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Corporate and Business Law

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CORPORATE AND BUSINESS LAW

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I. INTRODUCTION

In 2005, the Virginia Stock Corporation Act (the "Virginia Act") was extensively revised and updated for the first time since 1985. Having just undertaken such a major revision to the Virginia Act, the General Assembly further amended the Act in a more targeted fashion in 2006 and 2007. Section II of this article addresses some of the changes that have taken place since the 2005 amendments and gives a brief overview of some conforming changes that have been incorporated in the Virginia Nonstock Corporation Act (the "Nonstock Act").

There has also been a concerted effort to conform the language and substance of the various other business entity statutes over the past two years. Section III discusses some of the changes to the Virginia Limited Liability Company Act (the "LLC Act") and the Virginia Revised Uniform Limited Partnership Act (the "Virginia RULPA") that conform these Acts to the Virginia Act in some respects. This section also includes a discussion of other changes to these Acts that are entity-specific.

Section IV addresses some amendments that affect professional corporations and professional limited liability companies. The amendments were designed to provide professional corporations some flexibility in offering employee stock option plans and pro-

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vide clarification on the obligations of professionals to control professional entities.

Section V addresses a handful of changes to the Virginia Act that were designed to take into account the governance practices of open-end investment companies registered under the Investment Company Act of 1940 (the "Investment Company Act") and the updating amendment to the Virginia Securities Act (the "Securities Act").

Finally, section VI reviews five cases since 2005 in which the Supreme Court of Virginia addressed issues related to the law of corporations and limited liability companies.

II. CERTAIN STATUTORY CHANGES RELATED TO CORPORATIONS

Since the sweeping amendments in 2005, the amendments to the Virginia Act have been more targeted. Some of these targeted changes have included amendments addressing mergers, shareholder action without meetings, appraisal rights, the appointment of custodians or receivers for public corporations, householding of notice to shareholders, and a limited expansion of the ability to use objectively ascertainable facts in filings with the Virginia State Corporation Commission (the "SCC"). In addition, the General Assembly has passed multiple amendments to the Nonstock Act to conform it to the 2005, 2006, and 2007 amendments to the Virginia Act.

A. *Mergers and Share Exchanges Under the Virginia Stock Corporation Act*

In the 2006 amendments to the Virginia Act, the General Assembly addressed when the shareholders of a surviving corporation must approve a merger. The amendments also eliminated duplicative filing requirements for foreign corporations authorized to transact business in Virginia that merge with Virginia corporations or eligible entities, and clarified that the articles of incorporation of two or more merging domestic corporations must be able to lawfully include the purposes of all of the merging corporations. Additionally, the 2006 amendments created a provision that allows existing corporations to establish holding companies. Finally, the 2007 amendments simplified the approval process for a merger or share exchange involving a corporation that has not yet issued stock.

Traditionally, the Virginia Act did not require the shareholders of a surviving corporation in a merger to approve the merger unless: (i) the articles of incorporation of the surviving corporation were to be amended in ways other than those described in Virginia Code section 13.1-706; and (ii) the number of shares, preferences, limitations, and rights of the pre-merger shareholders of the surviving corporation were to be changed by the merger. Prior to 2005, the shareholders of a surviving corporation were also required to approve a merger if the number of voting shares outstanding increased by twenty percent or more as a result of the merger.[1] The 2005 amendments to the Virginia Act eliminated this requirement.[2] In 2006, the General Assembly restored the concept, but required shareholder approval if the merger causes a twenty percent increase in the number of outstanding shares that are eligible to vote for the election of directors as opposed to an increase in outstanding voting shares.[3]

Where a corporation is organized under the laws of another state and applies for authority to transact business in Virginia, it must file an application with the SCC for authority to transact business. Along with its application, it must submit certified copies of its articles of incorporation as filed in the foreign corporation's state or other jurisdiction of incorporation, including all amendments and mergers.[4] To keep the SCC's records current, a foreign corporation that engages in a merger is typically required to file its articles of merger with the SCC within thirty days after the merger becomes effective.[5] Pursuant to the 2006 amendments to the Virginia Act, a foreign corporation is no longer required to file its articles of merger with the SCC where: (i) the foreign corporation's articles of incorporation are not amended by virtue of the merger; (ii) the merger involves a domestic corporation or eligible entity (and thus the articles of merger are already filed with the SCC on its behalf); and (iii) the articles of merger filed on be-

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1. VA. CODE ANN. § 13.1-718(G)(3) (Repl. Vol. 1999).
2. Act of Mar. 26, 2005, ch. 765, 2005 Va. Acts 1219 (codified as amended at VA. CODE ANN. § 13.1-718(F) (Supp. 2007)).
3. Act of Apr. 5, 2006, ch. 663, 2006 Va. Acts 913 (codified as amended at VA. CODE ANN. § 13.1-718(F)(4) (Supp. 2007)).
4. VA. CODE ANN. § 13.1-759 (Repl. Vol. 2006).
5. *Id.* § 13.1-766.1 (Repl. Vol. 2006).

half of the domestic or eligible entity contain a statement that "the merger is permitted under the laws of the state or other jurisdiction in which the foreign corporation is incorporated and that the foreign corporation has complied with that law in effecting the merger."[6] A similar amendment was made to the Nonstock Act.[7]

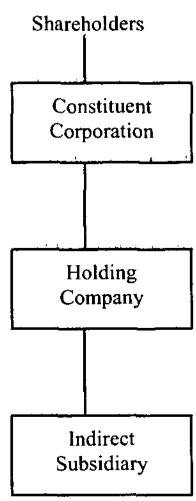
The 2006 amendments also make explicit a restriction on merging two domestic corporations that was previously implicit—one or more domestic corporations may only merge "if the articles of incorporation of each of them could lawfully contain all the corporate powers and purposes of all of them."[8] Thus, in addition to the explicit prohibition against mergers between businesses authorized to engage in the special kinds of business listed in section 13.1-620 (insurance companies, banks, savings and loans, railroads, and public service companies) and businesses that are not authorized to engage in such business, mergers of corporations that have special purposes and corporations that are not authorized to engage in such special business purpose are now also explicitly prohibited.[9]

Virginia Code section 13.1-719.1 was added in 2006 to allow an existing corporation, defined as a "constituent corporation," to place a holding company between itself and its shareholders without the approval of the constituent corporation shareholders and without the need to exchange share certificates.[10] To take advantage of the statute, the previously existing or constituent corporation forms a wholly owned subsidiary, referred to as the "holding company."[11] The holding company in turn forms a wholly owned subsidiary, defined as the "indirect subsidiary."[12] See the example included in Table 1.

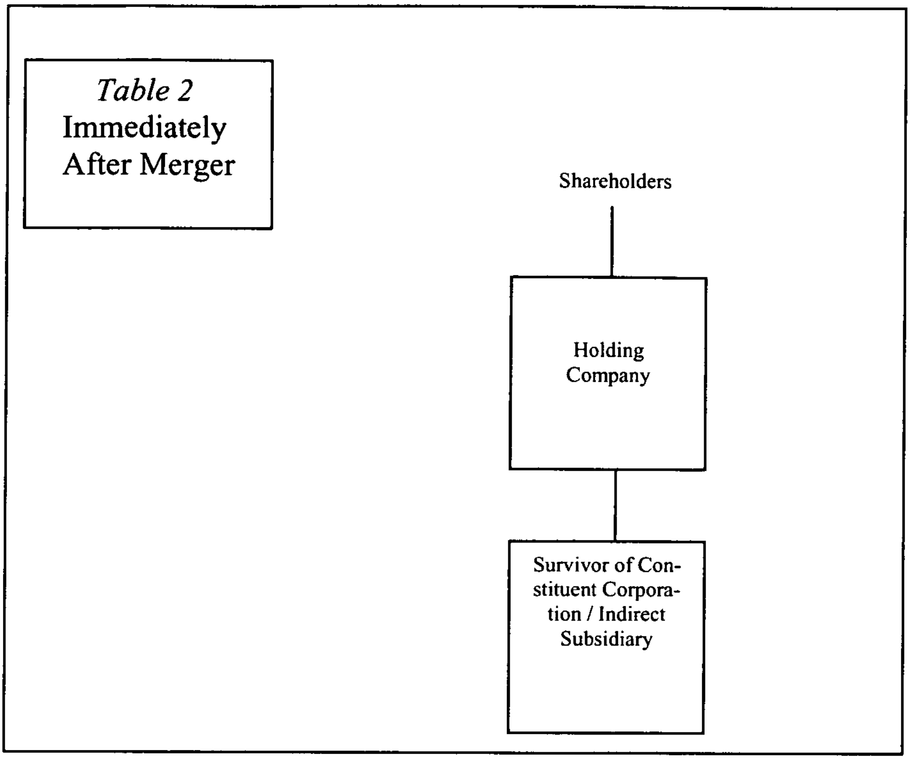
6. *Id.* § 13.1-766.1(A) (Repl. Vol. 2006).
7. *Id.* § 13.1-928.1(A) (Supp. 2007).
8. *Id.* § 13.1-716(F)(1) (Repl. Vol. 2006).
9. *Id.* § 13.1-716(F)(2) (Repl. Vol. 2006).
10. *Id.* § 13.1-719.1(A) to -719.1(B) (Repl. Vol. 2006).
11. *Id.* § 13.1-719.1(A) (Repl. Vol. 2006).
12. *Id.*

The indirect subsidiary can then merge into the constituent corporation with either the indirect subsidiary or the constituent corporation to be the survivor if each share or fraction of a share (or right to acquire a share) of the constituent corporation is converted into a share (or right to acquire a share) of the holding company having the same preferences, rights, and limitations as the shares of the constituent corporation.[13]

Table 1
Immediately Prior to Merger



13. *Id.* § 13.1-719.1(B) (Repl. Vol. 2006).



