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James W. Ellerman
Gentry Locke Rakes & Moor, L.L.P.

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COMMENTARIES

ACCRUAL OF CAUSES OF ACTION IN VIRGINIA

James W. Ellerman *

I. INTRODUCTION

Black's Law Dictionary defines "accrue" to mean "[t]o come into existence as an enforceable claim or right" or "to arise."¹ *Black's* further notes that "[t]he term "accrue" in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact."² In civil practice a determination of the time of accrual must precede any discussion of statutes of limitations.³ As prescribed by Virginia Code section 8.01-230, "[T]he right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property" or "when the breach of contract occurs in actions ex contractu."⁴

* Associate, Gentry Locke Rakes & Moore, LLP, Roanoke, Virginia. B.A., 2001, College of William and Mary; J.D., 2005, University of Richmond School of Law.

1. BLACK'S LAW DICTIONARY 21 (8th ed. 2004).

2. *Id.* (quoting 2 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 25:3, at 17-18 (2d ed. 1996)).

3. W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE 255 (3d ed. 1997) ("The time limit of a statute of limitations begins to run when the cause of action accrues to the plaintiff.").

4. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006). As Sinclair and Middleditch note, it is important to recognize that Virginia Code section 8.01-230 provides only a general rule for accrual, and it may be superseded by specific statutory provisions with their own statutes of limitations. KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 4.9, at 225 n.201 (3d ed. 1998) (citing actions under the Vir-

This article will examine major issues in Virginia law affecting the accrual of causes of action, specifically in the contexts of contract, tort, and property. In addition to surveying the basic accrual requirements for each area of law, this article will look more deeply into several specific issues that guide an accrual analysis—particularly the distinction between causes and rights of action, as well as the continuous treatment, discovery, and economic loss rules.

II. DISTINGUISHING BETWEEN CAUSE OF ACTION AND RIGHT OF ACTION

The general accrual rules of Virginia Code section 8.01-230 specify that the “right of action” accrues, and the statute of limitations begins to run, at the point of injury, property damage, or contract breach.⁵ In contrast, numerous other Virginia Code sections setting the statutes of limitations for specific actions refer not to the accrual of the “right of action,” but instead to the accrual of the “cause of action.”⁶ While courts in other jurisdictions have suggested that the two terms are synonymous,⁷ the distinction between cause of action and right of action seems to exist in Virginia case law.⁸ If there is such an established distinction in

ginia Securities Act and actions for the enforcement of construction bonds as examples).

5. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

6. See, e.g., *id.* § 8.01-243(A) (Repl. Vol. 2000 & Cum. Supp. 2006) (“Unless otherwise provided . . . every action for personal injuries . . . and every action for damages resulting from fraud, shall be brought within two years after the *cause of action* accrues.”) (emphasis added); *id.* § 8.01-243(B) (Repl. Vol. 2000 & Cum. Supp. 2006) (“Every action for injury to property . . . shall be brought within five years after the *cause of action* accrues.”) (emphasis added); *id.* § 8.01-244(A) (Repl. Vol. 2000 & Cum. Supp. 2006) (“[I]f a person entitled to bring an action for personal injury dies as a result of such injury with no such action pending before the expiration of two years next after the *cause of action* shall have accrued, then an action under § 8.01-50 [wrongful death] may be commenced . . .”) (emphasis added); *Id.* § 8.01-246 (Repl. Vol. 2000 & Cum. Supp. 2006) (“[A]ctions founded upon a contract . . . shall be brought within the following number of years next after the *cause of action* shall have accrued . . .”) (emphasis added).

7. See, e.g., 1 AM. JUR. 2D *Actions* § 2 (2005); see also *Brungard v. Hartman*, 405 A.2d 1089, 1092 n.7 (Pa. Commw. Ct. 1979). As Pennsylvania courts have explained, “Cause of action and right of action have the same meaning.” *Id.* (citing *Alpha Claude Neon Corp. v. Pa. Distilling Co.*, 188 A. 825, 826 (Pa. 1936)). Moreover, “[i]n the case of a tort, the cause or right of action is the negligent act or acts which occasioned the injury.” *Id.* (citing *Smith v. Fenner*, 161 A.2d 150, 154–55 n.3 (Pa. 1960)).

8. See 1A MICHIE’S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA *Actions* § 3, at 191–92 (2004) (“Although the two terms are often used interchangeably, the distinction between ‘cause of action’ and ‘right of action’ is recognized by the courts, and it has substantial foundation in reason.”).

Virginia jurisprudence, there is question as to the practical efficacy of maintaining the delineation between the cause of action and the right of action.⁹

A. *The Cause of Action*

Ultimately, the importance of the distinction between the cause of action and the right of action is most relevant when determining the running of a statute of limitations. Under Virginia Code section 8.01-230, the applicable statute of limitations begins to run at the time the right of action accrues.¹⁰ As previously discussed, however, a right of action will not arise absent a pre-existing cause of action.¹¹ Therefore, while the relevant Code provisions speak to the right of action, it is essential to first examine the elements of a cause of action. The cause of action is the act or omission that constitutes the violation of the duty complained of.¹² As the court has repeatedly held, “The essential elements of a good cause of action . . . are [1] a legal obligation of a defendant to the plaintiff, [2] a violation or breach of that right or duty, and [3] a consequential injury or damage to the plaintiff.”¹³ Each element is essential, and “[a] cause of action does not evolve unless all of these factors are present.”¹⁴

9. Questions have also arisen as to the constitutional validity of maintaining a distinction between causes and rights of action. As the Supreme Court of Virginia noted in *Harbour Gate Owners Ass'n v. Berg*, 232 Va. 98, 348 S.E.2d 252 (1986), “[I]n a property damage case where the breach of duty precedes the resulting injury or damage, the property owner’s right to sue may be barred before his property suffers any injury or damage.” *Id.* at 107 n.3, 348 S.E.2d at 258 n.3. Based on the court’s admonition that if Virginia Code section 8.01-230 is applied to bar a plaintiff’s claim before the claim ever arises, violations of both the Virginia and federal due process clauses may result. *See MacLellan v. Throckmorton*, 235 Va. 341, 345, 367 S.E.2d 720, 722 (1988). For further discussion of this potential constitutional issue, see Letter from J. Gray Lawrence, Jr., Esquire, Faggert & Freiden, P.C., to Wiley F. Mitchell, Jr., Esquire, Wilcox & Savage, P.C. (Aug. 5, 2004) [hereinafter *Boyd-Graves Letter*] (reporting the findings of a committee authorized by the 2004 Boyd-Graves Conference to research the right of action/cause of action distinction) (on file with author).

10. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

11. *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969).

12. *Seymour v. Richardson*, 194 Va. 709, 713, 75 S.E.2d 77, 80 (1953) (citing *State ex rel. Maynard v. Jarett*, 110 S.E. 568, 569 (W. Va. 1922)); *see also* BRYSON, *supra* note 3, at 255 (“The cause of action accrues when the defendant does or leaves undone whatever it is that subjects him to liability.”).

13. *Caudill*, 210 Va. at 13, 168 S.E.2d at 259; *see also* *Sides v. Richard Mach. Works, Inc.*, 406 F.2d 445, 446 (4th Cir. 1969); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 957, 275 S.E.2d 900, 904 (1981).

14. *Locke*, 221 Va. at 957, 275 S.E.2d at 904.

