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Annual Survey of Virginia Law: Corporate and Business Law

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CORPORATE AND BUSINESS LAW

*Robert L. Freed**

I. INTRODUCTION

Corporate and business law has undergone a variety of changes in the past two years. This article summarizes the developments that occurred in this area of the law from June 1996, through June 1998. In 1997, the Virginia General Assembly amended numerous provisions of the Virginia Code. The amendments became effective January 1, 1998. Virginia state courts and the federal courts have issued opinions which have impacted the law in this area. Part II examines the abundant legislative changes made to title 13.1 of the Virginia Code and the recent judicial decisions affecting corporations. Most of the changes discussed were made by the 1997 Session of the Virginia General Assembly. The 1998 Session made very few notable changes to the Virginia Code. Part III discusses the recent legislative and judicial developments affecting limited liability companies. And finally, Part IV reviews the recent legislative developments affecting partnerships, but does not address the amendments to the Virginia Uniform Partnership Act which were made by the General Assembly in its 1996 Session.¹

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1. For a discussion of amendments made to the Virginia Uniform Partnership Act, see William A. Musgrove, *Business and Corporate Law*, 30 U. RICH. L. REV. 1219, 1256-57 (1996). For a brief discussion of certain sections of the Virginia Uniform Partnership Act affecting mergers of partnerships with another entity, see *infra* notes 130-36 and accompanying text.

II. CORPORATIONS

A. Legislative Changes—Deadlines

The 1997 Session of the Virginia General Assembly amended numerous sections of title 13.1 of the Virginia Code. Some of the amendments became effective immediately and some of the amendments did not become effective until January 1, 1998.² Fewer amendments were made to title 13.1 of the Virginia Code in the 1998 Session of the Virginia General Assembly than in its 1997 Session.

The 1997 Session amended several deadlines which became effective January 1, 1998. Stock corporations and nonstock corporations must pay annual registration fees to the State Corporation Commission ("the Commission"), pursuant to Virginia Code sections 13.1-615³ and 13.1-815⁴ respectively. A corporation that has filed effectively a certificate of termination, withdrawal, or merger by a specified date will not have to pay the registration fee for that year. The 1997 Session eliminated March 15 as the cutoff date and, instead, amended the statute to provide that, if the certificate is effective by the date the annual report of the corporation is due,⁵ then that corporation will not have to pay the registration fee for that year.⁶

In addition, the Commission will reassess the registration fee for a foreign corporation if it effectively amends its articles of incorporation to reduce the number of shares it is authorized to issue. The 1997 Session eliminated January 1 as the cutoff date and, instead, amended the statute to provide that, if the foreign stock corporation makes the amendment to its articles effective by the date that the Commission is required to assess the corporation's registration fee, the Commission will reassess the fee.⁷

2. See *infra* notes 3-7 and accompanying text.

3. VA. CODE ANN. § 13.1-615(A) (Cum. Supp. 1998).

4. *Id.* § 13.1-815(A) (Cum. Supp. 1998).

5. For a stock corporation, the due date for the annual report is provided in Virginia Code section 13.1-775(C). *Id.* § 13.1-775(C) (Cum. Supp. 1998); see *infra* note 14 and accompanying text. For a nonstock corporation, the due date for the annual report is provided in Virginia Code section 13.1-936(C). *Id.* § 13.1-936(C) (Cum. Supp. 1998); see *infra* note 14 and accompanying text.

6. See VA. CODE ANN. §§ 13.1-615(B), -815(B) (Cum. Supp. 1998).

7. See *id.* § 13.1-775.1(B) (Cum. Supp. 1998). Each year, the Commission is re-

The Commission must terminate automatically the corporate existence of any domestic corporation when it fails to file annual reports and to pay annual registration fees by a specific deadline. Virginia Code sections 13.1-752 and 13.1-768, governing stock and nonstock corporations respectively, now state that to avoid automatic termination of corporate existence, all corporations must file an annual report with the Commission before the last day of the fourth month immediately following the date that its annual report is due.⁸

This amendment was made only to accommodate the amendments made to Virginia Code sections 13.1-775 and 13.1-936,⁹ which establish the filing due date of annual reports. Prior to 1998, annual reports were due between January 1 and April 1 of each year; therefore, automatic termination of corporate existence would occur if annual reports were not filed four months after April 1, which is September. The 1997 Session of the General Assembly amended sections 13.1-775 and 13.1-936 such that the filing due date for each corporation is dependent upon the corporation's date of incorporation.¹⁰ Consequently, the General Assembly had to amend sections 13.1-752 and 13.1-768 to allow every corporation an equal opportunity to file its annual report before the Commission terminates its corporate existence.¹¹

In addition, the Commission must terminate the corporate existence of a domestic corporation if it fails to pay the annual registration fee by "the last day of the fourth month immediately following the due date" of the corporation's annual report.¹²

quired to assess a registration fee for every corporation by a date specified in Virginia Code section 13.1-775.1(B). *See id.*

8. *See id.* §§ 13.1-752(A), -768(A) (Cum. Supp. 1998); *see also infra* notes 14-15 and accompanying text.

9. VA. CODE ANN. §§ 13.1-775(C), -936(C) (Cum. Supp. 1998) (governing stock and nonstock corporations); *see also infra* notes 16-18 and accompanying text.

10. *See* VA. CODE ANN. §§ 13.1-775(C), -936(C) (Cum. Supp. 1998).

11. *See id.* §§ 13.1-752, -768 (Cum. Supp. 1998).

12. *Id.* § 13.1-752(B) (Cum. Supp. 1998) (governing stock and nonstock corporations); *see also infra* notes 16-18 and accompanying text. If a corporation fails to pay the annual registration fee, although its corporate existence will not be terminated until the last day of the fourth month following the filing due date of the annual report, it will have to pay a penalty for any payments made after the annual report due date. *See* VA. CODE ANN. §§ 13.1-752(B)(1), -768(B)(1) (Cum. Supp. 1998).

