

1999

## Annual Survey of Virginia Law: Corporate Law

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### Recommended Citation

A. E. Kauders Jr., *Annual Survey of Virginia Law: Corporate Law*, 33 U. Rich. L. Rev. 841 (1999).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss3/7>

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# CORPORATE LAW

*A. Eric Kauders, Jr.\**

## I. INTRODUCTION

Despite its widely held reputation as being a bastion of all things conservative, Virginia has long been a leader on the frontier of corporate and partnership law. As a recent example confirming its progressive reputation, one need look no further than the 1991 passage of legislation permitting the formation of limited liability companies.<sup>1</sup> While the amount of activity in corporate law this year was far from notable, the legislation and judicial decisions from the past year continue to demonstrate Virginia's "corporate activism."

Part II of this article discusses the changes made to section 13.1 of the Virginia Code, which governs the creation and operation of corporations, partnerships, and limited liability companies.<sup>2</sup> Most significantly, the General Assembly continued to recognize the powerful role technology in general, and the Internet in particular, plays now in corporate governance and the impact it will surely have in the future. Among the more notable bills introduced was language that permitted notification of and proxy voting in shareholder meetings to be conducted by electronic means.<sup>3</sup> With this legislation, Virginia leapt to the forefront in corporate governance and regulation and continued the strong message that Virginia welcomes the birth of what has come to be known as the "Silicon Dominion."

Part III of this article covers the significant developments in case law during the past year from Virginia's courts. While the Supreme

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1. See VA. CODE ANN. §§ 13.1-1000 to -1073 (Repl. Vol. 1993). Virginia was among the first states to provide for limited liability companies as an alternative for asset protection in comparison to the more traditional forms of organization seen in corporations and limited liability partnerships.

2. Each of the legislative changes took effect July 1, 1999, unless otherwise noted. Surprisingly, there were no amendments to chapter 50 of the Virginia Code, which governs partnerships in the commonwealth, during the 1999 session of the General Assembly.

3. See VA. CODE ANN. § 13.1-847 (Repl. Vol. 1999).

Court of Virginia largely ignored issues of corporate governance and operations this term, the circuit courts issued a number of opinions that may have a significant impact on corporations, partnerships, and limited liability companies. Among these are decisions dealing with the right of a corporation to bring suit under the name of its predecessor when that name may not have been a valid corporate appellation,<sup>4</sup> the deposition of corporate parties who live and work in jurisdictions outside of Virginia,<sup>5</sup> and the right of shareholders not of record to bring derivative suits against or on behalf of the corporation, which was a case of first impression in Virginia.<sup>6</sup> In all, these well-reasoned decisions reflect a pocket of pragmatic innovation within an environment of more traditional and conservative corporate jurisprudence that combine well to foster and promote business in Virginia.

## II. LEGISLATION

### A. *Corporate Action Without Shareholder Notice*

Article 8 of the Virginia Stock Corporation Act (the "Stock Act") was amended this year to allow shareholders to take any of the various activities "required or permitted" by the Stock Act at a shareholders' meeting<sup>7</sup> without prior notice, as long as each of the shareholders entitled to vote on the action participates in that action.<sup>8</sup> This amendment is a practical recognition that notice to shareholders of a corporation's activities is duplicative and serves no useful purpose if each of the shareholders himself participates in that action. In practice, of course, this provision is targeted at, and will be used almost exclusively by, small and closely held corporations where the number of consenting shareholders is sufficiently small enough to make such coordination sensible and economical. The amendment further provides that, in such cases where corpo-

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4. See *Doug Discount Roofing Co. v. Reliable Builders, Inc.*, 45 Va. Cir. 81 (Norfolk City 1997).

5. See *Staples Corp. v. Washington Hell Corp.*, 44 Va. Cir. 372 (Fairfax County 1998).

6. See *Milstead v. Bradshaw*, 43 Va. Cir. 428 (Norfolk City 1997).

7. See, e.g., VA. CODE ANN. § 13.1-707 (Repl. Vol. 1993) (providing for shareholder approval of amendments to articles of incorporation and corporate bylaws); *id.* § 13.1-718 (Repl. Vol. 1993) (providing for shareholder approval of mergers and share exchanges); *id.* § 13.1-728.5 (Repl. Vol. 1993) (providing for shareholder approval of control share acquisitions); *id.* § 13.1-742 (Repl. Vol. 1993) (providing for shareholder approval of corporate dissolution).

