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Annual Survey of Virginia Law: Business and Corporate Law

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BUSINESS AND CORPORATE LAW

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I. INTRODUCTION

This article reviews recent developments in the law affecting Virginia businesses and corporations. Part II discusses recent judicial decisions in Virginia courts involving businesses and corporations. Part III discusses several acts of the 1993 session of the Virginia General Assembly that amend Virginia's corporate, partnership, limited liability company and securities act statutes.

II. RECENT JUDICIAL DECISIONS

A. *Shareholder Liability for Acting as Directors*

In *Curley v. Dahlgren Chrysler-Plymouth, Dodge, Inc.*,¹ the Supreme Court of Virginia held that a claim of unlawful distribution of corporate assets under the Virginia Stock Corporation Act (Stock Corporation Act) could be maintained against the shareholders of a closely held corporation where such shareholders actively conducted the business of the corporation and failed to observe corporate formalities.²

Edward R. Curley, Jr. (Curley) and two other individuals incorporated Dahlgren Chrysler-Plymouth, Dodge, Inc. (the dealership) and through it purchased an automobile dealer franchise.³ Chrysler Credit Corporation (Chrysler Credit) financed the dealership's purchase of new and used automotive inventory, parts and equipment.⁴ As part of the financing, Curley and the two other share-

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1. 245 Va. 429, 429 S.E.2d 221 (1993).

2. *Id.* at 434, 429 S.E.2d at 224.

3. *Id.* at 431, 429 S.E.2d at 222.

4. *Id.*

holders, along with their spouses entered an agreement guaranteeing dealership's indebtedness to Chrysler Credit.⁵

Subsequently, Motors Holding Company, Inc. (Motors Holding) and certain officers of Motors Holdings purchased all of the outstanding stock in the dealership and began actively participating in the operation of the dealership. At no time, however, did the new shareholders hold corporate meetings or elect corporate directors for the dealership.⁶

The dealership then sent Chrysler Credit three checks that were returned for insufficient funds and, pursuant to a court order, Chrysler Credit repossessed its collateral from the dealership and obtained a judgment against Curley, the other two original shareholders, and their spouses (collectively, the Curley Parties) for the dealership's unsatisfied indebtedness to Chrysler Credit.⁷

The Curley Parties filed an action against the dealership and each of its shareholders alleging, among other things, that the defendants distributed assets of the dealership at a time when the defendants knew that the dealership could not pay its debts, and, therefore, that such distributions violated the Stock Corporation Act.⁸ The trial court ruled that under section 13.1-692(A) of the Stock Corporation Act, such an action may only be brought against duly elected directors of the corporation and none of the defendants was a director.⁹

Under the Stock Corporation Act, the board of directors of a corporation "may authorize the corporation to make distributions to its shareholders unless, after such distribution, the corporation 'would not be able to pay its debts as they become due in the usual course of business.'"¹⁰ Section 13.1-692(A) of the Stock Corporation Act provides that a director may be liable to the corporation and to its creditors under certain circumstances if such director

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 432, 429 S.E.2d at 222-23. The specific violations were: (1) distributions to shareholders which would make the corporation unable to pay its debts as they become due (§ 13.1-653); (2) general standards of conduct for directors (§ 13.1-690); and (3) director liability for unlawful distributions to shareholders (§ 13.01-692).

9. *Id.* at 433, 429 S.E.2d at 223.

10. *Id.* (citing VA. CODE ANN. § 13.1-653 (Repl. Vol. 1993)).

votes for or assents to a distribution made in violation of section 13.1-653.¹¹

In reversing the trial court's decision, the Supreme Court of Virginia held that because the defendant shareholders ran the dealership on a daily basis, made acquisition and sale decisions and encumbered the corporation with debt, the shareholders assumed the roles of directors and officers of the corporation.¹² As such, "the shareholders assumed not only the authority and fiduciary responsibilities of directors, but also the liabilities resulting from the exercise of such roles."¹³ Consequently, the court ruled that the shareholders were "directors" for purposes of sections 13.1-653, -690 and -692 of the Stock Corporation Act and remanded the case for further proceedings.¹⁴

The court explained that shareholders of a closely held corporation who ignore corporate formalities do so at their own peril: "Shareholders, such as these, who comprise all the shareholders in the corporation, cannot escape liability by failing to observe the formality of electing directors when they exercise all the powers and undertake all the activities of directors."¹⁵

B. *Piercing the Corporate Veil and Personal Liability for the Obligations of a Corporation*

The doctrine of "piercing the corporate veil" was examined in two decisions during the past year, one from the United States Court of Appeals for the Fourth Circuit and another from the Circuit Court of Fairfax County.

In *Perpetual Real Estate Services, Inc. v. Michaelson Properties, Inc.*,¹⁶ the Court of Appeals for the Fourth Circuit held that Virginia law requires that to pierce the corporate veil and hold a shareholder liable for the obligations of the corporation, in addition to proving that the corporation is the alter ego of the shareholder, the plaintiff must also establish that the corporation was a

11. *Id.* A director found liable is entitled to seek contribution from the shareholders receiving the improperly distributed assets. *Id.*

12. *Id.* at 434, 429 S.E.2d at 224.

13. *Id.* at 434, 429 S.E.2d at 224 (citing *Pepper v. Litton*, 308 U.S. 295, 306, 309 (1939)).

14. *Id.* at 434, 429 S.E.2d at 224.

15. *Id.* (citing *Coastal Pharmaceutical Co. v. Goldman*, 213 Va. 831, 836, 195 S.E.2d 848, 852 (1973); *Moore v. Aetna Casualty & Surety Co.* 155 Va. 556, 570, 155 S.E.2d 707, 711 (1930)).

16. 974 F.2d 545 (4th Cir. 1992).

“device or sham used to disguise wrongs, obscure fraud or conceal crime.”¹⁷

Aaron Michaelson (Michaelson) incorporated Michaelson Properties, Inc. (MPI), under the laws of the state of Illinois for the purpose of entering into real estate joint ventures. Michaelson was the president and sole shareholder of MPI. MPI subsequently entered into two joint ventures with Perpetual Real Estate Services, Inc. (PRES), to convert apartment buildings into condominiums. One such joint venture involved the formation of Arlington Apartment Associates (AAA), with PRES and MPI each contributing \$50,000 and agreeing to share liabilities *pro rata*. AAA subsequently made various distributions of the profits from the condominium units. Prior to each distribution, the partners made a determination, as required by the partnership agreement, that the partners were leaving sufficient assets to permit the partnership to meet its anticipated expenses. MPI then authorized distributions of its profits to Michaelson.¹⁸

Subsequently, several condominium purchasers filed breach of warranty claims against AAA in the amount of five and one-half million dollars. The suit was settled pursuant to a settlement agreement under which PRES paid \$950,000 to the plaintiffs on behalf of the partnership. MPI made no contributions toward the settlement, because all of the profits that MPI had earned from its real estate ventures had been distributed to Michaelson.¹⁹

PRES then filed a diversity action in the United States District Court for the Eastern District of Virginia against Michaelson and MPI seeking recovery from MPI for a *pro rata* share of the settlement. PRES sought, *inter alia*, to hold Michaelson personally liable for MPI's debt on the theory that MPI was Michaelson's “alter ego or mere instrumentality” and that MPI's corporate veil should be pierced.²⁰ The jury found in favor of PRES and Michaelson appealed, arguing that the district court's instruction to the jury on piercing the corporate veil misstated Virginia law.²¹ The Court of Appeals for the Fourth Circuit agreed, reversing the jury verdict

17. *Id.* at 549.