The transaction can be completed without the approval of the shareholders of the constituent corporation and without the approval of the shareholders or the board of directors of the indirect subsidiary if shares (or rights to acquire shares) of the constituent corporation convert into shares (or rights to acquire shares) of the holding company as described in the preceding paragraph. Additionally, the following requirements must be met: (i) the constituent corporation and the indirect subsidiary are the only parties to the merger; (ii) the articles of incorporation and bylaws of the constituent corporation and holding company are identical as they relate to: (a) the designation, number, and par value of shares that are authorized and the preferences, rights, and limitations of each class and series of shares; (b) terms of the shares that are dependent on objectively ascertainable facts; (c) preemptive rights; (d) the definition, limitation, and regulation of the powers of the corporation, and its directors and shareholders; and (e) the management of the business and affairs of the corporation; and (iii) the directors of the constituent corporation become or remain the directors of the holding company upon the effective date of the merger.[14] Virginia Code section 13.1-719.1 also allows a merger between the constituent corporation and the indirect subsidiary without exchanging the share certificates of the constituent corporation for certificates in the holding company, and allows the plan of merger to include certain amendments to the articles of incorporation of the surviving corporation.[15]

The 2007 amendments to the Virginia Act allow the directors of a corporation that has not issued shares of stock to adopt and approve a merger or share exchange without shareholder action where such approval does not conflict with the corporation's articles of incorporation, even if the merger or share exchange would typically require the approval of the corporation's shareholders.[16]

B. *Action Without a Meeting of Shareholders*

The General Assembly in 2007 made significant revisions to Virginia Code section 13.1-657, which allows shareholder action to be taken without a meeting. Formerly, the provision allowed shareholder action to be taken without a meeting by unanimous written consent, and in corporations other than public corporations, if the corporation's articles allowed for action by less than unanimous written consent.[17] Consents signed by the holders of "not less than the minimum number of votes that would be required to authorize or take the action at a meeting at which all share[holders] entitled to vote on the action were present and voted" were also allowed.[18] The 2007 amendments allow any Virginia corporation, including a public corporation,[19] to act by less than unanimous written consent if its articles of incorporation allow action by less than unanimous written consent.[20] To allow for a more certain determination of record dates for written consents, if the record date is not otherwise fixed and board action must be

14. *Id.*
15. *Id.* § 13.1-719.1(C) (Repl. Vol. 2006).
16. *Id.* § 13.1-718(G) (Supp. 2007).
17. *Id.* § 13.1-657 (Supp. 2007).
18. *Id.*
19. Under the Virginia Act, a "public corporation" is "a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association." VA. CODE ANN. § 13.1-603 (Repl. Vol. 2006 & Cum. Supp. 2007).
20. *Id.* § 13.1-657(B) (Supp. 2007).

taken, the record date is the close of business on the date board action is taken. If no board action is required to be taken,[21] the record date is the date the first shareholder signs the consent.[22] As in the past, action taken by written consent is still approved when signed by shareholders having sufficient votes to take the action; however, now a corporation may allow a delay for tabulation in its articles or bylaws.[23] A unanimous written consent can specify the effective date of the consent if it also indicates the date of execution by each consenting shareholder;[24] however, an action by less than unanimous written consent or a consent to an action requiring notice to non-voting shareholders under the Virginia Act cannot be effective sooner than fifteen days after written consents sufficient to take the action have been delivered to the corporation.[25] Where notice of a proposed action is required to be delivered to nonvoting shareholders and action is to be taken by written consent, notice must be given to the nonvoting shareholders not less than fifteen days before the effective date of the action, and not more than ten days after the sufficient consents have been received for the action to be approved.[26] Similarly, where an action is taken by less than unanimous written consent, notice must be given to the nonconsenting shareholders not less than fifteen days before the effective date of the action and not more than ten days after sufficient consents have been received for the action to be approved.[27] In addition, the amendments allow for electronic transmission of written consents and provide that delivery of a consent is effective if delivered to the corporation's registered agent at its registered office or the corporation's secretary at its principal office.[28] Finally, the amendments provide that if a corporation's articles of incorporation provide for

21. Because shareholders have the ability to approve matters by unanimous consent that otherwise might need to be submitted to directors, this may occur with some frequency in Virginia corporations. *See* VA. CODE ANN. § 13.1-685(F) (Repl. Vol. 2006 & Supp. 2007).

22. *Id.* § 13.1-657(B) (Supp. 2007).

23. *Id.* § 13.1-657(D) (Supp. 2007).

24. *Id.*

25. *Id.* § 13.1-657(E) (Supp. 2007).

26. *Id.* § 13.1-657(F) (Supp. 2007).

27. *Id.* § 13.1-657(E) (Supp. 2007).

28. *Id.* § 13.1-657(G) to -657(H) (Supp. 2007).

cumulative voting, directors cannot be elected by written consent unless it is unanimous.[29]

C. *Appraisal Rights*

In its 2007 amendments to appraisal rights, the General Assembly primarily addressed the applicability of appraisal rights to actions approved by written consent of a corporation's shareholders, notice that accompanies appraisal rights, and the exclusivity of the appraisal rights remedy.

At first glance, there appear to be a significant number of 2007 amendments to definitions in Virginia Code section 13.1-729 and transactions triggering appraisal rights in section 13.1-730. Most of the amendments, however, create "beneficial owner," "interested person," and "interested transaction" definitions by moving language from section 13.1-730 to section 13.1-729.[30] A slightly different set of securities are now excluded from the appraisal rights process. The first exclusion now includes any federally covered security under section 18(b)(1)(A) or (B) of the Securities Act of 1933, as amended,[31] which would include securities listed on the New York Stock Exchange, American Stock Exchange, Nasdaq, or securities registered on exchanges determined by the Securities and Exchange Commission to have standards that are substantially similar to the three exchanges.[32] The second exclusion, however, has been limited by the addition of the language "[t]raded in an organized market."[33] The revisions to section 13.1-730 also provide some clarity for mutual funds organized in Virginia by specifically excluding from the appraisal rights process shares issued by any "open end management investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 [that] may be redeemed at the option of the holder at net asset value."[34]

With respect to notice of appraisal rights, the amendments comprehensively address transactions that are approved by

29. *Id.* § 13.1-669(E) (Supp. 2007).
30. *Id.* § 13.1-729 (Supp. 2007); *id.* § 13.1-730 (Repl. Vol. 2006).
31. 15 U.S.C. § 77r(b)(1)(A) (2000).
32. VA. CODE ANN. § 13.1-730(B)(1)(A) (Supp. 2007).
33. *Id.* § 13.1-730(B)(1)(b) (Supp. 2007).
34. *Id.* § 13.1-730(B)(1)(c) (Supp. 2007).

unanimous or less than unanimous consent pursuant to Virginia Code section 13.1-657.[35] Where a transaction triggering appraisal rights is to be approved by unanimous consent and the corporation has concluded that appraisal rights are or may be available, the corporation must include along with the consent solicitation a written notice that appraisal rights are or may be available, a copy of Article 15 of the Virginia Act, and the financial information discussed in more detail in the next paragraph.[36] In addition, notice of the transaction to nonconsenting and nonvoting shareholders required under revised sections 13.1-657(E) and (F) must be accompanied by notice that appraisal rights may be available, Article 15, and the financial information discussed below.[37] The General Assembly also made a number of other minor changes throughout Article 15 of the Virginia Act to address actions approved by less than unanimous written consent of the shareholders.[38]

As mentioned above, the revisions include an explicit obligation to include specific financial statements with the notice of appraisal rights.[39] The financial statements may be consolidated, and must be as of the fiscal year ended not more than sixteen months prior to the date of the notice.[40] The financial statements must include a balance sheet, income statement, and a statement of changes in shareholders' equity, or if such statements are not available, reasonably equivalent statements and the latest quarterly financial statements.[41] Shareholders may waive their right to receive financial statements, however, before or after the corporate action.[42]

The exclusivity of the Article 15 appraisal rights remedy has been modified by the deletion of former Virginia Code section 13.1-730(D) and the substitution of section 13.1-741.1. The new provision is more specific in excluding remedies other than appraisal rights. Now, a transaction listed in subsection A of section

35. *Id.* § 13.1-732(C) (Supp. 2007).

36. *Id.* § 13.1-732(C) to -732(D) (Supp. 2007).

37. *Id.*

38. *See* Act of Mar. 14, 2007, ch. 165, 2007 Va. Acts 232 (codified as amended at VA. CODE ANN. § 13.1-733(B)(4), -741.1(B)(4) (Supp. 2007)).

39. VA. CODE ANN. § 13.1-732(D) (Supp. 2007).

40. *Id.* § 13.1-732(D)(1) (Supp. 2007).

41. *Id.* § 13.1-732(D) (Supp. 2007).

42. *Id.* § 13.1-732(E) (Supp. 2007).