Similarly, the Commission must automatically revoke the certificate of authority of a foreign corporation when it fails to meet the deadlines discussed above.¹³

The 1997 Session amended the due date of the annual report of a domestic or foreign corporation. The annual report must now be

filed with the Commission by the last day of the twelfth month next succeeding the date it was incorporated or authorized to transact business in this Commonwealth, and by such date in each year thereafter. The report shall be filed no earlier than three months prior to its due date each year.¹⁴

In the past, annual reports were due between January 1 and April 1 of each year, without exception; however, the 1997 Session of the General Assembly created an exception to the above deadline by granting the Commission discretion to extend the filing due date on a monthly basis for up to eleven months.¹⁵

The Commission has to assess the registration fee that each corporation must pay "as of the first day of the second month next preceding the month of the corporation's annual registration fee due date each year."¹⁶ If such due date has been extended pursuant to section 13.1-775(C) or section 13.1-936(C), the Commission will increase the assessment "by a prorated amount to cover the period of extension."¹⁷ After the assessment has been made as provided in the amended Virginia Code,¹⁸ each corporation has to pay its annual registration fee

13. See VA. CODE ANN. at §§ 13.1-768 to 930 (Cum. Supp. 1998) (governing the automatic revocation of the certificate of authority of a foreign stock and nonstock corporation). The Commission may not terminate the corporate existence of a foreign corporation, but the Commission does have the authority to prevent the foreign corporation from transacting business in the Commonwealth of Virginia.

14. *Id.* §§ 13.1-775(C), -936(C) (Cum. Supp. 1998) (governing stock and nonstock corporations).

15. *See id.*

16. *Id.* §§ 13.1-775.1(B), -936.1(B) (Cum. Supp. 1998). The amount of a stock corporation's registration fee depends on the number of shares it is authorized to issue. *See id.* § 13.1-775.1(A) (Cum. Supp. 1998). Nonstock corporations, however, pay an annual registration fee of \$25. *See id.* § 13.1-936.1(A) (Cum. Supp. 1998).

17. *Id.* §§ 13.1-775.1(B), -936.1(B) (Cum. Supp. 1998).

18. *See id.* §§ 13.1-752(B)(1), -768(B)(1) (Cum. Supp. 1998) (governing domestic and foreign stock corporations); *id.* §§ 13.1-914(B)(1), -930(B)(1) (Cum. Supp. 1998) (govern-

by the amended filing due date of the corporation's annual report.

B. *Judicial Decisions*

1. Corporate Dissolution

In *Horton v. Howard Horton & Overlord Investments, Inc.*,¹⁹ the plaintiff, a fifty percent shareholder in the corporation, brought an action against the defendant and the defendant corporation, seeking corporate dissolution on the ground of shareholder oppression. The plaintiff and the defendant were married when the defendant transferred fifty percent of the shares of stock in his corporation to the plaintiff. The transfer was made to induce the plaintiff to obtain refinancing on other properties unrelated to those owned by the corporation. Although the plaintiff was a fifty percent shareholder, the defendant excluded the plaintiff from all aspects of the business and continued to operate the corporation without consulting the plaintiff.²⁰

The plaintiff brought this action against the defendant after the couple divorced. The defendant argued that when he transferred the fifty percent interest in his corporation, he was under economic duress. The Arlington Circuit Court rejected the defendant's argument and required that he pay the plaintiff fifty percent of the value of the corporation or dissolve the corporation and divide the net proceeds of dissolution.²¹

The Rockingham Circuit Court also faced a shareholder oppression claim in *Stickley v. Stickley*.²² William Stickley possessed a thirty-five percent minority interest in J.O. Stickley & Sons, Inc.²³ The minority shareholder filed suit against the majority shareholder, Dan Stickley, Jr., and the corporation,

ing domestic and foreign nonstock corporations).

19. 12 Va. Law. Wkly. 1573 (June 1, 1998).

20. *See id.*

21. *See id.*

22. 43 Va. Cir. 123 (Rockingham County 1997).

23. *See id.*

seeking dissolution of the corporation for shareholder oppression.²⁴

The majority shareholder refused to provide the minority shareholder with various records and documents that the minority shareholder had requested. In addition, the majority shareholder unilaterally changed several agreements. Furthermore, the majority shareholder paid himself unreasonable compensation.²⁵ The majority shareholder also negotiated to sell the company, pretended to discuss the sales transaction with the minority shareholder after the sales contract had been entered into, filled the board of directors with the majority shareholder's wife and children, and refused to tell the minority shareholder the reason that the company's by-laws and articles of incorporation were amended, all of which were designed to acquire absolute control of the corporation.²⁶ The circuit court found that these activities were "patently oppressive by any standard of normal commercial practice and ethics."²⁷

The court further stated that "the total picture of corporate activity" must be examined in determining whether shareholder oppression exists.²⁸ Although "individual acts in a vacuum" may "pass the test of probity . . . the pattern and totality of [those] acts certainly cannot."²⁹ As a result of the majority shareholder's oppression of the minority shareholder, the court ordered corporate dissolution of the corporation³⁰ and required the appointment of a receiver to dissolve and wind up the corporation.³¹

24. *See id.*

25. The majority shareholder committed numerous other acts which the court found to be "openly oppressive conduct." *Id.* at 147.

26. *See id.*

27. *Id.*

28. *Id.* at 148.

29. *Id.*

30. The court has the authority to order involuntary corporate dissolution pursuant to Virginia Code section 13.1-747. *See* VA. CODE ANN. § 13.1-747 (Repl. Vol. 1993 & Cum. Supp. 1998).

31. *See Sticklely*, 43 Va. Cir. at 149. The court has the authority to order the appointment of a receiver to wind up and liquidate the corporation pursuant to Virginia Code section 13.1-748. *See* VA. CODE ANN. § 13.1-748 (Repl. Vol. 1993).

