership that has been terminated can be reinstated within five years of termination.[71] To be reinstated, a business entity must submit an application, pay a $100 reinstatement fee, pay all past due registration fees (including those before and after termination), make any name changes that may be required, and replace its registered agent if such agent has resigned.[72]

Also in 2008, the General Assembly moved language regarding the winding up of a limited liability company from section 13.1-1050 to section 13.1-1048(A) of the LLC Act.[73] Similar changes

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2006 & Cum. Supp. 2009).

67. See *id.* §§ 13.1-753, 13.1-1050.3 (Cum. Supp. 2009); *id.* § 50-73.52:6 (Repl. Vol. 2009).

68. *Id.* §§ 13.1-1050.3(A), 13.1-1238.2(A) (Cum. Supp. 2009); *id.* § 50-73.52:6(A) (Repl. Vol. 2009).

69. *See supra* Part II.A.

70. *See supra* note 11 and accompanying text.

71. VA. CODE ANN. §§ 13.1-1050.4(A), 13.1-1239(A) (Cum. Supp. 2009); *id.* § 50-73.52:7(A) (Repl. Vol. 2009).

72. *Id.* §§ 13.1-1050.4(B), 13.1-1239(B) (Cum. Supp. 2009); *id.* § 50-73.52:7(B) (Repl. Vol. 2009).

73. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 157–58 (codified as amended at

were made to the BTA,[74] and the language related to winding up a limited partnership was added to the RULPA.[75]

In 2009, the General Assembly clarified that certain restrictions on LLCs regarding distribution do not apply to those LLCs in liquidation.[76] Similarly, a corporation's distributions upon dissolution are not subject to certain distribution restrictions under the VSCA.[77] Also, the General Assembly reduced from six to two years the period during which a limited liability company may recover distributions made to its members when the company was insolvent.[78] This makes the LLC Act's limitations period closer to the VSCA, which (1) allows an action to recover a wrongful distribution from a director within two years after a right of action accrues and (2) permits contribution claims by that director against his fellow directors and the shareholders for one year after that director is found liable for the distribution.[79]

In 2009, the General Assembly changed section 13.1-1049.1 of the LLC Act to conform to the changes made to analogous sections of the VSCA in 2008.[80] As amended, known, mature claims against a dissolved limited liability company are barred if the claimant does not commence an enforcement proceeding within ninety days of the effective date of notice from the limited liability company stating that it does not admit the claimant's claim.[81] Previously, the bar for a known, mature claim arose ninety days from the date the claimant delivered confirmation of its claim.[82] The General Assembly revised section 13.1-1049.3 of the LLC Act to clarify that only a dissolved limited liability company that has fully complied with the notice requirements under sections 13.1-

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VA. CODE ANN. § 13.1-1048(A) (Cum. Supp. 2008)).

74. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 143 (codified as amended at VA. CODE ANN. § 13.1-1236(A) (Cum. Supp. 2008)).

75. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 868 (codified as amended at VA. CODE ANN. § 50-73.51 (Cum. Supp. 2008)).

76. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1035(F) (Cum. Supp. 2009)).

77. VA. CODE ANN. § 13.1-653(H) (Repl. Vol. 2006).

78. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts __ (codified as amended at VA. CODE ANN. § 13.1-1036 (Cum. Supp. 2009)).

79. VA. CODE ANN. § 13.1-692(C), (D) (Repl. Vol. 2006).

80. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts __ (codified as amended at VA. CODE ANN. §§ 13.1-1049.1(C)(2), 13.1-1049.3(A) (Cum. Supp. 2009)); *see also* VA. CODE ANN. §§ 13.1-746, 13.1-746.1 (Cum. Supp. 2009).

81. VA. CODE ANN. § 13.1-1049.1(C)(2) (Cum. Supp. 2009).

82. *Id.* § 13.1-1049.1(C)(2) (Repl. Vol. 2006).

1049.2 and 13.1-1049.3—publishing in a newspaper of general circulation where the principal office is located or, if none in Virginia, where its registered office is located, and sending notice to each holder of a known but immature claim—may avail itself of the proceeding to dispose of unknown or immature claims by providing security for such claims as determined by the appropriate circuit court.[83]

3. Certificates of Authority

Section 13.1-1052 of the LLC Act, regarding an application for a certificate of authority, was revised in 2008 to clarify that a foreign LLC that fails to maintain a registered agent appoints the clerk of the VSCC as its agent for services of process.[84]

In 2008, the General Assembly added section 13.1-1055(A) to the LLC Act, which is analogous to section 13.1-760(C) of the VSCA, so that a foreign LLC that amends its articles of organization must also file a certified copy of the amended articles of organization with the VSCC.[85] The General Assembly imposed similar requirements on foreign limited partnerships by amending the RULPA[86] and business trusts by amending the BTA.[87] Sections 13.1-1056.1, 13.1-1056.2, and 13.1-1056.3, which relate to automatic cancellation, involuntary cancellation, and reinstatement of foreign LLCs, respectively, were added to the LLC Act.[88] These new sections conform to the VSCA's and LLC Act's provisions related to termination and reinstatement.[89] Similar provisions regarding automatic cancellation, involuntary cancellation, and reinstatement were added to the BTA[90] and the RULPA.[91] The

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83. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1049.3 (Cum. Supp. 2009)).

84. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 159 (codified as amended at VA. CODE ANN. § 13.1-1052(A)(4) (Cum. Supp. 2008)).

85. *Id.* at 160 (codified as amended at VA. CODE ANN. § 13.1-1055(A) (Cum. Supp. 2008)).

86. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 869 (codified at VA. CODE ANN. § 50-73.57(A) (Cum. Supp. 2008)).

87. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 144 (codified at VA. CODE ANN. § 13.1-1241(A) (Cum. Supp. 2008)).

88. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 160–61 (codified at VA. CODE ANN. §§ 13.1-1056.1, 13.1-1056.2, 13.1-1056.3 (Cum. Supp. 2008)).

89. *See supra* Part III.A.2; *see also* VA. CODE ANN. §§ 13.1-768, 13.1-769.1 (Repl. Vol. 2006); *id.* § 13.1-769 (Cum. Supp. 2009).

90. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 145–46 (codified at VA. CODE ANN.

LLC Act,[92] the RUPLA,[93] and the BTA,[94] were each amended to conform to section 13.1-766(A) of the VSCA.[95] Under these amendments, foreign limited liability companies, limited partnerships, and business trusts registered to do business in Virginia that are a party to a merger do not have to file certified copies of the articles of merger if the other party to the merger was a Virginia entity.[96]

4. Merger

In 2008 the General Assembly deleted a provision of the LLC Act that appeared to limit the types of entities that could survive a merger among an LLC, a partnership, and a corporation.[97] Before the deletion, it appeared that neither general partnerships nor limited partnerships could survive a merger that also involved a Virginia LLC and a domestic or foreign corporation.[98]

Sections 13.1-1072(B) through 13.1-1072(D) of the LLC Act were revised in 2008.[99] The changes to section 13.1-1072(B) were the most substantive. Now, articles of merger involving a domestic LLC must state that the merger was permitted under the laws of the state where any foreign entities were formed and that each foreign entity complied with the laws of its home state in affecting the merger.[100] The General Assembly also made corresponding changes to the RULPA[101] and the BTA.[102] In addition, the General

§§ 13.1-1246.1, 13.1-1246.2, 13.1-1246.3 (Cum. Supp. 2008)).

91. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 870–71 (codified at VA. CODE ANN. §§ 50-73.58:1, 50-73.58:2, 50-73.58:3 (Cum. Supp. 2008)).

92. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 161 (codified as amended at VA. CODE ANN. § 13.1-1060(A) (Cum. Supp. 2008)).

93. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 869 (codified as amended at VA. CODE ANN. § 50-73.57:2(A) (Cum. Supp. 2008)).

94. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 146 (codified as amended at VA. CODE ANN. § 13.1-1250(A) (Cum. Supp. 2008)).

95. *See* VA. CODE ANN. § 13.1-766(A) (Cum. Supp. 2009).

96. *See id.* §§ 13.1-1060(A), 13.1-1250(A) (Cum. Supp. 2009); *id.* § 50-73.57:2(A) (Cum. Supp. 2009).

97. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 163 (codified as amended at VA. CODE ANN. § 13.1-1070 (Cum. Supp. 2008)).

98. *See* VA. CODE ANN. § 13.1-1070(A)(8) (Repl. Vol. 2006).

99. Act of Mar. 2, 2008, ch. 108, 2008 Va. Acts 155, 163–64 (codified as amended at VA. CODE ANN. § 13.1-1072 (Cum. Supp. 2008)).

100. VA. CODE ANN. § 13.1-1072 (Cum. Supp. 2008).

101. Act of Mar. 12, 2008, ch. 586, 2008 Va. Acts 865, 867 (codified as amended at VA. CODE ANN. § 50-73.48:3(B) (Cum. Supp. 2008)).

Assembly added sections 13.1-1261(C) and 13.1-1261(D) to the BTA, which relate to the issuance of a certificate of merger by the VSCC and the effective time of the certificate, to conform the BTA with other Virginia business entity statutes.[103]

5. Bar of Certain Assignees and Successors

In 2008, the General Assembly added provisions to the LLC Act, the RULPA, and the BTA to prevent successors or assignees of a claim from a foreign entity that transacted business in the Commonwealth from maintaining a cause of action in Virginia courts unless the foreign entity or the successor registers to transact business in Virginia.[104]

6. Cancellation of Limited Liability Limited Partnerships

In 2009, the General Assembly conformed the language regarding revocation of limited liability partnerships with the language in the RULPA and the other entity statutes. Now a limited liability partnership is "cancelled" instead of "revoked" if it does not pay its annual fees in a timely fashion or file its annual reports.[105] A limited liability partnership seeking reinstatement has similar requirements to other entities seeking reinstatement: (1) it must file an application; (2) it must pay a $100 restoration fee; (3) it must file the annual continuation report; (4) it must pay all past due annual fees and any fees incurred since the cancellation; (5) it must replace a registered agent if the registered agent has resigned and not been replaced; and (6) it must make any amendment required by section 50-73.136(D) of the Virginia Code.[106]

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102. Act of Mar. 2, 2008, ch. 101, 2008 Va. Acts 141, 148 (codified at VA. CODE ANN. § 13.1-1261(B) (Cum. Supp. 2008)).