18. *Id.* at 546-47.

19. *Id.* at 544.

20. *Id.*

21. *Id.*

and remanding the case with instructions that judgment be entered for Michaelson.²²

The court of appeals emphasized that only in extraordinary cases have Virginia courts disregarded the corporate form and held some or all of the shareholders personally liable for the debts of the corporation.²³ “[A] fundamental purpose of incorporation is to ‘enable a group of persons to limit their liability in a joint venture to the extent of their contributions to the capital stock.’”²⁴ “This concept of limited liability ‘supports a vital economic policy,’ . . . a policy on which ‘large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.’”²⁵

Under Virginia law, a plaintiff bears the burden of convincing the court to disregard the corporate form, and must first establish “‘that the corporate entity was the alter ego, alias, stooge, or dummy of the individuals sought to be charged personally.’”²⁷ This element may be established by evidence that the defendant exercised “‘undue domination and control’ over the corporation.”²⁸ The court ruled that under this element of the test, the district court properly permitted the jury to consider evidence of whether the defendant observed corporate formalities, maintained corporate records, paid dividends, and whether the corporation had other officers or directors.²⁹

The court emphasized, however, that in addition to the foregoing, “something more than mere domination or control by a shareholder is required to induce the court to disregard the entity of a corporation.”³⁰ The plaintiff must also establish “‘that the corporation was a device or sham used to disguise wrongs, obscure fraud, or conceal crime.’”³¹

22. *Id.* at 549.

23. *Id.* at 548 (citing *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987); *Beale v. Kappa Alpha Order*, 192 Va. 382, 397, 64 S.E.2d 789, 797 (1951)).

24. *Id.* (quoting *Beale*, 192 Va. at 395, 64 S.E.2d at 796).

25. *Id.* (quoting *Cheatle*, 234 Va. at 212, 360 S.E.2d at 831).

26. *Id.* (quoting *Anderson v. Abbott*, 321 U.S. 349, 362 (1944)).

27. *Id.* (quoting *Cheatle*, 234 Va. at 212, 360 S.E.2d at 831).

28. *Id.* (quoting *Beale*, 192 Va. at 396, 64 S.E.2d at 797).

29. *Id.*

30. *Id.* (quoting *Beale*, 192 Va. at 396, 64 S.E.2d at 797).

31. *Id.* (quoting *Cheatle*, 234 Va. at 212, 360 S.E.2d at 831; *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 31, 147 S.E.2d 747, 753 (1966)).

In reversing the district court, the court of appeals held that the jury instruction, which permitted the imposition of personal liability on Michaelson if it was found that Michaelson dominated MPI and used the corporation to perpetrate an "injustice or fundamental unfairness," failed to communicate the rigorous standard of proof required in Virginia that the defendant use the corporation to "disguise" some legal "wrong."³² In reaching its conclusion, the court emphasized that the parties had entered into a contractual relationship, and that courts have been extraordinarily reluctant to lift the veil in contract cases "where the 'creditor has willingly transacted business' with the corporation."³³

In *PC-Expanders, Inc. v. Subsystem Technologies*,³⁴ the Fairfax County Circuit Court held that no private cause of action could be maintained against an officer of an undomesticated foreign corporation doing business in Virginia.³⁵ The action in *PC-Expanders* arose out of a sale by PC-Expanders, Inc. of certain computer merchandise to Subsystem Technologies, Inc. (STI), a Maryland corporation. At the time of such sale, STI did not have a certificate of authority to transact business in Virginia, as required by section 13.1-757(A) of the Stock Corporation Act.³⁶ As such, plaintiff argued that during the period of time that STI transacted business in Virginia without a certificate of authority, STI had no legal existence in Virginia, and, accordingly, liability should accrue to the sole known principal of STI, Samir Mehra (Mehra), the chief executive officer. The defendants argued that plaintiff failed to state a cause of action against Mehra individually.

The court observed that since the repeal of former section 13.1-119, the Stock Corporation Act no longer expressly imposes individual civil liability on the agents of an undomesticated foreign corporation transacting business in Virginia.³⁷ While the Stock Corporation Act does specify the consequences of transacting business in Virginia without authority, it does not include among the consequences the imposition of individual civil liability to private parties pursuant to a private cause of action.³⁸ Rather, the statute

32. *Id.* at 548-49.

33. *Id.* at 550 (quoting *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 693 (5th Cir. 1985)).

34. 28 Va. Cir. 231 (Fairfax County 1992).

35. *Id.* at 235.

36. VA. CODE ANN. § 13.1-757(A) (Repl. Vol. 1993).

37. *PC-Expanders*, 28 Va. Cir. at 233.

38. *Id.* at 234.

provides that "each officer, director and employee who does any such business in this Commonwealth knowing that a certificate of authority is required shall be liable for a penalty of not less than \$500 and not more than \$5,000."³⁹

The court interpreted the legislative intent behind the repeal of former section 13.1-119 combined with the enactment of the current statute to hold that the Virginia General Assembly intended to eliminate the imposition of personal liability on the officers of a foreign corporation that fails to obtain a certificate of authority to transact business in Virginia.⁴⁰

C. *Suits by Partners Against Co-Partners and Their Partnerships*

Several cases during the past year addressed the issue of whether a partner in a Virginia partnership may bring an action at law against a co-partner or the partnership prior to the dissolution of the partnership.

In *Dulles Corner Properties II Ltd. Partnership v. Smith*,⁴¹ the Supreme Court of Virginia held that a general partner in a limited partnership may not bring an action at law for breach of fiduciary duty against another general partner until the partnership has been dissolved and a final accounting made.⁴² The court reiterated the general rule of Virginia partnership law that "an action at law by one partner against his co-partners will not lie on a claim growing out of the partnership transactions until the business is wound up and the accounts finally settled."⁴³

The fact that the partnership was a limited partnership did not affect the court's analysis. The court held "that [sections 50-73.1 to -73.77] of the [RULPA], manifest a clear legislative intent to provide general partners of a limited partnership no more rights against each other than those of any partner in a partnership formed pursuant to common law and the [UPA]. . . ."⁴⁴

Therefore, the court concluded, the plaintiff was required to obtain a dissolution and accounting of the partnership prior to as-

39. VA. CODE ANN. § 13.1-758(D) (Repl. Vol. 1993).

40. *PC-Expanders*, 28 Va. Cir. at 234-35.

41. 246 Va. 153, 431 S.E.2d 309 (1993).

42. *Id.* at 155, 431 S.E.2d at 311.

43. *Id.* (quoting *Summerson v. Donovan*, 110 Va. 657, 658-59, 66 S.E.2d 822, 822 (1910)).