*Eastern Industrial Services, Inc. v. Lee*³² is another case dealing with corporate dissolution. The corporation brought suit in its own name seeking, among other actions, that the court liquidate it. Accordingly, the Amherst Circuit Court analyzed the application of Virginia Code section 13.1-747³³ and held that a corporation cannot bring an action in its own name for dissolution.³⁴ The circuit court held that an action for corporate dissolution must be brought by a shareholder, a creditor, or the board of directors.³⁵ In addition, the corporation must be named as the defendant in such a case.³⁶

2. Validity of Final Judgment Against Foreign Corporation Without Certificate of Authority

In *Quarles v. Miller*,³⁷ the Colonial Electric Company ("Colonial") was a South Carolina corporation that did not have a certificate of authority to transact business in Virginia. Colonial entered into a written contract with Commonwealth Capital Corporation ("Commonwealth") in Charlottesville, Virginia. The contract indicated that Commonwealth agreed to establish funding for Colonial's real estate project in South Carolina. The contract was executed by the vice president of Commonwealth. Commonwealth neglected to fulfill its obligations to Colonial as provided by the contract. Consequently, Colonial filed suit against both Commonwealth and its vice president to enforce the contract.³⁸

The Charlottesville Circuit Court granted judgment against Commonwealth, and the Supreme Court of Virginia granted judgment against both Commonwealth and its vice president, holding the vice president personally liable for Commonwealth's obligations to Colonial.³⁹ Soon after, Colonial filed suit against Commonwealth's vice president in state court, alleging fraudulent conveyance, and was granted judgment. In response,

32. 43 Va. Cir. 252 (Amherst County 1997).

33. VA. CODE ANN. § 13.1-747 (Repl. Vol. 1993 & Cum. Supp. 1998).

34. See *Lee*, 43 Va. Cir. at 253.

35. See *id.* at 253, 255.

36. See *id.* at 255.

37. 86 F.3d 55 (4th Cir. 1996).

38. See *id.* at 55.

39. See *id.*

Commonwealth's vice president filed suit in state court asserting that the judgment entered against him was void because Colonial, a South Carolina corporation, lacked a certificate of authority to transact business in the Commonwealth of Virginia.⁴⁰

Pursuant to Virginia Code section 13.1-758, "[a] foreign corporation transacting business in . . . [Virginia] without a certificate of authority may not maintain a proceeding in any court in . . . [Virginia] until it obtains a certificate of authority."⁴¹ Interpreting this statute, the court contended that the statute applied differently in cases of ongoing litigation than in cases where the court has entered a final judgment.⁴² The court interpreted this provision to allow it discretion to require a foreign corporation that does not have a certificate of authority to obtain such certificate before it can continue in litigation.⁴³ The court, however, relying on *Phlegar v. Virginia Foods, Inc.*,⁴⁴ asserted that a valid final judgment, which is issued by a court having personal and subject matter jurisdiction over the parties involved and which is obtained by a foreign corporation transacting business without a certificate of authority, is not void because of the failure of the foreign corporation to comply with Virginia Code section 13.1-758.⁴⁵

3. Continuity of Corporations—Successor Liability

In *Kaiser Foundation Health Plan v. Clary & Moore, P.C.*,⁴⁶ Kaiser Foundation Health Plan ("Kaiser") obtained a money judgment against Clary, Lawrence, Lickstein & Moore, P.C. (the "old firm"), a law firm, for unpaid rent. The old firm went into bankruptcy and was terminated due to severe financial difficulties, and Clary & Moore, P.C. ("Clary") was established to replace the old firm.⁴⁷ During the short duration of time when

40. *See id.*

41. VA. CODE ANN. § 13.1-758(A) (Repl. Vol. 1993 & Cum. Supp. 1998).

42. *See Quarles*, 86 F.3d at 58.

43. *See id.* (citing *Video Eng'g Co. v. Foto-Video Elecs., Inc.*, 207 Va. 1027, 154 S.E.2d 7 (1967); *Phlegar v. Virginia Foods, Inc.*, 188 Va. 747, 51 S.E.2d 227 (1949)).

44. 188 Va. at 747, 51 S.E.2d at 227.

45. *See Quarles*, 86 F.3d at 59 (citing *Phlegar*, 188 Va. at 747, 51 S.E.2d at 227).

46. 123 F.3d 201 (4th Cir. 1997).

47. *See id.* at 202.

both law firms were in existence, the new firm leased office furniture, equipment, and the services of the old firm's attorneys and staff, operated in the same office as the old firm, borrowed money from the old firm, and paid some of the debts of the old firm. After the old firm ceased to exist, almost all of the assets, employees, and clients of the old firm transferred to the new firm.⁴⁸

The debt owed to Kaiser was never paid by the old firm. Kaiser filed suit against Clary, alleging that Clary was obligated to pay the debts of the old firm because Clary was a mere continuation of the old firm. Virginia has ruled against successor liability⁴⁹ except in certain situations, such as when the purchasing firm is merely a continuation of the selling firm.⁵⁰

The court evaluated the following factors to determine whether Clary was a mere continuation of the old firm. First, "[t]he most critical element . . . is showing the same ownership of the two companies, a 'common identity of the officers, directors, and stockholders in the selling and purchasing corporations.'"⁵¹ Second, a party must show that "the new corporation continues in the same business as its predecessor, although courts point out that this is less important than identity of ownership."⁵² Third, a party must show that "transfer of the selling company's assets was done for less than adequate consideration."⁵³ Additionally, the court considered whether "only one [corporation] remain[ed] after the transaction at issue and whether the new company continues in the old offices with the same telephone number and address as the old company."⁵⁴ Applying these

48. *See id.*

49. *See id.* at 204. "In Virginia, as in most states, a company that purchases or otherwise receives the assets of another company is generally not liable for the debts and liabilities of the selling corporation." *Id.*

50. *See id.* at 205 (quoting *Harris v. T.I., Inc.*, 243 Va. 63, 70, 413 S.E.2d 605, 609 (1992)). The other exceptions to the rule against successor liability are as follows: "(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 the two corporations . . . (3) the transaction is fraudulent in fact." *Id.* at 204.