8. See *id.* § 13.1-657(A)(1) (Repl. Vol. 1999). This provision previously permitted action to be taken without a meeting of shareholders. See *id.* § 13.1-657(A) (Repl. Vol. 1993).

rate activities authorized by all of the voting shareholders are undertaken, no action by the board of directors is required.<sup>9</sup>

Even those companies not considered public by the Stock Act<sup>10</sup> can take such actions without either a meeting or prior notice of such a meeting if the “action is taken by shareholders who would be entitled to vote” and if that group of shareholders has, in effect, control of the minimum number of votes required for approval of that action.<sup>11</sup> If, however, action is to be taken by the corporation by any means other than unanimous consent of the shareholders eligible to vote, then the corporation must provide written notice to each of the eligible shareholders at least five days in advance.<sup>12</sup>

### B. *Electronic Meeting Notification and Voting*

Virginia joined the ranks of only a handful of other states this year when it passed one of the first laws aimed at limiting the exposure that companies may face because of liabilities related to Y2K computer problems.<sup>13</sup>

This sensitivity toward the changes and effects that technology has on the business community also led the General Assembly to permit large corporations<sup>14</sup> to notify shareholders of meetings by electronic means—most notably by e-mail—rather than by the more traditional method of written notification sent by first-class mail.<sup>15</sup> This measure, which could save corporations significant amounts of money in shareholder meeting expenses, is conditioned only upon certification by the shareholders that they authorize the delivery of such notices by electronic transmission.<sup>16</sup> As a complementary provision, the Virginia Code now permits shareholders to vote their shares by proxy through a number of means, including “telegram,

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9. *See id.* § 13.1-657(A)(1) (Repl. Vol. 1999).

10. The amendments provide that corporations are considered “public” if they have 300 or more shareholders. *See id.* § 13.1-657(E) (Repl. Vol. 1999).

11. *Id.* § 13.1-657(A)(2) (Repl. Vol. 1999).

12. *See id.* § 13.1-657(D) (Repl. Vol. 1999).

13. *See id.* § 8.01-227.1 to -227.3 (Cum. Supp. 1999). The Y2K computer problem is caused by a computer’s inability to process date and time data because it codes years as two digits instead of four digits (*i.e.*, “99” instead of “1999”). Thus, when computers are asked to process dates for the year 2000, for instance, they read “00” as being the year 1900 and not the year 2000.

14. Large corporations are those with 300 or more shareholders of record. *See id.* § 13.1-658(G) (Repl. Vol. 1999).

15. *See id.*

16. *See id.*

cablegram or other means of electronic transmission.”<sup>17</sup> Once again, “electronic transmission” is merely a euphemism for e-mail notification to the company of how a shareholder wishes to vote his or her shares at the shareholders’ meeting. Before this provision was enacted, the Virginia Code allowed shareholders to vote by proxy only upon execution of an appointment form properly submitted to the corporate secretary.<sup>18</sup>

### III. JUDICIAL DECISIONS

#### A. *Oppression of Minority Shareholders*

In *Stickley v. Stickley*,<sup>19</sup> the Rockingham County Circuit Court delivered a detailed opinion that discussed the legal standard for and circumstances supporting a decision to place a corporation into receivership and dissolve it when the majority shareholder operated the corporation in a manner that was found to be oppressive to the minority shareholder.<sup>20</sup>

The plaintiff in the suit was a minority shareholder who owned thirty-five percent of the stock of J.O. Stickley and Son, Inc., and requested that the corporation be dissolved and its affairs wound up pursuant to Virginia Code section 13.1-747.<sup>21</sup> In the alternative, the plaintiff requested that the court find that a sale of the corporate operating assets in 1995 to be a sale of substantially all of the corporation’s property pursuant to Virginia Code sections 13.1-724 and -730, thereby entitling the plaintiff, as a minority shareholder, to an appraisal and a redemption of his stock.<sup>22</sup> The court found that the majority shareholder, acting with family members, turned the corporation “into an engine of oppression” and “conducted the corporate affairs in a manner designed to oppress the minority shareholder.”<sup>23</sup> Therefore, the court ruled that the corporation would be put in the hands of a receiver for liquidation.<sup>24</sup>

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17. *Id.* § 13.1-847(B)(2) (Repl. Vol. 1999). A faxed copy or “other reliable reproduction” of the proxy designation is also now permitted to be used in lieu of the original writing, as long as it is a complete copy of the original. *See id.* § 13.1-847(B)(3) (Repl. Vol. 1999).