44. *Id.* at 156, 431 S.E.2d at 311.

serting the breach of fiduciary duty claim against the co-general partner.⁴⁵

Interestingly enough, several months prior to the *Dulles Corner Properties* decision, the Circuit Court for the City of Richmond in *Kumar v. Metropolitan Hospital L.P.*,⁴⁶ held that the general prohibition against suits brought by partners against their partnerships prior to dissolution does not apply to suits brought by limited partners against limited partnerships.⁴⁷

While making rounds at a hospital, the plaintiff, a medical doctor, slipped on some stairs, fell and was injured. The plaintiff sued the owners of the hospital claiming that his fall resulted from the negligence of agents and employees of the hospital. The hospital was owned by Metropolitan Hospital, L.P., a Virginia limited partnership, of which the plaintiff was a limited partner.⁴⁸ The hospital moved for summary judgment on the grounds that a partner cannot sue his partnership for negligence arising out of partnership business.

The circuit court denied the hospital's motion for summary judgment holding that the general prohibition in Virginia against a partner maintaining an action at law against the partnership has no application to limited partners.⁴⁹ In making the distinction, the court gave two reasons for the general prohibition against suits by partners of a general partnership.⁵⁰ First, every partner in a general partnership has a voice in the conduct of the business and, therefore, when one partner alleges wrongful conduct against the partnership, such partner is actually alleging wrongful conduct against himself.⁵¹ Second, each partner in a general partnership is liable for the debts of the partnership and, therefore, a judgment obtained by one partner against the partnership would constitute a judgment against himself.⁵²

45. *Id.*

46. 7 V.L.W. 1059, 1075 (Richmond City Cir. Ct. Feb. 25, 1993).

47. *Id.*

48. Amerihealth Systems of Virginia, Inc., the corporate general partner of the partnership, was also named as a defendant.

49. *Kumar*, 7 V.L.W. at 1075.

50. *Id.*

51. *Id.* (citing *Quillen v. Titus*, 172 Va. 523, 531, 2 S.E.2d 284, 287 (1939); VA. CODE ANN. § 50.18(e) (Repl. Vol. 1989)).

52. *Kumar*, 7 V.L.W. at 1075 (citing *Holloway v. Smith*, 197 Va. 334, 340, 88 S.E.2d 909, 915 (1955); VA. CODE ANN. § 50-15 (Repl. Vol. 1989)).

Unlike general partners, limited partners do not have an equal voice with general partners controlling the management and conduct of the business of the limited partnership, and limited partners are generally not liable for the debts of the partnership in excess of their capital contributions.⁵³ Thus, the court reasoned, a limited partner who alleges wrongful conduct on the part of the partnership does not allege wrongful conduct on his part because he is not presumed to have had an equal role in such conduct.⁵⁴ By the same token, a limited partner who obtains a judgment against the partnership would not obtain a judgment against himself because the limited partner is not liable for partnership debts.⁵⁵

The court observed that a limited partner is no different in these regards from a stockholder in a corporation and "there has never been any prohibition against a person maintaining a negligence action to recover for personal injuries against a corporation in which such person owns stock. The court can think of no logical reason to deny a limited partner the same right."⁵⁶

The court also rejected the hospital's argument that the suit was precluded by section 50-13 of the UPA which in general provides that partners are liable for losses or injuries caused by the partnership to anyone but a partner.⁵⁷ Section 50-6 of the UPA, however, provides that the UPA "shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith."⁵⁸ Because under the RULPA limited partners are generally not liable for partnership debts, section 50-13 of the UPA

53. *Kumar*, 7 V.L.W. at 1075 (quoting section 50-73.24(A) of the RULPA which provides, in pertinent part:

Except as provided in subsection D of this section, a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. . . .

VA. CODE ANN. § 50-73.24(A) (Repl. Vol. 1989 & Cum. Supp. 1993)).

54. *Kumar*, 7 V.L.W. at 1075.

55. *Id.*

56. *Id.*

57. *Id.*; see § 50-13 of the UPA which provides that

[w]here, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

VA. CODE ANN. § 50-13 (Repl. Vol. 1989).

58. VA. CODE ANN. § 50-6 (Repl. Vol. 1989).

is inconsistent with the law applicable to limited partnerships and, the court reasoned, is therefore inapplicable.⁵⁹

In *IMWA Equities IX Co. Limited Partnership v. WBC Associates Limited Partnership*,⁶⁰ the United States Court of Appeals for the Fourth Circuit held that under Virginia common law a partner could enforce an indemnity provision in an amendment to a partnership agreement prior to the partnership's dissolution, winding up and final accounting.⁶¹

IMWA Equities IX Company, L.P., a New Jersey limited partnership (IMWA) and WBC Associates Limited Partnership, a Virginia limited partnership (WBC), were two of three partners in Beacon Hill Farm Associates II Limited Partnership, a Virginia limited partnership (Beacon Hill), formed to acquire and develop a 2000-acre tract of land in Loudoun County, Virginia. James M. Wordsworth (Wordsworth) and Harvey C. Borkin (Borkin) were the general partners of WBC. Porten Sullivan Corporation, a Maryland corporation (PSC), was Beacon Hill's third partner and was both the sole general partner and a limited partner.⁶²

In connection with the development of the Loudoun County property, Beacon Hill admitted IMWA as a limited partner to provide additional security to Beacon Hill's lender. IMWA provided a six million dollar irrevocable letter of credit to the lender as security for a five and one-half million dollar loan made to Beacon Hill.⁶³ Beacon Hill's partnership agreement was amended to provide that any draws against the letter of credit would be treated as a loan from Beacon Hill to IMWA. Any such loan and all accrued interest thereon would be payable upon the earlier of the dissolution of Beacon Hill or one year from the date of the draw against the letter of credit.⁶⁴

To afford IMWA some protection in the event that Beacon Hill defaulted on its obligation to pay any such loan, PSC, WBC, Wordsworth and Borkin agreed to indemnify IMWA for a portion of any overdue principal and interest on any loan. The amendment

59. *Kumar*, 7 V.L.W. at 1075.

60. 961 F.2d 480 (4th Cir. 1992).

61. *Id.* at 483-84.

62. *Id.* at 480.

63. *Id.* at 481.

64. *Id.*

to the Beacon Hill's partnership agreement also provided for cross-indemnification between PSC, WBC, Wordsworth and Borkin.⁶⁵

Beacon Hill and PSC filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code. Beacon Hill's lender demanded payment on the entire six million dollar letter of credit.⁶⁶ IMWA's bank honored such demand, thereby converting the six million dollar letter of credit into a loan from IMWA to Beacon Hill. The loan became due and payable to IMWA upon Beacon Hill's Chapter 11 filing under the terms of the amended partnership agreement. Beacon Hill did not repay the loan and WBC, Wordsworth and Borkin subsequently refused to indemnify IMWA for any portion of the loan.⁶⁷ IMWA brought an action in federal district court alleging that WBC and each of Wordsworth and Borkin, as individuals, were liable for indemnifying IMWA in accordance with the terms of the Beacon Hill amended partnership agreement.⁶⁸ The district court dismissed the action stating that until the partnership had "been wound up, . . . you cannot sue on these individual obligations."⁶⁹

In reversing the decision of the district court, the court of appeals ruled that the indemnity provision in the Beacon Hill partnership agreement required WBC, Wordsworth and Borkin to indemnify IMWA in accordance with the terms of the partnership agreement in advance of any dissolution and final accounting for Beacon Hill.⁷⁰ The court observed that both the Virginia Revised Uniform Limited Partnership Act (RULPA)⁷¹ and the Virginia Uniform Partnership Act (UPA)⁷² were silent on the issue and, therefore, that Virginia common law would govern.⁷³

Under Virginia common law, "an action at law by one partner against his co-partners will not lie on a claim growing out of the partnership transactions until the business partnership is wound up and the accounts finally settled."⁷⁴ Nevertheless, "where there

65. *Id.*

66. *Id.*

67. *Id.* at 482.