103. *Id.* (codified at VA. CODE ANN. § 13.1-1261(C), (D) (Cum. Supp. 2008)); *see, e.g.*, VA. CODE ANN. § 13.1-1072(C), (D) (Cum. Supp. 2008).

104. Act of Mar. 10, 2008, ch. 523, 2008 Va. Acts 778, 778–79 (codified at VA. CODE ANN. §§ 13.1-1057(B), 13.1-1247(B) (Cum. Supp. 2008); *id.* § 50-73.59(B) (Cum. Supp. 2008)).

105. Act of Mar. 30, 2009, ch. 716, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 50-73.134(C) (Repl. Vol. 2009)).

106. *Id.* (codified as amended at VA. CODE ANN. § 50-73.134(E) (Repl. Vol. 2009)). It appears that the reference to section 50-73.136 may be erroneous, as this section allows, but does not seem to require, amendments. *See* VA. CODE ANN. § 50-73.136(D) (Repl. Vol. 2009). It is likely the reference should have been to sections 50-73.2, 50-73.78(A)(2), and 50-73.133 regarding name requirements and availability. *See id.* §§ 50-73.2, 50-

B. *Other Changes to the LLC Act*

1. Re-Domestication

In 2009, the General Assembly revised the LLC Act to require that an LLC filing articles of surrender to domesticate in a foreign jurisdiction must state that the plan of domestication was adopted in accordance with section 13.1076 of the LLC Act.[107]

2. Change of Registered Office

In 2009, the General Assembly amended the LLC Act to allow an LLC to change its principal office, which is listed in its initial articles of organization, by filing a form prescribed for that purpose.[108] Previously, a Virginia limited liability company could only change its principal office by filing an amendment to its articles of organization.[109]

3. Addressing *Mission Residential, LLC v. Triple Net Properties, LLC:* An LLC is Bound by its Operating Agreement

Out of an abundance of caution following *Mission Residential, LLC v. Triple Net Properties, LLC*,[110] the General Assembly added the following sentence to section 13.1-1023(A)(1) of the LLC Act: "A limited liability company is bound by its operating agreement whether or not the limited liability company executes the operating agreement."[111] Thus, if there had been any doubt before, it is now clear that a Virginia limited liability company is bound by its operating agreement.

73.78(A)(2), 50-73.133 (Repl. Vol. 2009).

107. Act of Mar. 27, 2009, ch. 201, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1078(A)(4) (Cum. Supp. 2009)).

108. Act of Mar. 27, 2009, ch. 450, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 13.1-1018.1, 13.1-1055 (Cum. Supp. 2009)).

109. *See* VA. CODE ANN. §§ 13.1-1011, 13.1-1011.1 (Repl. Vol. 2006); *id.* § 13.1-1014 (Cum. Supp. 2008).

110. 275 Va. 157, 654 S.E.2d 888 (2008); *see infra* Part VI.D.

111. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1023(A)(1) (Cum. Supp. 2009)).

IV. CERTAIN STATUTORY CHANGES RELATED TO PROFESSIONAL CORPORATIONS AND PROFESSIONAL LIMITED LIABILITY COMPANIES

In 2008, the General Assembly revised the professional corporation statute to clarify that a professional corporation has a legitimate business interest in enforcing employment agreements, including non-compete agreements, with the professionals it employs. In addition, the General Assembly adopted a uniform definition of "professional business entity" in the Professional Corporation statute and the Professional Limited Liability Company Act. Finally, the General Assembly addressed the effect of a member's disqualification from a professional limited liability company and the mandatory purchase of a member's interest in a professional limited liability company following his or her disqualification.

A. *General Assembly Addresses* Parikh v. Family Care Center, Inc.

In *Parikh v. Family Care Center, Inc.*, a case that created more questions than it answered, the Supreme Court of Virginia addressed a corporation's ability to enforce a non-competition covenant against a physician that it had previously employed.[112] Although Family Care Center, Inc. argued that section 13.1-542.1 permitted a corporation to "render" professional services, the supreme court declined to rule on what "render" means,[113] perhaps leaving room to later draw a distinction between being "engaged in business of the practice of medicine"[114] and "rendering" healing arts. The court also did not determine whether a non-professional corporation may employ licensed physicians, or could enforce a covenant not to compete with former employees "rendering" the same professional services as their former employer."[115]

The General Assembly addressed the questions left open in *Parikh*, clarifying that an entity not licensed to practice medicine

112. 273 Va. 284, 286, 641 S.E.2d 98, 99 (2007).