It is important to note that, while there is some authority to the contrary,¹⁵ it is not the wrongful act that triggers a cause of action, but rather the existence of some injury, damage, or loss.¹⁶ "Damage," the court has held, "is an essential element of a cause of action. Without some injury or damage, however slight, a cause of action cannot accrue."¹⁷ Therefore, where there has been no actual injury to the plaintiff, there is no recognizable cause of action.¹⁸ Conversely, where an injury or loss, no matter how slight, is sustained due to the defendant's wrongful acts, and the law provides a remedy for the plaintiff's damage, a cause of action is deemed to have arisen.

B. *The Right of Action*

As discussed above, Virginia Code section 8.01-230 looks to the accrual of the right of action as the point at which the running of the statute of limitations commences. "A right of action cannot accrue," however, "until there is a cause of action."¹⁹ The Supreme Court of Virginia has held that "[a] right of action is the right to presently enforce a cause of action—a remedial right affording redress for the infringement of a legal right belonging to some definite person."²⁰ As one commentator explains, "The statute begins to run when a party has a right to sue, that is, when

15. See *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 82, 301 S.E.2d 8, 14 (1983) (noting the defendant's misplaced reliance on *Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977), and *Richmond Redevelopment & Housing Authority v. Laburnum Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954)).

16. See, e.g., *Locke*, 221 Va. at 957-58, 275 S.E.2d at 904. But see *Street v. Consumers Mining Corp.*, 185 Va. 561, 572, 39 S.E.2d 271, 275 (1946) (noting that, in a wrongful death context, the "cause of action . . . is not the death itself, but the tort which produces the death"); *Sarver v. Prud'homme*, 67 Va. Cir. 315, 317-18 (Cir. Ct. 2005) (Roanoke City) ("The death of Mr. Sarver, although a prerequisite to a wrongful death claim, cannot be the cause of action because the death itself involved no act or omission that establishes negligence.").

17. *Keller v. Denny*, 232 Va. 512, 520, 352 S.E.2d 327, 332 (1987).

18. *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002). The Supreme Court of Virginia has construed "injury" to mean "positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded." *Locke*, 221 Va. at 957, 275 S.E.2d at 904. "Thus," the court notes, "the running of the time is tied to the fact of harm to the plaintiff, without which no cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action." *Id.* at 957-58, 275 S.E.2d at 904.

19. *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969).

20. *First Va. Bank-Colonial*, 225 Va. at 81, 301 S.E.2d at 13 (quoting 1 AM. JUR. 2D *Actions* § 2 (1962)).

there has been a breach of duty, or a violation of a contract, giving rise to a cause of action.”²¹ Since no cause of action accrues until there is some cognizable damage to the plaintiff’s person or interest,²² and no right of action can arise until there is a cause of action, there can be no right of action until there is injury. As the court has explained: “A right of action cannot accrue until there is a cause of action. . . . In the absence of injury or damage to a plaintiff or his property, he has no cause of action and no right of action can accrue to him.”²³

While the right of action triggers the running of the statute of limitations, it is also the right of action that is terminated upon conclusion of the statutory period. As the Supreme Court of Virginia noted in *Lewis’ Administrator v. Glenn*²⁴:

A cause of action is said to accrue to any person when that person comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus statutes of limitation do not affect the cause of action, but take away the right.²⁵

Stated otherwise, the statute of limitations has no effect on the cause of action, which is simply the factual basis giving rise to the plaintiff’s right to seek a remedy at law. Instead, the statute of limitations defines the time in which the plaintiff may pursue an action at law to seek redress for the defendant’s breach of duty, either legal or contractual. As stated by the Supreme Court of Virginia, “[statutes of limitations] are designed to compel the prompt assertion of an accrued right of action; not to bar such a right before it has accrued.”²⁶

21. MARTIN P. BURKS, PLEADING AND PRACTICE IN ACTIONS AT COMMON LAW § 210, at 350 (Clayton E. Williams & Martin P. Burks, III eds., 3d ed. 1934).

22. See *supra* notes 14–17 and accompanying text.

23. *First Va. Bank-Colonial*, 225 Va. at 82, 301 S.E.2d at 14 (quoting *Caudill*, 210 Va. at 13, 168 S.E.2d at 259).

24. 84 Va. 947, 6 S.E. 866 (1888).

25. *Id.* at 949, 6 S.E. at 882 (quoting 1 BOUVIER’S LAW DICTIONARY 247 (14th ed. 1873)).

26. *First Va. Bank-Colonial*, 225 Va. at 83, 301 S.E.2d at 14 (quoting *Caudill*, 210 Va. at 13, 168 S.E.2d at 259).

C. *Resolving the Distinction*

The Supreme Court of Virginia has distinguished between the cause of action and the right of action, holding that, while similar, “the terms are not interchangeable.”²⁷ It is, in the court’s words, “a distinction *with* a difference.”²⁸ “While a cause of action and a right of action *may* accrue simultaneously,” the court notes, “they do not necessarily do so. Indeed, two separate rights of action may arise from a single cause of action, and those rights may accrue at different times.”²⁹

1. Simultaneous Accrual

While the court’s distinction between the cause and right of action seems entrenched in Virginia case law, it is an unfounded distinction that is inherently inconsistent. Moreover, maintaining the distinction serves only to confound the already complex issues of accrual and the running of statutes of limitations.³⁰ Instead, the court should recognize the term “right of action” simply as a description of the statutory time period during which an aggrieved plaintiff may seek a remedy for a cause of action. Under this view, the cause of action and the right of action will *always* accrue simultaneously, and the statute of limitations will run from that point of accrual to the point at which it severs the plaintiff’s right of action.

The essential determination for accrual questions, as stated above, is when the cause of action accrues, as a cause of action must exist before the right of action may accrue. Whether a specific case sounds in the law of tort, contract, or property, a cause of action does not exist until there has been a breach of some duty which proximately causes some degree of injury, harm, or loss to

27. *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 546 n.1, 379 S.E.2d 316, 318 n.1 (1989).

28. *First Va. Bank-Colonial*, 225 Va. at 81, 301 S.E.2d at 13. For a recent example of the application of the “distinction with a difference” in a venue context, see *Sarver v. Prud’Homme*, 67 Va. Cir. 315, 316–17 (Cir. Ct. 2005) (Roanoke City).

29. *First Va. Bank-Colonial*, 225 Va. at 81, 301 S.E.2d at 13 (emphasis added) (citing *Carter v. Hinkle*, 189 Va. 1, 12, 52 S.E.2d 135, 140 (1949)).

30. As evidenced by the *Sarver* opinion, rendered by Judge Dorsey of the Roanoke City Circuit Court, the unresolved distinction between causes of action and rights of action has crossed into the context of Category B venue determinations.

the plaintiff.³¹ While the court suggests that a right of action may possibly accrue later than a cause of action,³² such a scenario seems impossible (practically, if not also logically). Once a legal obligation is owed the plaintiff by the defendant, and once that duty or right is violated or breached, causing consequential injury or damage to the plaintiff, a cause of action arises.³³ Each element of the cause of action is necessary and indispensable, thus no cause of action can accrue until each is satisfied. If, as discussed above, a right of action cannot accrue until there is first a cause of action, by implication a right of action also requires the fulfillment of all the elements of the cause of action. Therefore, the right of action, being based in the same elements required for a cause of action, should spring into existence immediately upon the cause of action's accrual. That is, upon the accrual of a cause of action, a right of action, whose duration is determined by a statute of limitations, also accrues and remains throughout the statutorily prescribed period.