13.1-730, in addition to not being able to be contested, cannot be enjoined, set aside, or rescinded once it has been approved by the shareholders of the corporation.[43] Under the revised provision, however, appraisal rights are not the exclusive remedy in several situations. The first few relate to the manner in which the transaction was approved and are essentially unchanged. The appraisal rights remedy is not exclusive if the transaction was not approved in accordance with: (i) the applicable provisions of Article 11 (Amendments to Articles of Incorporation and Bylaws), Article 12 (Merger and Share Exchange), or Article 13 (Disposition of Assets); (ii) the corporation's articles of incorporation or bylaws; or (iii) the resolution of the corporation's board of directors authorizing the transaction.[44] In addition, as before: (iv) appraisal rights are not the exclusive remedy if the transaction was procured as a result of fraud or a material misrepresentation.[45] Additional circumstances that make remedies other than appraisal rights available are: (v) "omission[s] of material fact[s] necessary to make statements made, in light of the circumstances in which they are made, not misleading;" (vi) interested transactions unless they are approved by disinterested directors or disinterested shareholders; and (vii) actions approved by less than unanimous written consent of the shareholders where the challenge is brought by a shareholder who did not consent, did not receive notice of the action at least fifteen days before it was effected, and brought a proceeding challenging the corporate action within ten days after the shareholder in question receives notice that the approval of the corporate action is effective.[46]

D. *Shareholder Right to Seek Judicial Dissolution for Public Corporations; Custodian or Receiver for a Public Corporation*

As of the 2007 amendments, a shareholder of a public corporation organized in Virginia can no longer seek judicial dissolution unless the corporation has abandoned its business and has failed within a reasonable time to liquidate and distribute its assets[47]—presumably a very rare situation. If a public corporation organ-

43. *Id.* § 13.1-741.1 (Supp. 2007).
44. *Id.* § 13.1-741.1(A)(1) (Supp. 2007).
45. *Id.* § 13.1-741.1(A)(2) (Supp. 2007).
46. *Id.* § 13.1-741.1(B) (Supp. 2007).
47. *Id.* § 13.1-747(A) (Supp. 2007).

ized in Virginia has not abandoned its business, a shareholder may only request that a custodian or receiver be appointed for the corporation and then only if:

> [t]he directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered; or [] [t]he directors or those in control of the corporation are acting fraudulently and irreparable injury to the corporation is threatened or being suffered.[48]

When such an action is initiated, the court has the authority to issue injunctions, appoint a temporary receiver or custodian, and take other actions to preserve the corporation's assets and carry on its business prior to a full hearing.[49] Otherwise, the powers of the court and of the receiver or custodian are nearly identical to those given under the judicial dissolution provisions of the Virginia Act.[50]

E. *Householding of Notice*

By adding section 13.1-610.1 to the Code of Virginia, the General Assembly has specifically authorized "householding" notices sent to a corporation's shareholders.[51] Under the new provisions, notice is deemed delivered to all shareholders who share a common address if the corporation addresses the notice to each shareholder individually, to all of the shareholders as a group, or in some other manner to which the shareholders have consented, and if each of the shareholders has given their express or implied consent to such notice.[52] Consent may be implied if a shareholder fails to object to receiving a household notice within sixty days of the corporation notifying the shareholder of its intention to begin sending household notices.[53] A shareholder can revoke consent to this form of notice at any time and the corporation must begin

48. *Id.* § 13.1-672.6(A) (Supp. 2007).
49. *Id.* § 13.1-672.6(B)(1) (Supp. 2007).
50. *Id.* § 13.1-748 (Repl. Vol. 2006).
51. Act of Mar. 9, 2007, ch. 165, 2007 Va. Acts 232 (codified as amended at VA. CODE ANN. § 13.1-610.1 (Supp. 2007)).
52. *Id.* § 13.1-610.1(A) (Supp. 2007).
53. *Id.* § 13.1-610.1(B) (Supp. 2007).

providing individual notices within thirty days of such revocation.[54]

F. *Objectively Ascertainable Facts*

Continuing the pattern started by the adoption of section 13.1-604(L) in 2005, the General Assembly has specifically included in the 2007 amendments that provisions in restated articles of incorporation implementing exchanges, reclassifications, or cancellations of issued shares may be made dependent upon facts objectively ascertainable outside the articles of restatement.[55]

G. *Virginia Nonstock Corporation Act*

In the 2007 session, extensive revisions were made to the Nonstock Act to conform it with the 2005 amendments to the Virginia Act. Highlights include: (i) the addition of section 13.1-804(L) to the Nonstock Act, which allows the terms of filings to be dependent on objectively ascertainable facts;[56] (ii) the defining of "disinterested director" in section 13.1-803, which is now more similar to its analog under the Virginia Act;[57] (iii) the permittence of actions in a nonstock corporation to be taken electronically in a way similar to actions allowed in an electronic medium in a stock corporation;[58] (iv) the allowance of less than unanimous consents in writing of members in nonstock corporations;[59] (v) the providence for voting procedures and inspectors of elections;[60] (vi) the creation of a safe harbor for a director of a nonstock corporation to now benefit from exploiting business opportunities;[61] (vii) the significant revision of the provisions applicable to mergers with nonstock corporations to now allow for combinations between nonstock corporations and eligible entities;[62] and (viii) the creation of

54. *Id.* § 13.1-610.1(C) (Supp. 2007).
55. Act of Mar. 14, 2007, ch. 165, 2007 Va. Acts 232 (codified at VA. CODE ANN. § 13.1-711(D)(4) (Supp. 2007)).
56. VA. CODE ANN. § 13.1-804(L) (Supp. 2007).
57. *Id.* § 13.1-803 (Supp. 2007).
58. *Id.* § 13.1-810(H) (Supp. 2007).
59. *Id.* § 13.1-841 (Supp. 2007).
60. *Id.* § 13.1-847.1 (Supp. 2007).
61. *Id.* § 13.1-893.1 to -897.1 (Supp. 2007).
62. *Id.* § 13.1-894(A) (Supp. 2007).

provisions to deal with contingent and unknown claims against a dissolved nonstock corporation.[63]

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

Virginia's legislators have continued to modify the statutes related to entities other than stock and nonstock corporations with amendments to the LLC Act and the Virginia RULPA. These amendments focused on conforming the Acts' language and substantive provisions to similar provisions under the Virginia Act with a few amendments that address issues unique to limited liability companies or limited partnerships. Amendments related to domestication of foreign limited liability companies, the definition of limited liability company membership interests, the method of approving amendments to limited liability company articles of organization, methods to eliminate or minimize contingent liabilities for dissolved limited liability companies and limited partnerships, and other changes to the limited partnership statute were made.

A. *Domestication of Foreign Limited Liability Companies*

In 2006, the General Assembly added domestication provisions to the LLC Act[64] similar to the provisions added to the Virginia Act in 2001.[65]

A foreign limited liability company may domesticate into a Virginia domestic limited liability company, and a domestic limited liability company may domesticate into a foreign limited liability company, if the limited liability company is not required by law to be a domestic limited liability company, and if the laws of the jurisdiction in which the company intends to domesticate allow for domestication.[66] Unlike under the Virginia Act, there is no explicit requirement that the jurisdiction in which a foreign limited liability company is formed allow for domestication where a for-

63. *Id.* § 13.1-908.1 to -908.3 (Supp. 2007).

64. Act of Apr. 19, 2006, ch. 912, 2006 Va. Acts 1563 (codified as amended at VA. CODE ANN. § 13.1-1074 to -1080 (Repl. Vol. 2006)).

65. VA. CODE ANN. § 13.1-722.2 to -722.7 (Repl. Vol. 2006).

66. *Id.* § 13.1-1074(B) (Repl. Vol. 2006).

eign limited liability company intends to domesticate in Virginia.[67] The domestication must be approved, however, in the manner required by the laws of the jurisdiction in which the limited liability company is organized.[68] Presumably, there would be no manner to approve domestication in jurisdictions where domestication is not available. Generally, a plan of domestication must be approved as provided in the limited liability company's articles of organization or operating agreement or, if the articles of organization and operating agreement are silent on domestication, by the members in the same manner as amendments to the operating agreement.[69]

The LLC Act's domestication provision allows for a simpler plan of domestication that only needs to state the jurisdiction where the limited liability company is presently domesticated and the jurisdiction where the limited liability company is to be domesticated.[70] The plan of domestication may also include as an attachment the articles of organization of the limited liability company upon its domestication and any other provisions relating to the domestication.[71] Although for a foreign limited liability company domesticating into Virginia, when articles of domestication are filed, new Virginia articles of organization must be included as an attachment to the plan of domestication.[72]

The provisions related to submitting articles of domestication are very similar to the provisions under the Virginia Act.[73] The articles must include the name of the foreign limited liability company and any new name if its name is unavailable or if a new name is desired, its plan of domestication, and, as previously stated, its new articles of organization.[74] Articles of surrender for limited liability companies are simpler than for corporations as they do not need to state the manner of approval.[75]

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67. *Compare id.* § 13.1-722.2(A) (Repl. Vol. 2006), *with id.* § 13.1-1074(A) (Repl. Vol. 2006).

68. *Id.* § 13.1-1077(A) (Repl. Vol. 2006).

69. *Id.* § 13.1-1076(A) (Repl. Vol. 2006).

70. *Id.* § 13.1-1075(A) (Repl. Vol. 2006).

71. *Id.* § 13.1-1075(B) (Repl. Vol. 2006).

72. *Id.* § 13.1-1077(B) (Repl. Vol. 2006).

73. *Compare id.* § 13.1-1077 (Repl. Vol. 2006), *with id.* § 13.1-722.4 (Repl. Vol. 2006).