68. *Id.* at 481-82.

69. *Id.* at 482.

70. *Id.* at 483.

71. VA. CODE ANN. §§ 50-73.1 to 50-73.77 (Repl. Vol. 1989 & Cum. Supp. 1993).

72. VA. CODE ANN. §§ 50-1 to 50-43 (Repl. Vol. 1989 & Cum. Supp. 1993).

73. *IMWA*, 961 F.2d at 482.

74. *Id.* at 482 (quoting *Summerson v. Donovan*, 110 Va. 657, 658-59, 66 S.E. 822, 822 (1910)).

is an express stipulation in the partnership articles which is violated by one partner, an action at law will lie."⁷⁵

The court concluded that the Beacon Hill partnership agreement, as amended, provided an express stipulation obligating WBC, Wordsworth and Borkin to indemnify IMWA in advance of dissolution and final accounting for the Beacon Hill partnership.⁷⁶

D. *Applicability of Partnership Law to Professional Corporations*

In *Boyd, Payne, Gates & Farthing, P.C. v. Payne, Gates, Farthing & Radd, P.C.*,⁷⁷ the Supreme Court of Virginia held that "[b]ecause [a professional corporation] was a close corporation and its shareholders validly conducted the internal affairs of their law practices as a partnership, . . . the trial court properly settled their rights and liabilities according to partnership law."⁷⁸

Boyd involved the breakup of a law firm which had originally been formed as a partnership but subsequently converted to a professional corporation. The law firm filed suit against the departing members, who had formed a separate professional corporation. The law firm alleged that its departing members had collected and deposited into a segregated interest bearing account monies in payment of the law firm's receivables.⁷⁹ In a cross bill, the departing members alleged that their former firm had been incorporated as a "convenience to obtain certain tax and other benefits, but that the law practice had been conducted as a partnership both before and after the corporation's formation."⁸⁰ The departing members asked that the court order an accounting and that the rights and liabilities of the parties be determined in accordance with the law of partnership. The law firm argued that it was "a legal impossibility" for a partnership and a corporation to coexist under these circumstances.⁸¹

The supreme court found that the course of dealing that was followed over a period of ten years estopped the professional corpora-

75. *Id.* at 482-83 (quoting *Gilbert v. Fontaine*, 22 F.2d 657, 662 (8th Cir. 1927)).

76. *Id.* at 483.

77. 244 Va. 418, 422 S.E.2d 784 (1992).

78. *Id.* at 430, 422 S.E.2d at 790.

79. *Id.* at 420, 422 S.E.2d at 785.

80. *Id.*

81. *Id.*

tion and its members from denying the existence of a partnership and the legality of the actions taken in that relationship.⁸² The firm was a close corporation and its shareholders validly conducted the internal affairs of their law practice as a partnership.⁸³ Therefore, the trial court properly settled their rights and liabilities according to partnership law.⁸⁴

E. *Applicability of Merger Defense to Partnership Judgments*

In *Equity Investors, Ltd. v. West*,⁸⁵ the Supreme Court of Virginia held that under the RULPA, if a judgment is entered against a partnership, the judgment creditor can file a subsequent action to enforce the judgment against individual partners who were not named parties to the initial action.⁸⁶

Equity Investors, Ltd., a Virginia general partnership (Equity), filed a motion for judgment against Super Seven, a Virginia general partnership seeking to collect the outstanding balances on six promissory notes executed by two general partners on behalf of Super Seven. None of the general partners of Super Seven was named as defendants in the lawsuit. Equity obtained a judgment against Super Seven partnership, but the trial court denied Equity's request to docket the judgment against the individual partners.⁸⁷ Equity then filed a motion for judgment against certain solvent Super Seven general partners. The partners filed demurrers asserting that Equity's cause of action had merged in the judgment against the Super Seven partnership.⁸⁸

The supreme court, reversing the trial court's decision, ruled that although under Virginia common law a judgment recovered by a creditor against a partnership would result in the merger of a cause of action against any of the partners not named in the original action, the Virginia General Assembly abolished the merger doctrine as applied to partners when it enacted section 50-8.1 of the UPA.⁸⁹ The last sentence of section 50-8.1 provides that a partnership's "partners shall be liable for judgment and be subject

82. *Id.* at 425, 422 S.E.2d at 788.

83. *Id.* at 430, 422 S.E.2d at 790.

84. *Id.*

85. 245 Va. 87, 425 S.E.2d 803 (1993).

86. *Id.* at 92, 425 S.E.2d at 806.

87. *Id.* at 88-89, 425 S.E.2d at 804-05.

88. *Id.* at 89, 425 S.E.2d at 805.

89. *Id.* at 91, 425 S.E.2d at 806.

to execution to the extent and in the manner provided by law.”⁹⁰ Therefore, the court reasoned, “[e]ven though Equity Investors’ causes of actions on the notes merged in the judgment it obtained against Super Seven, the right to enforce the judgment against the individual partners did not merge.”⁹¹

In response to the partners’ argument that they should not be liable for a judgment for which they might not have been notified, the court stated that “section 50-8.1 of the UPA gives all partners in a partnership constructive notice that partners ‘shall be liable for judgment and be subject to execution to the extent and in the manner provided by law.’”⁹²

F. *Affiliated Transactions and Fiduciary Duties of Proxy Holders and Directors*

The Fairfax County Circuit Court addressed numerous Virginia corporate law issues in the context of a transaction between a corporation and a majority shareholder. In *Roscigno v. DeVille*,⁹³ the Circuit Court for Fairfax County set aside a transaction where a corporation’s principal asset was sold to an interested shareholder of the corporation and the corporation was dissolved without a distribution to the plaintiff-shareholder.⁹⁴

Thomas Roscigno (Roscigno) was a stockholder of T&T International Industries, Inc. (T&T), a Virginia corporation formed for the purpose of constructing an office building in Herndon, Virginia.⁹⁵ On July 31, 1987, Roscigno and James A. DeVille (DeVile) entered into an agreement pursuant to which DeVille agreed to finance Roscigno’s purchase of stock from another T&T shareholder so that Roscigno would become the majority shareholder of T&T. Roscigno then put his stock in trust and granted his voting rights with respect to such stock to DeVille by proxy for a period of three years.⁹⁶

90. VA. CODE ANN. § 50-8.1 (Repl. Vol. 1989).

91. *Equity Investors*, 245 Va. at 91, 425 S.E.2d at 806.

92. *Id.* at 92, 425 S.E.2d at 806.

93. 28 Va. Cir. 96 (Fairfax County 1992).

94. *Id.* at 104.

95. *Id.* at 97.