51. *Id.* (quoting *Harris*, 243 Va. at 70, 413 S.E.2d at 609).

52. *Id.* (citing *Crawford Harbor v. Blake Constr. Co.*, 661 F. Supp. 880, 885 (E.D. Va. 1987)).

53. *Id.*

54. *Id.* (citing *Blizzard v. Nat'l RR. Passenger Corp.*, 831 F. Supp. 544, 548 (E.D.

factors, the court held that Clary was a mere continuation of the old firm.⁵⁵

4. Alter-Egos, Piercing the Corporate Veil, and Equitable Subordination

In *Ost-West-Handel Bruno Bischoff GmbH v. Project Asia Line, Inc.*,⁵⁶ a vessel was sold to satisfy outstanding maritime liens. The court gave first priority to a bank holding a first preferred foreign ship mortgage. Ost-West-Handel Bruno Bischoff GmbH ("Ost"), holding a claim for unpaid charter hire for use of a different vessel by Project Asia Line, Inc.'s ("Project"),⁵⁷ and Banchory Shipping Co., Ltd. ("Banchory"), holding a similar claim against Project, attempted to collect their claims from the proceeds that resulted from the sale of the vessel.⁵⁸

The court declared that, in order for Ost and Banchory to share in the proceeds, they must show that Project held some property interest in the vessel.⁵⁹ Ost and Banchory argued that Project and Empire Shipping, S.A. ("Empire"), the registered owner of the vessel, were alter-egos.⁶⁰ They further asserted that Project was the "owner-in-fact" of the vessel.⁶¹

Virginia courts tend to uphold the separate identities of corporations. Courts will, however, look beyond the corporate structure and find that one corporation is acting merely as an alter-ego of another corporation if several of the following factors are present:

gross under capitalization of the subservient corporation, a failure to observe corporate formalities between the two, the nonpayment of dividends, the insolvency of the subservient corporation, the siphoning of funds from the subservient

Va. 1993)).

55. *See id.* In arriving at its ruling, the court also considered the fact that both law firms concentrated in the same area of law and that the old firm ceased operations soon after the transfer of all its assets to Clary. *See id.* at 206-08.

56. 970 F. Supp. 471 (E.D. Va. 1997).

57. Project is the charterer of the vessel in question in this case. *See id.* at 478.

58. *See id.*

59. *See id.* at 483.

60. *See id.*

61. *See id.*

corporation, the non-functioning officers or directors, an absence of corporate records, and complete control by a dominant stockholder. Additionally, an element of injustice or fundamental unfairness must be present.⁶²

Applying these factors, the court proclaimed that Project and Empire were not alter-egos because the "traditional hallmarks of corporate irregularity" were not present.⁶³

In *Commonwealth v. Greenberg*,⁶⁴ the Circuit Court of the City of Richmond determined whether it should pierce the corporate veil and hold Jerome Greenberg, an officer, director, and shareholder of Allstate Express Check Cashing, Inc. ("Allstate"), personally liable for violating provisions of the Virginia Consumer Finance Act ("the Act"). Allstate not only cashed its customer's checks but, for a fee, Allstate would also advance cash to its customers without depositing those customers' checks until a later date. The court held that, by its actions, Allstate was making loans to its customers. As such, Allstate was required to comply with the provisions of the Act. The court, however, found that Allstate's fees far exceeded the limits imposed by the Act.⁶⁵

With respect to Greenberg's personal liability, courts in Virginia will not pierce the corporate veil unless the following two factors are present: (1) "a showing that the corporate entity was the alter ego, alias, stooge, or dummy of the individuals sought to be held personally liable;" and (2) "a showing that the corporation was used as a device or sham to disguise wrongs, obscure fraud, or conceal crime."⁶⁶ The court held that these elements were not present in this case.⁶⁷ Although there was evidence that Allstate violated the Act, the court ruled that there

62. *Id.* at 478 (citing *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 65 (4th Cir. 1989); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686-87 (4th Cir. 1976)).

63. *Id.* at 483.

64. 42 Va. Cir. 160 (Richmond City 1997), *aff'd in part, rev'd in part*, 255 Va. 594, 499 S.E.2d 266 (1998).

65. *See id.* at 160.

66. *Id.* at 161 (citing *Cheatle v. Rudd's Swimming Pool Supply Co.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987)).

67. *See id.* at 161.

was no evidence to indicate that Greenberg created the corporation to conceal his violation of the Act.⁶⁸ Furthermore, the court determined that Greenberg established the corporation to limit his personal liability, which is the purpose of incorporation; therefore, he cannot be held personally liable unless there is evidence to show that he "was attempting to hide his misdeeds by creating an incorporated entity."⁶⁹

Alternatively, the Commonwealth of Virginia argued that Greenberg should be personally liable because he actively participated in the violation of the Act. Liability on this theory is completely distinct from liability based on the theory of piercing the corporate veil. To impose liability under the active participation theory, the Commonwealth must show only that Greenberg had knowledge of the corporation's actions and approved them. Based on evidence that Greenberg was attempting to hide the fact that the corporation was making illegal loans, the circuit court held that Greenberg was aware and approved of the corporation's actions and could be held personally liable.⁷⁰

On appeal, the Virginia Supreme Court reversed the circuit court's use of the active participation theory to hold Greenberg personally liable and affirmed the circuit court's refusal to pierce the corporate veil.⁷¹

5. Shareholder's Derivative Suit

In *Milstead v. Bradshaw*,⁷² the Circuit Court of the City of Norfolk examined the issue of whether a final divorce decree was a sufficient equitable interest for standing to bring a shareholder's derivative suit.⁷³ A final divorce decree awarded

68. *See id.*

69. *Id.*

70. *See id.* at 162-63.

