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ABOUT THE SPEAKERS

James Abrenio, Abrenio Law / *Fairfax*
James Abrenio completed his undergraduate studies at the University of Virginia and earned his law degree from Syracuse University College of Law. Since finishing school, in 2008, he has been a trial attorney in Northern Virginia, practicing criminal defense and personal injury. Currently, Mr. Abrenio owns his own law firm, Abrenio Law. Prior to that, he worked at two private firms and served as an Assistant Public Defender for Loudoun County.

Recently, Mr. Abrenio served as a Citizen Member for the Virginia Redistricting Commission. He was also appointed to be a Citizen Member on the Joint Subcommittee to Study Barrier Crimes & Criminal History Checks. Mr. Abrenio is a Board Member of the Asian Pacific Bar Association of Virginia. He is also a member of the 2019 Class of the Sorensen Institute for Political Leadership.

Renu M. Brennan, Bar Counsel, Virginia State Bar / *Richmond*
Renu Brennan is the Bar Counsel for the Virginia State Bar. She served as Deputy Executive Director of the VSB from 2016 to 2018, and as Assistant Bar Counsel for the Bar from 2008 to 2016. Ms. Brennan is Secretary of Lawyers Helping Lawyers and is a member of the ABA Standing Committee on Client Protection. She was a faculty member for the Virginia State Bar Harry L. Carrico Professionalism Course from 2008 to 2011, and she has been a member of the Board of Directors of the Asian Pacific American Bar Association of Virginia since 2007. She also served as co-chair of the Judicial Nominations Committee of APABA-VA from 2009 to 2011. Ms. Brennan participated as an instructor in the Virginia Bar Association's Rule of Law program. Prior to coming to the Bar, she was a partner with the firm of Vandeventer Black, LLP, where she handled professional malpractice and commercial litigation. From 1998 to 2004, Ms. Brennan was with the firm of Wright, Robinson, Osthimer & Tatum in Richmond, Virginia. She is licensed in Virginia, the District of Columbia, and California, where she practiced in Los Angeles. She holds a bachelor's degree from the University of Virginia and a law degree from Boston University School of Law.

Sarah Brownlow, Virginia Estate & Trust Law, PLC / *Richmond*
Ms. Brownlow guides individuals and families through the estate planning process and then assists them with implementing their plans through trust and estate administration. Her practice includes charitable planning and advising on estate, gift, and generation-skipping transfer taxes, and sophisticated tax planning techniques typically of interest to high net worth individuals. She frequently represents entrepreneurs and business owners for whom estate and tax planning can have a significant impact on their long-term business viability. She also advises individual and corporate fiduciaries in all aspects of their duties in administering estates and trusts, including litigation and tax reporting matters. Sarah is licensed to practice law in Virginia and New York. She began her career in New York City at Willkie, Farr & Gallagher LLP and Stroock, Stroock & Lavan LLP. Sarah then worked with the firm of Nixon Peabody LLP in Rochester, New York before moving to Richmond and joining Virginia Estate and Trust Law, PLC. She is rated as a Super Lawyer ® for Estate Planning and Probate Law and is the past chair of the Estates and Trusts Law section of the Monroe County Bar Association and member of the Estate Planning

Council. Sarah will co-author the Annual Survey of Virginia Wills, Trusts and Estates legal developments for the University of Richmond Law Review in 2021. Sarah graduated with a B.B.A. in Finance from the College of William & Mary, and received her J.D. from Vanderbilt University Law School.

Stephanie Lipinski Galland, Miles & Stockbridge / *Richmond*
Stephanie Lipinski Galland has extensive legal experience in state and local taxation with an emphasis on representation before state and local taxing authorities in income, franchise, sales, use and unclaimed property controversies. She has represented clients in developing, implementing and defending tax positions in state audits. Her experience in a Fortune 500 company, as a tax partner in a national law firm and in the Virginia Department of Taxation provides her with valuable skills in all areas of taxation.

Stephanie has worked on multistate, state and local income, sales and property tax issues with a concentration on matters regarding tax and business planning, mergers and acquisitions (including due diligence issues), administrative appeals and negotiated settlements, tax incentive negotiations and maintenance, audits, unclaimed property issues including audits and voluntary disclosures, tax audits and multistate voluntary disclosures. Stephanie has additional experience in European VAT and Canadian HST. She advises clients on record maintenance as it affects audits, tax record maintenance and SEC issues.

She possesses broad experience in corporate governance, including interaction with operations and supply chain functions and the tax issues linked to both operations and supply chains. This experience includes structuring domestic and international transactions, negotiating contract terms with third party vendors, negotiating with governments on the national, state/provincial and local levels for economic development projects and finance and tax accommodations. Stephanie also drafts and negotiates tax provisions in licensing agreements between brands and affiliated companies for both trademark and trade dress and with unrelated parties for use of various trademarks.

Stephanie's experience in both the corporate and law firm environment provides her with an understanding of how to work within a team not only to plan but to implement overall goals and objectives. In 2018 and 2020, she was recognized in Washingtonian magazine's list of the best lawyers in D.C. for tax law. Stephanie is past Chair of the ABA State and Local Tax Committee, a member of the SALT Executive Committee and is currently serving as a Tax Section Council Member. She is also on the Executive Committee of the VBA Tax Committee. Stephanie is a member of the BNA SALT Advisory Board and the NYU SALT Advisory Board.

A frequent author and presenter, Stephanie is sought for her extensive knowledge in the area of taxation. She lectures on the State and Local Tax Program at Georgetown University Law School as an adjunct professor. She earned her B.A. from Christopher Newport University and her J.D., with an Emphasis on Taxation, from the College of William & Mary.

Jason Harbour, Hunton Andrews Kurth LLP / *Richmond*
Mr. Harbour's practice focuses on helping clients solve complex insolvency-related problems. Mr. Harbour represents major constituencies in Chapter 7, Chapter 11, and Chapter 15

bankruptcy proceedings, and out-of-court restructurings, including corporate debtors, unsecured creditor committees, secured and unsecured creditors, asset purchasers, parties to safe harbored financial contracts, indenture and securitization trustees, lessors, and other parties in interest. Mr. Harbour also provides insolvency-related structuring advice and legal opinions in connection with complex transactions for asset based-lending, asset securitizations, safe harbored financial contracts, conduits, derivatives and other financial hedges, project finance, REITS, REMICS, real estate finance, and other capital markets transactions. Mr. Harbour is a partner with Hunton Andrews Kurth LLP in Richmond, and is a member of the firm's Bankruptcy, Restructuring & Creditors' Rights Practice Group. He graduated from Davidson College in 1998 and received his J.D. from the Marshall Wythe School of Law at the College of William and Mary in 2001, where he received the Order of the Coif. Following law school he worked for Morris, Nichols, Arsht & Tunnell in Wilmington, Delaware, prior to joining Hunton in 2004. Mr. Harbour has been named as a Leader in Bankruptcy/Restructuring for Virginia by Chambers USA for 2017-2024.

Savannah L. Kimble, Kaufman & Canoles. P.C. / *Norfolk*
Savannah L. Kimble is an associate and member of the Intellectual Property Law Practice Group at Kaufman & Canoles. She graduated magna cum laude from Washington & Lee University and holds her law degree from William & Mary Law School, where she served as the Senior Articles Editor for the William & Mary Law Review. She also practices in the areas of Mergers and Acquisitions, Franchise, and Sports and Entertainment Law.

Stephen E. Noona, Kaufman & Canoles, P.C. / *Norfolk*
As head of the Litigation Section and the Intellectual Property Law Practice Group, Mr. Noona has spent over 36 years trying complex commercial cases in federal and state courts. Known for his hard work, Mr. Noona has a long and successful record as a trial lawyer who focuses his trial practice on intellectual property law cases in the Federal Courts across the nation. As a former President of the Virginia State Bar's Intellectual Property Law Section and the local Federal Bar Association, he is particularly well known for his knowledge and ability to navigate the complexities of the Eastern District's 'rocket docket' and has appeared in over 150 patent cases in all four of the District's Divisions. As co-counsel, he garnered two of the largest patent infringement verdicts ever awarded in the Eastern District of Virginia. He is a permanent member of the Fourth Circuit Judicial Conference, a Fellow in the Virginia Law Foundation, and Past President of the I'Anson-Hoffman American Inn of Court. Based on his extensive trial experience and professionalism, Stephen has been inducted as a Fellow in the prestigious American College of Trial Lawyers. His resume may be found at https://www.kaufcan.com/attorneys/stephen-e-noona/.

Elizabeth Shoenfeld, Virginia State Bar / *Richmond*
Elizabeth Shoenfeld is a Senior Assistant Bar Counsel for the Virginia State Bar, where she investigates and prosecutes ethical misconduct complaints against attorneys practicing in Virginia. Prior to joining the bar in 2015, she had a national litigation practice, focusing on defending automotive manufacturers in product liability actions. Since joining the bar, she has spoken throughout the Commonwealth on a number of ethics-related issues.

David W. Thomas, MichieHamlett / *Charlottesville*

David W. Thomas focuses his practice on issues of business law and fiduciary litigation, handling both complex commercial litigation and trusts and estate litigation. David has experience in business, real estate, construction, landlord-tenant and professional litigation, and routinely handles cases with significant electronic discovery. David was a "Virginia Rising Star" from 2013 to 2020, when he was finally too old. David taught Trial Advocacy at UVa Law from 2009 through 2020, is the current editor of LexisNexis's Virginia Forms, Volume 3A on the Uniform Commercial Code, and a co-editor of Virginia Business Torts. Prior to joining MichieHamlett in 2008, David clerked in federal district court and practiced antitrust and securities litigation for a national technology-focused law firm and for a national mass tort and products liability litigation boutique. A native of Virginia, David attended Thomas Jefferson High School for Science and Technology before graduating magna cum laude from Swarthmore College. David attended the University of Virginia School of Law, serving as the chancellor of the William Minor Lile Moot Court Competition. David is active in the Charlottesville community, where he currently serves on the Board of Directors of the Ronald McDonald House. David is a past president of the UVaClub of Charlottesville, and is a member of, and regular presenter to, the Leadership Charlottesville Alumni Association (Class of 2010). Within the legal community, David spent 6 years on the 7th District Disciplinary Committee, and now serves on the VSB's Judicial Candidate Evaluation Committee and the Committee for a Better Annual Meeting. David resides in Charlottesville with his wife and 9 and 6 year old daughters.

Chandra Sheppard, Geller Law Group / *Fairfax*
Chandra is Of Counsel with the Geller Law Group in the family law practice and is the firm's senior appellate litigator. She focuses her practice on all types of domestic relations matters. She is co-chair/founder of the Fairfax Bar Association's Diversity, Equity, and Inclusion Committee as well as a board member for the Northern Virginia Chapter of the Virginia Women Attorneys Association.

Lucia Anna Trigiani, MercerTrigiani LLP / *Alexandria*
Lucia Anna (Pia) Trigiani is a founding partner of MercerTrigiani in Alexandria, Virginia. Prior to entering private practice in 1987, Pia was property registration administrator for the Virginia Real Estate Board. In 2008, she was appointed by Governor Timothy M. Kaine to serve on the newly established Common Interest Community Board. She was reappointed to the Board by Governor Robert F. McDonnell (2011) and Governor Terence R. McAuliffe (2015). She was elected Chair of the Board in 2008 served as Chair until the conclusion of eligibility to serve on the Board in 2019.