96. *Id.* at 98. Roscigno also executed a promissory note in favor of DeVille and pledged all of his T&T stock to DeVille as security for payment of the note. The eventual goal of the arrangement was to effect a 50 percent division of ownership between DeVille and Roscigno and a 60 percent division of profits, respectively. *Id.*

DeVile was to have complete control over the business of T&T including the construction and resale of the Herndon property. DeVile and his son became the corporation's officers and directors. For various reasons, the property was never developed. On October 31, 1989, DeVile sent notice to the T&T shareholders of a special meeting to be held on November 27, 1989. The stated purpose of the meeting was to vote on the sale of T&T's principal asset and the dissolution of T&T due to a negative net worth and negative income. The notice also provided that DeVile would be a potential purchaser of the asset. Additionally, DeVile prepared a balance sheet reflecting an indebtedness of the corporation to him of \$534,033.⁹⁷

The shareholders met and passed a resolution, with DeVile voting Roscigno's stock by proxy and consent by the other shareholders, approving the sale of T&T's principal asset to a general partnership in which DeVile was a partner, and the dissolution of T&T. Roscigno received no monetary distribution from the sale or dissolution.⁹⁸

Roscigno filed suit against DeVile and T&T (1) seeking enforcement of certain statutory rights, including the statutory requirements governing notice of shareholders meetings, affiliated transactions and shareholder dissenter's rights, (2) alleging improper use of proxy and seeking to have the shareholder resolutions voided and (3) alleging breach of fiduciary obligations by DeVile.⁹⁹

The court ruled that the transaction constituted an unauthorized affiliated transaction under the Stock Corporation Act.¹⁰⁰ With exceptions not applicable to the transaction in *Roscigno*, sec-

97. *Id.*

98. *Id.* Roscigno's attorney was present at the meeting and voiced an objection to the propriety of the action taken, but did not expressly seek to revoke the proxy previously given. *Id.*

99. *Id.* at 99. The court first held that the notice of the special shareholders' meeting satisfied the requirements of sections 13.1-724(D) and 13.1-658 of the Stock Corporation Act even though the notice did not contain a statement that the T&T Board of Directors recommended the transaction. *Id.* Section 13.1-724(B)(1) of the Act requires that for the board of directors to "authorize" a sale of substantially all of a corporation's assets as contemplated under subsection (A), the board must "submit the proposed transaction to the shareholders with its recommendation," unless the board determines that because of conflicts of interest or other special circumstances a recommendation should not be made. VA. CODE ANN. § 13.1-724(B)(1) (Repl. Vol. 1993). The court held, however, that the act does not require that the notice to the shareholders contain a statement to such effect. *Roscigno*, 28 Va. Cir. at 99.

100. *Roscigno*, 28 Va. Cir. at 100.

tion 13.1-725.1 of the Stock Corporation Act provides that a corporation may not engage in an affiliated transaction¹⁰¹ with an interested shareholder¹⁰² for a period of three years following such interested shareholder's determination date, unless the transaction is approved by the affirmative vote of a majority (but not less than two) of the disinterested directors and by the affirmative vote of the holders of two-thirds of the voting shares other than shares beneficially owned by the interested shareholder.¹⁰³

The court held that because DeVille was the beneficial owner of Roscigno's shares by virtue of his proxy rights entitling him to vote such shares, the transaction by which T&T sold its principal asset to an entity in which DeVille was a partner constituted an "affiliated transaction" under section 13.1-725.1.¹⁰⁴ As a result, the transaction constituted an unauthorized affiliated transaction because T&T had only two directors, one of whom was DeVille, who was interested in the transaction.¹⁰⁵

In addition, the court found that DeVille breached his fiduciary duties to Roscigno while acting in his capacity both as a proxy holder and as an officer and director of T&T.¹⁰⁶ As a proxy holder, the court construed general principles of agency and corporate law to find that in Virginia a proxy holder is in a fiduciary relationship with the shareholder to the extent of the matters within the scope

101. VA. CODE ANN. § 13.1-725.1 (Repl. Vol. 1993). An "affiliated transaction" as defined in the Stock Corporation Act includes, among other transactions, any sale, except for transactions in the ordinary course of business, to or with any interested shareholder of any assets of the corporation having an aggregate fair market value in excess of five percent of the corporation's consolidated net worth, or the dissolution of the corporation if proposed by or on behalf of an interested shareholder. *Id.* § 13.1-725 (Repl. Vol. 1993).

102. *Id.* § 13.1-725.1. An "interested shareholder" is defined as any person that is the beneficial owner of more than ten percent of any class of the voting shares of the corporation. *Id.* § 13.1-725. A person is deemed to be a "beneficial owner" of voting securities as to which such person has, directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, voting powers, including the power to vote or to direct the voting of voting shares. *Id.*

103. *Id.* § 13.1-725.1.

104. *Roscigno*, 28 Va. Cir. at 100.

105. *Id.* The court ruled against Roscigno on his argument that he was entitled to dissenter's rights since such rights extend only to shareholders who are entitled to vote on the sale or exchange and Roscigno had no voting rights as a result of the proxy assignment to DeVille. *Id.*; see VA. CODE ANN. § 13.1-730 (Repl. Vol. 1993).

106. *Id.* at 101-03.

of his agency.¹⁰⁷ DeVille, the court ruled, breached his fiduciary duty by voting the shares which he held as proxy to his benefit.¹⁰⁸

As an officer and director of T&T, DeVille had a fiduciary duty to Roscigno as a shareholder to exercise good faith in his dealings with T&T and the shareholders.¹⁰⁹ Under Virginia law, a director of a private corporation may not directly or indirectly, in any transaction in which he is under a duty to guard the interests of the corporation, acquire any personal advantage, or make any profit for himself. If he does so, he may be compelled thereafter to account to the corporation.¹¹⁰ Although such an affiliated transaction is not necessarily void, it is presumed to be invalid and the fiduciary bears the burden of proving that the transaction was valid.¹¹¹

The court found that DeVille failed to show that he was entitled to receive the \$534,033 from T&T in connection with the sale of its principal asset. Therefore, DeVille did not meet his burden of proof to show that the transaction was fair and characterized by the utmost good faith.¹¹²

G. Successor Liability for Product Liability Claims

In *Taylor v. Atlas Safety Equipment Co.*,¹¹³ the United States District Court for the Eastern District of Virginia held that a purchasing corporation in an asset acquisition was not subject to

107. *Id.* at 102 (citing *Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 S.E.2d 592, 594 (1984); *H-B Partnership v. Wimmer*, 220 Va. 176, 179, 257 S.E.2d 770, 773 (1979); *Mutual Reserve Fund Ass'n v. Taylor*, 99 Va. 208, 219, 37 S.E. 854 (1901)).

108. *Id.*

109. *Id.* (citing *Giannotti v. Hamway*, 239 Va. 14, 24, 387 S.E.2d 725, 730 (1990); *Glass v. Glass*, 228 Va. 39, 47, 321 S.E.2d 69, 74 (1984); *Adelman v. Conotti Corporation*, 215 Va. 782, 789, 213 S.E.2d 774, 778 (1975)).

110. *Roscigno*, 28 Va. Cir. at 103 (citing *Giannotti*, 239 Va. at 24, 387 S.E.2d at 725).