113. *Id.* at 288–90, 641 S.E.2d at 99–101.

114. Since entities cannot obtain medical licenses, neither a professional nor a non-professional engage in the practice of medicine. *See* VA. CODE ANN. § 54.1-2929 (Repl. Vol. 2009).

115. *Id.* at 289–90, 641 S.E.2d at 100–01.

may employ licensed individuals and engage in the medical profession through licensed individuals.[116] The General Assembly further clarified that such an entity has a legitimate business interest in enforcing the terms of employment—presumably including non-competition and other restrictive covenants—with such licensed individuals.[117]

B. *Professional Business Entities*

In the Professional Corporations statute, the General Assembly added the definition of "professional business entities":

> [A]ny entity as defined in § 13.1-603 that is duly licensed or otherwise legally authorized under the laws of the Commonwealth or the laws of the jurisdiction under whose laws the entity is formed to render the same professional service as that for which a professional corporation or professional limited liability company may be organized, including, but not limited to, (i) a professional limited liability company as defined in § 13.1-1102, (ii) a professional corporation as defined in this subsection, or (iii) a partnership that is registered as a registered limited liability partnership registered under § 50-7.132, all of the partners of which are duly licensed or otherwise legally authorized to render the same professional services as those for which the partnership was organized.[118]

In the Professional Limited Liability Company Act, the "professional business entity" definition was updated to conform to the new definition in the Professional Corporations statute.[119] The General Assembly made a number of changes to the Professional Corporations statute and the Professional Limited Liability Company Act to clarify that "professional business entities" can be shareholders of professional corporations and members of professional limited liability companies organized in Virginia.[120]

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116. Act of Mar. 5, 2008, ch. 358, 2008 Va. Acts 534, 534 (codified as VA. CODE ANN. § 54.1-111(D) (Cum. Supp. 2008)).

117. *Id.*

118. Act of Mar. 4, 2008, ch. 265, 2008 Va. Acts 394, 395 (codified at VA. CODE ANN. § 13.1-543 (Cum. Supp. 2008)).

119. *Id.* at 397 (codified as amended at VA. CODE ANN. § 13.1-1102 (Cum. Supp. 2008)).

120. *Id.* at 395–97 (codified as amended at VA. CODE ANN. §§ 13.1-543, 13.1-549, 13.1-549.1, 13.1-550, 13.1-1102 (Cum. Supp. 2008)).

C. *Disqualification of Member, Manager, Agent, or Employee*

In 2009, the General Assembly amended the section of the Professional Limited Liability Company Act that permitted the VSCC to cancel a professional limited liability company's existence if the entity failed to terminate the employment of a member, manager, employee, or agent who had become legally disqualified to render the professional services of the professional limited liability company.[121] The amendment conformed the language regarding the VSCC's cancellation of a professional limited liability company's existence to language related to the involuntary cancellation of a limited liability company's existence.[122] The amendment also deleted language allowing the VSCC to revoke a foreign professional limited liability company's certificate of authority under similar circumstances.[123]

D. *Payments to Disqualified Members*

In 2009, the General Assembly modified the provision of the Professional Limited Liability Company Act that requires professional limited liability companies to purchase a disqualified member's membership interest.[124] As revised, the terminated member is eligible to receive payment whether or not the professional limited liability company elects to continue its existence and even if such member's disqualification stemmed from his ineligibility to provide the applicable professional services.[125] These changes reinforce the need to have an operating agreement that clearly delineates how a disqualified member is paid for his interest; otherwise, the professional limited liability company is re-

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121. Act of Mar. 27, 2009, ch. 201, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1116 (Cum. Supp. 2009)). Although section 13.1-1116 requires termination of employment for a disqualified member, manager, employee, or agent, section 13.1-1116 permits such persons to remain members of the limited liability company. VA. CODE ANN. § 13.1-1116 (Cum. Supp. 2009).

122. Act of Mar. 27, 2009, ch. 201, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1116 (Cum. Supp. 2009)); *see* VA. CODE ANN. § 13.1-1050.3 (Cum. Supp. 2009).

123. *Id.* (codified as amended at VA. CODE ANN. § 13.1-1116 (Cum. Supp. 2009)).

124. Act of Mar. 30, 2009, ch. 763, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-1117(C) (Cum. Supp. 2009)).

125. *See* VA. CODE ANN. § 13.1-1117(C) (Cum. Supp. 2009).

quired to pay the book value of the member's interest within one year of the disqualification.[126]

V. CHANGES TO VIRGINIA'S SECURITIES ACT

In 2009, the General Assembly increased the maximum civil penalty the VSCC can impose under Virginia's Securities Act from $5,000 to $10,000.[127] The General Assembly also made changes so that the VSCC can order the rescission of an investment advisory contract or security sale and require an investment advisor or seller of securities to pay restitution.[128] Previously, the VSCC could only request rescission and restitution.[129] In theory, given that the Supreme Court of Virginia has declined to adopt the "sale of business doctrine,"[130] and the General Assembly did not pass Senate Bill 1220,[131] which would have adopted that doctrine, the VSCC can now order the rescission of a business acquisition by stock purchase.