Pia was president of The Virginia Bar Association in 2011. She is a fellow and served as President of the Virginia Law Foundation in 2017. Pia was appointed by the Chief Justice of the Virginia Supreme Court to serve on the Judicial Council of Virginia from 2013 to 2019 and the Judicial Ethics Advisory Committee from 2015 to 2021. She served as Chair of the Committee in 2021. In 2017, she was appointed by the Chief Justice to the Committee on Lawyer Wellness. Pia is a member of the Boyd Graves Conference and a faculty member for Virginia Continuing Legal Education.

Pia was President of the Washington Metropolitan Chapter of Community Associations Institute ("CAI") in 2000. The Chapter has recognized her work with several awards: President's Award

in 1999, 2002 and 2013; Educator of the Year Award in 1996, 1999, 2002, 2003, 2004, 2008, 2009 and 2016; Chapter Appreciation Award in 2009; the first Public Advocate Award in 1998; and, the first Distinguished Service Award in 2000. In 2001, Pia was named to the Chapter Hall of Fame. CAI National awarded her the Distinguished Service Award, the Excellence in Designations Award and the President's Award (2013). Pia is a charter fellow (1994) of CAI's College of Community Association Lawyers.

Pia has served as a member of the boards and executive committees of the Library of Virginia Foundation and Virginia Free. In 2020, she became Chair of the Foundation Board. She serves on the board of the Commonwealth Catholic Charities Housing Corporation. She joined the Flint Hill School Board of Trustees in 2013 and now serves as Chair of the Board. In 2014, Governor McAuliffe appointed Pia to the Board of Visitors of Longwood University and in 2016, to the Virginia Growth and Opportunity Board. Governor Ralph S. Northam reappointed her to the Longwood University Board of Visitors in 2018 and to the Go Virginia Board in 2020. In 2019, she became Vice Rector and in 2021 became Rector of Longwood University.

Pia has been recognized in The Best Lawyers in America in Real Estate Law from 2006 to 2019. She was also selected to be included in the annual Virginia Super Lawyers list in 2006, 2009-2012, and 2021-2022 and the Washington DC Super Lawyers list in 2012, 2013 and 2014. Pia was included in the 2007, 2008, 2009 and 2011 Washington Super Lawyers lists and has been recognized in Washington D.C.'s Best Lawyers from 2006 to 2022. She was awarded "Lawyer of the Year" in 2022 for Real Estate Law.

In 2021, Virginia Business Magazine named Pia to the Power 500 list as a "living legend." Pia was named to the inaugural class of Influential Women of Virginia by Virginia Lawyers Weekly in 2009. She was named to the 2012 class of Leaders in the Law by Virginia Lawyers Weekly and was elected by the class as 2012 Leader in the Law. She was recognized by the Alexandria Bar Association with the Donald F. Mela Distinguished Service Award in 2012.

RECENT DEVELOPMENTS IN CREDITORS' AND DEBTORS' RIGHTS

Jason W. Harbour
Hunton Andrews Kurth LLP
Richmond, Virginia

I. CODE OF VIRGINIA REVISIONS (EFFECTIVE JULY 1, 2024, EXCEPT AS OTHERWISE NOTED BELOW)

A. § 5.1-2.25. Abandoned or derelict aircraft.

Provides that an airport has a lien on an abandoned or derelict aircraft, as defined in the bill, on its property for all fees and charges for the use of the airport by such aircraft and for all fees and charges incurred by the airport for the transportation, storage, and removal of the aircraft. The bill authorizes an airport operator or his designee to retain, trade, sell, or dispose of an abandoned or derelict aircraft on the property of such airport. The bill provides for notice requirements prior to any such transfer of ownership interest in the aircraft.

B. § 6.2-103.2. Financial institutions; reporting financial exploitation of elderly or vulnerable adults.

Permits a financial institution to allow an elderly or vulnerable adult, as defined in the bill, to submit and periodically update a list of trusted persons whom such financial institution or financial institution staff, as defined in the bill, may contact in the case of the suspected financial exploitation of such adult. The bill also permits a financial institution to conduct a training to instruct its staff on how to identify and report the suspected financial exploitation of an elderly or vulnerable adult internally at such financial institution, to a designated trusted contact, and to various other authorities. The bill directs the Bureau of Financial Institutions of the State Corporation Commission to develop and publish guidelines for such training by January 1, 2026. The bill provides that no financial institution staff that have received such training shall be liable in any civil or administrative proceeding for disclosing the suspected financial exploitation of an elderly or vulnerable adult pursuant to the bill's provisions if such disclosure was made in good faith and with reasonable care. The bill provides that no financial institution that has provided such training shall be liable for any such disclosure by financial institution staff.

C. § 8.01-126 and 8.01-454. Summons for unlawful detainer; hearing date; amendments to amount due; subsequent filings.

Specifies a process by which a plaintiff, plaintiff's attorney, or agent in an unlawful detainer action may amend the amount due to him in an unlawful detainer action. The bill further provides that if such an amendment is permitted the plaintiff shall not subsequently file additional warrants in debt against the defendant for additional amounts if those amounts could have been included in such amended amount. The bill provides that if the plaintiff requests all amounts due and owing as of the date of the hearing or if the court grants an amendment of the amounts requested, the plaintiff shall not subsequently file additional unlawful detainers or warrants in debt against the defendant for such additional amounts if those amounts could have been included in the amended amount.

D. § 8.01-130.01. Unlawful detainer; expungement; entering of an order without further petition or hearing.

Provides that in unlawful detainer actions filed in the general district court, if the 30-day period following the dismissal of such an action has passed or if a voluntary nonsuit is taken and the six-month period following such nonsuit has passed, the court shall, without further petition or hearing, enter an order requiring the expungement of such action, provided that no order of possession has been entered. The bill provides that if a judgment is entered in favor of the defendant, such defendant may petition the court for an expungement pursuant to the petition process under current law. Additionally, the bill retains the petition process existing under current law for unlawful detainer actions commenced prior to July 1, 2024, for which the court still has records.

E. § 8.01-246. Collection of medical debts.

Provides that in any action, including those brought by the Commonwealth, upon any contract to collect medical debt, as defined in the bill, such an action is barred if not commenced within three years from the due date applicable to the first invoice for a health care service unless the contract with a hospital or health care provider is for a payment plan that allows for a longer period of time for the collection of debt by the hospital or health care provider. The bill specifies that such limitation shall not apply to medical debt arising from services provided by programs administered by the Department of Medical Assistance Services.

F. § 8.01-506. Debtor interrogatories; fieri facias; against whom a summons shall be issued.

Requires the clerk of the court from which a fieri facias is issued to issue a summons against any person known or reasonably suspected to be a debtor to, or bailee of, the execution debtor in order to ascertain the personal estate of a judgment debtor provided the judgment creditor or his attorney files an affidavit stating as such. Under current law, such clerk of the court shall issue a summons against any debtor to, or bailee of, the execution debtor.

G. § 8.01-513. Service of garnishment summons upon corporation, limited liability company, etc.; garnishment designee.

The bill has a delayed effective date of January 1, 2025.

Requires a summons for garnishment against a corporation, limited liability company, limited partnership, financial institution, or other entity authorized to do business in the Commonwealth to be served on the garnishment designee, as that term is defined in the bill, of such corporation, limited liability company, limited partnership, financial institution, or other entity, unless such garnishment designee is also the judgment debtor. The bill provides alternative methods of service if the judgment creditor certifies that such corporation, limited liability company, limited partnership, financial institution, or other entity has no garnishment designee, such garnishment designee cannot be found at the designated address, or such garnishment designee

is also the judgment debtor. Before a judgment creditor serves the registered or statutory agent of a financial institution, such creditor shall further certify that after exercising due diligence, no managing employee, as that term is defined in the bill, could be found, that such managing employee is the judgment creditor, or that such service has been authorized or requested by such institution.

H. § 55.1-321. Foreclosure procedures; subordinate mortgage; affidavit required.

Provides that, when a foreclosure sale is initiated due to a default in payment of a subordinate security instrument, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to a property owner for each period of assessed interest, fees, or other charges and to include in such affidavit an itemized list of the current amount owed. The bill also requires that any purchaser at a foreclosure sale pay off any priority security instrument no later than 90 days from the date that the trustee's deed conveying the property is recorded in the land records, and, if such purchaser fails to pay, the person originally required to pay such instrument has the right to petition the circuit court of the city or county where the property is located to recover from such purchaser any payments made on such instrument after the date of the foreclosure sale, plus any attorney fees and costs.

I. § 58.1-3975. Nonjudicial sale of tax delinquent real properties; unimproved properties within urban redevelopment or revitalization zone.

Allows the nonjudicial sale of tax delinquent property when such property is (i) unimproved, (ii) one-half acre or less in size, and (iii) located within a designated urban redevelopment or revitalization zone.

J. § 59.1-200, 59.1-207.45, and 59.1-207.46. Consumer protection; automatic renewal or continuous service offers.

Requires a supplier making automatic renewal or continuous service offers that automatically renew after more than 30 days and extend the automatic renewal or continuous service offer for a period of more than 12 months to notify the consumer, as defined in the bill, of the option to cancel no less than 30 days and no more than 60 days before the cancellation deadline or the end of the current contract term.

K. § 59.1-200 and 59.444.1. Reporting of medical debt to consumer reporting agencies by certain health care providers; prohibited.

Prohibits certain medical care facilities, certain health care professionals, and emergency medical services agencies from reporting any portion of a medical debt, defined in the bill, to a consumer reporting agency. The bill prohibits collection entities collecting or attempting to collect a medical debt from reporting such collection or attempts to collect to a consumer reporting agency. The bill provides that a willful violation of such provisions constitutes a prohibited practice under the Virginia Consumer Protection Act.

L. Uniform Commercial Code; amendments.

This bill has a delayed effective date of July 1, 2025.

Makes a number of amendments to the Uniform Commercial Code (UCC) as adopted in Virginia. The bill amends the definitions of "money" and "conspicuous" for purposes of the UCC and makes extensive amendments throughout provisions related to UCC Article 9 to accommodate emerging technologies. Such amendments include updating the traditional rules for attachment and perfection to apply to digital assets, such as controllable electronic records, and changes to several definitions, including "chattel paper," which is reconfigured to reflect the concept that chattel paper is a secured party's or lessor's right to payment that is secured by specific goods or owned by a lessee under an agreement that includes specific goods, if evidenced by a tangible or electronic record. Under current law, UCC Article 9 provides that perfection of money is through possession; however, since the definition of "money" is amended by this bill to include intangible assets, the amended provisions related to UCC Article 9 describe perfection by control, requiring the electronic money to either be in a deposit account or evidenced through a controllable electronic record. Further amendments to provisions related to UCC Article 9 include updates to governing law provisions for perfection and priority of security interests in chattel paper and in controllable electronic records, controllable accounts, and controllable payment intangibles.