111. *Roscigno*, 28 Va. Cir. at 103 (citing *Giannotti*, 239 Va. at 24, 387 S.E.2d at 725); *Adelman*, 215 Va. at 789, 213 S.E.2d at 778.

112. *Roscigno*, 28 Va. Cir. at 103. With respect to Roscigno's argument that his proxy was improperly voted because it was revoked, the court held that although the proxy rights were revocable because there was no conspicuous statement of irrevocability. *Id.* at 101. See VA. CODE ANN. § 13.1-663 (Repl. Vol. 1993). The proxy was not properly revoked prior to the meeting. *Id.* at 101. Generally, if a proxy remains revocable, it may be revoked by the simple act of the shareholder of record appearing at the shareholders' meeting and voting or offering to vote the stock. *Id.* (citing 18A AM. JUR. 2D *Corporations* § 1094 (1993)). Roscigno did not appear at the meeting, and his attorney, although voicing an opinion as to the propriety of the action, did not specifically revoke the proxy and was not authorized to vote Roscigno's shares. *Id.*

113. 808 F. Supp. 1246 (E.D. Va. 1992).

successor liability for a tort committed by the selling corporation, notwithstanding that the purchasing corporation and the selling corporation had: (1) the same president, address and phone number (2) many of the same customers; and (3) sold the same product.¹¹⁴

The plaintiff, injured while working at a construction site in Virginia after a snap hook assembly he was wearing opened and caused him to fall,¹¹⁵ brought a product liability action against Atlas Safety Equipment Company, Inc., a New York corporation (Atlas), the snap hook manufacturer, and Atlas' successor corporation, Gemtor, Inc., a New Jersey corporation (Gemtor). Prior to the date of the accident, One Johnson Avenue Corporation (JAC), a New Jersey corporation, acquired, for \$25,000 cash, certain of Atlas' assets and trade debts, but specifically did not assume liability for any pending or future product liability claims against Atlas.¹¹⁶ JAC's sole shareholder was Atlas' president at the time, Alan Neustater.¹¹⁷ Thereafter, Atlas ceased doing business and was eventually dissolved three years after the date of acquisition.¹¹⁸

Contemporaneous with the formation of JAC, Neustater formed Gemtor and became Gemtor's president, sole director and shareholder.¹¹⁹ Gemtor subsequently began manufacturing and selling fall protection equipment, including the product at issue, using JAC's machinery that had apparently been abandoned.¹²⁰ Gemtor hired many of Atlas' former employees pursuant to new employment agreements, entered into a new lease on the premises formerly occupied by Atlas, and assumed Atlas' telephone number.¹²¹ Gemtor sold products to some of Atlas' former customers, although Gemtor did not sell any product stamped with the Atlas name, and did not fill any orders with Atlas' materials or inventory.¹²²

As a general rule, a corporation that purchases the assets of another corporation is not liable for the debts and contingent liabilities.

114. *Id.* at 1252.

115. *Id.* at 1248.

116. *Id.* at 1249.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* It is unclear from the opinion whether Gemtor contracted directly with either Atlas or JAC to acquire such assets.

121. *Id.*

122. *Id.*

ties of the selling corporation, including product liability claims.¹²³ Virginia law recognizes four traditional exceptions to the general rule.¹²⁴ The court stated:

In order to hold a purchasing corporation liable for the obligations of the selling corporation, it must appear that (1) the purchasing corporation expressly or impliedly agreed to assume such liabilities; (2) the circumstances surrounding the transaction warrant a finding that there was a consolidation or *de facto* merger of two corporations; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is fraudulent in fact.¹²⁵

The court rejected plaintiff's argument that the transaction constituted a *de facto* merger because there was no continuity of ownership between Atlas and Gemtor.¹²⁶ The court stated that although the Supreme Court of Virginia has not squarely addressed the concept in the area of successor liability, Virginia would likely adopt the traditional view of the *de facto* merger exception.¹²⁷ The elements of the exception are (1) a continuity of the selling corporation's enterprise, including continuity of management, personnel, physical location, assets, and general business operations, (2) a continuity of ownership because the purchasing corporation acquires the assets with shares of its own stock, which ultimately are held by the selling corporation's shareholders, (3) prompt liquidation and dissolution of the selling corporation's business operations, and (4) an assumption by the purchasing corporation of the selling corporation's obligations necessary for normal operation of the seller's business.¹²⁸ The key element of a *de facto* merger is a continuity of ownership between the selling and purchasing corpo-

123. *Id.* at 1250 (citing *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985); *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987); 15 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7122, 7123, 7123.05 (Perm. Ed. 1990)).

124. *Taylor*, 808 F. Supp. at 1250 (citing *Harris v. T.I., Inc.*, 243 Va. 63, 413 S.E.2d 605 (1992)).

125. *Id.* (quoting *Harris*, 243 Va. at 70, 413 S.E.2d at 609). The plaintiff did not contend that Gemtor expressly or impliedly agreed to assume Atlas' liabilities or that the purchase of Atlas' assets was fraudulent.

126. *Id.* at 1251.

127. *Id.* at 1250 (citing *Harris*, 243 Va. at 69-72, 413 S.E.2d at 609-10).

128. *Id.* at 1250-51.

rations.¹²⁹ The *Taylor* Court held that this essential element was not present because Gemtor purchased Atlas' assets for cash, no shareholders of Atlas became shareholders of Gemtor, and because no shareholders of Gemtor obtained an ownership interest in Atlas as a result of the transaction.¹³⁰

The court also rejected plaintiff's argument that Gemtor was a "mere continuation" of Atlas.¹³¹ Under the traditional view adopted by Virginia¹³² of whether one corporation is the "mere continuation" of another, the essential inquiry is whether there has been a continuation of the corporate entity of the seller, not whether there has been a continuation of the seller's business operations.¹³³ As the Virginia Supreme Court recently observed in *Harris*, the "key element" of such inquiry is whether there is "[a] common identity of the officers, directors, and stockholders in the selling and purchasing corporations."¹³⁴

In rejecting plaintiff's claim that Gemtor was a mere continuation of Atlas under Virginia law, the court found that there was no identity of ownership between Atlas and Gemtor, except for Neustater, there was no identity of management between Atlas and Gemtor, and there remained two corporations following the transaction as Atlas continued its corporate existence for approximately three-and-one-half years prior to dissolving.¹³⁵

III. RECENT LEGISLATIVE DEVELOPMENTS

During the 1993 Session of the Virginia General Assembly, eleven bills were proposed in the corporation, partnership and lim-

129. *Id.* (citing *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977) ("[a]bsent a transfer of stock, the nature and consequences of a transaction are not those of a merger."); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439-40 (7th Cir. 1977); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 884 (E.D. Va. 1987) ("[t]he essential characteristic of a *de facto* merger is the succession of the selling corporation's stockholders to stockholder status in the purchasing corporation.")).

130. *Taylor*, 808 F. Supp. at 1251.

131. *Id.* at 1252.

132. *Id.* at 1251 (citing *Harris v. T.I., Inc.*, 243 Va. 63, 69-72, 413 S.E.2d 605, 609-10 (1992)).

133. *Taylor*, 808 F. Supp. at 1251 (citing *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Travis*, 565 F.2d at 447; *Crawford Harbor*, 661 F. Supp. at 885; *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 98 (Minn. 1989)).