71. *See Greenberg v. Commonwealth*, 255 Va. 594, 600-01, 499 S.E.2d 266, 270 (1998).

72. 43 Va. Cir. 428 (Norfolk City 1997).

73. A shareholder's right to bring a derivative suit is one crucial means by which shareholders may protect their interest in a corporation. Normally, a shareholder does not have the right to bring suit in his or her own name, but when a corporation refuses to take action, the shareholder can step forth on an individual basis. The court will not allow a shareholder to file a derivative suit unless he or she makes a

Theresa Milstead 100 shares of Currents General, Inc. The shares constituted a thirty-three percent interest in the corporation. By virtue of this transfer of stock, Milstead argued that she was a shareholder and, thus, had standing to bring a derivative suit against Currents General, Inc.⁷⁴

Virginia Code section 13.1-672.1(A) provides that only a shareholder may bring a derivative suit.⁷⁵ In addition, the shareholder must have owned stocks in the corporation at the time of the alleged wrongful act, received stocks from a person who was a shareholder at the time of the alleged wrongful act, or owned stocks prior to public disclosure of the alleged wrongful act without knowledge of such alleged wrongful act.⁷⁶ The final requirement for standing to bring a derivative suit is that the shareholder must "fairly and adequately represent . . . the interest of the corporation in enforcing the right of the corporation."⁷⁷

Theresa Milstead's husband argued that she lacked standing to bring a derivative suit because she was not a shareholder. Theresa Milstead argued that she had standing to bring a derivative suit because her final divorce decree is a "nominee certificate," thereby making her a shareholder. The court, however, rejected this argument because a procedure for nominee certificate was absent from the bylaws of Currents General, Inc.⁷⁸ In this case, the stocks could not have been directly issued by the corporation because there was no provision allowing such action in the bylaws, hence, the transfer of stock resulting from the divorce decree could not be considered a nominee certificate.⁷⁹

demand upon the corporation and the corporation fails to act within 90 days. *See* VA. CODE ANN. § 13.1-672.1(B) (Repl. Vol. 1993). If the shareholder can show that the corporation has rejected his or her demand or that there will be irreparable injury to the corporation if the corporation fails to act, then the shareholder will not have to wait until the expiration of the 90-day period. *See id.*

74. *See Milstead*, 43 Va. Cir. at 431-32.

75. *See* VA. CODE ANN. § 13.1-672.1(A) (Repl. Vol. 1993).

76. *See id.* § 13.1-672.1(A)(1)-(3) (Repl. Vol. 1993).

77. *Id.* § 13.1-672.1(A)(4) (Repl. Vol. 1993).

78. *See Milstead*, 43 Va. Cir. at 431.

79. *See id.*

Theresa Milstead then argued that the final divorce decree gave her an equitable ownership interest in Currents General, Inc. The circuit court, relying on case law from other jurisdictions, agreed with her.⁸⁰ Consequently, holders of equitable or beneficial interests in shares of stock of a corporation have standing to commence a shareholder's derivative suit.⁸¹ Actual record ownership of shares is no longer necessary to bring a derivative suit.⁸²

6. Personal Liability

In *Eckelman v. Marina Resorts Group, Inc.*,⁸³ the Fairfax County Circuit Court determined whether the two agents of Marina Resorts Group, Inc. ("Marina") would be personally liable for the terms of a written contract. Marina needed commercial financing and obtained the help of Daniel Eckelman, a commercial loan finder. Emery Boudreau, president and director of Marina, agreed to pay Eckelman a finder's commission fee and signed a fee agreement, which was written on corporate stationary. Upon the placement of the commercial loan, Mr. Boudreau and his wife were required to be personal guarantors of the corporate obligation. Eckelman never received his finder's commission fee and brought suit in an effort to hold the Boudreau's personally liable for payment of the fee.⁸⁴

Eckelman argued that Mr. Boudreau was personally liable because of his signed letter and that Mr. and Mrs. Boudreau were both personally liable because they were personal guarantors on the deed of trust note to the lending institution. The court, however, rejected these arguments.⁸⁵ First, the court held that Mr. Boudreau was not personally liable for the finder's commission fee by virtue of the signed letter because, although the letter established an agreement by Marina to pay a finder's commission fee, it did not evidence his personal

80. *See id.* at 431-32.

81. *See id.* at 432, 436.

82. *See id.* at 432.

83. 43 Va. Cir. 537 (Fairfax County 1997).

84. *See id.* at 538-39.

85. *See id.* at 537, 539.

agreement to pay the finder's fee.⁸⁶ Second, the court held that Mr. and Mrs. Boudreau could not be held personally liable by virtue of the deed of trust note because, although they agreed to act as personal guarantors for the commercial loan, they did not agree to act as personal guarantors of the finder's fee.⁸⁷

7. Indemnification

In *Davison v. FastComm Communications Corp.*,⁸⁸ the Loudoun County Circuit Court determined if, and when, officers and directors of a corporation are entitled to receive indemnification for their reasonable expenses. Pursuant to an Indemnification Agreement, the officer was entitled to indemnification for the "reasonable legal fees and expenses" incurred from the investigation conducted by the Securities and Exchange Commission ("SEC").⁸⁹ In addition, the court held that, pursuant to Virginia Code section 13.1-700.1,⁹⁰ the officer is entitled to indemnification for reasonable expenses incurred in obtaining the court's order of indemnification, which necessarily includes reasonable attorney's fees.⁹¹

The court applied the standard established in *Mullins v. Richlands National Bank*,⁹² which required the factfinder "to determine from the evidence what are reasonable fees under the factual circumstances of the particular case."⁹³ In applying the *Mullins* standard, the court found that it was necessary to "consider such circumstances as time consumed, effort expended, the nature of the services rendered, as well as the expert testimony offered by the parties."⁹⁴

86. *See id.* at 538-39.

87. *See id.* at 539.

88. 42 Va. Cir. 76 (Loudoun County 1997).

89. *See id.* at 77.