18. *See id.* § 13.1-847(B), (C) (Repl. Vol. 1993).

19. 43 Va. Cir. 123 (Rockingham County 1997).

20. *See id.* at 149.

21. *See id.* at 123 (citing VA. CODE ANN. § 13.1-747 (Repl. Vol. 1993)).

22. *See id.* (citing VA. CODE ANN. §§ 13.1-724, -730 (Repl. Vol. 1993)).

23. *Id.* at 143.

24. *See id.*

Proceedings under Virginia Code section 13.1-747 are supplemental to the rights that minority shareholders enjoy in common law and in the statutes governing shareholder relationships.<sup>25</sup> The circuit court noted that the word "oppressive," as used in the statute, does not necessarily "carry an essential inference of imminent disaster," nor is it synonymous with illegal or fraudulent behavior.<sup>26</sup> Rather, the circuit court has held oppressive to mean "a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely," and "a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members."<sup>27</sup>

The circuit court noted that "[t]ypical examples of improper conduct are excessive compensation, improper related party transactions, and inadequate dividends paid to stockholders."<sup>28</sup>

The circuit court found that a more blatant example of openly oppressive conduct, marked by "a total lack of probity and breach of fiduciary duty," could not be found in what was presented by the facts of this case.<sup>29</sup> Among other things, the majority shareholder refused to produce the corporation's books, financial information, and records to the minority shareholder; unilaterally changed the terms of corporate notes held by the minority shareholder by lowering the interest rates and the term of payment; converted corporate assets for the majority shareholder's personal benefit; negotiated to sell all or a majority of the corporation's assets as a way to deprive the minority shareholder of any ownership interest; stacked the corporate board with other family members to ensure that there would be no independent investigation of any facts or corporate decisions; and payed the majority shareholder an unreasonable level of compensation given the work he performed for the corporation.<sup>30</sup> Because the majority shareholder "devised a way by which he could dispose of all the combined [corporate] assets without ever having to submit to a vote or a buy-out of the minority

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25. See *E. F. White and P. W. Oil Co. v. Perkins*, 213 Va. 129, 134-35, 189 S.E.2d 315, 319 (1972).

26. *Stickley*, 43 Va. Cir. at 144-45 (quoting *Brown v. Scott County Tobacco Warehouses, Inc.*, 5 Va. Cir. 75, 78 (Scott County 1983)).

27. *Id.* at 145 (quoting *Brown*, 5 Va. Cir. at 78) (citations omitted).

28. *Id.* at 146 (citing *Giannotti v. Hamway*, 239 Va. 14, 24, 382 S.E.2d 725, 731 (1990)).

29. *Id.* at 147.

30. See *id.* at 147-48.

stockholder," the court dissolved the corporation and put it into receivership to wind up and liquidate the corporation.<sup>31</sup>

### B. *Corporate Dissolution*

An action seeking a corporate dissolution must be sought by the corporation's board of directors, a creditor, or a shareholder, and not the corporation itself.<sup>32</sup> In *Eastern Industrial Services, Inc. v. Lee*, the plaintiff corporation sought its own dissolution in conjunction with an accounting under Virginia Code section 8.01-31.<sup>33</sup> The defendant demurred, asserting that there can be no dissolution because no shareholder or other eligible party initiated the dissolution proceedings against the company.<sup>34</sup> The circuit court agreed and held that while it is "certainly proper" to join other shareholders, the corporation must be the defendant in a shareholder-initiated dissolution under Virginia Code section 13.1-747.<sup>35</sup>