74. *Id.* § 13.1-1077(A) (Repl. Vol. 2006).

75. *Compare id.* § 13.1-1078 (Repl. Vol. 2006), *with id.* § 13.1-722.5 (Repl. Vol. 2006).

The effect of a foreign limited liability company's domestication into Virginia is virtually identical to its analog under the Virginia Act.[76] While the limited liability company is new to Virginia, it has continuity of existence,[77] is considered to be the same limited liability company as it was prior to domestication,[78] continues to hold title to all of its properties,[79] remains subject to all of its liabilities and any suits pending against it,[80] and its members remain subject to any liabilities of the limited liability company for which they were previously liable.[81]

B. *Definition of Membership Interest Under Limited Liability Company Act*

An interesting change in 2007 is the amended definition of "membership interest" in the LLC Act. Previously, the definition was: "'Membership interest' or 'interest' means, except as otherwise provided in the articles of organization or an operating agreement, a member's share of the profits and the losses of the limited liability company and the right to receive distributions of the limited liability company's assets."[82] In 2007, the phrase "except as otherwise provided in the articles of organization or an operating agreement" was deleted.[83] It appears that the intention was to clarify that the right to share in distributions, profits, and losses is the essential element in every membership interest,[84] and that this element of a membership interest cannot be altered in the articles or operating agreement of a limited liability company. This revision should not be construed as restricting a membership interest only to those rights, since obviously, a membership interest can include voting or management rights, and it should not be construed as restricting a limited liability company from creating classes of membership interests that have differing

76. *Compare id.* § 13.1-1079 (Repl. Vol. 2006), *with id.* § 13.1-722.6 (Repl. Vol. 2006).
77. *Id.* § 13.1-1079(A)(5)(b) to -1079(A)(5)(c) (Repl. Vol. 2006).
78. *Id.* § 13.1-1079(A)(5)(b) (Repl. Vol. 2006).
79. *Id.* § 13.1-1079(A)(1) (Repl. Vol. 2006).
80. *Id.* § 13.1-1079(A)(2) to -1079(A)(3) (Repl. Vol. 2006).
81. *Id.* § 13.1-1079(B) (Repl. Vol. 2006).
82. *Id.* § 13.1-1002 (Repl. Vol. 2006).
83. *Id.* § 13.1-1002 (Supp. 2007).
84. *See id.* § 13.1-1039(A) (Repl. Vol. 2006) (regarding the right of even an assignee who has not been admitted as a member to share in the distributions, profits, and losses of his predecessor in interest).

or preferred rights to distributions, profits, and losses, as long as each member has some right to distributions, profits, and losses.

C. *Amendment to Limited Liability Company Articles of Organization*

In the 2006 session, the General Assembly included a change to the procedure for approving an amendment to a limited liability company's articles of organization.[85] Now an amendment of the articles of organization is no longer effective upon approval by a majority of members if the articles of organization and operating agreement are silent on the issue. Instead, an amendment is approved in the same way an amendment to the operating agreement is approved.[86] While minor looking, this amendment could change the vote required to amend articles of organization for many limited liability companies.

D. *Disposition of Contingent or Unknown Claims Against a Limited Liability Company or Limited Partnership in Dissolution*

In the 2006 amendments to the LLC Act and the Virginia RULPA, the General Assembly included provisions that allow limited liability companies and limited partnerships in dissolution options for the disposition of contingent and unknown claims similar to those available to stock corporations.[87] The new provisions allow for a dissolved limited liability company or limited partnership to publish a notice of its dissolution that includes a request that persons with claims present them to the dissolved entity.[88] The notice must be published in a newspaper of general circulation in the city or county where the principal office or, if none, the registered office of the dissolved limited liability company or limited partnership was last located.[89] The notice must

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85. Act of Apr. 19, 2006, ch. 912, 2006 Va. Acts 1563 (codified as amended at VA. CODE ANN. § 13.1-1014 (Repl. Vol. 2006)).

86. *See* VA. CODE ANN. § 13.1-1014(B) (Repl. Vol. 2006).

87. *Compare* Act of Apr. 19, 2006, ch. 912, 2006 Va. Acts 1563 (codified at VA. CODE ANN. §§ 13.1-1049.2 to -1049.3, 50-73.52:2 to -73.52:3 (Repl. Vol. 2006)), *with* VA. CODE ANN. § 13.1-746.1 to -746.2 (Repl. Vol. 2006).

88. VA. CODE ANN. § 13.1-1049.2(A) (Repl. Vol. 2006); *id.* § 50-73.52:2(A) (Repl. Vol. 2005).

89. *Id.* § 13.1-1049.2(B)(1) (Repl. Vol. 2006); *id.* § 50-73.52:2(B)(1) (Repl. Vol. 2005).

also describe what information a claimant must include in their claim and state that the claim will be barred unless asserted prior to the earlier of the expiration of any applicable statute of limitations or three years after the publication of the notice.[90] If a dissolving limited liability company or limited partnership follows this procedure and a claim is not asserted prior to the earlier of the expiration of any applicable statute of limitations or three years after the publication of the notice, claims for which the claimant did not receive the known claims notice under Virginia Code section 13.1-1049.1 or section 50-73.52:1, contingent claims that the entity is aware of but that have not been asserted in court, a contingent liability or claim based on an event occurring after the date of dissolution, and a liability or claim the ultimate maturity of which is more than sixty days after the delivery of written notice to the claimant, will each be barred.[91]

Further, if a dissolved limited liability company or limited partnership has followed the notice process described above, it may at any time initiate a proceeding in the circuit court where the dissolved entity's principal office, or if none, its registered office, was last located to determine the amount of security to be posted for claims that would be barred under Virginia Code section 13.1-1049.2(C) or section 50-73.52:2(C).[92] Within ten days after filing its application, the limited liability company or limited partnership must provide notice to each claimant holding a contingent claim that is shown on the records of the dissolved entity.[93] The court may appoint a guardian ad litem to represent unknown claimants.[94] The court's determination of security nec-

90. *Id.* § 13.1-1049.2(B)(2) to -1049.2(B)(3) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:2(B)(2) to -73.52:2(B)(3) (Repl. Vol. 2006).

91. VA. CODE ANN. § 13.1-1049.2(C) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:2(C) (Repl. Vol. 2005). The mechanics of Virginia Code section 13.1-1049.2(C)(3) and section 50-73.52:2(C)(3), however, are a bit awkward. The reference to a definition of "claim" is odd because the provision referenced is not a definition of "claim" but instead excludes certain matters from the definition of "claim." The intention of this mechanism is to bar claims that are: (i) a contingent liability or claim based on an event occurring after the date of dissolution; or (ii) a liability or claim the ultimate maturity of which is more than sixty days after the delivery of written notice to the claimant. *See e.g.*, *id.* § 13.1-746.1(C)(3) (Repl. Vol. 2006).

92. VA. CODE ANN. § 13.1-1049.3(A) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:3(A) (Repl. Vol. 2005).

93. VA. CODE ANN. § 13.1-1049.3(B) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:3(B) (Repl. Vol. 2005).

94. VA. CODE ANN. § 13.1-1049.3(C) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:3(C) (Repl. Vol. 2005).

essary to be posted for such claims shall be the dissolved limited liability company or limited partnership's only obligation, and if an entity follows this procedure, a contingent liability or claim based on an event occurring after the date of dissolution and a liability or claim the ultimate maturity of which is more than sixty days after the delivery of written notice to the claimant may not be pursued against the dissolving entity's former members or partners.[95] Persons holding "known claims" entitled to notice under Virginia Code section 13.1-1049.1 or section 50-73.52:1 whose claims are not barred under section 13.1-1049.1(C) or 50-73.52:1(C), however, may proceed against former members or partners.[96] Thus, a limited liability company or limited partnership that intends to dissolve may provide its members or partners, respectively, a great deal of protection from contingent liabilities by following this claims process.

E. *Certain Statutory Changes Related to Limited Partnerships*

In the 2007 session, the General Assembly did some housekeeping within the Virginia RULPA by, among other things: (i) specifying that foreign limited partnerships must register in Virginia to conduct business; (ii) allowing a limited partnership to be the survivor of a merger with a corporation, limited liability company, or business trust; and (iii) providing a method for a general partnership to convert to a limited partnership.[97] Additionally, an entity that transacts business in Virginia as a limited partnership without registering either as a domestic or foreign limited partnership has committed a Class 1 misdemeanor.[98]

Prior to 2007, Virginia Code section 50-73.48:1 included among its requirements for a merger involving a Virginia limited partnership the following limitation: "In the case of a merger of a limited partnership to which one or more domestic or foreign corporations are parties, a domestic or foreign corporation, limited liability company or business trust party to the merger is the sur-

95. VA. CODE ANN. § 13.1-1049.3(C) to -1049.3(D) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:3(D) (Repl. Vol. 2007).

96. VA. CODE ANN. § 13.1-1049.3(D) (Repl. Vol. 2006); VA. CODE ANN. § 50-73.52:3(D) (Repl. Vol. 2005).

97. *See* Act of Mar. 20, 2007, ch. 631, 2007 Va. Acts 941 (codified as amended in scattered sections of VA. CODE ANN. § 50-73 (Cum. Supp. 2007)).