The bill includes amendments to provisions governing sales and leases to provide clarification regarding hybrid or bundled transactions and adds definitions for "hybrid transaction" and "hybrid lease." The bill provides the following approach to the application of provisions related to sales or leases in hybrid or bundled transactions: if the goods aspect of the hybrid transaction predominates, then the provisions that relate to sales or leases apply, but if other aspects predominate, then the provisions that relate primarily to the goods but not the transaction as a whole apply.

The bill also adds a new title that parallels UCC Article 12, relating to controllable electronic records, as defined in the bill, and explaining the payment rights of a purchaser of an electronic record when such record is transferred. To fall within the scope of these provisions, the bill specifies that an electronic record must be controllable. The bill provides that to transfer the economic value associated with the controllable electronic record, or to receive the benefits associated with the controllable electronic record free of competing property interests, a person must have control of the controllable electronic record, which depends on requirements as described in the bill. The new title that parallels UCC Article 12 also describes qualifying purchasers of controllable electronic records, debtor security interests in relation to the person identified as in control of the controllable electronic record, and how to demonstrate control for purposes of priority and order of payment rights. These new provisions also include choice of law provisions to determine jurisdiction of a controllable electronic record.

The bill includes a number of transition provisions to address perfection and priority issues that may arise after the effective date of the bill. Under the transition provisions of the bill, the Commonwealth may provide an adjustment date of one year after the effective date of the bill to allow persons with established perfection or priority to perfect their interests that may otherwise be

affected or lost after the adjustment date based on the UCC amendments in the bill. Finally, the bill makes technical amendments throughout the UCC.

II. SELECTED DECISIONS ON CREDITORS' RIGHTS

A. District Court

1. Court Granted in Part and Denied in Part Motion to Dismiss FDCPA Claims.

Goodall v. LVNV Funding, LLC, 2023 WL 3687967 (E.D. Va. May 26, 2023) (Payne, J.).

Plaintiff sought statutory damages, damages for mental and emotional injury, and attorney's fees under the Fair Debt Collection Practices Act (FDCPA). *See* 15 U.S.C. §§ 1692k(a).

This case arose out of a debt Plaintiff allegedly incurred with Synchrony Bank. Defendant brought suit in Chesterfield County Circuit Court against Plaintiff to collect this debt. Plaintiff moved the Circuit Court to dismiss the case because Defendant was not registered with the Virginia State Corporation Commission (SCC) as required by Virginia Code § 13.1-1057(A). After a hearing, the Circuit Court dismissed the complaint.

In response to Plaintiff's FDCPA complaint, Defendant filed a motion to dismiss arguing that Defendant was not "transacting business" within the meaning of Virginia Code § 13.1-1057(A) when it filed the state court complaint against Plaintiff, and therefore was not required to register with the SCC. Specifically, Defendant argued that under the Virginia Limited Liability Company Act (the LLC Act), foreign LLCs do not need to register if they are only filing and maintaining a lawsuit, creating or acquiring a debt, or collecting a debt.

The Court noted that Virginia Code § 13.1-1057(A) states that "[a] foreign limited liability company transacting business in the Commonwealth may not maintain any action, suit, or proceeding in any court of the Commonwealth until it has registered in the Commonwealth." The Court also noted, however, that Virginia Code § 13.1-1059(A) provides a list of activities that do not constitute transacting business, including "[m]aintaining, defending, or settling any proceeding" and "[s]ecuring or collecting debts or enforcing deeds of trust and security interests in property securing the debts." Both statutes use the term "maintain."

The Court then noted that the although no state court in Virginia had defined "transacting business" in the context of these two statutes, the Supreme Court of Virginia has defined "maintain" in § 13.1-1057 to mean "'to continue (something),' not to start or commence." *Nolte v. MT Tech. Enters., LLC*, 726 S.E.2d 339, 345 (Va. 2012) (emphasis added). As a result, the Court concluded that the term "maintain" in § 13.1-1059(A) excludes continuing, defending, or settling any proceeding from being classified as activities that constitute "transacting business," but that the starting and commencing of any proceeding are activities that constitute "transacting business." Accordingly, because Defendant files actions in many courts around the Commonwealth of Virginia, the Court concluded that Defendant is transacting business within the meaning of the statute.

Notably, an entity is entitled to register with the SCC prior to the time of final judgment to comply with Virginia Code § 13.1-1057(A). Here, however, Defendant admitted that it had no intention of ever registering with the SCC. As a result, the Court concluded that Plaintiff sufficiently alleged a claim under the FDCPA for falsely taking or threatening an action that could not be taken, in the collection of a consumer debt, and falsely representing that a garnishment could occur, because Defendant had no intention of registering with the SCC as required, and thus without any possibility of collecting through a judgment.

Although the Court concluded that Plaintiff sufficiently alleged a claim under sections 1692e(4) and (5) of the FDCPA, the Court concluded that Plaintiff failed to sufficient allege abusive and harassing actions and unfair or unconscionable means to collect the alleged debt in violation of FDCPA sections 1692d and 1692f. Accordingly, the Court granted the motion to dismiss without prejudice, but instructed Plaintiff's counsel that no other amendments would be permitted.

2. Law Firm Was a Debt Collector Under FDCPA

Lord v Senex Law, P.C., 2023 WL 3727003 (W.D. Va. May 30, 2023) (Urbanski, J.).

Plaintiffs sought summary judgment against Defendant alleging that Defendant acted as a debt collector under the Fair Debt Collection Practices Act (FDCPA). *See* 15 U.S.C. § 1692(a)(6). Specifically, Plaintiffs argued that Defendant was a debt collector because Defendant drafted and sent Notices of Noncompliance (Notices) to delinquent tenants for landlord clients. Defendant argued that Defendant was not a debt collector because the Notices were reviewed, approved, and signed by the landlord clients, and Defendant's task of sending the Notices was ministerial.

The Court found that Defendant provided an integrated delinquent rent collection system for its landlord clients by preparing the Notices, sending the Notices to the landlords for approval, and then reviewing and mailing them to the delinquent tenants. In sum, the Court held that it could not be concluded that Defendant, operating a fully integrated system for collecting delinquent tenant rent for its landlord clients, merely engages in ministerial functions and that to conclude otherwise would be to ignore the reality of the comprehensive rent collection system of Defendant. In particular, the Court noted that debt collectors cannot evade the requirements of the FDCPA merely by having the creditor sign the communications.

As a result, the Court held that Defendant was a debt collector under section 1692(a)(6) of the FDCPA and granted summary judgment for Plaintiffs.

3. Court Lacks Subject Matter Jurisdiction and Remands Case to State Court.

Home Transition Specialist, LLC v. Fegley, 2023 WL 3998374 (E.D. Va. Jun. 14, 2023) (Young, J.).

Plaintiff had initiated an action in Hanover County General District Court to reduce a foreclosure claim to judgment. Defendant sought to remove the state court proceeding to the District Court claiming that the state court proceeding violated her rights under the Fair Debt Collection Practices Act.

The District Court noted that it has subject matter jurisdiction over civil cases (i) arising under the Constitution, laws, or treaties of the United States (federal question jurisdiction); and (ii) in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which diversity of citizenship exists between the parties (diversity jurisdiction). 28 U.S.C. §§ 1331, 1332.

The District Court concluded that it could not exercise diversity jurisdiction because the Defendant had not established diversity of citizenship existed between the parties.

With respect to federal question jurisdiction, the District Court noted that the case involves reducing a foreclosure to judgment, which is a process that arises solely under Virginia law. The District Court further noted that although Plaintiff raised objections to the underlying state court proceedings predicated on the FDCPA, those objections do not independently create federal jurisdiction where the underlying complaint does not appear to implicate any federal claim. The District Court also noted that the FDCPA does not create preemptive power of review for a federal court, and that Plaintiff court not bootstrap her FDCPA claims against Plaintiff to Plaintiff's wholly-state-law-claims and thereby create federal jurisdiction and thus grounds for removal. Instead, the District Court noted that the federal question must be presented on the face of a plaintiff's properly pleaded complaint and a defendant may not use supplemental jurisdiction as a source of federal question subject-matter jurisdiction.

As a result, because Plaintiff could not have brought its action to reduce a foreclosure claim to judgment in federal court, Defendant could not raise a new issue—outside of the face of Plaintiff's foreclosure-judgment complaint—to create federal question jurisdiction. Thus, the District Court concluded that it lacked subject matter jurisdiction and remanded the case to state court.

4. Court Granted Default Judgment But Reduced Attorney's Fees Based on Time Spent.

Wells Fargo Commercial Distribution Finance, LLC v. Shore Saw & Mower, Inc., 2023 WL 5153723 (E.D. Va. Aug. 10, 2023) (Jackson J.).

Plaintiff sought a default judgment and attorney's fees. The District Court granted the default judgment but reduced the amount of the requested attorney's fees based on the amount of time spent.

Plaintiff sued Defendants for breach of contract based on an inventory financing agreement. Defendants failed to make a payment under the contract and Plaintiff terminated the contract and filed the Complaint, a motion for a temporary restraining order, a motion for detinue, and a motion for default judgment. Defendants did not appear at the hearing on the motions.

The District Court found that the well-pled allegations in the Complaint supported relief for breach of contract, and that Defendants were liable to Plaintiff for damages, attorney's fees, and post-judgment interest. The District Court noted that to succeed on a breach of contract claim at trial under Virginia law, a plaintiff must establish the following elements: (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. *See Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 154 (2009); *see also Filak v. George*, 267 Va. 612, 619 (2004).

The District Court found that the well-pled facts in the Complaint established that the parties entered into an enforceable contract, Defendants failed to fulfill their obligations under the contract, and caused damage to Plaintiff as a result of their breach.

With respect to the award of attorney's fees, the District Court noted that Plaintiff initially failed to submit supporting documentation, including an affidavit of reasonableness from independent counsel. Upon request, Plaintiff submitted supporting documentation, including an affidavit of reasonableness from independent counsel. The District Court found, however, that the requested fees of $49,074.50 were not reasonable. The District Court found that the hours Plaintiff's counsel expended during this matter required a downward adjustment because the issues presented in the case were not novel or particularly difficult and the hours provided to the District Court showed duplicative efforts. The District Court noted that the dispute was a simple breach of contract for failure to make timely payments, and that Plaintiffs filed a Complaint, a motion for a temporary restraining order, a motion for detinue, and a motion for default judgment. The District Court concluded that the motions asked for substantively the same relief, did not engage with complex areas of law, and used the same facts. The Court further concluded that the motion for temporary restraining order and motion for detinue were filed simultaneously, used the same supporting memorandum, and requested the same relief. Accordingly, the Court concluded that with respect to the requested attorney's fees, the Defendants were liable to Plaintiff for only $34,352.15.

5. Court Granted Default Judgment But Reduced Attorney's Fees Based on Rate.

Regions Bank v. Frazier, 2023 WL 5051388 (W.D. Va. Aug. 8, 2023) (Dillon, J.).

Plaintiff sought a default judgment and attorney's fees. The District Court granted the default judgment but reduced the amount of the requested attorney's fees based on the hourly rate.

Plaintiff sued Defendant based on a Guaranty related to an equipment financing agreement.