VI. SELECTED CASES AFFECTING CORPORATE AND BUSINESS LAW

During the last two years, the Supreme Court of Virginia declined to adopt the "sale of business doctrine" and instead adopted the "stock characterization test." It also addressed standing to bring a derivative claim and whether fiduciary duties run from a manager to a Virginia limited liability company or directly to its members. Finally, the court addressed the interpretation of limited liability company operating agreements.

A. *The Sale of Business Doctrine:* Andrews v. Browne

Frequently, the buyer of a closely held business prefers to purchase assets and specifically identified liabilities of the seller because the buyer is concerned about unknown liabilities that may come along with purchasing equity. Following *Andrews v.*

126. *Id.*

127. Act of Mar. 27, 2009, ch. 566, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 13.1-521(A) (Cum. Supp. 2009)).

128. *Id.* (codified as amended at VA. CODE ANN. § 13.1-521(C), (D) (Cum. Supp. 2009)).

129. VA. CODE ANN. § 13.1-521(C), (D) (Repl. Vol. 2006).

130. *See infra* Part VI.A.

131. S.B. 1220, Va. Gen. Assembly (Reg. Sess. 2009).

Browne,[132] there are additional reasons to prefer an asset purchase over a sale of capacity.

John Andrews and other co-purchasers bought all of the stock of Manassas Health Club, Inc., a fitness facility located in Manassas, Virginia, from James Stein and Michael Browne in 2004.[133] Prior to closing, Stein provided Andrews with the Manassas Income and Expense Report.[134] After closing, Stein provided Andrews with a floppy disk that Stein stated was too damaged to be accessed.[135] Andrews was ultimately able to access the disk, which showed that the Manassas Income and Expense Report had overstated Manassas Health Club's income and understated its expenses.[136] Andrews also believed that Manassas Health Club made misstatements about the number of club members and the club's filing and payment of tax returns.[137]

After Andrews became the sole shareholder by buying the interests of his co-purchasers, Andrews brought an action in the Prince William County Circuit Court against Browne and Stein alleging that they had deliberately understated expenses and overstated revenues and made false statements of fact regarding the number of members of the health club, its assets and liabilities, and the filing and payment of taxes.[138] Andrews sought, among other things, a judgment under section 13.1-522 of the Virginia Securities Act.[139] The trial court dismissed the Securities Act claims on a motion for summary judgment; Andrews nonsuited his other claims and appealed the summary judgment.[140]

Because the definition of "security" in the Virginia Securities Act was based in part on federal securities laws, the Supreme Court of Virginia declined to adopt the sale of business doctrine and applied the stock characterization test from *Landreth Timber Co. v. Landreth* and *Gould v. Ruefenacht*.[141] The court held that if

132. 276 Va. 141, 662 S.E.2d 58 (2008).
133. *Id.* at 144, 662 S.E.2d at 60.
134. *Id.*
135. *Id.* at 145, 662 S.E.2d at 61.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 145–46, 662 S.E.2d at 61.
140. *Id.* at 146, 662 S.E.2d at 61.
141. *Id.* at 150–53, 662 S.E.2d at 62–65 (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 (1985); Gould v. Ruefenacht, 471 U.S. 701, 704 (1985)).

an instrument possesses all of the following characteristics typically associated with stock, it is subject to the Virginia Securities Act: "(1) the right to receive dividends contingent upon an apportionment of profits; (2) negotiability; (3) ability to be pledged or hypothecated; (4) conferring of voting rights in proportion to the number of shares owned; and (5) ability to appreciate in value."[142] The court determined that the stock in Manassas Health Club purchased by Andrews possessed all of these characteristics and thus held that the Virginia Securities Act applied to his purchase of stock.[143]

As a result of *Andrews v. Browne*, a seller in a sale of all of a corporation's stock will be more vulnerable to claims from a purchaser based on section 13.1-522.[144] A purchaser pursuing a claim under section 13.1-522(A) of the Virginia Securities Act will not have to prove all of the elements of actual fraud, including any scienter or intent to mislead; rather, the claimant need only prove that there was a misrepresentation.[145] The General Assembly failed to adopt the sale of business doctrine this year,[146] so, for the foreseeable future, a seller who structures the sale of his or her businesses as a sale of stock must not make any "untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made . . . not misleading . . . ."[147]

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142. *Id.* at 153, 662 S.E.2d at 65 (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851 (1975)).

143. *Id.* at 154, 662 S.E.2d at 66.

144. Section 13.1-522(A) provides:

> Any person who . . . sells a security by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him who may sue either at law or in equity to recover the consideration paid for such security, together with interest thereon at the annual rate of six percent, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of such security, or for the substantial equivalent in damages if he no longer owns the security.