134. *Taylor*, 808 F. Supp. at 1251 (quoting *Harris*, 243 Va. at 70, 413 S.E.2d at 609).

135. *Id.*

ited liability company area. All of these bills were passed and signed by Governor Wilder.¹³⁶

A. *Distribution of Shareholders' Life Insurance Policy Proceeds*

The Stock Corporation Act was amended to change the definition of "distribution" to exclude a corporation's acquisition of shares from the estate of a deceased shareholder.¹³⁷ This exclusion, however, is effective only to the extent that (1) the corporation purchases the shares using proceeds of insurance on the deceased shareholder's life and (2) the board of directors approved the policy and the redemption terms prior to the shareholder's death. This legislation was endorsed by the Virginia Bar Association.

Those attorneys who represent small corporations should make special note of this legislation. Many small closely held corporations have redemption or buy-out agreements between the corporation and certain shareholders which provide that upon the death of a shareholder his or her shares shall be purchased by the corporation with proceeds from life insurance policies. At the time of the death of any shareholder, however, the corporation may be prohibited by the solvency requirements of the Stock Corporation Act from paying to the estate of the deceased shareholder the life insurance proceeds as a distribution. Accordingly, if the corporation and the shareholders desire for this type of payment to be made and not deemed a distribution, counsel must ensure that the statutory requirements to avoid characterization as a "distribution" in section 13.1-603 are satisfied. These procedural requirements are

136. The legislation enacted in the corporate, partnership and limited liability company areas that is not discussed in this article includes the removal of the general restrictions in Code of Virginia §§ 13.1-308 and 13.1-336 on the use of the word "cooperative" as part of a corporate or business name for corporations or associations whose purpose is to promote housing opportunities or to represent, coordinate and further the purposes of groups organized to construct, operate or promote housing. Act of Mar. 29, 1993, ch. 822, 1993 Va. Acts 822 (codified at VA. CODE ANN. §§ 13.1-308 and 13.1-366 (Repl. Vol. 1993)).

Also, gas companies and electric companies are authorized to enter into partnership agreements, joint ventures or other associations where the purposes of such partnerships, joint ventures or other associations are found by the State Corporation Commission to be in direct furtherance of such entities certificated business and are otherwise found to be in the public interest. Act of Mar. 11, 1993, ch. 143, 1993 Va. Acts 143 (codified at VA. CODE ANN. § 13.1-627 (Repl. Vol. 1993)). Under current law, such business arrangements are permitted only between gas companies or between electric companies.

137. Act of Mar. 15, 1993, ch. 200, 1993 Va. Acts 200 (codified at VA. CODE ANN. § 13.1-603 (Repl. Vol. 1993)).

designed to prevent abuse of this characterization of life insurance proceeds.

B. *Shareholder Derivative Actions*

In the wake of "major additions to, and revisions of, Virginia's derivative suit statute" in 1992 by the Virginia General Assembly,¹³⁸ the 1993 Virginia General Assembly changed the recently enacted statute¹³⁹ to amend provisions governing the conduct of shareholder derivative actions. Under prior law, a court could dismiss a shareholder derivative action if the court found, among other things, (1) that corporate representatives determined that maintenance of the shareholder derivative action was not in the best interest of the corporation, and (2) the corporate representative submitted a short and concise statement of the reasons for the determination and such determination was not "manifestly unreasonable." The 1993 amendment to the statute eliminates the requirement that the determination not be "manifestly unreasonable."¹⁴⁰ This change makes this statute consistent with the comparable provisions of the Model Business Corporation Act.¹⁴¹

The General Assembly also enacted two procedural changes to the derivative action statute, both of which should benefit plaintiffs. Under the 1992 legislation, a court could order the plaintiff to pay fees and expenses if the court determined that the action was commenced or maintained "without reasonable cause."¹⁴² The legislature modified this standard so that a court must find that the action was commenced or maintained "arbitrarily, vexatiously or not in good faith," in order to award fees and expenses to the defendant.¹⁴³ The legislature also eliminated provisions which permitted a court to direct the plaintiff, at any time during a derivative suit proceeding, to post a bond representing fees the plaintiff could be ordered to pay to the defendant.¹⁴⁴

138. ALLEN C. GOOLSBY, *VIRGINIA CORPORATION LAW AND PRACTICE* 82 (1992); see also George C. Freeman III, *Business and Corporate Law*, 26 U. RICH. L. REV. 653, 673-75 (1992).

139. Act of Mar. 15, 1993, ch. 233, 1993 Va. Acts 233 (codified at VA. CODE ANN. §§ 13.1-672.4, -672.5 (Repl. Vol. 1993)).

140. *Id.* 258 (codified at VA. CODE ANN. § 13.1-672.4(A)(3) (Repl. Vol. 1992)).

141. Goolsby, *supra* note 138, at 88.

142. VA. CODE ANN. § 13.1-672.5(A)(2) (Cum. Supp. 1992).

143. Act of Mar. 15, 1993, ch. 233, 1993 Va. Acts 258 (codified at VA. CODE ANN. § 13.1-672.5(2) (Repl. Vol. 1993)).

144. Act of Mar. 15, 1993, ch. 233, 1993 Va. Acts 233 (codified at VA. CODE ANN. § 13.1-672.5(B) (Repl. Vol. 1993)).

C. *Limited Liability Companies*

The 1993 Virginia General Assembly adopted some technical amendments¹⁴⁵ to Virginia's Limited Liability Company Act.¹⁴⁶ House Bill 1787, as enacted (1) amends the procedural requirements for conversion of a general or limited partnership to a limited liability company,¹⁴⁷ (2) permits professional limited liability companies to serve as registered agents,¹⁴⁸ (3) changes the Professional Limited Liability Company Act to conform to the Professional Corporation Act,¹⁴⁹ and (4) adds limited liability companies to the list of entities that are not entitled to plead usury as a defense.¹⁵⁰ In addition, the General Assembly authorized public service companies, banking corporations, insurance corporations, savings and loan associations, credit unions, and industrial loan associations to purchase the securities of a limited liability company.¹⁵¹

D. *"Good Standing" Status of Corporations*

The General Assembly revised the provisions in the Virginia Stock and Nonstock Corporations Acts pertaining to a corporation's "good standing" status.¹⁵² The "good standing" statutes in each of these Acts previously provided that a corporation was in good standing if, among other things, it filed an annual report with the State Corporation Commission (SCC) within the preceding fourteen months.¹⁵³ Because of 1991 amendments to the Virginia Stock and Nonstock Corporation Acts, each corporation is required to file an annual report not later than the first of September of

145. Act of Mar. 10, 1993, ch. 113, 1993 Va. Acts 113 (codified at VA. CODE ANN. §§ 6.1-330.76, 13.1-619, 13.1-634, 13.1-819, 13.1-833, 13.1-1001.1, 13.1-1002, 13.1-1005, 13.1-1010.1, 13.1-1010.2, 13.1-1011, 13.1-1015, 13.1-1023, 13.1-1038.1, 13.1-1067, 13.1-1071, 13.1-1072, 13.1-1102 (Repl. Vol. 1993)).