The District Court concluded that Plaintiff sufficiently alleged Defendant's liability on the merits. The agreement at issue expressly stated that it "shall be governed and construed under the laws of the State of California without reference to its principles of conflict of laws" and in California, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011). The District Court concluded that based on the factual allegations made in the Complaint, Plaintiff stated a claim for breach of the contract, and the District Court granted default judgment in favor of Plaintiff.

With respect to the damages claim for attorney's fees, however, based on the nature and difficulty of the litigation and the skill required to handle the matter, the District Court found that counsel's hourly rate—approximately $438 per hour—was high in light of the relative simplicity of the underlying claim and actions taken in the case. The District Court also noted that courts in its district have only awarded attorneys' fees at hourly rates of $450 or more in the most complex commercial and civil rights cases. As a result, the District Court ordered attorney's fees at a reduced rate of $350 per hour.

6. Case Dismissed and Arbitration Clause Enforced.

Jacobs v. Quest Diagnostics, 2023 WL 5278712 (W.D. Va. Aug. 16, 2023) (Ballou, J.).

A *pro se* Plaintiff sued her former employer alleging that she was fired because of her race in violation of Title VII of the Civil Rights Act of 1964. Defendant filed a motion to dismiss and to compel arbitration, claiming that at the outset of her employment Plaintiff signed an arbitration agreement with Defendant that governs the subject matter of this action. The District Court concluded that the arbitration agreement governed and granted the motion to dismiss and compel arbitration.

The Court noted that the arbitration agreement stated in pertinent part "[a]ny and all claims, disputes, or controversies of any kind arising out of or relating to my employment, the termination thereof, my hiring, or any other association I have with the Company (as defined below) shall be settled by final binding arbitration ... This Agreement is governed by the Federal Arbitration Act."

Defendant submitted a declaration that indicated that each job applicant must create an electronic account that requires new employees to review the arbitration agreement, and then click a button for electronic signature or a signature tab. The exhibits to the declaration included (1) a screenshot of Defendant's business records showing that Plaintiff completed her onboarding documents, including the arbitration agreement, and (2) the electronically signed arbitration agreement. The arbitration agreement contained a provision allowing an employee to opt-out of the agreement by submitting an Arbitration Opt-Out Form withing 30 days of signing the agreement. Plaintiff did not opt out of the arbitration agreement.

The District Court noted that in the Fourth Circuit, a party may compel arbitration if four elements are met: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect, or refusal of the plaintiff to arbitrate the dispute. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–01 (4th Cir. 2002). The District Court found that each of these elements was met.

Plaintiff had asserted in an earlier pleading that she did not sign the arbitration agreement, but the District Court noted that a party cannot avoid compelled arbitration by generally denying the facts upon which the right to arbitration rests; instead, the party must identify specific evidence demonstrating a material factual dispute. The District Court found that Plaintiff did not offer specific evidence to refute that she electronically signed the arbitration agreement, and therefore concluded that the arbitration agreement is a valid and binding agreement and that it governed this dispute.

7. Court Dismissed Three Out of Four Counts.

Bo v. Ruitang, 2023 WL 5615994 (E.D. Va. Aug. 30, 2023) (Alston, J.).

Plaintiff asserted four Counts under Virginia law against Defendants: (1) actual and constructive fraud; (2) fraud in the inducement; (3) breach of contract; and (4) unjust enrichment. Plaintiff alleged that Defendants made misrepresentations to Plaintiff that Plaintiff relied upon when entering into a loan agreement with Defendants, and that Defendants breached the contract and have been unjustly enriched by their failure to repay the loan. Defendants filed a motion to dismiss and the District Court dismissed Counts 1, 2, and 4, and authorized Plaintiff to amend and replead Count 4.

The District Court dismissed the fraud claims in Counts 1 and 2 because Plaintiff failed to plead fraud with sufficient particularity and based on the economic loss rule. Under Virginia law, the economic loss rule provides that in order to recover in tort, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract. Thus, as the only damages that Plaintiff alleged were Defendants' failure to repay the loan principal and interest, the economic loss rule barred recovery.

After concluding that Plaintiff adequately stated a claim for breach of contract under Count 2, the District Court addressed the unjust enrichment claim in Count 4. The District Court noted that Courts in this District, applying Virginia law, have recognized that pleading unjust enrichment as an alternative to a breach of contract claim is appropriate where the validity or existence of an express contract governing the plaintiff's claims is in dispute. The District Court allowed Plaintiff to amend the Complaint with respect to Count 4 to attempt to include both Defendants in the unjust enrichment claim.

8. Motion to Dismiss Granted Based on Res Judicata.

<u>Ballesteros v. MTGLQ Investors, LP.</u>, 2023 WL 7388903 (E.D. Va. Nov. 8, 2023) (Giles, J.).

The District Court granted Defendants' motions to dismiss on the grounds of res judicata.

Plaintiff filed this Complaint on March 24, 2023, alleging wrongful foreclosure, breach of contract, fraud, violations of TILA, violations of the FDCPA, and violations of RESPA.

Previously, on December 14, 2022, as part of state court litigation concerning the property, the state court had dismissed Plaintiff's counterclaims with prejudice. Accordingly, Defendants moved to dismiss the Complaint on the grounds of res judicata.

The District Court noted that under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. The District Court also noted that there are three elements of res judicata: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits. The District Court further noted that parties are said to be in privity with one another when a party's interest is so identical with another that representation by one party is representation of the other's legal right.

The District Court noted that there was no dispute about the first element.

With respect to the second element, the District Court indicated that for res judicata purposes, the claims raised in a second civil lawsuit do not need to be identical to those raised in the first action, only that the claims were or could have been raised in the prior action. The District Court concluded that the Complaint was based on claims that were or could have been raised in the prior case.

With respect to the third element, the District Court found that Defendant MTGLQ was a party to the prior action, and the other Defendants are in privity with Defendant MTGLQ. Thus, the District Court dismissed the Complaint with prejudice.

Plaintiff subsequently filed a motion for reconsideration, which the District Court denied. *Ballesteros v. MTGLQ Investors, LP*, 2024 WL 1773994 (E.D. Apr. 23, 2024).

9. Court Denied Motion for Judgment on the Pleadings.

Pellegrino v. Equifax Information Services, LLC., 2024 WL 37062 (E.D. Va. Jan. 2, 2024) (Brinkema, J.).

Defendant Higher Education Loan Authority of the State of Missouri (MOHELA) argued that it was immune from this suit because it is part of the State of Missouri under Supreme Court precedent and, therefore, is entitled to sovereign immunity under the Eleventh Amendment, or it is otherwise an arm of the state of Missouri under the Fourth Circuit's prevailing four factor test. Plaintiff argued that given the structural and financial independence Defendant exercises, Defendant would fail the Fourth Circuit's arm-of-the state test. The District Court denied Defendant's motion for judgment on the pleadings.

Plaintiff had multiple student loans serviced by Defendant. The Complaint alleged that Defendant inaccurately reported that Plaintiff was delinquent on seven of his loans during a time when the loans were on forbearance or deferred status. The Complaint alleged that Defendant violated the FCRA when it failed to follow reasonable procedures to assure the maximum possible accuracy of information concerning Plaintiff in his consumer reports.

After indicating that Defendant's "part of the state" argument was not persuasive, the District Court turned to the "arm of the state" analysis. The District Court noted that because federal law governs whether a state-created entity is an "arm of the state" such that it is entitled to immunity under the Eleventh Amendment, courts in the Fourth Circuit evaluate the following four non-exclusive factors when determining arm-of-the-state status: (1) whether any judgment against the entity as defendant will be paid by the State;(2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions; (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

With respect to the first factor, the District Court concluded that because Defendant continues to operate as financially segregated from any State funds, the first factor, which is the most significant factor, weighs heavily against finding that the Defendant is an arm of the state.

The District Court then found that the second factor weighs against finding that Defendant is an arm of the state because Defendant has substantial autonomy from the state, Defendant is financially independent of the State, and the State does not have veto power of Defendant's regular activities.

The District Court found that the third factor slightly weighs in favor of Defendant being an arm of the state because it was initially created to help Missourian's access student loans needed to help pay for college, though Defendant is now a nationwide servicer of student loans.

With respect to the fourth factor, the District Court found that the fourth factor weighed in favor of Defendant being an arm of the state.

The District Court held that under the Fourth Circuit's four factor test, the Defendant was not an arm of the state and therefore denied the Defendant's motion for judgment on the pleadings.

10. Case Dismissed and Arbitration Clause Enforced.

Rader v. Northwest Federal Credit Union, 2024 WL 388097 (E.D. Va. Feb. 1, 2024) (Alston, J.).

Plaintiff alleged that Defendant improperly assessed and collected overdraft fees on debt card transactions and collected multiple fees on a single item. Defendant filed a motion to dismiss and compel arbitration.

The District Court noted that despite strong federal policy favoring arbitration, the Federal Arbitration Act does not divest federal courts of otherwise-possessed subject matter jurisdiction over disputes subject to arbitration agreements. The District Court further noted that while a plaintiff's failure to comply with contract terms that require arbitration typically bar the plaintiff's ability to then sue in federal court, it does not affect whether the district court possesses the power to hear the case and that an obligation to arbitrate would impair a plaintiff's right of access to the court, but it does not impact the court's independent jurisdiction because subject matter jurisdiction can never be forfeited or waived. Accordingly, the District Court found that dismissal was not appropriate on subject matter jurisdiction grounds.

The District Court noted, however, that the Fourth Circuit has held that dismissal is appropriate where all of the issues presented in a lawsuit are subject to arbitration and that a determination of whether a dispute is subject to arbitration, requires demonstration of four elements: (1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction to interstate commerce; and (4) the failure or refusal of a party to arbitrate the dispute.

Plaintiff denied that she agreed to any arbitration provision, but the District Court found that Plaintiff agreed to two of the three applicable agreements, and that those agreements contained

arbitration provisions. Thus, the District Court granted the motion to dismiss and compel arbitration with respect to those two agreements.

11. Claims Dismissed Because They Were Not Viable Under Virginia Law.

Young v. CapitalOne Bank USA, N.A., et al., 2024 WL 780415 (E.D. Va. Feb. 26, 2024) (Giles, J.).

The District Court granted Defendants' motion to dismiss after finding that Plaintiff failed to state a claim as a matter of law.

Plaintiff had been a Chapter 7 debtor and had received a discharge that provided that "[c]reditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally." Plaintiff alleged that after the discharge, Defendants sent her automated emails related to her credit card account and her CreditWise account, and that the emails prompted her to verify her phone number to receive text alerts and apply for a new credit card, notified her about changes and alerts related to her credit report and score, and gave Plaintiff tips on managing her credit.

Plaintiff initiated this action in the U.S. District Court for the Northern District of Texas and Defendants filed a motion to transfer venue to the Eastern District of Virginia, which was granted pursuant to a mandatory forum selection clause in the terms and conditions of Defendants' CreditWise program.

Plaintiff asserted claims for violating the Texas Debt Collection Practices Act (TDCPA), invasion of privacy, and violating the Fair Credit Reporting Act (FCRA).