VA. CODE ANN. § 13.1-522(A) (Repl. Vol. 2006 & Cum. Supp. 2009).

145. *See* Diaz Vicente v. Obenauer, 736 F. Supp. 679, 694 (E.D. Va. 1990).

146. S.B. 1220, Va. Gen. Assembly (Reg. Sess. 2009).

147. VA. CODE ANN. § 13.1-522 (Repl. Vol. 2006 & Cum. Supp. 2009).

B. *Derivative Actions:* Jennings v. Kay Jennings Family Limited Partnership[148]

In Virginia, an equity-holder plaintiff cannot pursue a derivative action unless he or she "fairly and adequately represent[s] the interests" of the equity holders and the entity.[149] Recently, in *Jennings v. Kay Jennings Family Limited Partnership*, the Supreme Court of Virginia construed the concept of fair and adequate representation for the first time.[150]

In *Jennings*, Michael E. Jennings, the plaintiff, and his four siblings, Louis, Katherine, Mary, and Beverly, were the limited partners in Kay Jennings Family Limited Partnership; Louis, Katherine, and Beverly were also the general partners in the partnership.[151] The partnership was the tenant on property owned by Mary R. Boothe, subleased by the partnership to Michael Jennings, and used by Michael to operate a Toyota automobile dealership in Springfield, Virginia.[152]

Michael Jennings proposed that the partnership subordinate its lease to the construction loan Michael sought for the dealership; when the general partners refused, Michael offered to buy out his siblings' interests in order to control the partnership and the land.[153]

In July of 2005, after Michael complained about comments his brother Louis made to representatives of Toyota Motor Sales USA, Inc. about the lease of the Boothe land potentially being invalid, Katherine and Beverly sent all of the general partners a letter reminding them that one general partner acting alone could not bind the partnership.[154] In August of 2005, Michael filed a derivative action against the partnership and Louis, asserting that Louis had breached his fiduciary duties to the partnership.[155]

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148. For a more detailed discussion of *Jennings v. Kay Jennings Family Limited Partnership*, see Patricia Collins McCullagh, *Partnership Derivative Suits:* Jennings v. Kay Jennings Family Ltd. Partnership, 44 U. RICH. L. REV. 167 (2009).

149. VA. CODE ANN. § 50-73.62 (Repl. Vol. 2009).

150. 275 Va. 594, 601, 659 S.E.2d 283, 287 (2008).

151. *Id.* at 598–99, 659 S.E.2d at 285–86.

152. *Id.* at 598, 659 S.E.2d at 285–86.

153. *Id.*, 659 S.E.2d at 286.

154. *Id.* at 599, 659 S.E.2d at 286.

155. *Id.*

While the derivative action was pending, Michael formed DAMN, LLC with his wife, purchased the Boothe property, and increased the rent paid by the partnership from $2,500 per month to $10,500 per month.[156] The partnership challenged the rent increase and, as provided in the lease, the matter was submitted to arbitration.[157]

The trial court determined that Michael did not fairly and adequately represent the partnership "because he (1) ha[d] economic interests that [were] directly adverse to those of the partnership, (2) maintained as manager of the DAMN, LLC, an arbitration adverse interest to the partnership as well, and (3) . . . pursu[ed] remedies that [were] not supported by the other parties."[158] Michael appealed.[159]

In affirming the trial court's decision, the Supreme Court of Virginia held that the eight factors outlined in *Davis v. Comed, Inc.*, including economic antagonisms between the representative and members of the class, other litigation pending between the plaintiff and the defendants, and the degree of support the plaintiff is receiving from the members of the class, are relevant to determining standing, but they are not exclusive considerations.[160] Rather, the factors "must be considered in the totality of the circumstances found in each case."[161] In contrast with the approach in *Davis*, the court noted that "[e]conomic interests that may not be directly antagonistic to the claims made in the derivative suit may, nevertheless, have an impact on the derivative plaintiff's ability to fairly and adequately maintain the litigation in the best interests" of the entity and its owners.[162] Similarly, a plaintiff who is engaged in separate litigation, arbitration, or similar proceedings against the entity is adverse to the entity, and it is proper for a court to give this fact weight in determining whether or not a person is a proper derivative plaintiff.[163] Finally, a trial court may

156. *Id.*

157. *Id.* at 599, 659 S.E.2d at 286–87.

158. *Id.* at 600, 659 S.E.2d at 287 (internal quotations omitted).

159. *Id.*

160. *Id.* at 601–02, 659 S.E.2d at 287–88 (citing Davis v. Comed, Inc., 619 F.2d 588, 593–94 (6th Cir. 1980)).

161. *Id.* at 602, 659 S.E.2d at 288.

162. *Id.* at 603, 659 S.E.2d at 289.