146. Act of Mar. 10, 1993, ch. 113, 1993 Va. Acts 114 (codified at VA. CODE ANN. §§ 13.1-1000 to 1069 (Repl. Vol. 1993)).

147. *Id.* (codified at VA. CODE ANN. §§ 13.1-1010.1, 13.1-1010.2, 13.1-1067 (Repl. Vol. 1993)).

148. *Id.* (codified at VA. CODE ANN. §§ 13.1-619, 13.1-634, 13.1-819, 13.1-833, 13.1-1011 (Repl. Vol. 1993)).

149. *Id.* (codified at VA. CODE ANN. § 13.1-1102 (Repl. Vol. 1993)).

150. *Id.* (codified at VA. CODE ANN. § 6.1-330.76 (Cum. Supp. 1993)).

151. Act of Mar. 5, 1993, ch. 61, 1993 Va. Acts 61 (codified at VA. CODE ANN. §§ 13.1-620, -627 (Repl. Vol. 1993)).

152. Act of Mar. 5, 1993, ch. 60, 1993 Va. Acts 60 (codified at VA. CODE ANN. §§ 13.1-609, -809 (Repl. Vol. 1993)).

153. VA. CODE ANN. §§ 13.1-609, 13.1-809 (Cum. Supp. 1992).

each year to avoid being terminated or having its certificate of authority revoked, under prior law, a corporation that had filed an annual report within the last fourteen months but had not filed a current report would have been considered in "good standing" even though it would have been terminated on September first. The new legislation deletes the fourteen-month provision. Thus, if a corporation's annual corporate report is not filed with the SCC by the April 1 due date, the corporation will not be reported by the SCC as a corporation in good standing on and after April 2, irrespective of when the corporation's last report was filed. That status will continue until the report is filed or the corporation is terminated or has its certificate revoked on September first.

E. *Virginia Securities Act*

Under Senate Bill 731, the SCC has been given the authority to waive the requirement that a prospectus be delivered for offers and sales of securities registered by notification.¹⁵⁴ When securities are first sold in an initial public offering, the issuer, as the primary beneficiary of the sale, provides a sales prospectus furnishing key financial information about the company. In subsequent sales of the securities in the secondary market (non-issuer sales), the most current information about the issuer will be found in quarterly or annual reports. Accordingly, purchasers in the secondary market do not ordinarily rely on the now-obsolete information contained in the initial public offering prospectus. Nevertheless, the provisions of Code of Virginia section 13.1-508 currently require broker-

154. Act of Mar. 15, 1993, ch. 179, 1993 Va. Acts 179 (codified at VA. CODE ANN. § 13.1-508 (Repl. Vol. 1993)). Registration by notification operates as an abbreviated process for registering securities in Virginia. This shortened registration process is available to an issuer that has been in continuous operation for at least five years, with no default occurring on any securities for the past three years, and either (A) meets certain financial standards with respect to its operations or securities offerings or (B) for securities being registered in connection with a non-issuer distribution, the securities are of the same class as any securities that have been duly registered or, alternatively, the securities were issued originally pursuant to an exemption under the Virginia Securities Act (VA. CODE ANN. § 13.1-507(A) (Repl. Vol. 1993)).

The registration statement must include the following: (1) facts evidencing the eligibility for registration by notification; (2) the amount and maximum offering price of the securities being offered; and (3) a copy of any prospectus used in the offering. Absent the issuance of a stop order by the SCC with respect to the offering, the registration statement automatically becomes effective on the second full business day following the filing of the registration statement, or at any time earlier as determined by the SCC. In connection with the offering of securities registered by notification, the SCC may require that a prospectus detailing certain prescribed information be delivered to each person to whom an offer is made.

dealers to furnish a prospectus in connection with any sale of a security, making no distinction between initial public offerings and secondary market sales.¹⁵⁵

The new legislation authorizes the SCC to relieve broker-dealers of the obligation to distribute a current prospectus in connection with securities registered by notification and it is anticipated that waivers from the prospectus may be available for secondary market offerings. Nonetheless, the prospectus requirement for initial public offerings is expected to remain applicable.

The SCC was also given the authority to require only the information it deems appropriate in a registration statement filed in connection with a registration by qualification¹⁵⁶ under section 13.1-510 of the Securities Act.¹⁵⁷ It is anticipated that under this new authorization, the SCC will be authorized to accept the Small Corporate Offering Registration Form (Form U-7) for small business applicants. Thus, registration by qualification should be less burdensome for small businesses.

The Virginia Securities Act was also amended to provide a self-claiming exemption from the securities registration requirements with respect to a security issued by a Virginia church and offered or sold only to and by its members provided they are Virginia residents and do not receive compensation, either directly or indirectly, for offering or selling the security.¹⁵⁸ Under prior law, such

155. VA. CODE ANN. § 13.01-508 (Repl. Vol. 1993).

156. Registration by qualification, available to any security to be sold in Virginia, involves the registration of securities through full and thorough disclosure of all material information relating to the issuer and the securities offering. The registration statement, filed with the SCC, must disclose, among other things, basic information regarding (1) the corporation and its business; (2) the officers and directors, including information regarding any remuneration to be received by such persons for selling the securities; (3) the capitalization and long term debt of the issuer and any subsidiaries, including descriptions regarding any outstanding classes of securities; (4) the terms and nature of the securities offering; (5) the estimated cash proceeds that the issuer expects to receive; (6) a description of any outstanding stock options; and (7) a description of all material contracts outside the ordinary course of business. In addition, with the registration statement the following items must also be included (1) a copy of any prospectus, sales literature or other advertisement regarding the offering; (2) a specimen of the securities being registered; (3) an opinion of counsel as to the legality of the securities being registered; and (4) various financial statements of the issuer. The registration statement becomes effective only upon an order of the SCC. A prospectus detailing certain prescribed information must be delivered to each person to whom an offer is made. VA. CODE ANN. 13.1-510 (Repl. Vol. 1993).

157. VA. CODE ANN. § 13.1-510 (Repl. Vol. 1993)).

158. VA. CODE ANN. §§ 13.1-514, -514.1 (Repl. Vol. 1993)).

exemptions were obtained only upon filing and receiving an order of exemption from the State Corporation Commission.¹⁵⁹

F. *Limited Partnerships*

The General Assembly made minor technical changes to the Virginia Revised Uniform Limited Partnership Act, including changes relating to general partnership conversion, registered agent requirements, and filing and fee requirements.¹⁶⁰

IV. CONCLUSION

There were numerous significant developments in Virginia's business and corporate law during the past year, including several Virginia circuit court opinions. Because of the wider circulation of circuit court opinions through the *Virginia Circuit Court Reporter* and *Virginia Law Weekly*, practitioners can now look to these courts more readily for guidance on business law issues. In addition, the 1993 General Assembly enacted several statutes which further illustrate Virginia's commitment to remaining in the forefront of business law issues.

159. VA. CODE ANN. § 13.1-514 (Cum. Supp. 1992).

160. Act of Mar. 17, 1993, ch. 292, 1993 Va. Acts 292 (codified at VA. CODE ANN. §§ 50-37.1, -37.3, -73.4, -73.11, -73.11:1, -73.12, -73.13, -73.15, -73.17, -73.57, -73.77 (Cum. Supp. 1993)).