The same conclusion may be reached by looking to the text of Virginia Code section 8.01-230, which states that the right of action is deemed to accrue and the prescribed limitation period begins to run from the time of contract breach, of damage to property, or of personal injury.³⁴ If the right of action accrues immediately upon the plaintiff's injury or damage, as suggested by the statute, then it must accrue simultaneously with the corresponding cause of action. Damage, by the language of Virginia Code section 8.01-230, is a necessary prerequisite of the right of action; however, the cause of action is also a prerequisite of the right of action.³⁵ Once again, "A right of action cannot arise until a cause of action exists."³⁶ Damage, however, is also required for the accrual of a cause of action.

31. See *supra* notes 14–17 and accompanying text.

32. See, e.g., *Shipman v. Kruck*, 267 Va. 495, 504, 593 S.E.2d 319, 324 (2004) (noting that the determinative issue was whether "the [plaintiff's] right of action came into existence simultaneously with their cause of action or whether it accrued at another time").

33. See *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 546, 379 S.E.2d 316, 317 (1989).

34. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006); see also *Laguna v. Wallace*, 67 Va. Cir. 535, 538 (Cir. Ct. 2004) (Loudoun County).

35. See *supra* note 18 and accompanying text.

36. *Laguna*, 67 Va. Cir. at 538 (citing *Stone v. Ethan Allen, Inc.*, 232 Va. 365, 368, 350 S.E.2d 629, 631 (1986)).

Placing the pieces in order, it becomes clear that the right of action must accrue contemporaneously with the cause of action. First, there must be a duty, contractual or legal, owed by the defendant to the plaintiff. Second, there must be some breach or violation of that duty by the defendant. Finally, some damage or injury must be caused by the defendant's breach of duty. Immediately upon the suffering of loss, damage, or injury, all of the elements will be satisfied and a cause of action will accrue to the plaintiff. Likewise, as the cause of action has accrued and damage has occurred, the right of action will also immediately accrue and trigger the running of the statute of limitations.

2. *Harbour Gate* and Misinterpretation

Much of the confusion surrounding the distinction between the cause of action and the right of action stems from the Supreme Court of Virginia's holding in *Harbour Gate Owners' Ass'n v. Berg*,³⁷ wherein the court suggests that a right of action may accrue after a cause of action and before any injury or damage is suffered by the plaintiff.³⁸ The *Harbour Gate* opinion not only illustrates the complexity of the distinction, but also highlights the inherent flaw of dogmatic adherence to past holdings, or *stare decisis*. In striving to maintain an unnecessary distinction between the cause and the right of action, the *Harbour Gate* court reaches a conclusion that is correct in result, but unsound in theory.

The issue in *Harbour Gate* concerned the accrual of a cause and right of action for damages to property and a breach of warranty. In 1973, the developers of the Harbour Gate Condominiums in Virginia Beach began construction of the buildings, which reached substantial completion in 1975.³⁹ The first residential units were sold in 1976, with approximately 120 more units sold through 1978.⁴⁰ The deeds through which the units were conveyed contained no express warranties, but were ultimately covered by the Condominium Act, which became effective in July 1974.⁴¹ The Condominium Act contained specific warranty provi-

37. 232 Va. 98, 348 S.E.2d 252 (1986); see also Boyd-Graves Letter, *supra* note 9, at 2.

38. *Harbour Gate*, 232 Va. at 107, 348 S.E.2d at 258 ("The statute of limitations began to run as to his claim 'when the breach of contract or duty occur[red].'").

39. *Id.* at 100, 348 S.E.2d at 254.

40. *Id.*

41. *Id.*; see VA. CODE ANN. §§ 55-79.39 to -79.103 (Repl. Vol. 2003 & Cum. Supp. 2006).

sions mandating warranties or guarantees against structural defects in condominium units and common elements for a period of two years.⁴² In April 1978, residents discovered damage to the roof of the condominium.⁴³ Alleging that the defective roof breached the Condominium Act's statutory warranties, the plaintiffs filed suit for damages against the developer, architects, contractors, and subcontractors.⁴⁴ The developers filed a plea asserting that the statute of limitations had passed, thus cutting off the plaintiffs' right of action in the case.⁴⁵ The Virginia Beach City Circuit Court, ultimately sustaining the defendants' plea, held that the plaintiffs' right of action for breach of warranty had accrued when the first condominium unit was sold in 1976 and that this case, having been filed more than three years after that time, was time-barred under the applicable statute of limitations.⁴⁶ The Supreme Court of Virginia then granted the plaintiffs' appeal from the order sustaining the plea.⁴⁷

In addressing the trial court's ruling on the statute of limitations, the Supreme Court of Virginia began by noting that the statutory two-year warranty period was not a statute of limitations, but merely the period in which a cause of action for a breach of that warranty may accrue.⁴⁸ As the court explained: "If a breach occurs before the two-year warranty expires, a cause of action accrues. If a person suffers damage or injury as a result of the breach, a right of action accrues to him."⁴⁹ The court correctly reasoned that, in order to determine the duration of such a right of action, it must look to the applicable statute of limitations.⁵⁰ Ultimately concluding that Virginia Code section 8.01-246(4)'s three-year limitations period had been correctly applied in the court below, the Supreme Court of Virginia then turned its attention to the question of when the right of action actually accrued.⁵¹

42. *Harbour Gate*, 232 Va. at 101, 348 S.E.2d at 254 (citing VA. CODE ANN. § 55-79.79(B) (Cum. Supp. 2006)).

43. *Id.*, 348 S.E.2d at 255.

44. *Id.* at 101-02, 348 S.E.2d at 255.

45. *Id.* at 102, 348 S.E.2d at 255.

46. *Id.* (citing VA. CODE ANN. § 8.01-246(4) (Repl. Vol. 2000 & Cum. Supp. 2006) (governing contracts not in writing, as the applicable statute)).

47. *Id.*

48. *Id.* at 105, 348 S.E.2d at 257.

49. *Id.*

50. *Id.*

51. *Id.* at 105-06, 348 S.E.2d at 257.

Citing past opinions, the court began by reiterating that, just as in actions for personal injury, in actions for damage to property, "where a breach of duty preceded damage to property rights, a right of action did not accrue to the property owner until his property suffered damage or injury."⁵² The court then turned to Virginia Code section 8.01-230, which at the time, read as follows:

In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue *and the prescribed limitation period shall begin to run* from the date the injury is sustained in the case of injury to the person, *when the breach of contract or duty occurs in the case of damage to property* and not when the resulting damage is discovered⁵³

In light of the statutory provision, the court observed that while the accrual rules for personal injury actions remain unchanged, the effect on actions for damage to property was substantial.⁵⁴ For plaintiffs who had purchased deeds after section 8.01-230 became effective, the court ruled that the statute of limitations began to run in 1976, when the breach of contract or duty occurred, rather than in 1978, when the actual damage was discovered.⁵⁵ In a concluding note, the court sought to defend a holding it considered unfair by citing its obligation to follow the law:

It seems unlikely that the revisors [of Virginia Code section 8.01-230] intended the harsh result dictated by its clear language: in a property damage case where the breach of duty precedes the resulting injury or damage, the property owner's right to sue may be barred before his property suffers any injury or damage. Indeed, as here, any right of action may be barred before he becomes an owner of the property. It is not our function to amend the law, however, and we must leave to the General Assembly any consideration of change.⁵⁶

The most significant concern with the *Harbour Gate* decision has since been resolved through changes to Virginia Code section

52. *Id.* at 106, 348 S.E.2d at 257 (reviewing *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 82-83, 301 S.E.2d 8, 14 (1983)).