98. VA. CODE ANN. § 50.1-73.10:1 (Cum. Supp. 2007).

viving entity of the merger."[99] The 2007 amendments removed this limitation. A limited partnership may now be the survivor of a merger with a domestic or foreign corporation, limited liability company, or business trust.[100]

The 2007 amendments to the Virginia RULPA allow a domestic or foreign general partnership to convert to a Virginia limited partnership in much the same way that a domestic or foreign partnership may convert to a limited liability company under the LLC Act.[101] The general partnership must approve the conversion in the manner specified in its partnership agreement, or if no method of approval is specified, the conversion must be approved by all of the partners.[102] The converting general partnership must file a certificate of limited partnership that satisfies the name, registered agent, principal office, and general partner information required under Virginia Code section 50-73.11 and includes: (i) the name of the general partnership and any identification number issued to it by the SCC; (ii) the jurisdiction where the general partnership was formed; (iii) if the partnership was a registered limited liability partnership, a statement to that effect; and (iv) a statement confirming that the conversion was approved in the manner described in section 50-73.11:3(B).[103] When a domestic or foreign general partnership converts into a Virginia limited partnership, it is considered to be the same entity as it was prior to conversion, continues to hold title to all of its properties, and remains subject to all of its liabilities and any suits pending against it.[104] If the converted entity was previously registered as a limited liability partnership, the effective date of its organization shall continue to be the date it was registered as a registered limited liability partnership.[105] General partners who become limited partners as a result of the conversion remain liable as general partners for obligations that were incurred prior to the conversion becoming effective.[106]

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99. *Id.* § 50-73.48:1 (Repl. Vol. 2005).
100. *Id.* § 50-73.48:1(A) (Cum. Supp. 2007).
101. *Compare id.* § 50-73.11:3 (Cum. Supp. 2007), *with* VA. CODE ANN. § 13.1-1010.1 (Repl. Vol. 2006).
102. VA. CODE ANN. § 50.1-73.11:3(B) (Cum. Supp. 2007).
103. *Id.* § 50.1-73.11:3(C) (Cum. Supp. 2007).
104. *Id.* § 50.1-73.11:4(A) to -73.11:4(B) (Cum. Supp. 2007).
105. *Id.* § 50.1-73.11:4(D) (Cum. Supp. 2007).
106. *Id.* § 50.1-73.11:4(C) (Cum. Supp. 2007).

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

A. *Professional Corporations and Employee Stock Option Plans*

By enacting HB 952 during the 2006 session, the General Assembly authorized professional corporations to keep and maintain "eligible employee stock option plans."[107] An "eligible employee stock option plan" must be an employee stock ownership plan as defined in section 4975(e)(7) of the Internal Revenue Code of 1986, as amended.[108] In addition, unless there is a conflict of interest, all trustees of the employee stock option plan must be "individuals who are duly licensed or otherwise legally authorized to render the professional services for which the professional corporation is organized."[109] Where a conflict exists, a special independent trustee may be engaged to make a decision with respect to the conflict.[110] An eligible employee stock option plan must also provide that no rights under the plan are available to any person other than an "individual duly licensed or otherwise legally authorized to render the professional services for which the professional corporation is organized," unless the shares are transferred to "a plan beneficiary and subject to immediate repurchase by the professional corporation, the employee stock ownership plan or another person authorized to hold such shares."[111] For professional corporations engaged in the business of certified public accounting, at least fifty-one percent of the professional corporation's stock must be held by the plan for the benefit of licensed certified public accountants or be held directly by licensed certified public accountants.[112] For professional corporations providing the professional services of architects, professional engineers, land surveyors, certified landscape architects, or certified interior designers, at least two-thirds of the professional corporation's

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107. Act of Apr. 5, 2006, ch. 672, 2006 Va. Acts 926 (codified as amended in scattered sections of VA. CODE ANN.).

108. VA. CODE ANN. § 13.1-543(A) (Repl. Vol. 2006 & Supp. 2007).

109. *Id.* § 13.1-543(A)(1) (Repl. Vol. 2006 & Supp. 2007).

110. *Id.*

111. *Id.* § 13.1-543(A)(2) (Repl. Vol. 2006 & Supp. 2007).

112. *Id.* § 13.1-543(A)(2)(a) (Repl. Vol. 2006 & Supp. 2007).

stock must be held by the plan for the benefit of licensed persons or be held directly by licensed persons.[113]

B. *Professional Corporations and Supervision of Individuals Licensed to Provide Professional Services*

In the 2006 session, the General Assembly clarified whether even if a professional corporation's board of directors is eliminated by virtue of a shareholder agreement or otherwise, only individuals who are employed by the corporation and licensed and legally authorized to render the professional services that the corporation provides shall supervise and direct the provision of professional services.[114] In the case of professional corporations rendering architect, engineering, landscape architect, or land surveyor services that only need to be two-thirds owned by such professionals, at least two-thirds of the individuals providing supervision and direction must be employees of the corporation and legally authorized to use the professional title.[115]

C. *Professional Corporation and Limited Liability Company Board and Managers' Authority to Delegate to Agents*

Although the 2006 amendment placed the accountability for management on the licensed professionals whether they keep the board structure or eliminate it, the 2007 amendment appears to clarify that, although responsibility remains with the licensed professionals, the licensed professionals may delegate managerial duties and tasks related to the company's operations.[116]

V. CERTAIN STATUTORY CHANGES RELATED TO INVESTMENT COMPANIES AND THE SECURITIES ACT

In addition to being excluded from the appraisal rights process,[117] the 2006 amendments include four changes that allow a Virginia corporation registered as an open-end investment com-

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113. *Id.* § 13.1-543(A)(2)(b) (Repl. Vol. 2006 & Supp. 2007).

114. Act of Apr. 5, 2006, ch. 649, 2006 Va. Acts 876 (codified as amended at VA. CODE ANN. § 13.1-553 (Repl. Vol. 2006 & Supp. 2007)).

115. VA. CODE ANN. § 13.1-553 (Repl. Vol. 2006).

116. *Id.* §§ 13.1-553, -1118 (Supp. 2007).

117. *See supra* Part II.C.

pany under the Investment Company Act of 1940 to manage itself in a way that is consistent with the rules and regulations promulgated under the Investment Company Act.[118] The board of directors of an open-end investment company without the need for any shareholder action may:

> [c]lassify any unissued shares into one or more classes or into one or more series within one or more classes; [r]eclassify any unissued shares of any class into one or more classes or into one or more series within one or more classes; or [r]eclassify any unissued shares of any series of any class into one or more classes or into one or more series within one or more classes.[119]

In addition, the 2006 amendments exempt a corporation registered as an open-end investment company from the provisions that limit the authority of a corporation's board of directors to increase or decrease the number of directors.[120] Members of the board of directors of a Virginia corporation registered as an open-end management investment company under the Investment Company Act are deemed disinterested and independent for purposes of the Virginia Act if they are not interested persons as defined in the Investment Company Act.[121] Finally, the board of directors of a Virginia corporation registered as an open-end management company under the Investment Company Act may, without shareholder action, increase or decrease the aggregate number of shares or classes or series of shares unless the articles of incorporation provide otherwise.[122]

A couple of interesting amendments were made to the Securities Act in the 2007 session. Virginia Code Section 13.1-514(B) lists certain transactions that are exempt from the securities, broker-dealer, and agent registration requirements of the Securities Act.[123] The Securities Act is based on the Uniform Securities Act of 1956 and Virginia Code section 13.1-514(B)(9) is modeled after section 402(b)(12) of the Uniform Securities Act of 1956.[124] Section 13.1-514(B)(9) prior to the amendments exempted:

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118. *See* Investment Company Act of 1940, 15 U.S.C. § 80a-1 to -52 (2006).
119. VA. CODE ANN. § 13.1-639(D) (Repl. Vol. 2006).
120. *Id.* § 13.1-675(B) (Repl. Vol. 2006).
121. *Id.* § 13.1-690.1 (Repl. Vol. 2006).
122. *Id.* § 13.1-706(7) (Repl. Vol. 2006).
123. *Id.* § 13.1-514(B) (Repl. Vol. 2006 & Supp. 2007).
124. *See* UNIF. SEC. ACT § 402(b)(12) (amended 1958, withdrawn 1985), 7C U.L.A. 848 (2006 & Supp. 2007).

> [a]ny offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933; but this exemption shall not apply while a stop order is in effect or, after notice to the issuer, while a proceeding or examination looking toward such an order is pending under either act.[125]

The intent under both the Securities Act and the Uniform Securities Act of 1956 was for this exemption only to apply during the period between a filing of a registration statement with the Securities and Exchange Commission and its effectiveness. When the Uniform Securities Act of 1956 was revised in 1985 and 2002, this problem was corrected.[126] Since Virginia has stood by the 1956 Uniform Securities Act, however, the ambiguity persisted until this year's amendment which clarified that this transactional exemption is only applicable until the registration statement becomes effective.[127] In addition, the amendments allowing the SCC to promulgate rules allowing an "agent" of a broker-dealer to be employed by more than one broker-dealer or issuer is another instance where Virginia is selectively implementing some of the concepts in the 1985 and 2002 revisions in the Uniform Securities Act of 1956.[128]

VI. SELECTED CASES AFFECTING CORPORATE AND BUSINESS LAW

Since 2005, the Supreme Court of Virginia has issued a number of rulings that touched on corporations and limited liability companies. Two cases addressed the court's stance on the enforceability of shareholder agreements. In these cases, the court discussed an officer's ability to bind a corporation to an agreement to sell substantially all of its assets, the corporate opportunity doctrine, and the fiduciary duties owed by a manager to a limited liability company.