### C. *Proper Corporate Name For Bringing Suit*

In *Rockwell v. Allman*,<sup>36</sup> the Supreme Court of Virginia was presented with a personal injuries suit for damages where the plaintiff inadvertently failed to serve the administrator of the estate of the driver who caused the accident.<sup>37</sup> The supreme court upheld the trial court's entry of summary judgment because the named defendant, who was not a valid administrator of the decedent's estate, was the wrong person to be sued, rather than just a misnomer.<sup>38</sup> "A misnomer is a mistake in name, but not person. Here, the wrong person was named and it cannot be corrected under [the statute] by labeling it a misnomer."<sup>39</sup>

A recent opinion delivered by the Norfolk City Circuit Court addressed a similar issue. In *Doug Discount Roofing Co. v. Reliable Builders, Inc.*,<sup>40</sup> the question presented was whether a corporation has the right to sue in its corporate name for any debts owed to its

31. *Id.* at 148-49.

32. *See Eastern Indus. Serv., Inc. v. Lee*, 43 Va. Cir. 252, 253 (Amherst County 1997).

33. *See id.*

34. *See id.*

35. *See id.* at 255.

36. 211 Va. 560, 179 S.E.2d 471 (1971) (per curiam).

37. *See id.* at 561, 179 S.E.2d at 472.

38. *See id.*

39. *Id.*

40. 45 Va. Cir. 81 (Norfolk City 1997).

predecessor when the corporation was not entitled to use that name at the time it allegedly entered into the contract.<sup>41</sup> The defendant demurred, claiming that the plaintiff was neither “a corporation registered by the Virginia State Corporation Commission nor licensed to do business in the Commonwealth, nor [was] that name registered as a fictitious name for some other entity.”<sup>42</sup> The defendant argued, therefore, that the plaintiff had no standing or basis, either in contract or otherwise, to sue the defendant in its motion for judgment.<sup>43</sup>

While the facts were somewhat in dispute at the time of the circuit court’s opinion, it appears that the contract between the parties was executed in 1993 and carried the signature of James D. Lundy under the heading “Doug’s Discount Roofing, Inc., by: James D. Lundy.”<sup>44</sup> Not only did the parties agree that the plaintiff’s name in the contract and in the suit papers differed by the absence of an “s,” but the parties also agreed that the plaintiff had incorporated as Doug Discount Roofing Company, Inc., in 1995, well after the contract was executed and the work was completed under the contract.<sup>45</sup>

The circuit court noted that while the plaintiff did not enjoy the right to use its corporate name at the time the contract was formed, it did use that name in the contract itself.<sup>46</sup> The court set aside for later consideration the issue of whether the contract signed by Mr. Lundy, “purportedly as president of the corporation, but of a corporation that did not exist at that time,” was a valid contract in light of the corporation’s lack of official status at the time.<sup>47</sup> Instead, the court analogized the facts before it with those presented in *Rockwell* and in *Jacobson v. Southern Biscuit Co.*,<sup>48</sup> which discussed the distinction between misnomer and mistakes in person.<sup>49</sup> The circuit court concluded the “corporate successor” to Mr. Lundy’s sole proprietorship roofing business was the corporation that he formed in 1995, and held that a corporation has the

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41. *See id.* at 82.

42. *Id.* at 81-82.

43. *See id.* at 82.

44. *Id.*

45. *See id.* at 83.

46. *See id.* at 85.

47. *Id.* at 89.

48. 198 Va. 813, 97 S.E.2d 1 (1957).

49. *See Doug Discount*, 45 Va. Cir. at 87-88.

right to bring suit on any debt owed to its predecessor in the corporate name.<sup>50</sup>

#### D. *Deposition of Corporate Party*

In *Staples Corp. v. Washington Hall Corp.*,<sup>51</sup> the parties were involved in litigation over an alleged breach of contract to sell real property located in Reston, Virginia.<sup>52</sup> The Fairfax County Circuit Court was presented with the defendant's motion to preclude the plaintiff from orally deposing two corporate officers of the defendant, and deposing a designated agent of defendant pursuant to Rule 4:5(b)(6) under the Rules of the Supreme Court of Virginia.<sup>53</sup> Staples Corp. ("Staples") had previously noticed the oral depositions of two individuals who were officers of the corporate defendant, but not parties to the suit, and who resided and worked in Japan.<sup>54</sup> Staples noticed these depositions even though it previously deposed one of the defendant's agents who, it was stipulated, would be designated as a Rule 4:5(b)(6) representative by the defendant.<sup>55</sup>