53. *Id.*, 348 S.E.2d at 257-58. It is important to note that the version of Virginia Code section 8.01-230 relied on by the *Harbour Gate* court uses the term "cause of action," whereas now the statute starts the running of the statute of limitations at the accrual of the right of action. "Over the years, the statute was amended to expand its application to actions *ex contractu* generally, not merely to those involving property damage, and to substitute 'right of action' for 'cause of action.'" Boyd-Graves Letter, *supra* note 9, at 1.

54. *Harbour Gate*, 232 Va. at 106, 348 S.E.2d at 258.

55. *Id.* at 107, 348 S.E.2d at 258.

56. *Id.* at 107 n.3, 348 S.E.2d at 258 n.3.

8.01-230. Whereas then the statute did provide that a cause of action for damage to property accrued only at the time of the breach of duty, it has since been amended to provide that the limitations period “begin[s] to run from the date the injury is sustained in the case of injury to the person or damage to property.”⁵⁷ A flaw remains, however, in the court’s interpretation of the terms “cause of action” and “right of action” and their individual significance. Relying wholly on the language of Virginia Code section 8.01-230, the court ruled that the cause of action accrued when the breach of duty occurred, avoiding any discussion of the previously required prerequisite of damage or injury. As a result, some have construed the *Harbour Gate* decision, even after the most recent amendments to Virginia Code section 8.01-230, to imply that a right of action can accrue before any damage, injury, or loss is suffered.⁵⁸ Had the court decided the case based on its past holdings related to causes and rights of action, rather than solely on the language of the statute, such questions could likely have been avoided, though the same outcome would have resulted.

In 1954, in the case of *Richmond Redevelopment & Housing Authority v. Laburnum Construction Corp.*,⁵⁹ the Supreme Court of Virginia held that the plaintiff’s cause of action arose at the time of the breach of warranty—when defective work was done—and not at the time of extensive property damage.⁶⁰ The court so held because, at the time of breach, the plaintiff’s property had been damaged to some calculable degree, which the court classified as consequential damages.⁶¹ In support of its decision, the court noted that:

[W]here an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefor the statute of limitations attaches at once. It is not material that all the damages resulting from the act should have been sustained at that time and the running of the statute [of limitations] is

57. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

58. See *Wright v. Eli Lilly & Co.*, 65 Va. Cir. 485, 490 (Cir. Ct. 2004) (Portsmouth City); see also 12A MICHIE’S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA *Limitation of Actions* § 23, at 337 (2002); Boyd-Graves Letter, *supra* note 9, at 3 (suggesting that the current statutory language should be changed so as to avoid the problems illustrated in *Harbour Gate*, “i.e., commencement of the running of the statute of limitations before an injury ha[s] occurred”).

59. 195 Va. 827, 80 S.E.2d 574 (1954).

60. *Id.* at 836–39, 80 S.E.2d at 580–81.

61. *Id.* at 836, 80 S.E.2d at 580.

not postponed by the fact that the actual or substantial damages do not occur until a later date.⁶²

Likewise, in 1928 the Supreme Court of Virginia held in *Louisville & Nashville R.R. v. Saltzer*,⁶³ that:

Whenever any injury, however slight it may be, is complete at the time the [act or omission] is completed, the cause of action then accrues; but, whenever the [act or omission] is not legally injurious, there is no cause of action until such injurious consequences occur, and it accrues at the time of such consequential injury.⁶⁴

In *Harbour Gate*, as in *Laburnum Construction* and *Saltzer*, significant injury occurred long after the initial breach of contract or warranty. Nonetheless, as these earlier precedents make clear, there is sufficient loss to the plaintiff at the time of breach, that is, the delivery of a defective product or the defective completion of work, to qualify as "damage" for the purposes of accrual. As in *Laburnum Construction*, the requisite damage need not be catastrophic. Therefore, the court's (and others') fear that "in a property damage case where the breach of duty precedes the resulting injury or damage, the property owner's right to sue may be barred before his property suffers any injury or damage"⁶⁵ is misplaced. Regardless of the wording of Virginia Code section 8.01-230, the same result is reached. The plaintiff's cause of action for damage to property arising from a breach of warranty may accrue upon delivery or conveyance of the defective property. Taking into account the foregoing discussion of the distinction between the cause and right of action, therefore, the two will arise contemporaneously, since there is both a cause of action and calculable damage.

3. Statutory Inconsistency

As mentioned earlier, the Virginia Code is horribly inconsistent in its use of the terms "cause of action" and "right of action."⁶⁶

62. *Id.* at 839, 80 S.E.2d at 581 (quoting *Street v. Consumers Mining Corp.*, 185 Va. 561, 566, 39 S.E.2d 271, 272 (1946)).

63. 151 Va. 165, 144 S.E. 456 (1928).

64. *Id.* at 171, 144 S.E. at 457, quoted in *Locke v. Johns-Manville Corp.*, 221 Va. 951, 960, 275 S.E.2d 900, 906 (1981).

65. *Harbour Gate Owners' Ass'n v. Berg*, 232 Va. 98, 107 n.3, 348 S.E.2d 252, 258 n.3 (1986).

66. See *supra* note 6.

thus contributing to the confusion over their respective meanings.⁶⁷ Specifically with regard to contract actions, Virginia Code section 8.01-246 provides that the statute of limitations begins with the accrual of the *cause of action*,⁶⁸ whereas Virginia Code section 8.01-230 looks to the accrual of the *right of action*.⁶⁹ If one adopts the view that the right of action accrues contemporaneously with the cause of action and serves only to define the period in which one can seek a remedy, such statutory inconsistencies are only of clerical concern.

Virginia Code section 8.01-246 states that “actions founded upon a contract . . . shall be brought within the following number of years next after the cause of action shall have accrued.”⁷⁰ Following the preceding analysis, the cause of action will accrue upon a breach of a contractual duty proximately causing damage or loss to the plaintiff.⁷¹ At that time, the right of action will also accrue, as its two prerequisites, the cause of action and damage, will exist. Therefore, implicit in the words “after the cause of action shall have accrued” is the understanding that the right of action will spring from the accrued cause of action and will last until it is cut off by the applicable statute of limitations.

Conversely, Virginia Code section 8.01-230 prescribes the point at which “the right of action shall be deemed to accrue and the prescribed limitations period shall begin to run.”⁷² Similar to section 8.01-246, Virginia Code section 8.01-230 carries with it certain implied language. Implicit in its text is the understanding that before the right of action can accrue and the statutory time can begin to run, there must first be an accrued cause of action and some measure of damage or loss suffered by the plaintiff.⁷³

67. See Boyd-Graves Letter, *supra* note 9, at 3 (“The Committee believes that the conflict between Code §§ 8.01-246 and 8.01-230 needs resolving, especially in view of the Supreme Court’s past decisions holding that Code § 8.01-230 may apply to bar a claim before there is an injury.”).

68. VA. CODE ANN. § 8.01-246 (Repl. Vol. 2000 & Cum. Supp. 2006).

69. *Id.* § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

70. *Id.* § 8.01-246 (Repl. Vol. 2000 & Cum. Supp. 2006).

71. See *Brown v. Harms*, 251 Va. 301, 306, 467 S.E.2d 805, 807 (1996).

72. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

73. See *id.*

D. Conclusion

If courts and scholars will accept the view that the cause of action and right of action accrue simultaneously, there is no pressing need, beyond only an aesthetic desire for consistency, to undertake major revisions of Title 8.01 of the Virginia Code. To achieve consistency, however, the Supreme Court of Virginia must speak to the cause of action/right of action distinction with some measure of finality. As shown above, there is an ample foundation in both the Virginia Code and Virginia common law upon which the court could hold that "right of action" simply describes the period of time in which a litigant may seek a remedy for a cause of action. Nonetheless, the distinction is ultimately a matter more of academic and logical significance than of practical relevance. In practice, the Virginia lawyer should continue to look to the cause of action—the breach of duty proximately causing injury—in determining whether to file suit and when the applicable statute of limitations will bar his or her client's legal remedy.