90. VA. CODE ANN. § 13.1-700.1(B) (Repl. Vol. 1993).

91. *See Davison*, 42 Va. Cir. at 77. "Expenses" is defined in Virginia Code section 13.1-696 to include reasonable attorney's fees. *See* VA. CODE ANN. § 13.1-696 (Repl. Vol. 1993).

92. 241 Va. 447, 403 S.E.2d 334 (1991).

93. *Davison*, 42 Va. Cir. at 77 (citing *Mullins*, 241 Va. at 449, 403 S.E.2d at 335).

94. *Id.*

The court determined that the officer should be reimbursed for all expenses that were billed and that were attributable to the SEC investigation.⁹⁵ The court was not as generous with respect to those expenses incurred in obtaining an order of indemnification from the court. In particular, the court opined that the attorneys employed by the officer in this case "over-lawyered, over-tried, and over-papered" this simple indemnification proceeding.⁹⁶ If the matter can be handled by a competent local trial attorney, who could achieve similar results, then any attorney's fees that exceed those of the trial attorney are excessive.⁹⁷ The court allowed the officer to be indemnified only for an amount it thought to be reasonable given the circumstances of the case. In doing so, the court reduced both the hourly rate and the amount of time spent in preparation of litigation.⁹⁸

III. LIMITED LIABILITY COMPANIES

A. 1997 Legislation

1. Articles of Organization

The 1997 Session of the Virginia General Assembly amended Virginia Code section 13.1-1011,⁹⁹ which sets forth the information that is required in the articles of organization of a limited liability company. The articles are no longer required to state when the limited liability company will be dissolved and its affairs wound up.¹⁰⁰

2. Members

Virginia Code section 13.1-1038.1 lists the statutory requirements for an individual to acquire a membership interest in a

95. *See id.* at 79.

96. *Id.* at 77.

97. *See id.* at 82.

98. *See id.* at 81-85.

99. VA. CODE ANN. § 13.1-1011(A)(1)-(3) (Cum. Supp. 1998).

100. *See id.*

limited liability company.¹⁰¹ A limited liability company always retains the right to establish its own standards and requirements for attaining membership interest.¹⁰² When such standards are absent from the limited liability company's operating agreement, however, the provisions of Virginia Code section 13.1-1038.1 govern.

Prior to the General Assembly's amendment of this section in 1997, an individual had to receive the consent of all current members of the limited liability company as a condition to attaining a membership interest. The General Assembly lessened this stringent condition and refined its application. If the limited liability company is managed by managers, then an individual seeking a membership interest must only receive a majority of the current managers' consent.¹⁰³ If the limited liability company is managed by members, then the individual must only receive the majority of the current members' consent.¹⁰⁴

A person who has acquired another person's interest in the limited liability company may become a member upon the occurrence of certain conditions provided for in Virginia Code section 13.1-1040.¹⁰⁵ The strict conditions required by Virginia Code section 13.1-1038.1 prior to its amendment, as discussed above, also were imposed on assignees who desired to become members of the limited liability company.¹⁰⁶ Accordingly, a similar change was made to Virginia Code section 13.1-1040. If the limited liability company is managed by members, then the assignee can become a member upon receiving the consent of a majority of the members, excluding the member who is the assignor.¹⁰⁷ If the limited liability company is managed by managers, then the assignee has to receive the consent of a majority of the managers who are also members, excluding the member who is the assignor.¹⁰⁸

101. *See id.* § 13.1-1038.1(A) (Cum. Supp. 1998).

102. If this is the case, then Virginia Code section 13.1-1038.1(A) does not operate with respect to that limited liability company. *See id.* § 13.1-1038.1 (Cum. Supp. 1998).

103. *See id.* § 13.1-1038.1(A)(1) (Cum. Supp. 1998).

104. *See id.*

105. *Id.* § 13.1-1040 (Cum. Supp. 1998).

106. *See id.* § 13.1-1040 (Repl. Vol. 1993).

107. *See id.* § 13.1-1040(A) (Cum. Supp. 1998).

108. *See id.*

3. Dissolution

In 1996, the Virginia General Assembly amended Virginia Code section 13.1-1046(3), governing dissolutions of limited liability companies; however, this section was amended again in 1997.¹⁰⁹ Virginia Code section 13.1-1046 provides that a limited liability company will be dissolved and its affairs wound up if certain enumerated events take place.¹¹⁰ One such event is the termination of a membership interest in the limited liability company, resulting from, for example, death or resignation, unless the articles of organization or operating agreement provide otherwise.¹¹¹ A majority vote of the remaining members of the limited liability company can save the company from dissolution.¹¹² If the limited liability company is managed by managers and if there is at least one member who is a manager, then there must be a majority vote of the remaining members who also are managers of the limited liability company.¹¹³

The General Assembly made one further amendment to this section by adding an additional event by which a limited liability company could be dissolved. Virginia Code section 13.1-1062 requires that a limited liability company pay an annual registration fee.¹¹⁴ If the fee is not paid by a date specified in section 13.1-1064, then the Commission will automatically cancel its certificate.¹¹⁵ Automatic cancellation of a limited liability company's certificate is grounds for dissolution and winding up.¹¹⁶

B. 1998 Legislation

A limited liability company is a hybrid of a corporation and a partnership. It combines the advantages of both business forms

109. *See id.* § 13.1-1046(3) (Cum. Supp. 1998).

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* § 13.1-1062 (Cum. Supp. 1998).