Several of the Rules of the Supreme Court of Virginia govern the procedures by which a party may pursue discovery of opposing parties and third parties. Rule 4:5(a) permits any party to "take the testimony of any person, including a party, by deposition upon oral examination" after the commencement of the action.<sup>56</sup> The rule later provides that if the deponent is a party to the lawsuit, the examination is to take place in the locality where the suit is pending.<sup>57</sup> Where the deponent is a nonparty, the rule requires that the depositions be taken where the witness "resides, is employed, or has his principle place of business" unless the parties agree or where the court orders otherwise.<sup>58</sup> For any nonparty witnesses who do not reside in Virginia, depositions are to be taken "in the locality where he resides or is employed or at any other location agreed upon by the parties."<sup>59</sup>

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50. *See id.* at 88.

51. 44 Va. Cir. 372 (Fairfax County 1998).

52. *See id.* at 372.

53. *See id.*

54. *See id.* at 373; *see also* VA. SUP. CT. R. 4:1, :5.

55. *See Staples*, 44 Va. Cir. at 374, 378.

56. VA. SUP. CT. R. 4:5(a).

57. *See id.* at 4:5(a1).

58. *Id.*

59. *Id.*

Of course, a party can also take the deposition of a corporation pursuant to Rule 4:5(b)(6), which states that these terms do “not preclude taking a deposition by any other procedure authorized in these Rules.”<sup>60</sup> Under this rule, the examining party designates the subject matter of the examination and the corporation to be examined designates a representative to testify on its behalf.<sup>61</sup>

In *Staples*, the defendant argued that the depositions of its two corporate officers must take place, if at all, in Japan because the individuals were not parties to the case and because Rule 4:5(a1) mandates that nonparty witness depositions are to be taken in the locality where that witness works or resides.<sup>62</sup> The court, however, disagreed and stated that the defendant’s officers can be deposed as “party” witnesses under Rule 4:5(a1) because they are officers of a party to a lawsuit.<sup>63</sup> Moreover, the court held that, despite the enactment of Rule 4:5(b)(6), an examining party is entitled to designate specific officers, directors, or managing agents to testify on behalf of a corporate entity that is a party to a lawsuit.<sup>64</sup>

On the question as to where these witnesses should be deposed, the court held that Rules 4:7(a)(3) and 4:12(b) “manifest an intent by the Virginia Supreme Court to treat officers, directors, and managing agents selected to testify on behalf of a corporate litigant by the examining party as ‘party’ witnesses for the purposes of Rule 4:5(a1).”<sup>65</sup> Rule 4:7(a)(3) provides that the deposition for any person “who at the time of taking the deposition was an officer, director or managing agent” of a corporate party to the litigation can be used by an adverse party for any purpose.<sup>66</sup> Rule 4:12(b)(2) provides that whenever an “officer, director, or managing agent of a party” refuses to testify or permit discovery, that party may be sanctioned as a result.<sup>67</sup> The court concluded that based on this language, it would defy logic to hold the defendant liable for discovery sanctions if, as the defendant argued, the witness failing to testify was a nonparty witness.<sup>68</sup> Based on this analysis, the court concluded that “individuals designated to testify on behalf of a corporate litigant by the examining party constitute the equivalent of party witnesses for

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60. *Id.* at 4.5(b)(6).

61. *See id.*

62. *See Staples*, 44 Va. Cir. at 374.

63. *See id.* at 374-75.

64. *See id.* at 374, 377.

65. *Id.* at 377.

66. VA. SUP. CT. R. 4:7(a)(3).

67. *Id.* at 4:12(b)(2).