III. CONTRACT VERSUS TORT AND THE ECONOMIC LOSS RULE

The distinction between contract and tort arises often when parties seek to determine whether a cause of action has accrued and which statute of limitations will apply to the particular action at issue. This problem most often arises in products liability⁷⁴ and in professional liability actions.⁷⁵ In determining whether a cause of action is more appropriately deemed tort or contract, courts look sometimes to the source of the defendant's duty to the plaintiff and other times to the nature of the loss, injury, or damage sustained by the plaintiff. The economic loss rule, often applied in property damage cases, may serve to resolve inconsistencies that arise in the duty-based analysis employed in professional liability actions.

74. See, e.g., *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988).

75. See, e.g., *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004); *Oleyar v. Kerr*, 217 Va. 88, 225 S.E.2d 398 (1976).

A. *The Economic Loss Rule*

The case of *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*⁷⁶ provides the best example of Virginia's use of the economic loss rule to distinguish causes of action arising in tort from those arising in contract. In *Sensenbrenner*, the plaintiffs alleged that the defendants' negligent design, supervision, and construction of a swimming pool on their property caused water pipes to break, leading to extensive damage to a house next to the pool.⁷⁷ In response to the plaintiffs' allegations, the defendants asserted that the action was barred because the plaintiffs claimed damages for only economic loss and thus could not recover in tort because of a lack of privity.⁷⁸

Virginia Code section 8.01-223 provides that "where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense."⁷⁹ In *Blake Construction Co. v. Alley*,⁸⁰ the Supreme Court of Virginia held that since section 8.01-223 is limited only to cases involving injury to persons or property, it has no application in actions where plaintiffs seek damages for purely economic losses.⁸¹ Therefore, the dispute in *Sensenbrenner* turned entirely on whether the plaintiffs' claims were for injuries to their property or, rather, for purely economic loss.⁸²

As the Supreme Court of Virginia noted in *Sensenbrenner*, the majority of courts "equate economic losses, for which no action in tort will lie, with disappointed economic expectations,"⁸³ where "goods purchased fail to meet some standard of quality."⁸⁴ Further illustrating the distinction, the court turned to the law of products liability, explaining that "when a product 'injures itself' because one of its component parts is defective, a purely economic loss results to the owner for which no action in tort will lie."⁸⁵ Cit-

76. 236 Va. 419, 374 S.E.2d 55 (1988).

77. *Id.* at 422, 374 S.E.2d at 56.

78. *Id.*

79. VA. CODE ANN. § 8.01-223 (Repl. Vol. 2000 & Cum. Supp. 2006).

80. 233 Va. 31, 353 S.E.2d 724 (1987).

81. *Id.* at 34, 353 S.E.2d at 727.

82. *Sensenbrenner*, 236 Va. at 423, 374 S.E.2d at 57.

83. *Id.* (citing *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (1982), as an example).

84. *Id.* (citing *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443 (1982)).

85. *Id.* at 424, 374 S.E.2d at 57 (quoting *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 871 (1986)).

ing the Supreme Court of the United States, the court observed that if tort law applied to such cases sounding in contract, "contract law would drown in a sea of tort,"⁸⁶ and attorneys would always turn to tort to avoid the more restrictive limits of contract damages.⁸⁷ "The law of torts," the court observed, "is well equipped to offer redress for losses suffered by reason of a 'breach of some duty imposed by law to protect the broad interests of social policy.'"⁸⁸ As the court continued:

Tort law is not designed, however, to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.⁸⁹

Accordingly, the court found that the plaintiffs had alleged "nothing more than disappointed economic expectations"⁹⁰ and that the defendants had assumed no duties beyond those imposed on them by contract.⁹¹

As shown above, while the court made mention of the source of the duty involved, the dispositive factor in *Sensenbrenner* was the characterization and pleading of damages. As the court concluded, the damages caused to the plaintiffs' house, a part of their property, constituted "a diminution in the value of the whole, measured by the cost of repair."⁹² Employing the economic loss rule, the court ultimately held that such damage "is a purely economic loss, for which the law of contracts provides the *sole* remedy."⁹³

86. *Id.* (quoting *East River*, 476 U.S. at 866).

87. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 614 (4th ed. 1971)). Conversely, the same rationale may apply to prevent parties from seeking to place in the law of contract that which more appropriately belongs in the law of torts. *See, e.g.*, *Glisson v. Loxley*, 235 Va. 62, 366 S.E.2d 68 (1988).

88. *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d at 58 (quoting *Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983)).

89. *Id.* (citing *Kamlar*, 224 Va. at 706, 299 S.E.2d at 517).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (emphasis added).

B. *The Duty Analysis and Actions for Professional Malpractice*

As mentioned above, the contract-tort distinction is also relevant in actions for professional malpractice. Whereas the economic loss rule, most often employed in property damage cases, focuses on the classification of the plaintiff's injuries, the focus of the contract-tort distinction for professional malpractice is the underlying duty owed the plaintiff by the defendant.

In this context, the distinction is most clearly illustrated in Virginia's treatment of legal malpractice actions. In 1976, in the case of *Oleyar v. Kerr*,⁹⁴ the Supreme Court of Virginia adopted the view that "an action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract and thus governed by the statute of limitations applicable to contracts."⁹⁵ The court's holding in *Oleyar* was based in large part on explanations of English precedents found in *Burks Pleading and Practice*.⁹⁶ As that treatise explains:

The distinction is this: If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.⁹⁷

Since *Oleyar*, this view of legal malpractice as an action governed by contract statutes of limitations has been repeatedly upheld in the commonwealth,⁹⁸ most recently in *Shipman v. Kruck*.⁹⁹ Citing other precedents, the Supreme Court of Virginia noted in *Shipman* that "[a] cause of action for legal malpractice

94. 217 Va. 88, 225 S.E.2d 398 (1976).

95. *Id.* at 90, 225 S.E.2d at 400.

96. *See id.*, 225 S.E.2d at 399-400.

97. MARTIN P. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 234, at 406 (T. Munford Boyd ed., 4th ed. 1952) (quoting *Atlantic & Pacific R. Co. v. Laird*, 164 U.S. 393, 399 (1896)).

98. *See, e.g.*, *MacLellan v. Throckmorton*, 235 Va. 341, 344, 367 S.E.2d 720, 721 (1988) ("We adhere to the rule that actions for legal malpractice are governed by the limitation periods applicable to actions for breach of contract.").

99. 267 Va. 495, 593 S.E.2d 319 (2004).

requires the existence of an attorney-client relationship which gave rise to a duty."¹⁰⁰ Furthermore, the court noted, "it is the contract [between attorney and client] that gives rise to the duty."¹⁰¹

C. *The Economic Loss Rule in Professional Liability Actions*

While it is clearly established in Virginia that legal malpractice actions are to be governed by contract statutes of limitations, an apparent inconsistency arises when one applies the court's rationale for this rule to cases for medical malpractice. To resolve this conflict, it may be possible to employ the economic loss rule to rationalize the use of a contract statute of limitations for legal malpractice, an action ostensibly sounding in tort.