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125. VA. CODE ANN. § 13.1-514(B)(9) (Supp. 2007).

126. *See* UNIF. SEC. ACT § 402(16) (amended 1988); 7C U.L.A. 278 (2006); UNIF. SEC. ACT § 202(16), 7C U.L.A. 60 (2006).

127. VA. CODE ANN. § 13.1-514(B)(9) (Supp. 2007).

128. *Id.* § 13.1-504(B) (Supp. 2007); *see also* UNIF. SEC. ACT § 402(e) (2002); UNIF. SEC. ACT § 208(d) (amended 1988), 7C U.L.A. 240 (2006).

A. *Shareholder Agreements*

In *Hamlet v. Hayes*, the Supreme Court of Virginia upheld and specifically enforced the provisions of a shareholder agreement that gave a corporation and its shareholders a right of first refusal in the event a shareholder desired to sell his shares to a third party at the third party's offering price but on payment terms contained in the shareholder agreement.[129]

Valerie Hamlet, Raymond Miler, and Jane Perry were shareholders in Commonwealth Wood Preservers, Inc. along with Jackie L. Hayes and Millard Davis.[130] The shareholders and the corporation had entered into a shareholder agreement dated January 2, 1990.[131] The agreement provided that if a shareholder desired to sell his or her shares, the shareholder must first offer those shares to the corporation.[132] If the corporation declined to purchase, the remaining shareholders also had a right of first refusal.[133]

In 2004, Millard Davis offered to purchase all of Hayes's shares for a purchase price of $700,000.[134] Mr. Hayes then offered those shares to the corporation, but the corporation declined to exercise its first refusal right and notified the remaining shareholders of their first refusal right.[135] In accordance with the shareholder agreement, Hamlet, Miller, and Perry notified the corporation that they intended to exercise their first refusal right.[136] Thereafter, Davis rescinded his offer to purchase Hayes's shares, and Hayes attempted to rescind his offer to sell his shares to the corporation and the remaining shareholders pursuant to the shareholder agreement.[137]

Hamlet, Miller, and Perry filed a bill of complaint alleging breach of contract and requesting specific performance against Hayes and the corporation.[138] Hayes and the corporation filed a

129. Hamlet v. Hayes, 273 Va. 437, 442–44, 641 S.E.2d 115, 118–19 (2007).
130. *Id.* at 439, 441, 641 S.E.2d at 116–17.
131. *Id.* at 439, 641 S.E.2d at 116.
132. *Id.* at 439–40, 641 S.E.2d at 116.
133. *Id.* at 440, 641 S.E.2d at 116.
134. *Id.* at 441, 641 S.E.2d at 117.
135. *Id.*
136. *Id.*
137. *Id.*
138. *See id.* at 441–42, 641 S.E.2d at 117–18.

demurrer stating that Hamlet, Miller, and Perry had failed to allege the essential elements of a breach of contract that would entitle them to specific performance. The trial court sustained the demurrer.[139] The Supreme Court of Virginia reviewed the case de novo and found that when Hayes notified the corporation of his first refusal right, as was his duty under the shareholder agreement, it constituted an offer to sell.[140] The court further found Hamlet, Miller, and Perry's indication to the corporation that they desired to purchase Hayes's shares constituted an acceptance, and the provisions in the shareholder agreement that allowed for the purchasing shareholders to buy the offered shares at the same purchase price but on different payment terms—instead of all cash at closing, twenty percent cash at closing and eighty percent via a negotiable promissory note—was enforceable.[141] The court also found that the shareholder agreement included covenants allowing specific performance, but even if it had not, specific performance was the proper remedy because the shares were unique personal property and there was no adequate remedy at law.[142]

In *Barber v. VistaRMS, Inc.*, the Supreme Court of Virginia did not address Virginia Code section 13.1-671.1, which deals with shareholder agreements, but it did uphold an agreement to transfer stock upon termination of employment that is of the type commonly used by closely held Virginia corporations in shareholder agreements.[143] Barber was an employee of VistaRMS, a corporation owned by three original shareholders and four employees.[144] The original shareholders had signed an agreement on December 22, 1998, which provided that if an employee should "leave the employment of [VistaRMS] for any reason—either voluntarily, by termination of employment or death—[his] ownership of the common stock . . . shall immediately cease."[145] After the original shareholders agreed to issue Barber shares in connection with his employment, Barber signed an addendum to the 1998 agreement

139. *Id.* at 439, 641 S.E.2d at 116.
140. *Id.* at 439, 442, 641 S.E.2d at 116, 118.
141. *Id.* at 442–43, 641 S.E.2d at 118.
142. *Id.* at 443, 641 S.E.2d at 118.
143. *See* 272 Va. 319, 332–33, 634 S.E.2d 706, 714 (2006).
144. *Id.* at 323, 634 S.E.2d at 709.
145. *Id.* at 323–24, 634 S.E.2d at 709.

each time he received shares in 1999 and 2002.[146] The addenda expressly stated that if Barber left employment of the corporation, his ownership of the stock would immediately cease.[147] Barber's employment was suddenly terminated on January 15, 2004, and Barber signed a separation agreement that terminated all of his rights to "future compensation, bonuses, savings plans, stocks and stock options."[148] The corporation failed to request, however, that Barber return his stock certificates or note that the certificates had been cancelled in the corporation's books and records.[149] In December 2004, upon learning that the corporation was in discussions with a potential buyer, Barber sought access to corporate records.[150] The corporation refused access, and Barber filed a petition for writ of mandamus in the Circuit Court of Fairfax County seeking an order to require that the corporation provide him access to its books and records, provide him notice of his dissenting rights, and be prohibited from distributing the corporation's assets to the shareholders.[151]

VistaRMS filed and was granted a demurrer, and Barber appealed to the Supreme Court of Virginia.[152] Barber asserted that he was a shareholder during the period in question because he held the shares of stock and was listed as a shareholder in the corporation's records.[153] He argued that the 1998 agreement and the 1999 and 2002 addenda did not address how the shares would be transferred back to the corporation, and that the share certificates themselves stated they could only be transferred by the holder or his attorney in fact.[154] He further asserted that the corporation's release of Barber surrendered any claims it may have had to the stock, and because Barber did not "deliver" the shares, no transfer occurred under Article 8 of Virginia's Uniform Commercial Code.[155] Barber also claimed that the transfer created preferences, limitations, and rights not stated in the articles of

146. *Id.* at 324, 634 S.E.2d at 709.
147. *Id.*
148. *Id.* at 325, 634 S.E.2d at 709–10.
149. *Id.* at 325–26, 634 S.E.2d at 710.
150. *Id.* at 326, 634 S.E.2d at 710.
151. *Id.*
152. *Id.* at 326–27, 634 S.E.2d at 711.
153. *Id.* at 328, 634 S.E.2d at 711.
154. *Id.* at 330, 634 S.E.2d at 712–13.
155. *Id.* at 330–31, 634 S.E.2d at 713.

incorporation in violation of Virginia Code section 13.1-638(A).[156] Finally, he asserted that the 1999 and 2002 addenda were against public policy, and that the 1998 agreement and the addenda did not constitute a shareholder agreement under Virginia Code section 13.1-671.1.[157]

On Barber's appeal of the demurrer, the court reviewed whether the trial court ruled correctly that Barber was not a shareholder based on the facts asserted in his pleading.[158] The court found the parties had agreed that the shares would be surrendered without further action by the corporation immediately upon termination of Barber's employment, and the boilerplate in the stock certificates did not negate the parties agreement in this regard.[159] The court held this transfer did not involve a purchase and sale of stock, and therefore Article 8 did not apply.[160] It also found section 13.1-638(A) was not violated by the corporation because Barber had the same rights as all other shareholders during the term of his employment.[161] The court held that provisions such as those in the corporation agreement may be necessary to keep a corporation closely held, and therefore do not violate public policy.[162] Finally, the court declined to address Barber's assertion that the 1998 agreement and addenda did not constitute shareholder agreements under section 13.1-671.1 because "[t]he sole impact of such a determination . . . would be to subject these agreements to the statutory provisions previously addressed" by the court's findings.[163]

B. *Authority of Officer to Bind Corporation to Sale of Substantially All Assets*

In *WBM, LLC v. Wildwoods Holding Corp.*, the Supreme Court of Virginia addressed the concept of the sale of substantially all corporate assets under the Virginia Act prior to the 2005 amend-

156. *Id.* at 331, 634 S.E.2d at 713.
157. *Id.* at 331–32, 634 S.E.2d at 713–14.
158. *Id.* at 323, 634 S.E.2d at 708.
159. *Id.* at 330, 634 S.E.2d at 713.
160. *Id.* at 331, 634 S.E.2d at 713.
161. *Id.*
162. *Id.* at 332, 634 S.E.2d at 714.
163. *Id.*

ments.[164] Virginia Code section 13.1-724(A) previously allowed a corporation to:

> sell, lease, exchange or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors adopts and its shareholders approve the proposed transaction.[165]

At issue was whether a contract for the sale of real estate that was signed by the President of Wildwoods Holding Corporation ("Wildwoods"), but was approved by its board of directors or shareholders could be specifically enforced against the corporation.[166]

Wildwoods had existed since 1971 and had held twenty-three lots since its initial incorporation as its sole asset.[167] Gerald Chaplain, as President of Wildwoods, allegedly signed a contract to sell these twenty-three lots to Edward Chaplain.[168] Subse-

164. 270 Va. 156, 613 S.E.2d 402 (2005).