After concluding that the forum selection clause was mandatory, that the terms and conditions required the application of Virginia law, and that subject matter jurisdiction existed, the District Court addressed Plaintiff's claims.

The District Court found that a contractual relationship existed between Plaintiff and Defendants via Plaintiff's acceptance of the CreditWise terms and conditions, and that Defendants were permitted to review Plaintiff's account information and pull her credit report. Additionally, as Plaintiff was unable to allege a creditor-debtor relationship existed to support her FCRA claim, the District Court granted Defendants' motion to dismiss the FCRA claim.

The District Court concluded that because the choice of law provision applies to Plaintiff's TDCPA claim, Virginia law governs and thus, Plaintiff could not state a claim under Texas statutory law. Accordingly, the District Court granted Defendants' motion to dismiss the TDCPA claim.

Finally, the District Court dismissed the invasion of privacy claim because Virginia does not recognize a common law cause of action for invasion of privacy or intrusion upon seclusion.

12. Court Dismissed FDCPA Claims Because a Business Only Enforcing a Security Interest Through Nonjudicial Foreclosure Is Not a Debt Collector.

Raja et al. v. Specialized Loan Servicing, LLC, et al., 2024 WL 1201603 (E.D. Va. Mar. 20, 2024) (Alston, J.).

Pro se Plaintiffs' Complaint arose from the attempted foreclosure on a second mortgage secured by Plaintiffs' home.

With respect to the Fair Debt Collection Practices Act (FDCPA) claims, Defendants argued that the claims should be dismissed because they were not debt collectors. The District Court cited to the Supreme Court's case *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1036 (2019), in which the Supreme Court held that a business that does no more than enforce security interests through nonjudicial foreclosure proceedings is not a "debt collector" under the FDCPA. Thus, the District Court found that because Defendants were entities that allegedly took steps to carry out a nonjudicial foreclosure on the property, their foreclosure activities were not subject to the FDCPA under Sections 1692f(1), 1692e, 1692(d)(1), or Regulation F. Accordingly, the District Court dismissed each of Plaintiffs' FDCPA claims.

The District Court similarly dismissed Plaintiffs' other claims based on conversion, fraud, malicious abuse of process, breach of contract, and rescission.

13. Court Denied Motions to Dismiss FCRA Claims.

Gerena v. Freedom Mortgage Corp., et al., 2024 WL 1023033 (E.D. Va. Mar. 8, 2024) (Lauch, J.).

Plaintiff brought causes of action against Defendants for alleged violations of the Fair Credit Reporting Act (FCRA). Plaintiff was the victim of identity theft. In March 2021, Plaintiff contacted consumer reporting agencies and learned about unauthorized accounts that had been opened in her name. Approximately three months later, Plaintiff completed an online FTC Identity Theft report. One week thereafter, Plaintiff filed a police report detailing the identity theft allegations.

Plaintiff sent correspondence to the consumer reporting agencies disputing the inaccurate information in her consumer credit reports and requesting that the consumer reporting agencies investigate and remove the inaccurate reporting. Plaintiff also sent correspondence to the lenders with the fraudulently opened accounts.

Plaintiff alleged FCRA claims based on the failure of Defendants to properly investigate and correct her credit report information.

The District Court initially addressed Defendants' standing arguments and concluded that Plaintiff had standing to bring the FCRA claims. The District Court found that Plaintiff's alleged financial harm coupled with her allegations of embarrassment, humiliation, and other mental and emotional distress were just sufficient, at that stage of the litigation, to establish an injury-in-fact with respect to Defendants' inaccurate reporting.

The District Court then concluded that based on Plaintiff's factual allegations, Plaintiff had alleged willful, or in the alternative negligent, violations of the FCRA against Defendants.

B. State Court – Virginia Supreme Court

1. *Escheat Provision of Statute Violated Takings Clause of Virginia Constitution.*

<u>McKeithen Trustee of Craig E. Caldwell Trust v. City of Richmond</u>, 893 S.E. 2d 369 (Va. 2023) (Kelsey, J.).

The City of Richmond obtained a judicial sale of a parcel of property subject to a statutory lien for delinquent taxes. Although the sale proceeds wholly satisfied the City's tax lien, the Circuit Court for the City of Richmond held that Va. Code § 58.1-3967 required it to award a portion of the surplus sale proceeds to the City rather than an unsatisfied junior lienor. The Virginia Supreme Court agreed that the statute's text required this result, but held that as applied to this case, the statute operated in a manner that violated Article I, Section 11 of the Constitution of Virginia.

The City filed an action in 2017 seeking a judicial sale of the property at issue to satisfy its statutory lien for 10 years of unpaid taxes. Under Va. Code § 58.1-3340, the City's tax lien took priority over all prior liens on the property. The City alleged that two prior liens had been recorded. The earliest lien, a deed of trust recorded in 2001 and securing a $14,000 debt, had been filed by Ms. Jones, who subsequently died, but the lien remained subject to the claim of her unknown heirs. J.A. at 71. The later lien, a judgment lien recorded in 2012, existed in favor of the Craig E. Caldwell Trust and secured an unpaid award that, including principal and interest, exceeded $100,000.

At the foreclosure sale the highest bidder bought the property for $50,050.

The Circuit Court confirmed the sale on April 30, 2018, ordering that the property be conveyed free and clear of all liens to the highest bidder. The order directed that the City's lien for delinquent taxes, along with its costs and legal fees, be fully paid by the purchase proceeds. Having statutory priority over all other liens, the City received $19,563.06 for delinquent taxes, penalties, and interest and $9,315.84 for the City's costs and legal fees. The Circuit Court directed that the remaining $21,171.10 of the surplus proceeds be deposited in the Court's registry in the event that the unknown Jones beneficiaries and the Caldwell Trust made timely claims — $14,000 to be held for the unknown Jones beneficiaries as the superior lienor and the remaining $7,171.10 to be held for the Caldwell Trust.

In June 2019, the Caldwell Trust obtained payment of the $7,171.10 from the Court's registry. Then, in June 2020, the Caldwell Trust filed a motion seeking payment of the remaining, unclaimed portion of the $21,171.10 in surplus proceeds held in the Court's registry. The Caldwell Trust argued that under Va. Code § 58.1-3967, the unknown Jones beneficiaries had forfeited their claim to the surplus proceeds by not asserting it within two years from the entry of the Court's 2018 Order. Because the unknown Jones beneficiaries had forfeited their interest by failing to file a timely claim and because the City had been made whole, the Caldwell Trust argued that the remaining portion of the $21,171.10 surplus held in the Court's registry should be applied to the Caldwell Trust's outstanding secured debt that exceeded $100,000.

The City, however, opposed the Caldwell Trust's request, arguing that the $14,000 unclaimed portion of the surplus proceeds escheats to the City under Va. Code § 58.1-3967 even though the City's tax lien had been fully satisfied. The Circuit Court agreed with the City based on the language of the statute.

The Virginia Supreme Court agreed with the City and the Circuit Court's conclusion that the statute provided that the unclaimed funds held for the unknown Jones beneficiaries escheated to the City even though the City's tax lien had been paid in full.

The Court then addressed Article I, Section 11 of the Constitution of Virginia, and indicated that the threshold question was whether the alleged taking involved a "property interest" recognized by Virginia law. The Court noted that equitable principles deem each competing lienor to have an intangible property interest in the surplus proceeds of the sale because in equity the judgment is a lien upon the whole of the debtor's equitable estate. Accordingly, the Court held that the Caldwell Trust, a judgment creditor, had an intangible property interest under Virginia law in the surplus proceeds of the sale to the extent of its underlying judgment.

The Court noted that the City had been fully compensated for its claim, and held that as applied to this particular scenario Va. Code § 58.1-3967 unconstitutionally authorized the City to take these proceeds from the Caldwell Trust and to keep them for itself. The Court remanded the case for further proceedings.

C. State Court – Court of Appeals

1. *Appeal Dismissed Because There Was No Jurisdiction to Hear Appeal.*

Marinaro v. Zimmer & Lewis Attorney and Counsellors at Law, 2023 WL 3827795 (Va. Court of Appeals 2023) (Per Curiam).

Pro se Appellant sought to appeal an order of the Circuit Court of the City of Virginia Beach dismissing her appeal of an order of the Virginia Beach General District Court denying her motion to set aside the District Court's judgment. Appellant argued that the Circuit Court erred in finding that it did not have jurisdiction to consider the appeal and in failing to set aside the District Court's judgment. The Appellant, however, did not preserve the objection to the Circuit Court's ruling and therefore her arguments on appeal were waived under Rule 5A:18.

The District Court entered a judgment against Appellant on November 18, 2021. Months later, on August 5, 2022, Appellant filed a "notice and motion to set aside judgment and dismiss with prejudice" the judgment, which the District Court denied. Appellant then appealed to the Circuit Court. The Circuit Court concluded that the November 18, 2021, judgment was a final order and that therefore an appeal was required to be filed within ten days of the entry of such order. *See* Va. Code § 16.1-106. The Circuit Court also concluded that the District Court's decision to deny Appellant's August 5, 2022, motion did not alter, amend, or vacate the November 18, 2021. The Circuit Court further held that a District Court ruling denying a motion to set aside a judgment is not an appealable order. Appellant then moved to vacate the Circuit Court's order. The Circuit Court did not rule on that motion and the Appellant subsequently filed this appeal.

The Court of Appeals, however, noted that Appellant did not simultaneously with its issuance, challenge the Circuit Court's ruling that it did not have subject matter jurisdiction to hear the appeal of the District Court judgment. The Court of Appeals quoted Rule 5A:18, which provides that "[n]o ruling of the trial court ... will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Rule 5A:18.

The Court of Appeals also noted that although Appellant timely filed and docketed her motion to vacate, the Circuit Court never ruled on the motion. As a result, the Court of Appeals concluded that the Circuit Court's jurisdiction to rule on the motion to vacate expired 21 days after the final order was entered on October 28, 2022, in accordance with Rule 1:1(a), and that because Appellant did not obtain a ruling from the Circuit Court on the motion to vacate, there is no ruling for the Court of Appeals to review on appeal, and Appellant's argument is waived under Rule 5A:18.

Finally, the Court of Appeals concluded that the ends of justice exception in Rule 5A:18 did not apply because Appellant failed to expressly invoke such exception, and the Court of Appeals would not do so *sua sponte*.

2. Guaranty Found to be Enforceable.

CSE, Inc. v. Kibby Welding, LLC, 77 Va. App. 795 (Va. Court of Appeals 2023) (Raphael, J.).

Appellant appealed trial court's ruling that Individual Defendant was not liable on a personal guaranty. The Court of Appeals concluded that the trial court erred in finding that the Individual Defendant's personal guaranty was not enforceable and in failing to enter judgment on the guaranty in favor of Plaintiff.

LLC Defendant provided pipeline-welding and fabrication services for the Transcontinental Gas Pipeline in Virginia. Individual Defendant was the 22 year-old daughter of the owner of LLC Defendant, and only made $12 to $14 per hour. Individual Defendant was responsible for certain billing and accounting services for LLC Defendant, but Individual Defendant testified that she had no authority to sign checks, pledge LLC Defendant's credit, or sign contracts on behalf of LLC Defendant. Nevertheless, the trial court found that Individual Defendant held herself out as having the apparent authority to act on behalf of LLC Defendant as the "Sales Representative" and no official with the authority to speak for LLC Defendant denied that Individual Defendant had both actual and apparent authority to act on LLC Defendant's behalf.