115. *See id.*

116. *See id.* § 13.1-1046(1)(5) (Cum. Supp. 1998).

into one. Limited liability companies are acquiring more and more of the advantages of the corporation. In 1998, the General Assembly granted members of a limited liability company two additional managerial powers that are very similar to those possessed by directors of a corporation. First, members of a limited liability company now have the power to delegate their powers of management and control to officers, agents, and employees.¹¹⁷ Second, members have the power to take action without holding a meeting, giving notice, or voting if they have signed written consents by those members entitled to vote.¹¹⁸ Also, members may vote by proxy.¹¹⁹ All of these rights and powers have become the default rule and cannot be taken away unless so stated in the articles of organization or the operating agreement.¹²⁰

If the limited liability company is managed by managers as opposed to members, then the provisions of Virginia Code section 13.1-1024¹²¹ govern the powers and rights of the manager. This section has been amended in a manner similar to Virginia Code section 13.1-1022, discussed above. The managers of a manager-managed limited liability company also have acquired the additional rights and powers given to the members in section 13.1-1022.¹²²

C. *Judicial Decisions*

In *Hagan v. Adams Property Associates, Inc.*,¹²³ the Supreme Court of Virginia determined whether or not a sale took place between the owner of the property and the owner's limited liability company. Ralph and Maureen Hagan owned the Stuart Court Apartments. The Hagans wanted to sell the property and entered into a written agreement with Adams Property Associates, Inc. ("Adams"), granting them an exclusive right to sell the property and offering a fee if the sale could be made

117. *See id.* § 13.1-1022(D) (Cum. Supp. 1998).

118. *See id.* § 13.1-1022(E) (Cum. Supp. 1998).

119. *See id.*

120. *See id.* § 13.1-1022(A) (Cum. Supp. 1998).

121. *Id.* § 13.1-1024 (Cum. Supp. 1998).

122. *See id.* § 13.1-1024(H)-(I) (Cum. Supp. 1998).

123. 253 Va. 217, 482 S.E.2d 805 (1997).

within one year. Prior to the end of one year, Hagan formed the Hagan, Parsons & Tepper, L.L.C. and conveyed the property to the company. Adams brought suit against the Hagens seeking payment of the fee.¹²⁴

The Hagens argued that Adams is not entitled to payment of the fee because no sale took place. The Hagens contended that the transaction lacked valuable consideration and that it was merely a "contribution to the capitalization of [his] new company."¹²⁵ The court rejected this argument and found that the Hagens received valuable consideration in exchange for the conveyance of the property.¹²⁶ The court held that the Hagens did receive valuable consideration because the limited liability company took over the first deed of trust note on the property, which has not been fully paid.¹²⁷ In addition, the Hagens obtained a note that was secured by a second deed of trust on the property. Finally, the Hagens received an interest in the limited liability company. The court ruled that all these benefits were valid consideration for the conveyance of the property to the company.¹²⁸ Moreover, the court held that the limited liability company was a separate entity; therefore, the conveyance of the property from Hagan to the company constituted "more than a change in the form of ownership."¹²⁹ Consequently, Adams was entitled to payment of its fees for selling the property to the limited liability company.

IV. PARTNERSHIPS

A. 1997 and 1998 Legislation

1. Inclusion of Partnerships in the Virginia Stock Corporation Act

Several sections of the Virginia Code were amended to include partnerships. The 1997 Session amended Virginia Code

124. *See id.*

125. *Id.* at 219, 482 S.E.2d at 806.

126. *See id.* at 219-20, 482 S.E.2d at 807.

127. *See id.*

128. *See id.*

129. *Id.* at 220, 482 S.E.2d at 807.

section 13.1-722 (A) to permit partnerships to merge with domestic corporations.¹³⁰ These mergers are governed by the law of the state or, in the case of a foreign partnership, the country where the partnership is incorporated.¹³¹ In addition, section 13.1-722(A)(1)(c)¹³² requires that domestic partnerships comply with article 9 of the Virginia Uniform Partnership Act.¹³³

As a result of the amendments made to the above provisions of the Virginia Code, the 1997 Session had to amend Virginia Code section 13.1-766.1, governing mergers that involve a foreign corporation.¹³⁴ Partnerships that survive the merger with a foreign corporation are bound by the requirements in section 13.1-766.1, namely the filing of an authenticated copy of the instrument of merger with the Commission, the receipt of a certificate of authority if the partnership wants to conduct business in Virginia, and the registration of the partnership.¹³⁵ In light of the addition of partnerships to Virginia Code sections 13.1-722(A) and 13.1-766.1, the definitions section of the Virginia Stock Corporation Act has been expanded to include three paragraph definitions "domestic partnership," "foreign partnership," and "foreign registered limited liability partnership."¹³⁶

2. Inclusion of Partnerships in the Virginia Limited Liability Act

Partnerships can be converted to limited liability companies

130. See VA. CODE ANN. § 13.1-722(A) (Cum. Supp. 1998).

131. See *id.* § 13.1-722(A)(1)(a) (Cum. Supp. 1998).

132. *Id.* § 13.1-722(A)(1)(c) (Cum. Supp. 1998).

133. *Id.* §§ 50-73.124 to -73.131 (Repl. Vol. 1998). Virginia Code section 50-73.128 requires that the merger comply not only with the law of the state or country where each party to the merger is incorporated, but also with all domestic partnership agreements. See *id.* § 50-73.128(A) (Repl. Vol. 1998). Furthermore, each domestic partnership must approve a plan of merger that supplies the information requested. See *id.* § 50-73.128(B)(1)-(6) (Repl. Vol. 1998). The surviving entity must take over all assets, debts, and obligations of all entities whose existence has ceased due to the merger. See *id.* § 50-73.129(A)(1)-(4) (Repl. Vol. 1998). And finally, the surviving entity must file a statement of merger that includes the information requested. See *id.* § 50.73.131(B)(1)-(4) (Repl. Vol. 1998).