As discussed above, the Supreme Court of Virginia has long held that legal malpractice actions are limited by contract statutes of limitations because the cause of action's prerequisite duty arises only from the agreement of the parties. Conversely, tort causes of action, of which medical malpractice is one, require the breach of some duty imposed on the defendant by operation of law, wholly independent of the parties' dealings. Inconsistency arises, however, when one considers Virginia's requirement that, before a cause of action for medical malpractice can arise, there must first be a physician-patient relationship. In *Lyons v. Grether*,¹⁰² the Supreme Court of Virginia held that "[a] physician's duty arises *only* upon the creation of a physician-patient relationship; that relationship springs from a consensual transaction, a contract, express or implied, general or special."¹⁰³ Continuing, the court further noted that "[w]hether a physician-patient relationship is created is a question of fact, turning upon a determi-

100. *Id.* at 501, 593 S.E.2d at 322 (quoting *Rutter v. Jones, Blechman, Woltz & Kelly*, P.C., 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002)).

101. *Id.* *But see* *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 457 S.E.2d 28 (1995). In *Tidewater Capital*, the issue before the court was whether a defendant in a legal malpractice action could employ the defense of contributory negligence, traditionally reserved exclusively for tort causes of action. *Id.* at 431, 457 S.E.2d at 31. In allowing the use of the defense, the court held that "[w]ith respect to contributory negligence, we discern no logical reason for treating differently legal malpractice and medical malpractice actions. Both are negligence claims, and actions against attorneys for negligence are governed by the same principles applicable to other negligence actions." *Id.* at 432, 457 S.E.2d at 32.

102. 218 Va. 630, 239 S.E.2d 103 (1977).

103. *Id.* at 633, 239 S.E.2d at 105 (emphasis added).

nation whether the patient entrusted his treatment to the physician and the physician accepted the case.”¹⁰⁴ Later in its opinion, the court used more contract-sounding language to discuss the termination of the physician’s duty, noting that “the relationship may be terminated earlier by mutual consent or by the unilateral action of the patient.”¹⁰⁵

This problem of inconsistency is compounded, however, by the fact that an attorney’s duties to his or her client may arise before the formation of a contract between them. It is uniformly understood that an attorney owes a duty of confidentiality to prospective clients, even those with whom he never enters into a contractual agreement to provide legal services. While the Supreme Court of Virginia bases its accrual rules for legal malpractice on the formation and breach of contractual duties, the problem of prospective clients illustrates that the duty-based classification of actions is not so simple.¹⁰⁶

The economic loss rule may serve to reconcile this apparent inconsistency. In *Sensenbrenner*, the Supreme Court of Virginia observed that:

The controlling policy consideration underlying tort law is the safety of persons and property—the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed

104. *Id.*

105. *Id.* at 634, 239 S.E.2d at 106.

106. See *supra* note 101. In *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 457 S.E.2d 28 (1995), the Supreme Court of Virginia made several statements that would suggest uniform treatment of legal and medical malpractice claims. See *id.* at 432, 457 S.E.2d at 32; see also *Allied Prods., Inc. v. Duesterdick*, 217 Va. 763, 764–65, 232 S.E.2d 774, 775 (1977). As the court notes in *Tidewater Capital*, “[T]he duty upon the attorney to exercise reasonable care, skill, and diligence on behalf of the client arises out of the relationship of the parties, irrespective of a contract, and the attorney’s breach of that duty, *i.e.*, the appropriate standard of care, constitutes negligence.” *Tidewater Capital*, 249 Va. at 432, 457 S.E.2d at 32. The court does not attempt to reconcile this inherent contradiction in the *Tidewater Capital* decision. Nor does the later decision in *Shipman v. Kruck*, 267 Va. 495, 593 S.E.2d 319 (2004), speak to the *Tidewater Capital* decision or its rationale. It is perhaps possible to reconcile this problem by noting that the *Tidewater Capital* holding, insofar as it applies a traditional duty and negligence formula to legal malpractice cases, is limited in applicability only to the use of the contributory negligence defense. See *supra* note 101. For the purposes of this analysis and a discussion of statutes of limitations, the *Shipman* rationale should still control, as that decision was limited in scope to the applicable limitations period for legal malpractice actions. *Shipman*, 267 Va. at 501, 593 S.E.2d at 322.

in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other."¹⁰⁷

Whereas tort damages seek to provide a remedy for the breach of a duty "to take care for the *safety* of the person or property of another,"¹⁰⁸ contract damages seek to compensate parties for purely economic losses. In attorney-client relationships, the parties are fully able, at the time of the formation of the relationship (whether or not it is ultimately ratified by contract) to determine the measure of damages that would result from a breach of duty. This predictability stems not from the source of the duty, but rather from the nature of the damages the aggrieved client would ultimately plead. The legal malpractice plaintiff does not seek redress for an injury to himself or his property, but instead for the disparity between the services he bargained for and those he actually received from his attorney. "That type of compensation," the court has observed, "necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts."¹⁰⁹ Conversely, when forming the physician-patient relationship, the parties in a medical malpractice action could not have foreseen the ultimate damages stemming from a missed diagnosis of melanoma or a botched gastric bypass procedure.

By employing a duty-based approach to apply the contract statute of limitations to legal malpractice actions, the Supreme Court of Virginia has fashioned a legal distinction where there is no corresponding distinction in fact or in practice. Distinguishing the two causes of action along economic loss lines, however, more clearly justifies the distinction without resorting to the creation of legal fiction.

107. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988).

108. *Id.* (quoting *Blake Constr. Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (1987)).

109. *Id.*

IV. THE DISCOVERY RULE

A. *Judicial Rejection of the Discovery Rule*

Notwithstanding its application in a number of states, including neighboring West Virginia, Virginia has repeatedly refused to adopt a “discovery rule” to, as one commentator notes, “ameliorate the fate of the hapless victim of actionable conduct who cannot learn of the injury he has suffered until after the limitation period has run.”¹¹⁰ The rationale for the rejection of the discovery rule, which would set the commencement of the limitations period at the date upon which the plaintiff knew or should have known of his cause of action, stems largely from the court’s historical treatment of the damage prerequisite to a cause of action.

As discussed above, the Supreme Court of Virginia has repeatedly held that damage, no matter how slight, is an essential element of a cause of action,¹¹¹ and “[i]n the absence of any injury or damage, there is no cause of action.”¹¹² Furthermore, in evaluating the damage element of a cause of action, the court has held that “it is immaterial whether all the damages resulting from the negligent act were sustained at the time that act occurred.”¹¹³ Rather, the running of a statute of limitations will not be delayed by the fact that the bulk of the plaintiff’s damages, injuries, or losses did not occur until a later date.¹¹⁴

In *Virginia Military Institute v. King*,¹¹⁵ the case most often cited for the commonwealth’s rejection of the discovery rule, the Supreme Court of Virginia stated that:

We have followed the general rule that the applicable period of limitation begins to run from the moment the cause of action arises rather than from the time of discovery of injury or damage, and we

110. SINCLAIR & MIDDLEDITCH, *supra* note 4, § 4.10, at 232.

111. See *Keller v. Denny*, 232 Va. 512, 520, 352 S.E.2d 327, 332 (1987); *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969).

112. *Shipman v. Kruck*, 267 Va. 495, 502–03, 593 S.E.2d 319, 323 (2004) (quoting *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 313, 568 S.E.2d 693, 695 (2002)).

113. *Id.* at 503, 593 S.E.2d at 323; see also *Owens v. Combustion Eng’g, Inc.*, 279 F. Supp. 257, 258 (E.D. Va. 1967) (“[I]f an injury occurs, even though it be ever so slight and not capable of ascertainment at the time, the cause of action then accrues.”).