68. *See Staples*, 44 Va. Cir. at 377.

purposes of Rule 4:5(a1).<sup>69</sup> This assumes, of course, that such designees are either officers, directors, or managing agents of the corporate deponent.<sup>70</sup> The court ordered that the two officers of the defendant party could be deposed and that their depositions should take place in Fairfax County, Virginia.<sup>71</sup>

### E. *Officer and Director Employment*

In *Nida v. Business Advisory Systems, Inc.*,<sup>72</sup> a former officer and director of the defendant brought suit for commissions he claimed were due from the defendant and that were derived from the course of his employment there.<sup>73</sup> The defendant filed a counterclaim against the plaintiff claiming, inter alia, breach of fiduciary duty, tortious interference, conspiracy, and breach of contract.<sup>74</sup> The plaintiff, Thomas A. Nida, was hired by the defendant as a loan officer and later appointed as an officer and director of the corporation.<sup>75</sup> The litigation began as a result of the defendant's declining business and the plaintiff's subsequent search for alternate employment.<sup>76</sup> The plaintiff eventually established a competing business several weeks after he left the defendant's employ.<sup>77</sup>

Addressing the defendant's counterclaim for breach of fiduciary duty, the court found that although "the officers and directors of a going solvent corporation cannot engage in a competing business to the detriment of the corporation which they represent," a former officer or director is not precluded from forming and engaging in a competing business, absent an enforceable covenant not to compete.<sup>78</sup> Noting that the plaintiff "did about all he could under the circumstances to sever his relationship with [the defendant] before forming" his new company, the court held that his only remaining connection with the defendant, his former employer, was the plaintiff's independent contractor agreement.<sup>79</sup> Nothing in the

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69. *Id.*

70. *See id.*

71. *See id.*

72. 44 Va. Cir. 487 (Winchester City 1998).

73. *See id.* at 487.

74. *See id.*

75. *See id.* at 488.

76. *See id.* at 490-94.

77. *See id.* at 488-89.

78. *Id.* at 495 (quoting 18(b) AM. JUR. 2D *Corporations* § 1712 (1985)).

79. *Id.* at 496.

agreement prevented the plaintiff from leaving the defendant's employment to engage in a competing business.<sup>80</sup>

Although the plaintiff's independent contractor agreement contained a provision that purported to restrict the time in which he could engage in competing business against the defendant, the court held that it was not enforceable because it was "not limited to a reasonable geographic area."<sup>81</sup> Relying on the criteria set out in *New River Media Group, Inc. v. Knighton*,<sup>82</sup> the court evaluated the validity and enforceability of a noncompetition agreement.<sup>83</sup> The trial court found a complete lack of reference to a geographic area; therefore, if the noncompetition clause were enforced, it would effectively prohibit the plaintiff from competing with the defendant anywhere on the face of the earth.<sup>84</sup>

Although the trial court acknowledged that Virginia law allows courts to sever objectionable contract language and maintain the remainder of the contract as enforceable, it distinguished between that conduct and conduct that amounted to rewriting a contract for the parties.<sup>85</sup> Because the court held that the noncompete provisions of the parties' contract were unenforceable as written and "Virginia courts do not rewrite the parties [sic] contract for them," the trial court struck the offending language from the contract and held that the plaintiff was free from his fiduciary and contractual bonds with the defendant, thus enabling him to engage in competitive activities against it.<sup>86</sup>

#### F. Shareholders' Right to Employment

In *Summers v. Viamac, Inc.*,<sup>87</sup> the plaintiff, who was a director, officer, employee, and minority shareholder of the defendant corporation, sued for corporate dissolution of the defendant.<sup>88</sup> Shortly after the plaintiff was terminated from his employment, the defendant's president and majority stockholder offered to purchase the plaintiff's shares at a price that the plaintiff considered too

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80. *See id.*

81. *Id.* at 497.

82. 245 Va. 367, 371, 429 S.E.2d 25, 26 (1993).

83. *See Nida*, 44 Va. Cir. at 497-98.

84. *See id.* at 497-99.

85. *See id.* at 498 (citing *Grant v. Carotek, Inc.*, 737 F.2d 410, 411 (4th Cir. 1984); *Roto-Die Co. v. Lesser*, 899 F. Supp. 1515, 1519 (W.D. Va. 1995)).

86. *Id.*

87. 45 Va. Cir. 201 (Salem City 1998).