134. See *id.* § 13.1-766.1 (Cum. Supp. 1998).

135. See *id.* § 13.1-766.1(B) (Cum. Supp. 1998).

136. *Id.* § 13.1-603 (Cum. Supp. 1998).

pursuant to Virginia Code section 13.1-1010.1.¹³⁷ Prior to the 1997 amendment, only a general partnership could convert, whereas after the amendment, domestic, foreign, and limited partnerships can convert to limited liability companies.¹³⁸ Paragraphs defining domestic partnerships and foreign partnerships have been added to Virginia Code section 13.1-1002.¹³⁹ The amended section also has a paragraph defining foreign registered limited liability partnerships.¹⁴⁰ Conversion from a partnership to a limited liability company occurs upon the filing of articles of organization which includes the name of the converting partnership.¹⁴¹ If the conversion is by a registered limited liability partnership, then the articles of organization must contain the date and place of filing of its registration or statement of partnership.¹⁴² The 1998 Session has deleted the requirement that the date and place of filing of the initial certificate of partnership be included in the articles of organization.¹⁴³

Prior to the 1997 amendment, the filing of the articles of organization mentioned above served as a certificate of cancellation of a limited partnership; however, the 1997 Session of the Virginia General Assembly simultaneously narrowed and expanded the scope of this provision.¹⁴⁴ Articles of organization that have been filed can serve as a certificate of cancellation if the entity is a domestic limited partnership.¹⁴⁵ Additionally, the articles of organization can serve as a statement of dissolu-

137. *Id.* § 13.1-1010.1 (Cum. Supp. 1998).

138. *See id.* § 13.1-1010.1(A) (Cum. Supp. 1998).

139. *Id.* 13.1-1002 (Cum. Supp. 1998).

140. *See id.* These definitions also have been added to Virginia Code section 50-73.1 which governs limited partnerships. *See id.* § 50-73.1 (Repl. Vol. 1998). The addition of these definitions are identical to those in Virginia Code section 13.1-603 which governs Virginia corporations. *See id.* § 13.1-603 (Cum. Supp. 1998); *see supra* note 136 and accompanying text. Virginia Code section 13.1-1002 also has a new paragraph defining non-United States entities. *See VA. CODE ANN.* § 13.1-1002 (Cum. Supp. 1998). This definition becomes applicable in Virginia Code section 13.1-1067 which requires the Commission, if requested, to issue a certificate of change of name or conversion when a non-United States entity is domesticated as a limited liability company. *See id.* § 13.1-1067(A) (Cum. Supp. 1998).

141. *See id.* § 13.1-1010.1(A)(1) (Cum. Supp. 1998).

142. *See id.* § 13.1-1010.1(A)(2) (Cum. Supp. 1998).

143. *See id.* § 13.1-1010.1(A) (Cum. Supp. 1998).

144. *See id.* § 13.1-1010.2(C) (Cum. Supp. 1998)

145. *See id.*

tion and cancellation of registration if the entity is a domestic partnership.¹⁴⁶

Not only can partnerships be converted to limited liability companies, but they can also be merged with limited liability companies pursuant to Virginia Code section 13.1-1070.¹⁴⁷ The amendments made to sections 13.1-1060 and 13.1-1070¹⁴⁸ are similar to the amendments made to sections 13.1-722 and 13.1-766.1, which govern the merger of a partnership with a corporation.¹⁴⁹ If a partnership is involved in the merger, as required by any other entity, the surviving partnership will have to file articles of merger, pursuant to the amended provisions of Virginia Code section 13.1-1072(A), after the plan of merger has been approved by each party involved in the merger.¹⁵⁰

3. Title 50—Partnerships

The 1997 General Assembly made numerous changes to the provisions of title 50 of the Virginia Code. Most of the changes in this title reflect those that were made to various sections in title 13 of the Virginia Code, particularly the amendments allowing partnerships to merge with a corporation and a limited liability company. The 1998 Session of the Virginia General Assembly did not make further changes to any provisions of this title.

146. *See id.*

147. *See id.* § 13.1-1070 (Cum. Supp. 1998). Upon the merger of any limited liability company with any other entity, or upon the conversion of any entity to a foreign limited liability company, the Commission, if requested, will issue a certificate stating who has ownership of or interest in real estate. *See id.* § 13.1-1067(B) (Cum. Supp. 1998). Virginia Code section 50-37.3, governing general partnerships, and section 50-73.130, which is the Virginia Uniform Partnership Act, have been similarly changed. *See id.* §§ 50-37.3, -73.130 (Repl. Vol. 1998).

148. *Id.* §§ 13.1-1060, -1070 (Cum. Supp. 1998).

149. *See supra* notes 130-36 and accompanying text.

150. *See* VA. CODE ANN. § 13.1-1072(A) (Cum. Supp. 1998).

B. *Judicial Decision*

In *Pitsilides v. Lawyers Title Insurance Co.*,¹⁵¹ the Virginia Beach Circuit Court determined whether or not a conveyance of partnership property to a partner, as trustee, constituted a purchase. George Pitsilides was a partner of G & J Land Company, which owned two parcels of land. When the partnership was dissolved, one parcel of land, which had a title defect, was conveyed to Pitsilides, as trustee of a trust. Pitsilides wanted the partnership's title insurance policy to compensate him for the defect.¹⁵²

The title insurance company refused to insure the defect in title because it considered Pitsilides a purchaser of the property. The policy only insured the partnership and any person or entity who attained ownership by operation of law.¹⁵³ The circuit court agreed with the title insurance company and denied compensation to Pitsilides.¹⁵⁴ Although Pitsilides could have obtained ownership of the property by operation of law, the circuit court held that Pitsilides, as trustee, could not receive compensation because he was not a partner of the partnership.¹⁵⁵

V. CONCLUSION

Despite the abundant changes that already have been made to numerous provisions of title 13.1 and title 50 of the Virginia Code, the Virginia General Assembly undoubtedly will continue to make more changes in the future. Accordingly, courts will continue to interpret and refine the law affecting corporations, limited liability companies, and partnerships.

151. 42 Va. Cir. 54 (Virginia Beach City 1997).

152. *See id.*

153. *See id.* at 55.

154. *See id.*

155. *See id.* The title insurance company probably would have insured the title defect if the property had been conveyed to Pitsilides, as an individual, instead of Pitsilides, as trustee. A good argument can be made that once a partnership is dissolved, a partner can acquire property belonging to the partnership by operation of law. *See id.*