114. See *Richmond Redev. & Hous. Auth. v. Laburnum Constr. Corp.*, 195 Va. 827, 839, 80 S.E.2d 574, 581 (1954).

115. 217 Va. 751, 232 S.E.2d 895 (1977).

have said that difficulty in ascertaining the existence of a cause of action is irrelevant.¹¹⁶

Recognizing the potentially harsh outcome of such strict adherence to a minimal injury standard, the court observed that “[t]he inequities that may arise from the general rule which may trigger a statute of limitations when the injury or damage is unknown or difficult or even incapable of discovery are apparent.”¹¹⁷ Nonetheless, the court in *King* refused to alter this firmly established precedent, asserting that “any change in a rule of law that has been followed in our jurisdiction and relied on by bench and bar for so many years should be made not by us, but by the General Assembly, which thus far has not approved any modification.”¹¹⁸

Since the court’s initial decision in *King*, it has since continued its refusal to adopt a discovery rule.¹¹⁹ Moreover, the court’s deference to the General Assembly on this matter is further strengthened by the explicit language of Virginia Code section 8.01-230, which states that the statute of limitations will begin to run “when the breach of contract occurs . . . not when the resulting damage is discovered.”¹²⁰

B. Statutory Exceptions

While the Supreme Court of Virginia shows no sign of wavering in its staunch denunciation of a generally applicable discovery rule, the General Assembly has crafted a number of very limited exceptions. One such statutory exception applies to occupational

116. *Id.* at 759, 232 S.E.2d at 900 (citing *Laburnum*, 195 Va. at 838, 80 S.E.2d at 580–81). In refusing to adopt a discovery rule in *King*, the court noted several examples of situations wherein it had adhered to the requirement that a cause of action accrues and a statute of limitations begins upon injury. In *Hawks v. DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966), the Supreme Court of Virginia held that the cause of action accrued when a surgeon left a needle in the patient’s neck, as opposed to when the physician’s negligence was discovered. *Id.* at 814, 146 S.E.2d at 190. Likewise, in *Caudill*, the supreme court held that the statute of limitations began for a personal injury at the time of injury rather than when the plaintiff purchased a vehicle whose defective condition caused the plaintiff’s injury. 210 Va. at 14–15, 168 S.E.2d at 260.

117. *King*, 217 Va. at 760, 232 S.E.2d at 900.

118. *Id.*

119. See *Shipman v. Kruck*, 267 Va. 495, 503, 593 S.E.2d 319, 323 (2004) (“Nevertheless, we concluded that it was the role of the General Assembly, not the judiciary, to change a rule of law that has been relied upon by bench and bar for so long. We continue to adhere to that principle.”).

120. VA. CODE ANN. § 8.01-230 (Repl. Vol. 2000 & Cum. Supp. 2006).

disease claims. Under Virginia Code section 8.01-249(4), the cause of action will be deemed to accrue “[i]n actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis . . . or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician.”¹²¹ Prior to the enactment of section 8.01-249, the Supreme Court of Virginia, in *Locke v. Johns-Manville Corp.*,¹²² allowed the plaintiff’s negligence action for asbestos-related injuries to proceed, notwithstanding the fact that his most recent exposure to asbestos occurred over five years before he brought suit.¹²³ While the *Locke* decision prompted some to assert that the court had created at least a quasi-discovery rule,¹²⁴ the court unequivocally stated that it had not done so.¹²⁵ Distinguishing the case from *King* and other decisions, the court asserted that in *Locke*, there was no injury or damage at the time of the wrongful act, thus no cause of action could accrue at that point.¹²⁶ “A disease like this cancer,” the court noted, “must first exist before it is capable of causing injury. To hold otherwise would result in the inequity of barring the mesothelioma plaintiff’s cause of action before he sustains injury.”¹²⁷

Virginia Code section 8.01-249 also provides exceptions for “actions for fraud or mistake and in actions for rescission of contract,”¹²⁸ and for products liability actions arising from complications from “the implantation of any prosthetic device for breast augmentation or reconstruction.”¹²⁹ Furthermore, section 8.01-249(6) provides an extension of time for personal injury actions, regardless of the theory of recovery, when the cause of action arises from an incident of childhood sexual abuse.¹³⁰ Under this provision, the cause of action is deemed to accrue, and the statute

121. *Id.* § 8.01-249(4) (Repl. Vol. 2000 & Cum. Supp. 2006).

122. 221 Va. 951, 275 S.E.2d 900 (1981).

123. *Id.* at 958–59, 275 S.E.2d at 905.

124. See Deborah Hutchins Combs, Comment, *Statutes of Limitations in Occupational Disease Cases: Is Locke v. Johns-Manville a Viable Alternative to the Discovery Rule?*, 39 WASH. & LEE L. REV. 263, 277 (1982).

125. *Locke*, 221 Va. at 959, 275 S.E.2d at 905 (noting that “the rule we have just articulated is not a so-called ‘discovery’ rule, and plaintiff does not advocate that we embrace such a theory”).

126. *Id.*, 275 S.E.2d at 906.

127. *Id.*

128. VA. CODE ANN. § 8.01-249(1) (Repl. Vol. 2000 & Cum. Supp. 2006).

129. *Id.* § 8.01-249(8) (Repl. Vol. 2000 & Cum. Supp. 2006).

130. *Id.* § 8.01-249(7) (Repl. Vol. 2000 & Cum. Supp. 2006).

of limitations begins to run, “when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist.”¹³¹

The General Assembly has also created statutory exceptions limited in applicability to actions against healthcare providers. Virginia Code section 8.01-243(C)(1) grants an extension of the normal two-year limitations period “[i]n cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient’s body, for a period of one year from the date the object is discovered or reasonably should have been discovered.”¹³² Similarly, section 8.01-243(C)(2) also provides a one-year extension of time “[i]n cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period.”¹³³

V. THE CONTINUING TREATMENT RULE

While the Supreme Court of Virginia has firmly adhered to the rule that the statute of limitations will begin to run upon the accrual of the cause of action (right of action), regardless of a plaintiff’s ignorance of the injury, potential claimants can find some solace in the continuing treatment rule. Since at least 1900, Virginia has followed the general rule that “where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run . . . until the termination of the undertaking or agency.”¹³⁴ Later dubbed the “continuing treatment” rule,¹³⁵ or the “continuous representation rule,”¹³⁶

131. *Id.*

132. *Id.* § 8.01-243(C)(1) (Repl. Vol. 2000 & Cum. Supp. 2006).

133. *Id.* § 8.01-243(C)(2) (Repl. Vol. 2000 & Cum. Supp. 2006) (resolving the problems raised by the court’s decision in *Hawks v. DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966)); see also *Johnson v. Commonwealth*, 51 Va. Cir. 311, 322–23 (Cir. Ct. 2000) (Stafford County) (applying *Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977), in a medical malpractice action). Courts have refused to expand Virginia’s discovery rule beyond those areas explicitly allowed by statute. See, e.g., *Herman v. McCarthy Enters., Inc.*, 61 Va. Cir. 697, 698–99 (Cir. Ct. 2002) (Loudoun County) (holding that Virginia’s discovery rule has not been extended to cases arising under the Virginia Consumer Protection Act).

134. *Riverview Land Co. v. Dance & Co.*, 98 Va. 239, 244, 35 S.E. 720, 722 (1900).

135. *Farley v. Goode*, 219 Va. 969, 979, 252 S.E.2d 594, 600 (1979).