88. *See id.* at 201.

low.<sup>89</sup> For that reason, the plaintiff maintained the offer constituted corporate oppression as set forth in Virginia Code section 13.1-747.<sup>90</sup> The plaintiff claimed that his rights as a stockholder had been expanded from what a stockholder traditionally enjoys, such as proportionate ownership in the corporation, a voice in running the business, and a proportionate share of the corporate profits.<sup>91</sup>

Distinguishing this case from other decisions where the right to employment was enforced because corporate profits were distributed to shareholders in the form of salary, the trial court held that "guaranteed employment is not an incident of stock ownership."<sup>92</sup> Further, the court noted that when the plaintiff purchased his stock, he "entered into agreements concerning his rights as a stockholder, his rights as an employee, and his rights to compete with his employer. Each right was treated as separate and distinct."<sup>93</sup> Because the plaintiff, at the time of his termination, was an at-will employee, his employment relationship was independent and distinct from each of those other rights and was not incident to his stock ownership in the defendant corporation.<sup>94</sup>

### G. Shareholder Ability to File Derivative Suit

In *Milstead v. Bradshaw*,<sup>95</sup> the Norfolk City Circuit Court pioneered new ground in Virginia when it held that a woman who had a mere equitable ownership interest in shares of corporate stock could maintain a derivative suit against the corporation on behalf of other shareholders.<sup>96</sup> By all accounts, this was a case of first impression in the Commonwealth, although the court relied on persuasive authority from a number of other courts and jurisdictions.<sup>97</sup>

Derivative suits are equitable devices available to shareholders to protect against abuses occasioned "by the corporation, its directors, officers, and controlling shareholders."<sup>98</sup> Generally,

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89. *See id.*

90. *See id.*

91. *See id.*

92. *Id.* at 202.

93. *Id.*

94. *See id.* at 203. The court did note that his "status as an owner of corporate stock is undiminished by his termination" of employment. *Id.*

95. 43 Va. Cir. 428 (Norfolk City 1997).

96. *See id.* at 433.

97. *See id.* at 430-35.

98. *Id.* at 429.

derivative suits are used for two purposes: (i) to “compel the corporation to sue upon a right of action,” and (ii) to bring suit on behalf of the corporation against those who are liable to the corporation.<sup>99</sup> Derivative suits provide an exception to the general rule that shareholders have no standing to prosecute an action in the name of the corporation.<sup>100</sup>

The problem in *Milstead* was that the plaintiff was not a shareholder of record and, therefore, did not have standing to sue under the explicit terms of the Virginia corporation statutes.<sup>101</sup> Instead, the plaintiff maintained that she obtained an equitable ownership interest in shares of the defendant corporation when her final divorce decree was executed by her and her then husband and entered by the circuit court.<sup>102</sup> The divorce decree incorporated the couple’s settlement agreement and provided that she would receive 100 shares of the defendant corporation.<sup>103</sup> Because the separation agreement and the final decree created a “contractual expectancy in the 100 shares of stock,” the plaintiff claimed that she had an equitable ownership interest in the shares.<sup>104</sup> The court agreed.<sup>105</sup>

The next issue presented to the court was whether someone with merely an equitable ownership interest in a corporation’s shares, rather than someone with actual record ownership of shares, could bring a derivative suit on behalf of the other shareholders.<sup>106</sup> The court held that Virginia Code section 13.1-603 could be construed to permit such a suit.<sup>107</sup> After discussing the governance structure offered by other states that recognize standing in such “equitable shareholders” or persons with beneficial interests<sup>108</sup> and comparing

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99. *Id.*

100. *See id.*; *see also* VA. CODE ANN. § 13.1-672.1(B) (Repl. Vol. 1993).

101. *See Milstead*, 43 Va. Cir. at 431. While the plaintiff obviously was not a holder of the actual shares, she maintained that her final divorce decree was a nominee certificate under the terms defined in Virginia Code section 13.1-603. *See id.* Because the corporation did not issue the “nominee certificate,” however, and because the “certificate” was not on file with the corporation, the court concluded “that *Milstead* does not qualify as a ‘shareholder’ using this theory under Virginia law because she is not a ‘beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with [the] corporation.’” *Id.*; *see also* VA. CODE ANN. § 13.1-664 (Repl. Vol. 1993).