165. VA. CODE ANN. § 13.1-724(A) (Repl. Vol. 1999). In 2005, section 13.1-724(A) was amended to address some of the ambiguities in what exactly constitutes a sale of substantially all corporate assets. The pertinent section now reads:

> A. A sale, lease, exchange or other disposition of the corporation's assets, other than a disposition described in § 13.1-723, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. Unless the articles of incorporation or a shareholder-approved bylaw otherwise provide, if a corporation retains a business activity that represented at least 20 percent of total assets at the end of the most recently completed fiscal year, and 20 percent of either (i) income from continuing operations before taxes or (ii) revenues from continuing operations for that fiscal year, in each case of the corporation and any of its subsidiaries that are consolidated for purposes of federal income taxes, the corporation will conclusively be deemed to have retained a significant continuing business activity.
>
> B. A disposition that requires approval of the shareholders under subsection A shall be initiated by adoption of a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also submit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors shall transmit to the shareholders the basis for that determination.

VA. CODE ANN. § 13.1-724(A) to -724(B) (Repl. Vol. 2006 & Supp. 2007).

166. *WBM, LLC*, 270 Va. at 159–60, 613 S.E.2d at 404. Damages were not addressed.

167. *Id.* at 159, 613 S.E.2d at 404.

168. *Id.* at 159–60, 613 S.E.2d at 404.

quently, Gerald denied signing the contract and Wildwoods refused to convey the property in question to WBM, which had been formed by Edward and others and assigned Edward's purchase rights under the contract.[169] WBM brought an action to specifically enforce the contract, but the chancery court declined to do so because Gerald Chaplain was not authorized to sign the contract by Wildwoods's board of directors and shareholders.[170]

In affirming the chancellor's decision, the Supreme Court of Virginia held that although Wildwoods's charter provided that it was in the business of selling land, it had never sold any land, the twenty-three lots in question constituted substantially all of the corporation's assets, and sale of these assets required approval of the corporation's board of directors and shareholders.[171] Because there was no formal corporate action showing approval or any evidence that all of the directors and shareholders had knowledge of the contract and had acquiesced to Gerald's action, the court held that the contract was not specifically enforceable against Wildwoods.[172] Finally, on the issue of apparent authority, the court held that "[by] virtue of his office alone, no executive officer or agent of a corporation has any authority to sell or make a contract for the sale of the real estate of the corporation."[173]

C. *Corporate Opportunity Doctrine*

In its most recent case on the corporate opportunity doctrine, *Today Homes, Inc. v. Williams*, the Supreme Court of Virginia addressed the burden of proving a breach of fiduciary duty in connection with the fiduciary's exploitation of a corporate opportunity and fiduciary duties of former officers of a corporation.[174]

Emma Williams and George Woodhouse were employed as officers of Today Homes, Inc., trading as Chesapeake Homes ("Chesapeake"), a corporation in the business of developing and building single family homes.[175] In early 2003, Williams and

169. *Id.* at 160, 613 S.E.2d at 404.
170. *Id.* at 161, 613 S.E.2d at 405.
171. *Id.* at 162, 613 S.E.2d at 405–06.
172. *Id.* at 164, 613 S.E.2d at 407 (citing Mosel & Realty Corp. v. Schofield, 183 Va. 782, 790, 33 S.E.2d 774, 777 (1945)).
173. *Id.* (quoting *Mosel & Realty Corp.*, 183 Va. at 790, 33 S.E.2d at 777).
174. 272 Va. 462, 634 S.E.2d 737 (2006).
175. *Id.* at 466, 634 S.E.2d at 739.

Woodhouse became aware of a parcel of real property for sale in Hampton, Virginia, known as the "Sinclair Property," which had been planned as a community for fifty-five and older active adults.[176] At the time, Williams and Woodhouse did not think Chesapeake would be interested in the Sinclair Property because Chesapeake did not engage in this type of development.[177]

On March 13, 2003, Williams's employment was unexpectedly terminated by Chesapeake.[178] Woodhouse testified that he prepared a resignation letter on that date but did not submit it until April 24, 2003.[179] Since Woodhouse was the only employee with a North Carolina contractor's license, Chesapeake convinced him to stay on the payroll for an additional month to allow someone else to get a North Carolina contractor's license.[180] Woodhouse did not leave Chesapeake's employ until May 9, 2003.[181]

Meanwhile, once Williams had left Chesapeake but while Woodhouse was still employed by Chesapeake, Williams and Woodhouse began discussing setting up their own company, and on March 27, 2003, they formed Majestic Homes, Inc.[182] Majestic Homes entered into an agreement, signed by Williams, to purchase a portion of the Sinclair Property on April 15, 2003.[183] Woodhouse began working for Majestic Homes on May 15, 2003.[184]

Chesapeake filed a bill of complaint alleging that Williams and Woodhouse had breached their fiduciary duties as officers to Chesapeake, that Williams aided and assisted Woodhouse in breaching his fiduciary duties, and that they conspired to breach their fiduciary duties.[185] The trial court dismissed Chesapeake's bill of complaint, holding that Chesapeake had failed to meet its burden of proof—allocating the burden of proving that a fiduciary duty had been breached to Chesapeake—but finding that the Sinclair Property was "important to [Chesapeake]" and that Chesa-

176. *Id.* at 466, 634 S.E.2d at 740.
177. *Id.*
178. *Id.*
179. *Id.* at 467, 634 S.E.2d at 740.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 468, 634 S.E.2d at 741.
184. *Id.* at 467, 634 S.E.2d at 740.
185. *Id.* at 468, 634 S.E.2d at 741.

peake was "seeking other business opportunities" like the Sinclair Property.[186]

Chesapeake appealed on a number of grounds, but the two most important were: (1) "the trial court erred in finding that Williams and Woodhouse . . . did not breach a fiduciary duty to Chesapeake when they failed to disclose the existence of the Sinclair Property to Chesapeake while one or both were still employed by Chesapeake;" and (2) "the trial court misallocated the burden of proof by placing upon Chesapeake the burden of showing the breach of fiduciary duty rather than requiring [Williams and Woodhouse] to show that they did not breach their fiduciary obligations."[187]

In upholding the trial court's ruling with respect to Williams and reversing and remanding with respect to Woodhouse, the Supreme Court of Virginia held on the burden of proof issue:

> Once a plaintiff has shown that a corporate opportunity existed and the corporate fiduciary appropriated it without disclosure and consent of the corporation, a *prima facie* case has been shown. Under our jurisprudence, the burden shifts to the defendant fiduciary to show why the taking of the corporate opportunity was not a breach of his fiduciary duty.[188]

Thus, once the trial court found that the Sinclair Property was important to Chesapeake and that Chesapeake was seeking similar opportunities, the burden was on Williams and Woodhouse, not on Chesapeake, to prove there was no breach of fiduciary duty.

On whether there had been a breach of fiduciary duties, the court held that while a former officer of a corporation may still have fiduciary duties related to opportunities that arose during the officer's employment, Williams, in her capacity as a Chesapeake officer, was only casually aware of the Sinclair Property corporate opportunity. She also had no interest in exploiting the opportunity prior to the termination of her employment, and she did not base the decision to take advantage of the opportunity on information gained during her employment.[189] Thus, Williams

186. *Id.*
187. *Id.* at 469, 634 S.E.2d at 741.
188. *Id.* at 473, 634 S.E.2d at 744.
189. *Id.* at 474, 634 S.E.2d at 744–45.

could not breach any fiduciary duty by taking advantage of the Sinclair Property corporate opportunity without disclosing it to her former employer. Chesapeake still employed Woodhouse, however, when Majestic Homes signed the agreement to purchase a portion of the Sinclair Property.[190] For this reason, the court reversed and remanded with respect to Woodhouse.[191]

D. *Corporation's Ability to Enforce Non-Competition Covenants*

In *Parikh v. Family Care Center, Inc.*, a case that created more questions than it answered, the Supreme Court of Virginia addressed a corporation's ability to enforce a non-competition covenant against a physician it had previously employed.[192]

On July 27, 1993, Nipun Parikh, a physician licensed in Virginia, signed an employment agreement with Family Care Center.[193] The agreement recited that Family Care Center was "engaged in the practice of medicine in Lynchburg, Virginia" and included a covenant that restricted Dr. Parikh's ability to engage in "a competing practice of General Practice, Family Medicine Ambulatory Care, or General Internal Medicine within a radius of twenty miles measured from the offices of [Family Care Center]" for three years after the termination of his employment.[194] The employment agreement provided liquidated damages in the amount of $10,000 per month for "each month [Parikh] is engaged in a competing practice."[195] Family Care Center was a professional corporation solely owned by Dr. Dennis E. Burns when it hired Dr. Parikh on July 27, 1993.[196] Later in 1993, Dr. Burns was killed in a car accident and ownership in the corporation transferred to his widow, Karen Burns.[197] After Dr. Burns's death, Dr. Parikh continued to work for Family Care Center but ultimately terminated his employment as of December 31,

190. *See id.* at 475, 634 S.E.2d at 745 (rejecting the contention that Williams is liable for assisting Woodhouse in his breach of fiduciary duty).

191. *Id.*

192. 273 Va. 284, 286, 641 S.E.2d 98, 99 (2007).

193. *Id.* at 286–87, 641 S.E.2d at 99.

194. *Id.* at 286–87, 641 S.E.2d at 99.

195. *Id.* at 287, 641 S.E.2d at 99.