136. *Shipman v. Kruck*, 267 Va. 495, 505, 593 S.E.2d 319, 324 (2004).

the principle applies to breaches of duty arising from relationships wherein a client entrusts an agent with “a continuing series of transactions, or a single but long-protracted transaction.”¹³⁷

The Supreme Court of Virginia has applied the continuing treatment rule in a variety of cases, including actions for legal and medical malpractice. The court first employed the doctrine in the context of legal malpractice in 1987 in *Keller v. Denny*.¹³⁸ In *Keller*, the court held that:

[W]hen malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney’s services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney’s work on other undertakings or transactions for the same client.¹³⁹

Underlying the court’s adoption of the continuing treatment rule in *Keller* was the fiduciary nature of the attorney-client relationship. As the court noted several years earlier, the relationship between attorney and client is “one which commands the highest fidelity to a most solemn trust, for the lawyer is the expert and the client is utterly dependent upon his knowledge, his skill, and his honor.”¹⁴⁰

The *Keller* court made clear that the continuing treatment or representation rule applies “only when a continuous or recurring course of professional services relating to a particular undertaking is shown to have taken place over a period of time.”¹⁴¹ Therefore, the court determined that “[t]he proper inquiry is not whether a general attorney-client relationship has ended, but instead, when the attorney’s work on the particular undertaking at issue has ceased.”¹⁴²

137. *Keller v. Denny*, 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987).

138. *Id.* at 518, 352 S.E.2d at 330.

139. *Id.*

140. *Allied Prods., Inc. v. Duesterdick*, 217 Va. 763, 767, 232 S.E.2d 774, 776–77 (1977).

141. *Keller*, 232 Va. at 518, 352 S.E.2d at 331.

142. *Shipman v. Kruck*, 267 Va. 495, 505, 593 S.E.2d 319, 324 (2004) (noting the court’s decision in *Keller*). In *Keller*, the court further distinguished such long-term services from individual acts of negligence, noting that, for single, isolated acts, Virginia Code section 8.01-230 “dictates that the statute of limitations begins to run when that act is performed, regardless of the time of its discovery.” 232 Va. at 518–19, 352 S.E.2d at 331.

The court has similarly applied the continuing treatment rule to medical malpractice actions, noting that the rule applies only to a continuous course of improper examination or treatment that is substantially uninterrupted, and not to a single, isolated act of negligence.¹⁴³ The court has been careful to note, however, that the continuing treatment rule does not assert that a defendant's negligence continued for the duration of the relationship.¹⁴⁴ Rather, the rule provides that a plaintiff-patient can wait until the end of a continuing physician-patient relationship to bring an action for negligence that has occurred during that treatment.¹⁴⁵

In applying the continuing treatment rule to medical malpractice actions, the Supreme Court of Virginia has recognized that, while on one hand it may be unjust to require a physician to be prepared to defend himself for alleged acts of negligence that occurred from the beginning of a long-term relationship, it is equally unjust to "penaliz[e] a plaintiff patient who, under long-continued treatment, had the right to assume that due care and skill would be exercised."¹⁴⁶ Therefore, part of the rationale for the use of the rule in medical malpractice actions is that plaintiff-patients would otherwise have to bring suit for alleged negligence while the defendant-physician was attempting to affect a cure.¹⁴⁷ As the court notes, "[P]ermitting a patient to wait until the termination of treatment before being required to file suit [is] conducive to mutual confidence between physician and patient because it [gives] the physician all reasonable time and opportunity to correct mistakes made at the beginning of a course of treatment."¹⁴⁸

It is crucial to note that the continuing treatment rule does not provide the plaintiff a detour around the limitations of the discovery rule. Rather, the tolling effects of the rule only serve to ex-

143. See, e.g., *Grubbs v. Rawls*, 235 Va. 607, 612, 369 S.E.2d 683, 686 (1988). Virginia circuit courts have followed suit, applying the continuing treatment rule in medical malpractice actions. See, e.g., *Crockett v. Waller-Smith*, 63 Va. Cir. 562, 564 (Cir. Ct. 2004) (Roanoke City); *Dixon v. Messer*, 61 Va. Cir. 527, 528 (Cir. Ct. 2003) (Norfolk City). Courts have similarly applied the rule in actions against chiropractors, *Taylor Chiropractic Clinic, Ltd. v. Gupton*, 10 Va. Cir. 227, 229 (Cir. Ct. 1987) (Colonial Heights City), and dentists, *Burgess v. Anderson*, 9 Va. Cir. 435, 436 (Cir. Ct. 1979) (Richmond City). Courts have refused, however, to extend application of the doctrine to pharmacists. See, e.g., *Coakley v. Orr*, 6 Va. Cir. 170, 171-72 (Cir. Ct. 1984) (Loudoun County).

144. *Grubbs*, 235 Va. at 611-12, 369 S.E.2d at 686.

145. *Id.*

146. *Keller*, 232 Va. at 517, 352 S.E.2d at 330.

147. *Grubbs*, 235 Va. at 611, 369 S.E.2d at 686.

148. *Id.* at 611-12, 369 S.E.2d at 686.

tend the plaintiff's right of action for the time during which a particular illness should have been diagnosed or reasonable care should have been given for the particular breach and harm giving rise to the particular cause of action.¹⁴⁹ Similarly, as one commentator notes, "[C]ontinuous treatment is not the equivalent of a wrong that goes unremedied for a long period" of time.¹⁵⁰ That is, when a defendant violates some contractual duty to the plaintiff and makes no attempt to cure his breach, a cause of action accrues and the statute of limitations begins to run despite the incidental existence of a continuing relationship.¹⁵¹ Finally, the continuing treatment rule will not apply where a relationship may be divided into distinct contractual pieces.¹⁵² In such cases, the court will look to each part and each breach as individual causes of action, with the appropriate statute of limitations beginning accordingly.¹⁵³

VI. CONCLUSION

In any civil action, an understanding of accrual and the applicable statute of limitations is as indispensable as the elements of the particular cause of action being asserted. As this article has illustrated, however, the determination of these crucial facts may not always be a simple one. Although the Virginia practitioner must grapple with the long-standing distinction between the cause of action and the right of action, resolution of this question may only be the first step in determining when an action must be brought. As discussed above, it will often be necessary to determine whether a cause of action sounds in tort or contract. Once this determination is made, an attorney must also consider whether the continuing treatment rule or a limited discovery rule will apply to prolong the accrual of the cause of action and the running of the statute of limitations.

149. See *Justice v. Natvig*, 238 Va. 178, 180, 381 S.E.2d 8, 9 (1989).

150. SINCLAIR & MIDDLEDITCH, *supra* note 4, § 4.11, at 233.

151. See *id.* (citing *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 237 Va. 543, 379 S.E.2d 316 (1989)).

152. *Id.* at 233-34.

153. *Id.* (citing *Nelson v. Commonwealth*, 235 Va. 228, 368 S.E.2d 239 (1988)). Similarly, if the plaintiff in a medical malpractice action leaves the care of the defendant physician, the physician-patient relationship is terminated and the plaintiff can not rely on the continuing treatment rule to extend the time for his or her right of action. *Bennett v. Clark*, 69 F. Supp. 2d 809, 812 (E.D. Va. 1999).

Following the court's edict that there is no right of action until there is a cause of action,¹⁵⁴ it is clear that the importance of this multi-faceted accrual analysis cannot be overstated. If there is no right of action, the injured party is left without recourse in the courts. Far from simply academic questions left to journals or classrooms, the concepts of accrual and statutes of limitations serve as indispensable prerequisites to any civil action and their comprehension as necessary obligations in the diligent representation of clients.

154. *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 13, 168 S.E.2d 257, 259 (1969) ("A right of action cannot accrue until there is a cause of action.").