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

103. *See id.* at 432, 437.

104. *Id.* at 432.

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

106. *See id.* at 432.

107. *See id.*

108. Among these states are Florida, West Virginia, and Delaware. *See* DEL. CODE ANN. tit. 8 § 327 (1998); FLA. STAT ANN. §§ 607.07401(1), (7) (West 1993); W. VA. CODE § 31-1-103 (1995); *Shilling v. Erwin*, 888 F. Supp. 236 (S.D. W.Va. 1995) (quoting *Felsenheld v. Bloch*

them to Virginia's scheme,<sup>109</sup> the court stated that public policy allowed equitable owners of shares the opportunity to enforce corporate rights on behalf of themselves and other shareholders.<sup>110</sup> In short, the court's reasoning revolved around the purpose behind requiring only shareholders to prosecute actions on behalf of the corporation.<sup>111</sup> If the rule were otherwise, it would be possible for people to purchase shares of stock in order to bring an action to "attack a transaction which occurred prior to the purchase of stock."<sup>112</sup> Limiting the right to bring a derivative suit only to those who were shareholders—actual, beneficial or otherwise—prevents the opportunism of "subsequent purchasers of shares [who] could reap a windfall from any recovery in a derivative suit which was not considered in the purchase price of their shares."<sup>113</sup> Furthermore, a rule that would deny beneficial or equitable shareholders the right to bring derivative suits may "lead to an inequitable result since there may be no other shareholders willing to bring a derivative suit."<sup>114</sup>

Considering the facts before it, the court held that because the plaintiff came into her beneficial ownership of the shares by operation of law and not for the purpose of establishing standing to bring the derivative suit, her status did not frustrate the purpose behind Virginia's statute defining who has standing to bring such a suit.<sup>115</sup> Moreover, the court found that the corporation's other shareholders would be unlikely to bring a derivative suit themselves if the plaintiff was not permitted to bring her suit.<sup>116</sup> As such, the court held that on the basis of the facts presented, the Virginia Code permits shareholders with equitable ownership interests in the corporation to bring a derivative action.<sup>117</sup>

Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545 (1937)); *Jones v. Taylor*, 348 A.2d 188 (Del Ch. 1975); *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022 (Fla. Dist. Ct. App. 1996).

109. See *Milstead*, 43 Va. Cir. at 432 (comparing FLA. STAT. ANN. §§ 607.07401(1), (7) (West 1993) with VA. CODE ANN. §§ 13.1-603, -672.1 (Repl. Vol. 1993 & Cum. Supp. 1997)).

110. See *id.* at 432-34.

111. See *id.* at 434.

112. *Id.* (quoting *Jones*, 348 A.2d at 191).

113. *Id.* (citing 13 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5981 (perm. ed. rev. vol. 1995 & Cum. Supp. 1996)).

114. *Id.* at 434 (citing *Jones*, 348 A.2d at 192).

115. See *id.* at 435; see also VA. CODE ANN. § 13.1-671.1 (Repl. Vol. 1993 & Cum. Supp. 1997).

116. See *Milstead*, 43 Va. Cir. at 435.

117. See *id.* at 437; see also VA. CODE ANN. §§ 13.1-603, -672.1 (Repl. Vol. 1993 & Cum. Supp. 1997).

#### IV. CONCLUSION

Virginia's "corporate activism" may have been tempered this year in terms of volume of legislation, but the courts have provided a number of useful, pragmatic, and progressive opinions to help business entities compete in the next century. While some may lament the General Assembly's failure to seize the reins of progressive change with greater vigor in 1999, it must be remembered that the demands of electric power deregulation required a huge commitment of time and resources in the General Assembly this year. And, while a pioneering vision of the next century's business structure may attract businesses and stimulate their growth and competitiveness, a chief hallmark of a healthy business environment is also an air of stability. This is merely to say that progressive action for its own sake is not, and never has been, an earmark of the Virginia courts or legislature. Rather, time-tested methods and philosophies, coupled with an eye toward the pragmatic and a healthy respect for changes brought by innovation, all combine to create an environment where business can flourish.