Individual Defendant testified that no one from Plaintiff asked her to personally guarantee LLC Defendant's credit. She denied understanding that she was applying for credit on behalf of LLC Defendant. Individual Defendant admitted, however, that she would have read the form before signing it, and she had no trouble reading the fine print into the record at trial.

The Court of Appeals noted that a guaranty is an independent contract, by which the guarantor undertakes, in writing, upon a sufficient undertaking, to be answerable for the debt, or for the performance of some duty, in case of the failure of some other person who is primarily liable to pay or perform. The Court of Appeals further noted that to be enforceable, a guaranty must be in writing and supported by an adequate consideration.

Individual Defendant argued that there was not adequate consideration because Plaintiff did not know at first that she was the person who signed it, and Plaintiff never checked her creditworthiness, so Plaintiff could not have relied on the guaranty when extending credit to LLC Defendant. The Trial Court, however, found that the submission of the Credit Application and the credit check run thereupon induced Plaintiff to perform crane services for LLC Defendant on credit

(promise to pay basis). The Court of Appeals also accepted the Trial Court's factual finding that Plaintiff did not actually rely on Individual Defendant's personal guaranty when extending credit to LLC Defendant.

The Court of Appeals found that the Trial Court erred as a matter of law in concluding that whether Plaintiff subjectively relied on the guaranty was relevant to whether the guaranty was supported by adequate consideration. The Court of Appeals noted that the Virginia Supreme Court has long held that extending credit to another party constitutes adequate consideration for a guaranty.

Referencing the Restatement of Contracts, the Court of Appeals stated that the enforceability of the personal guaranty cannot be defeated by proof that Plaintiff did not subjectively rely on the guaranty when it extended credit to LLC Defendant, and Plaintiff's true motive in extending credit to LLC Defendant is not relevant to whether the guaranty was supported by consideration. Instead, the Court of Appeals noted that it is the intent of the parties as manifested to one another that determines the validity of the consideration. Referencing the Second Restatement of Contracts, the Court of Appeals then noted that the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement.

The Court of Appeals concluded that by signing her name to that promise, Individual Defendant a manifested an intention to induce Plaintff to extend credit to LLC Defendant. Plaintiff then extended credit to LLC Defendant, manifesting an intention to provide consideration in exchange for Individual Defendant's promise. Because the external manifestation of the parties' actions shows a bargained-for exchange, Individual Defendant's guaranty is supported by adequate consideration.

3. *Judgment Upheld.*

City-to-City Auto Sales, LLC v. Harris, 78 Va. App. 334 (Va. Court of Appeals 2023) (Decker, J.).

Defendant appealed the Circuit Court's entry of judgment against Defendant.

Plaintiff purchased a commercial truck from Defendant and the truck experienced engine failure less than a month after the purchase. Plaintiff brought an action for fraud against Defendant. Defendant did not file a responsive pleading and Plaintiff moved for a default judgment.

At the hearing on Plaintiff's motion for default judgment, the Circuit Court, denied Defendant's motion for leave to file a late answer, granted Plaintiff's motion for a default judgment, and entered an order setting case for trial solely on issue of damages. Following a jury trial, the Circuit Court entered judgment on the jury verdict awarding Plaintiff compensatory and punitive damages, granted Plaintiff's motion for attorney fees, and denied all of Defendant's posttrial motions. Defendant appealed.

Defendant argued that the Circuit Court erred in not setting aside the default judgment and enforcing the arbitration provision in the purchase agreement. The Court of Appeals noted the

public policy in favor of enforcing arbitration, but concluded that Defendant waived the enforcement of the arbitration provision by not raising the issue until after the Circuit Court entered default judgment.

The Court of Appeals then concluded that the damage awards were supported by the evidence and the Circuit Court did not abuse its discretion in awarding damages against the Defendant.

4. *Plaintiff Did Not Lose Malpractice Claim in Bankruptcy.*

Shaw-McDonald v. Eye Consultants of Northern Virginia, P.C., et al., Record No. 0067-23-4 (Va. Court of Appeals Jan. 30, 2024) (Raphael, J.).

Plaintiff sued Defendants for medical malpractice. While the case was pending, the Plaintiff filed for Chapter 7 bankruptcy. The Circuit Court dismissed the medical malpractice case for lack of standing, but the Court of Appeals reversed.

Plaintiff did not initially identify the medical malpractice claim in her bankruptcy Schedules and failed to disclose the bankruptcy to Defendants in response to an Interrogatory from Defendants. On the night before trial, however, Defendants discovered the bankruptcy. At trial, Defendants brought the bankruptcy to the Circuit Court's attention and moved to dismiss the case for lack of standing.

That same day, Plaintiff filed amended Schedules in the Bankruptcy Court identifying the medical malpractice claim. Two weeks later, the Chapter 7 trustee certified that the bankruptcy estate was fully administered. The Bankruptcy Court closed the Plaintiff's bankruptcy case.

Thereafter, Defendants filed a renewed motion to dismiss and the Circuit Court granted the motion.

The Court of Appeals noted that the medical malpractice claim was part of Plaintiff's Chapter 7 bankruptcy estate, but that because the medical malpractice claim was not administered at the time of the closing of Plaintiff's bankruptcy case, it was abandoned back to Plaintiff. The Court of Appeals also noted that Plaintiff was entitled to amend her Schedules at any time before the bankruptcy case was closed. Thus, the Court of Appeals concluded that Plaintiff had standing to pursue the medical malpractice claim when the case was filed, lost temporary control of the claim during the bankruptcy, and then recovered the medical malpractice claim when the bankruptcy case was closed. As a result, the Court of Appeals held that Plaintiff had standing to pursue the claim.

5. *Summary Judgment Reversed.*

Neal v. Secretary of the Dept. of Veterans Affairs, 79 Va. App. 1 (Va. Court of Appeals 2023) (Humphreys, J.).

Defendant appealed the decision of the Circuit Court of Prince William County granting summary judgment, and awarding a writ of possession to, Plaintiff.

Defendant owned a home subject to a deed of trust. The loan was guaranteed by Plaintiff. Defendant went into default on the loan and the trustee under the deed of trust initiated a non-judicial foreclosure sale and Plaintiff was the winning bidder. Plaintiff sent Defendant a notice to quit and vacate, Defendant refused, and Plaintiff filed an unlawful detainer action.

In responding to the unlawful detainer complaint, although Defendant admitted to being in default on the loan, she alleged that when she entered into a loan modification, a representative of Plaintiff told her that she would not longer have a "VA loan" that required compliance with all of the VA regulations. Defendant further alleged that if she had known that this representation was false, she would have availed herself of certain protections contained in the VA regulations and guaranteed to her in the deed of trust.

The Circuit Court granted Plaintiff's summary judgment motion on the basis that an affirmative defense was not an appropriate vehicle to challenge to Plaintiff's title.

The Court of Appeals noted that an unlawful detainer is an action brought against a defendant who lawfully entered into possession of real property but whose right to lawful possession has since expired. *Parrish v. Fed. Nat'l Mortg. Ass'n*, 292 Va. 44, 50, 787 S.E.2d 116 (2016). The Court of Appeals also noted that the sole issue to be determined by a court in an unlawful detainer action is whether the plaintiff, who is presently out of possession, has a superior right of possession to the defendant, and that in order to prevail, the plaintiff must show one of two things: first, prior actual possession, which was then yielded to the defendant under some temporary or defeasible estate that has ended, or second, a right of possession acquired after the defendant's entry.

The Court of Appeals held that the nature of the unlawful detainer proceeding permits the use of an affirmative defense to contest the validity of the plaintiff's title if the plaintiff's right of possession is derivative of the allegedly defective title. Accordingly, the Court of Appeals indicated that a defendant's affirmative defense that the deed is invalid, if proven, defeats the plaintiff's asserted right of possession.

The Court of Appeals noted that although Defendant's answer was not a model of clarity, Defendant pled sufficient facts that, if proven, could satisfy a court of equity to set aside the foreclosure. The Court of Appeals also stated that although a court will generally not rescind a completed foreclosure sale, a foreclosure sale may be set aside in cases involving fraud, which requires proof that the offending party made a false representation of a material fact; made intentionally, in the case of actual fraud, or negligently, in the case of constructive fraud; reliance on that false representation to [he injured party's detriment; and resulting damage. The Court of Appeals concluded that Defendant's pleaded assertions sufficiently created a genuine dispute of material facts, thereby making summary judgment inappropriate.

6. *Judgment Against Defendant Reversed.*

Green v. Portfolio Recovery Associates, LLC, 80 Va. App. 119 (Va. Court of Appeals 2024) (Causey, J.).

Plaintiff filed warrant in debt against Defendant, alleging that she had defaulted on credit card debt and seeking to collect the unpaid balance. Defendant filed a grounds of defense, asserting

that Plaintiff lacked standing to sue her because it had failed to produce evidence of chain of title to prove its ownership of the debt, and filed counterclaim seeking damages for Plaintiff's alleged violation of the Fair Debt Collection Practices Act (FDCPA). The Alleghany Circuit Court granted judgment to Plaintiff in the amount of the debt and Defendant appealed. The Court of Appeals held that Plaintiff failed to establish its ownership of the debt and reversed the Circuit Court's decision.

The Court of Appeals concluded that a plaintiff who asserts ownership of a debt by assignment must produce evidence, for each and every assignment, showing the chain of title for the debt passed from the original assignor to the plaintiff. The Court of Appeals further concluded that, at minimum, such evidence must show that the defendant's account number, along with other relevant identifying information, was included in the assignment (e.g., an attachment to a bill of sale listing account numbers and other identifying information that traces back to the bill of sale by affidavit). Additionally, the Court of Appeals held that (i) if the claim is based on a written contract, the plaintiff must produce evidence that the defendant signed and dated that agreement, or otherwise follow the lost document affidavit procedures at Va. Code § 8.01-32; and (ii) if documentary evidence is unavailable for a given assignment, the plaintiff must produce, by witness testimony or an affidavit, evidence from a custodian of record or other qualified individual with personal knowledge that the defendant's specific account was assigned.

The Court of Appeals found that Plaintiff failed to prove that it owned the debt through a chain of title tracing and therefore held that the Circuit Court was wrong in finding otherwise.

After the entry of this decision, however, the Court of Appeals granted an *en banc* hearing on this matter. *Green v. Portfolio Recovery Associates, LLC*, 80 Va. App. 472 (Va. Court of Appeals 2024).

D. State Court – Circuit Court

1. *Default Judgment Case Reopened Based on Allegation of Intrinsic Fraud.*

Jae W. Chung v. Chungsu Kim., et al., Case No. CL 2002-1955 (Fairfax County Circuit Court June 28, 2023) (Oblon, J.).

The Circuit Court ruled that a default judgment case would be repoened because Defendant sought to re-open the default judgment case within two years pursuant to Virginia Code § 8.01-428 alleging that Plaintiff secured the default judgment through a materially fraudulent statement.