196. *Id.* at 286–87, 641 S.E.2d at 99.

197. *Id.* at 287, 641 S.E.2d at 99.

1993.[198] He subsequently obtained employment with a similar medical practice less than one mile from Family Care Center.[199]

Family Care Center filed an action to enforce the non-compete agreement in Campbell County Circuit Court, which determined that Family Care Center was entitled to enforce its non-compete agreement and awarded $210,000 in damages.[200] Dr. Parikh appealed, asserting that Family Care Center was not licensed to practice medicine, and consequently, it did not have a legitimate business interest in enforcing the non-compete covenant.[201]

The Supreme Court of Virginia reviewed the case *de novo* and restated some of its guidepost holdings in the area of enforcement of non-compete agreements: "Restrictive covenants are disfavored restraints on trade and, therefore, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee," and "[a] covenant not to compete between an employer and an employee will be enforced if the covenant is narrowly written to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and does not violate public policy."[202]

The court held that upon Dr. Burns's death and the transfer of ownership to Mrs. Burns, who was not licensed to practice medicine in Virginia, Family Care Center converted to a non-professional corporation by operation of law.[203] After citing Virginia Code sections 54.1-2930, 54.1-2929, 54.1-2902, and 54.1-111(A), which require any person who practices medicine in Virginia to be licensed, the court concluded that a non-professional corporation cannot obtain a license to practice medicine, and thus cannot engage in the practice of medicine in Virginia.[204] Based on this holding, the court found that Family Care Center had no legitimate business interest in enforcing its covenant not to compete.[205]

198. *Id.*
199. *Id.*
200. *Id.* at 286, 641 S.E.2d at 99.
201. *Id.* at 287–88, 641 S.E.2d at 99.
202. *Id.* at 288, 641 S.E.2d at 100 (citations omitted).
203. *Id.* at 287, 641 S.E.2d at 99.
204. *Id.* at 289–90, 641 S.E.2d at 100–01.
205. *Id.* at 291, 641 S.E.2d at 101.

Although the court determined Dr. Parikh's fate, its decision left open many questions. Despite Family Care Center arguing that section 13.1-542.1 permits a non-professional corporation to "render" professional services, the court declined to rule on what "render" means, possibly leaving room to later draw a distinction between being "engaged in the practice of medicine" and "rendering" healing arts.[206] The court also left open the questions of whether a professional or non-professional corporation can employ a physician and whether any entity could have a legitimate business interest in enforcing restrictive covenants if the employment agreement recited that the entity rendered professional services through its employed licensed physicians. Until the court answers these questions, practitioners will have difficulty providing clients advice on an entity's ability to enforce restrictive covenants in the context of licensed professions where the entity cannot obtain a license to engage in the profession.

E. *Fiduciary Duties of Managers; Amendment to Articles of Organization to Permit Termination of a Member*

In *Gowin v. Granite Depot, LLC*, the Supreme Court of Virginia addressed: (i) whether an amendment to a limited liability company's articles of organization to provide for termination of a member's interest upon failure to make a required capital contribution was a breach of fiduciary duty; (ii) whether an individual manager's waiver binds the limited liability company; and (iii) whether the failure to make payments under a note delivered as a capital contribution constitutes a failure to make the required capital contribution.[207]

John Stathis and Patrick Gowin held eighty percent and twenty percent membership interests, respectively, in Granite Depot.[208] Stathis was also the sole manager of the limited liability company and Gowin was employed by the limited liability company.[209] For his twenty percent membership interest, Gowin contributed a promissory note in the amount of $12,500 and no cash.[210] The $12,500 promissory note bore an interest rate of nine

206. *Id.* at 290, 641 S.E.2d at 101.
207. *See* 272 Va. 246, 250, 634 S.E.2d at 714, 717 (2006).
208. *Id.* at 250, 634 S.E.2d at 717.
209. *See id.*
210. *See id.*

percent, and required twenty-four payments, with the first payment due on February 1, 2000.[211] In November of 2000, when Gowin became a member and Stathis asked him to sign the note, Stathis stated that the note was "something [the company's lawyer] said had to be done" and that "the company would take care of it."[212] Gowin made no payments under the note.[213]

On May 31, 2002, Gowin terminated his employment with Granite Depot but did not surrender his membership interest.[214] Shortly thereafter, Stathis, acting as member and manager: (i) amended the articles of organization of Granite Depot "to allow the members by majority vote" to terminate the membership interest of any member that failed to make its capital contribution; and (ii) "executed a written consent of members" removing Gowin as a member for failing to make his capital contribution.[215]

Gowin filed a derivative action on Granite Depot's behalf against Stathis. The trial court ultimately found that "termination of membership for failure to meet the capital contribution requirement was not a breach of fiduciary duty."[216] The court also found that, although Stathis waived payment under the note, "absent from the record is any evidence that the corporation affirmed the actions of Mr. Stathis."[217]

Gowin, on appeal to the Supreme Court of Virginia, asserted among other things that: (i) Granite Depot had affirmed the actions of Stathis in waiving the note payments; (ii) the adoption of an amendment to the articles of organization allowing for the termination of a member's interest for failure to make a capital contribution was a breach of fiduciary duty; and (iii) because of its ambiguous payment terms, the note was a demand note, no demand had been made, the note was not due and payable, and therefore, there was no failure to make the capital contribution in a timely fashion.[218]

211. *Id.* at 257, 634 S.E.2d at 721.
212. *Id.* at 251, 634 S.E.2d at 717.
213. *Id.*
214. *Id.*
215. *Id.*
216. *See id.* at 251, 634 S.E.2d at 717.
217. *Id.* at 252, 634 S.E.2d at 718.
218. *See id.*

Because neither the articles of organization or operating agreement addressed waiver of capital contributions, the court based its holding that Granite Depot had not affirmed Stathis's waiver of the note payments on Virginia Code section 13.1-1027(C), which requires that a member's obligation to make a capital contribution "may be compromised only by consent of all the members unless the operating agreement or articles provide otherwise."[219] The court also based its decision on section 13.1-1022(E), which the court interpreted to allow action to be taken by a limited liability company's members outside of a meeting "only when the requisite number of members sign a document reflecting the action taken and their consent to it."[220] Because neither the articles of organization nor the operating agreement addressed waiver of capital contributions, and there was neither a meeting of the members waiving the note payments nor an action in writing of the members waiving payment, the court held no waiver had occurred.[221]

The court addressed Stathis's fiduciary duties to the limited liability company but it did not address any fiduciary duties between the members. The court found the amendment had no impact on the company and Stathis adopted it both to ensure capital contributions were made to the company and to eliminate Gowin's interest.[222] The court held there was no error in the trial court's finding that an after-the-fact amendment of a limited liability company's articles of organization to allow for termination of a membership interest for a failure to make a capital contribution was not a breach of fiduciary duty.[223]

The court held the $12,500 note was a demand note because the note's payment terms required Gowin to begin making pay-

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219. *Id.* at 253, 634 S.E.2d at 718.

220. *Id.* The court also indicated its willingness to apply the "closed corporation" or "corporate formalities" rule to limited liability companies. Presumably, under the rule, despite a limited liability company's failure to formally act to ratify or affirm a given action by a manager or member, if its managers and members generally fail to ignore obligations in the limited liability company statute and its organizational documents to take such formal corporate action, the limited liability company may be bound by the actions of a manager or member. However, the court declined to apply it in this matter because there was not sufficient evidence that Stathis and Granite Depot ignored limited liability company formalities. *See id.* at 254–56, 634 S.E.2d at 719–20.

221. *See id.* at 256, 634 S.E.2d at 720.

222. *See id.* at 258–59, 634 S.E.2d at 722.

223. *Id.* at 259, 634 S.E.2d at 722.

ments almost two years before he signed the note, and the payment terms were too ambiguous for the note to be payable at a specific time.[224] Because the note was a demand note, and Stathis had made no demand for payment, there was no failure on the part of Gowin to make the required capital contribution.[225] The court reversed the trial court on this issue and remanded the case for further proceedings.[226]

VII. CONCLUSION

In many respects, the 2005 update to the Virginia Act has caused a cascade of targeted changes throughout the various business entity statutes. As discussed in Section II, this included targeted changes within the Virginia Act designed to further refine the 2005 overhaul. Section II also covered the amendments to the Nonstock Act to conform it to some of the 2005, 2006, and 2007 revisions to the Virginia Act. In addition, as discussed in Section III, the LLC Act and the Virginia RULPA have been revised in some respects to conform to the amendments to the Virginia Act in 2005, 2006, and 2007.

In contrast, as discussed in Section IV, revisions to the statutes governing professional corporations and professional limited liability companies were almost entirely related to the unique issues of professional entities. Similarly, Section V reviewed some of the changes to the Virginia Act and the Virginia Securities Act to address very specific concerns related to open-end investment companies registered under the Investment Company Act of 1940, transactional exemptions from registration, and the ability of a broker-dealer, or more than one broker-dealer, to employ a broker-dealer agent.

Finally, Section VI highlighted opinions issued by the Supreme Court of Virginia that may affect the way practitioners draft corporate and limited liability company governance documents, agreements, and authorizing resolutions related to the sale of a corporation's assets. These decisions also affect the lawyer's ability to advise their clients on the scope of the corporate opportunity doctrine in Virginia.

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224. *See id.* at 257–58, 634 S.E.2d at 721.
225. *Id.* at 258, 634 S.E.2d at 721.
226. *Id.* at 259, 634 S.E.2d at 722.