163. *See id.* at 604, 659 S.E.2d at 289.

consider whether members of the plaintiff's proposed class—the equity holders—support bringing the claim.[164]

C. *Fiduciary Duties:* Remora Investments, L.L.C. v. Orr

In *Remora Investments, L.L.C. v. Orr*, the Supreme Court of Virginia addressed the fiduciary duties of members and managers of a Virginia limited liability company.[165] Remora Investments, L.L.C. ("Remora") and Orr were each fifty percent members of O.A.L.L.C. ("OA"), a Virginia limited liability company.[166] Orr was also the manager of OA.[167] OA held a fifty percent membership interest in another limited liability company that sold certain real property, and upon sale of such real property, OA received a distribution in the amount of $1,384,166.55.[168] Orr, as manager of OA, caused the distribution to be deposited in an investment account he set up for OA in October of 2003 but did not cause OA to distribute the proceeds to Orr and Remora, as members of OA, until September and October of 2005.[169]

Remora brought an action in Fairfax County Circuit Court asserting claims that Orr, as manager, had breached fiduciary duties owed to Remora, as a member.[170] The trial court referred the matter to a chancellor who determined that Remora could assert its breach of fiduciary duty claims directly against Orr as manager.[171] The trial court disagreed with the chancellor and "held 'that a claim for breach of fiduciary duty cannot be brought directly by one member of an L.L.C. against another member or manager . . . .'"[172] On appeal, Remora asserted that the trial court erred in holding that a manager owes no fiduciary duties to the members of a limited liability company, that the members have no direct right of action against a manager, and that a claim by a member against a manager may only be brought derivatively.[173]

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164. *See id.* at 604–05, 659 S.E.2d at 289–90.
165. 277 Va. 316, 318, 673 S.E.2d 845, 845 (2009).
166. *Id.* at 318–19, 673 S.E.2d at 845.
167. *Id.* at 319, 673 S.E.2d at 845.
168. *Id.*, 673 S.E.2d at 845–46.
169. *Id.* at 319–20, 673 S.E.2d at 846.
170. *Id.*
171. *Id.* at 320, 673 S.E.2d at 846.
172. *Id.*
173. *Id.*

The Supreme Court of Virginia, reviewing the matter de novo, noted that neither section 13.1-690 of the VSCA nor section 13.1-1024.1,

> imposes duties between members of an L.L.C., between members and managers of an L.L.C., between stockholders of a corporation, or between individual shareholders and officers and directors. By contrast, general partnership law in Virginia provides that "a partner owes to the partnership *and the other partners* . . . the duty of loyalty and the duty of care."[174]

The court held that if the General Assembly wanted to impose such duties, it could have done so explicitly as it did under the Uniform Partnership Act.[175] In addition, the court pointed out that shareholders of a corporation or members of a limited liability company could impose direct fiduciary duties by contract, but OA had not done so here.[176] Because neither the LLC Act nor OA's operating agreement imposed such fiduciary duties, the court affirmed the trial court's decision.[177]

For practitioners who have counseled clients that managers of a Virginia LLC owe fiduciary duties to the company, but probably not to its members, and that a member probably does not owe other members fiduciary duties, *Remora Investments, L.L.C. v. Orr* is a welcome development. However, *Remora* should also remind practitioners to avoid inadvertently creating fiduciary duties in the governance of a limited liability company.

D. *Did the Virginia Supreme Court Hold that an LLC is Not Bound by its Operating Agreement?:* Mission Residential, LLC v. Triple Net Properties, LLC

The articles of organization and the operating agreement, either written or oral, are the two governing documents of a Virginia limited liability company under the LLC Act.[178] Because practitioners often take for granted that entities are bound by their governing documents, *Mission Residential, LLC v. Triple Net*

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174. *Id.* at 322, 673 S.E.2d at 847 (quoting VA. CODE ANN. § 50-73.102 (Repl. Vol. 2005)).

175. *Id.*

176. *Id.* at 324, 673 S.E.2d at 848 (citing Simmons v. Miller, 261 Va. 561, 576, 544 S.E.2d 666, 675 (2001)).

177. *Id.* at 324, 673 S.E.2d at 849.

178. *See* VA. CODE ANN. §§ 13.1-1011, 13.1-1023 (Cum. Supp. 2009).

Properties, LLC may have caused some alarm.[179] However, a close look at this case suggests that it was no cause for concern.

Triple Net Properties, LLC ("Triple") and Mission Residential, LLC ("Mission") formed NNN/Mission Residential Holdings, LLC ("NNN") in 2004 as a joint venture to facilitate like-kind exchange transactions.[180] The parties included in the NNN operating agreement the following passage:

> *Disputes*. The Members shall in good faith use their best efforts to settle disputes regarding their rights and obligations hereunder. All disputes that the parties have failed to resolve shall be submitted to arbitration. All arbitration to resolve a dispute shall be conducted in accordance with the provisions of this Section 13.9 and to the extent not inconsistent therewith, the Commercial Arbitration Rules of the American Arbitration Association ("AAA") . . . . The arbitrator's award shall be final, binding and not subject to appeal.[181]