Plaintiff filed a Complaint on February 11, 2022, alleging fraud in the inducement and fraudulent conveyance against Defendants. In the Complaint, Plaintiff alleged that Defendants fraudulently induced him to lend them $3,145,000 through three Promissory Notes, using knowingly false statements. Plaintiff also alleged that some of the funds were then used to purchase property solely in the name of one of the Defendants.

Plaintiff properly served Defendants on March 7, 2022, by posting on the front door of their homes. Defendants admitted that they knew of the Complaint, but did not file a response or otherwise appear in the case. Defendants explained that they lacked knowledge of the consequences of a judgment, and that they believed that Plaintiff would be unable to obtain judgment against them.

When Defendants failed to respond to the lawsuit, Plaintiff quickly filed a Motion for Default Judgment on April 7, 2022. The Court found Defendants to be in default on April 22, 2022, and scheduled the matter for an ex parte damages hearing. At that hearing, on June 3, 2022, the Court entered a Final Order. For Count 1 it awarded Plaintiff $2,917,000 against Defendant Kim for compensatory damages, plus $350,000 for punitive damages. For Count 2 it awarded Plaintiff $228,000 against both Defendants, plus $350,000 for punitive damages. The Final Order also awarded attorney's fees and costs.

Following the entry of the Final Order, Plaintiff commenced aggressive, unsuccessful, collection activity. Then, on May 26, 2023, nearly a year after the entry of the Final Order, and after the Plaintiff had died, Defendants filed a motion to reopen and a motion to vacate default judgment. Defendants alleged that Plaintiff had secured his default judgment through an affidavit filled with false information. Defendants sought to vacate the Final Order under Virginia Code § 8.01-428(A) due to "fraud on the court."

The Court cited Virginia Code § 8.01-428(A), which states

> [u]pon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction, or (iv) on proof [of a Soldier Sailors Act matter]. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

The Court distinguished this statute from Virginia Code § 8.01-428(D), which is applicable to "other judgments or proceedings," and states

> [o]ther judgments or proceedings.--This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in § 8.01-322, or to set aside a judgment or decree for fraud upon the court.

The Court noted that under paragraph A of the statute, a party involved in a default judgment may set aside the judgment after proving, inter alia, fraud on the court or a void judgment. The Court further noted that former carries a two-year statute of limitations period for bringing the challenge and that the latter has no limitation period because void judgments are void and can be challenged at any time.

The Court noted that Defendants alleged that Plaintiff secured his default judgment based on a false affidavit. If true, his false statements are intrinsic fraud. The Court further noted that while normally Defendants had only 21 days after judgment entered to challenge a voidable judgment procured by intrinsic fraud, Virginia Code § 8.01-428(A) extended their deadline to two years after the entry of the Final Order. The Court noted that there was no allegation of extrinsic fraud in the motion—no allegations that the proper parties were not joined, improper notice to the parties, bribery of court officials, or that there was any other act that would block a fair trial on the merits. Instead, the alleged fraud was a classic example of intrinsic fraud—false statements material to the judgment. As a result, the Court reopened the case.

2. *Mechanics Lien Upheld and Property Ordered to be Sold.*

Premier Restorations, LLC v. Barnes, et al., CL22-10509 (City of Norfolk Circuit Court 2022) (Lannetti, J.).

The Circuit Court ruled that Plaintiff had a properly perfected mechanics lien that was properly before the Court, and ordered the sale of the property and that the proceeds be used to satisfy the mechanics lien.

Defendant's home was substantially damaged by a fire and Defendant hired Plaintiff to provide various services in connection with the restoration of the home. The insurance company paid all funds associated with the services, less Defendant's deductible, to the mortgage company, which then forwarded the checks to Defendant with the understanding that Defendant would endorse the checks and forward them to Plaintiff. Defendant did not forward all of the checks to Plaintiff.

Plaintiff timely filed a mechanic's lien against the property, and then timely filed a suit to enforce the mechanic's lien. Defendant filed a counterclaim alleging that some of the work was not properly performed.

Although Plaintiff offered no evidence regarding the mechanic's lien during its case in chief at the trial, the Circuit Court noted that it was undisputed that Plaintiff filed the mechanic's lien with the Circuit Court along with an affidavit supporting the mechanic's lien, and that the mechanic's lien therefore could be considered as evidence. The Circuit Court then concluded that the mechanic's lien was properly perfected and enforceable and ordered the property sold.

3. *Court Set Amount of Suspending Bond.*

Comerica Bank v. Cartograf USA, Inc., et al., CL22-1590 (Chesterfield County Circuit Court March 26, 2024) (Minton, J.).

The parties disputed the amount of the bond, if any, Defendant should be required to post to stay the proposed sale of the property at issue.

The Court noted that the applicable statute was Va. Code § 8.01-676.1 and that Paragraph (C) of Va. Code § 8.01-676.1 states that an

> appellant who wishes execution of the judgment or award from which an appeal is sought to be suspended during the appeal shall, subject to the provisions of subsection J, file a suspending bond or irrevocable letter of credit conditioned upon the performance or satisfaction of the judgment and payment of all damages incurred in consequence of such suspension ….

Subsection J of Va. Code § 8.01-676.1 states that

> [i]n any civil litigation under any legal theory, the amount of the suspending bond or irrevocable letter of credit to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form

> of relief in order to stay the execution thereon during the entire course of appellate review by any courts shall be set in accordance with applicable laws or court rules, and the amount of the suspending bond or irrevocable letter of credit shall include an amount equivalent to one year's interest calculated from the date of the notice of appeal in accordance with § 8.01-682. However, the total suspending bond or irrevocable letter of credit that is required of an appellant and all of its affiliates shall not exceed $25 million, regardless of the value of the judgment.

The Court concluded that the Court's order from which the Defendant appealed orders the sale of the subject property for a sum of $16,500,000. As a result, the Court held that under Va. Code § 8.01.676.1(J) the suspending bond would be in the amount of one year's interest at 6% on the sale price of $16,500,000, which would be the sum of $990,000.

III. SELECTED DECISIONS ON BANKRUPTCY LAW

A. Fourth Circuit

1. Discharge Exceptions of Subchapter V Apply to Both Individual and Corporate Debtors.

Kiviti v. Bhatt, 80 F.4th 520 (4th Cir. 2023) (Richardson, J.).

Creditors who had hired Chapter 7 Debtor's company to renovate their home filed an adversary complaint, seeking in Count I a declaration that Debtor owed them $58,770 under District of Columbia law and in Count II a determination that the prepetition debt was nondischargeable based on fraud. The Debtor moved to dismiss. The Bankruptcy Court dismissed Count II.

The parties subsequently filed a joint stipulation of dismissal as to Count I without prejudice because both Counts I and II were necessary for the Creditors to be successful, believing that with both Counts dismissed, the Order dismissing Count II would be final and the parties could proceed with this appeal.

The Fourth Circuit, however, noted that Courts do not allow parties to manufacture finality. The Fourth Circuit held that the Bankruptcy Court's partial dismissal was not a final order and that the parties' after-the-fact machinations did not make it one.

The Fourth Circuit noted that the discrete dispute at issue here was the adversary proceeding itself, not a particular claim within that proceeding. As a result, an order dismissing only one claim in a multi-claim adversary proceeding does not amount to a final order.

The Fourth Circuit then addressed the Creditors' mootness argument and related Article III issues. The Creditors argued that the dismissal of Count II rendered their Count I moot, and therefore rendered the adversary proceeding legally over. The Fourth Circuit, however, held that this type of mootness is an Article III doctrine, arising out of Article III's case or controversy requirement, and Bankruptcy Courts are not Article III courts.

The Fourth Circuit noted that a bankruptcy case must start with Article III judicial power, as bankruptcy cases are referred by the applicable District Court to the Bankruptcy Court. The

Fourth Circuit also noted that any action the District Court takes concerning a bankruptcy case is constrained by Article III because the District Court is an Article III court. The Fourth Circuit held, however, that the case or controversy requirement does not constrain a Bankruptcy Court because it is not an Article III Court. The Fourth Circuit then addressed the statutory authority granted to bankruptcy courts by Congress and noted that bankruptcy courts "may hear and determine *all* [bankruptcy] cases ... and *all* core proceedings ... referred" to them by a district court. 28 U.S.C. § 157(b)(1).

The Fourth Circuit then recapped the issues, noting that (i) bankruptcy courts are not Article III courts; (ii) so Article III constraints—such as mootness—do not apply to them as a matter of constitutional law; (iii) they only apply if Congress said so in a statute; (iv) but Congress hasn't; and (v) that means whether Count I was constitutionally moot is beside the point, the Bankruptcy Court could still adjudicate it.

Thus, the Fourth Circuit vacated the District Court's order on these issues for lack of jurisdiction because the order was not final.

2. Settlement Amounts Related to Assault Constituted a Nondischargeable Debt.

Hilgartner v. Yagi (In re Hilgartner), 91 F.4th 186 (4th Cir. 2024) (Harris, J.).

The Fourth Circuit held that the principal, interest, and attorney's fees owed under a settlement agreement related to an assault were nondischargeable under Bankruptcy Code Section 523(a)(6). The Fourth Circuit noted that Bankruptcy Code Section 523(a)(6) excepts from discharge debts "for willful and malicious injury" to another and that the question before the Court was whether and to what extent money owed under a pre-suit settlement agreement arising from such injury falls within the scope of Section 523(a)(6).

The settlement agreement arose following two separate incidents of physical assault by the Debtor. The Claimant filed a nondischargeability adversary proceeding under Section 523(a)(6) based on the amounts owed under the settlement agreement. The Bankruptcy Court ruled in favor of the Claimant with respect to the principal amount owed under the settlement agreement, but concluded that the interest and attorney's fees were dischargeable because they did not flow directly from the injuries sustained but from the settlement agreement itself.

The District Court agreed with the Bankruptcy Court about the principal amounts but also concluded that the interest and attorney's fees were non-dischargeable because they "arise" from the same willful and malicious injury.

The Fourth Circuit agreed with the District Court and concluded that all of the amounts owed under the settlement agreement arise from the same willful and malicious injury and are nondischargeable.

3. Contempt Sanctions Appeal Was Dismissed Because Order Was Not Final.

In re Bestwall, LLC., 99 F.4th 679 (4th Cir. 2024) (Rushing, J.).

The Bankruptcy Court had held Appellants in contempt and sanctioned them for defying a discovery order. Appellants appealed the contempt and sanctions order. The District Court for the Western District of North Carolina dismissed the appeals for lack of jurisdiction. Appellants appealed to the Fourth Circuit. The Fourth Circuit agreed with the District Court that the contempt and sanction orders were nonfinal, interlocutory decisions and that the appeals were properly dismissed for lack of jurisdiction.

The Fourth Circuit noted that Debtor's bankruptcy case is ongoing and that no final decree has been entered. The Fourth Circuit then noted that orders in bankruptcy cases are immediately appealable if they finally dispose of discrete disputes within the larger bankruptcy case. The Fourth Circuit noted that for adversary proceedings, the relevant procedural unit is the entire adversary proceeding, not one of the many decisions made within it, and that an order only partially ending the adversary proceeding is not final and appealable.