In an arbitration proceeding, Triple asserted a direct breach of contract claim against Mission, and asserted a derivative claim on behalf of NNN against Mission.[182] Mission petitioned Fairfax County Circuit Court, seeking a declaratory judgment that there was no agreement to arbitrate claims between Mission and NNN.[183] While that petition was pending in Fairfax County Circuit Court, the arbitrator ruled that the derivative claims were subject to arbitration, and that, based on section 13.9, the arbitrator's determinations were final.[184] The circuit court agreed with the arbitrator and Mission appealed.[185]

The Supreme Court of Virginia interpreted the NNN operating agreement as a matter of contract law and applied a de novo standard of review.[186] The court held that "[a]lthough Mission and Triple might have chosen to employ language that would have committed them to arbitrate their disputes with [NNN], they did not do so. Thus, there was no contractual undertaking by which Mission had agreed to arbitrate any dispute with [NNN]."[187] In

179. 275 Va. 157, 654 S.E.2d 888 (2008).
180. *Id.* at 159, 654 S.E.2d at 889–90.
181. *Id.* at 160, 654 S.E.2d at 890.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 160–61, 654 S.E.2d at 890 (citing Phillips v. Mazcyck, 273 Va. 630, 635–36, 643 S.E.2d 172, 175 (2007)).
187. *Id.* at 162, 654 S.E.2d at 891.

arriving at this decision, the court pointed out that NNN was a separate and distinct entity from its members, just as a corporation is a distinct entity from its shareholders.[188] The court also noted that NNN, not the member bringing the derivative claim, was the real party in interest.[189] Because NNN was a separate entity, and the operating agreement arbitration provision only addressed conflicts between the members, not conflicts between the members and NNN, the court concluded that Triple was not entitled to arbitrate the derivative claim it brought on behalf of NNN against Mission.[190]

The holding in *Mission Residential, LLC v. Triple Net Properties, LLC* raised some concerns that Virginia limited liability companies may not be bound by their operating agreements. To remove any doubt on this point, the General Assembly modified the LLC Act in 2009 to make clear that Virginia limited liability companies are, in fact, bound by their operating agreements.[191] However, when the Supreme Court of Virginia stated in its opinion that "Mission and Triple might have chosen to employ language that would have committed them to arbitrate their disputes with [NNN]," it clearly indicated that the members could have bound NNN by the arbitration provision if they had prepared an arbitration provision that said NNN and the members were bound to arbitrate disputes.[192] Because the language of the NNN operating agreement only addressed obligations of the members to arbitrate disputes between the members and did not impose that obligation on NNN, the court declined to impose an obligation on NNN that was not in its operating agreement.[193] For this reason, it seems likely that the revisions to the LLC Act this year would not have changed the outcome in *Mission Residential, LLC v. Triple Net Properties, LLC*.

188. *Id.* at 161, 654 S.E.2d at 891 (citing VA. CODE ANN. § 13.1-1009 (Cum. Supp. 2009)); *id.* § 13.1-1019 (Repl. Vol. 2006 & Cum. Supp. 2009); C.F. Trust, Inc. v. First Flight Ltd. P'ship, 266 Va. 3, 9, 580 S.E.2d 806, 809 (2003)).

189. *Id.* at 161–62, 654 S.E.2d at 891 (citing Little v. Cooke, 274 Va. 697, 709, 652 S.E.2d 129, 136 (2007); Simmons, 261 Va. 561 at 573, 544 S.E.2d at 674 (2001)).

190. *Id.* at 162, 654 S.E.2d at 891.

191. *See supra* Part III.B.3.

192. *Mission Residential, LLC*, 275 Va. at 162, 654 S.E.2d at 891.

193. *Id.*

VII. CONCLUSION

The General Assembly spent 2008 and 2009 making minor changes to the VSCA, the Professional Corporation statute and Professional Limited Liability Company Act. It made substantial changes to the LLC Act, the RULPA, and the BTA to conform those statutes to the VSCA. Finally, the General Assembly made selected substantive changes to the VSCA in order to incorporate federal immigration penalties and made changes to the Securities Act to increase civil penalties and allow the VSCC to impose rescission and restitution. The General Assembly provided limited liability companies with a method to change their principal office without amending their articles of organization, and it clarified that limited liability companies are bound by their operating agreements.

Over the last two years, the Supreme Court of Virginia declined to adopt the sale of business doctrine, and the General Assembly failed to adopt it legislatively, so sellers who structure the sale of their businesses as a sale of stock should be aware of the application of the Securities Act. The supreme court also addressed how it may determine whether a derivative plaintiff fairly and adequately represents the interest of a Virginia entity: it held that an adverse business interest, even if it is not directly adverse to the litigation, can disqualify a plaintiff. The court confirmed that, absent duties imposed by contract in an operating agreement, a manager of a Virginia limited liability company owes fiduciary duties to the LLC, not its members, and a member does not owe other members any fiduciary duties. Finally, the court clarified that it applies contract interpretation principles to operating agreements and, as such, will not impose obligations on an LLC that are not clearly included in the language of its operating agreement.