Although Appellants argued that the contempt and sanctions orders were final appealable orders, the Fourth Circuit concluded that if they accepted Appellants' formulation of finality, every ruling to enforce a discovery order—and, likely, every discovery order itself—would be an appealable final decision supposedly terminating a bankruptcy "proceeding." Accordingly, the Fourth Circuit held that the contempt and sanctions orders were interlocutory and could not be immediately appealed as of right, and that the District Court correctly dismissed the appeals for lack of jurisdiction.

B. District Court

1. District Court Reversed Bankruptcy Court Based on Ambiguities in Contract.

SES Americom Inc. v. Intelsat US, 2023 WL 4137469 (E.D. Va. June 22, 2023) (Payne, J.).

The District Court reversed the Bankruptcy Court's holding that the contract at issue was unambiguous and order sustaining the objection to Claimant's claims, and remanded the case for further proceedings.

Claimant filed proofs of claim against each of the Debtors, alleging that each Debtor had repudiated its obligations under a Consortium Agreement, including the obligation to split evenly any proceeds received by Debtors and Claimant. Claimant sought "at least $1.8 billion" against each Debtor, claiming it was entitled to "approximately $450 million" in compensatory damages, plus punitive damages. Debtors objected to Claimant's claims.

Among other things, the Bankruptcy Court held that the Consortium Agreement was unambiguous and that the plain meaning of the Consortium Agreement controlled. The Bankruptcy Court concluded that the transactions required by the FCC's Final Order were not contemplated by the Consortium Agreement and that therefore Claimant was not entitled to any payments under the Consortium Agreement. As a result, the Bankruptcy Court sustained the claim objection and disallowed the claims.

The District Court reviewed de novo whether the Consortium Agreement was ambiguous. The District Court noted that under New York law, which both parties agreed applied, a contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception, and concerning which there is no reasonable basis for a difference of opinion.

After noting that the Consortium Agreement is certainly not a model of clarity, the District Court noted that the definitions it provides are often circular and confusing, some of the important textual provisions are contradictory, and that the Consortium Agreement cannot be described as unambiguous, respecting the terms "Project" and "Project Gross Proceeds" and whether the Consortium Agreement involved only collaboration, and, if successful, sharing the proceeds from, the parties' proposed market-based approach. The District Court noted that the definition of "Project Gross Proceed" turns on the meaning of "Project," but that important term is not defined. After analyzing numerous other terms of the Consortium Agreement, the District Court concluded that the relevant provisions were ambiguous, and that extrinsic evidence would be needed.

The District Court then detailed voluminous extrinsic evidence provided by Claimant and held that it was necessary to remand the case for reassessment in light of the decision that the Consortium Agreement is ambiguous and that the extrinsic evidence must be thoroughly and independently considered.

2. District Court Affirmed Dismissal of Chapter 13 Case.

Davy v. Gorman, 2023 WL 4422851 (E.D. Va. July 10, 2023) (Alston, J.).

Pro se Chapter 13 Debtor appealed dismissal of Chapter 13 case. The Bankruptcy Court had dismissed the case because (1) Debtor had not made a first plan payment; (2) Debtor had not filed her pay stubs with the Chapter 13 Trustee; and (3) the Bankruptcy Court does not act as an appellate court for the state court's judgment and is not "in a position to tell the government" to compromise its debt amount. The Bankruptcy Court held that each of these were sufficient independent grounds upon which to dismiss the case.

The District Court reviewed the Bankruptcy Court's decision to dismiss under Bankruptcy Code Section 1307(c) for abuse of discretion.

The District Court noted that there was not dispute that Debtor failed to make the first plan payment and that Section 1326(a)(1) of the Bankruptcy Code requires plan payments to begin within 30 days of filing the plan. Accordingly, the District Court concluded that the Bankruptcy Court appropriately dismissed the case based on the failure to make the first plan payment.

The District Court noted that without the pay stubs, a Chapter 13 Trustee is unable to determine whether a debtor's plan is feasible based on their income, which is part of the Trustee's duties. Thus the District Court concluded that failure to provide the Trustee with pay stubs was an independent grounds for dismissal under Bankruptcy Code Section 1307(c).

With respect to the state court child support judgments against Debtor, the District Court concluded that the Bankruptcy Court does not sit as an appellate court for state court judgments and

that under *Rooker-Feldman*, "[l]ower federal courts cannot sit in direct review of final state court decisions." *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 229 (4th Cir. 1997). Accordingly, the District Court held that the Bankruptcy Court did not err in refusing to review the order entered by the state court or in finding that the Chapter 13 Plan was infeasible in light of the child support order.

3. *District Court Affirmed Bankruptcy Court's Conclusion About the Effect of the Bankruptcy on an LLC Member's Rights.*

King v. Johnson, 2023 WL 5110930 (E.D. Va. August 9, 2023) (Nachmanoff, J.).

The District Court affirmed the Bankruptcy Court's holding that all of Debtors' economic and non-economic rights in a limited liability company became property of the bankruptcy estate, notwithstanding Va. Code Ann. §§ 13.1-1040.1(6)(a), 13.1-1040.2(A), and that the Trustee could exercise those rights as he saw fit.

The two individual Debtors were two of four members of an LLC. After Debtors filed a Chapter 7 bankruptcy petition, the Chapter 7 Trustee sought to dissolve the LLC, sell real property owned by the LLC, and use the proceeds to pay Debtors' debts. The Chapter 7 Trustee argued that based on the 76% combined membership interests of Debtors in the LLC, the Chapter 7 Trustee had the 52% membership interests required by the LLC's Operating Agreement to take the requested actions. The Bankruptcy Court granted the Chapter 7 Trustee's requested relief.

On appeal, the District Court concluded that the Bankruptcy Court correctly decided that the Trustee received all of the Debtor's economic and non-economic rights in the LLC.

Under Virginia law, members of a limited liability company are dissociated upon the filing of a bankruptcy petition; and, upon dissociation, the member loses all non-economic rights (i.e., the rights related to managing the company), but keeps their economic rights (i.e., the rights to share in the profits, losses, and distributions of the company). Va. Code Ann. §§ 13.1-1040.1(6)(a), 13.1-1040.2(A). Under federal bankruptcy law, however, upon filing a petition for bankruptcy, all of a debtor's interests in a limited liability company become the property of the bankruptcy estate and are therefore subject to the control of the trustee of that estate. 11 U.S.C. § 541(c)(1). The Bankruptcy Code is also clear that it preempts any "non-bankruptcy law" that may provide otherwise.

The District Court agreed with the Bankruptcy Court and concluded that Va. Code Ann. § 13.1-1040.1(6)(a) is a "non-bankruptcy law" that affects a forfeiture, modification, or termination of a debtor-member's non-economic interest in a limited liability company both by converting the debtor-member to an assignee and by stripping them of everything but their economic rights merely because the debtor-member filed bankruptcy.

Thus, the District Court concluded that all of Debtors' membership rights—both economic and non-economic—became the property of the bankruptcy estate and the Trustee was free to exercise those rights as he saw fit.

4. District Court Affirmed Nunc Pro Tunc Retention Order.

David v. King, 2023 WL 5004039 (E.D. Va. Aug. 4, 2023) (Giles, J.).

The District Court affirmed the Bankruptcy Court's *nunc pro tunc* approval for a former Chapter 11 Trustee to employ professionals, effective only for the Chapter 11 time period.

Debtor filed a Chapter 7 bankruptcy petition, and then converted his case to Chapter 11 and then to Chapter 13. The person who had been appointed Chapter 7 and Chapter 11 Trustee, but not Chapter 13 Trustee, applied pursuant to the Bankruptcy Court's conversion order for approval of Chapter 11 administrative expenses, which included professional services rendered by a law firm. The Bankruptcy Court approved the Trustee's requested compensation and expense reimbursement. Debtor appealed. The District Court vacated and remanded. On remand, the Trustee applied to employ the law firm *nunc pro tunc* for the period prior to the conversion from Chapter 11 to Chapter 13. The Bankruptcy Court granted retroactive approval and Debtor appealed.

The District Court analyzed whether the Bankruptcy Court had the authority to approve, *nunc pro tunc*, a retention application for a former Chapter 11 Trustee to employ professional persons on behalf of a bankruptcy estate, effective only for the Chapter 11 time period.

The District Court noted that *nunc pro tunc* orders allow courts to rule on a determination previously made, but for some reason improperly entered or expressed, which may be corrected and entered as of the original time when it should have been, or when there has been an omission to enter it at all. The District Court also noted that the Order converting the case to Chapter 13 permitted the hiring of the firm retroactively, covering the time period before the Trustee's fiduciary office was terminated by the case's conversion to Chapter 13. Further, the District Court noted that nothing within Sections 327, 330, or 348(e) of the Bankruptcy Code restricts a Bankruptcy Court from retroactively approving an employment application, and that instead, Bankruptcy Courts can authorize professional employment and compensation of work professionals performed prior to an order approving such employment.

The District Court then addressed the Supreme Court's decision in *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 140 S. Ct. 696, 206 L.Ed.2d 1 (2020) (per curiam), and its progeny concerning whether *nunc pro tunc* relief may be used to retroactively approve an application to retain and compensate counsel for a bankruptcy estate. In *Acevedo*, however, the issue was whether or not a federal court could restore a state court's jurisdiction retroactively. The District Court noted that *Acevedo* does not stand for the proposition that retroactive/*nunc pro tunc* relief may not be used to approve an application to retain and compensate counsel for a bankruptcy estate retroactively to an earlier date. The District Court found that *Acevedo* was distinguishable because the instant case did not involve jurisdiction, which was at issue in *Acevedo*, and *Acevedo* did not involve the approval of a bankruptcy employment application via *nunc pro tunc* order. The District Court also indicated that Debtor did not identify any cases decided after *Acevedo* that explicitly held that Bankruptcy Courts could not use retroactive/*nunc pro tunc* orders to retroactively approve an application to retain and compensate counsel for a bankruptcy estate. The District Court also noted that there was no creation of facts that did not occur in this case.

As a result, the District Court affirmed the Bankruptcy Court's decision.

5. District Court Affirmed Nondischargeability of Debt.

Burstein v. Nonte, 2023 WL 5435608 (E.D. Va. Aug. 23, 2023) (Walker, J.).

The District Court affirmed the Bankruptcy Court's decision that a state court judgment based on a separation agreement incorporated into a divorce decree was nondischargeable.

Creditor filed an adversary complaint against Chapter 7 Debtor, her former spouse, seeking a determination that a confessed judgment entered prepetition by a Maryland state court in her favor against Debtor, after he defaulted under the settlement agreement resolving her state-court action against him for having allegedly breached the separation agreement incorporated into their divorce decree, was nondischargeable as a debt to a former spouse owed in connection with a divorce and separation agreement. On cross-motions for summary judgment, the Bankruptcy Court granted Creditor's motion and denied Debtor's motion. Debtor appealed.

The District Court noted that Section 523 of the Bankruptcy Code governs exceptions to dischargeability and that for a debt to be deemed nondischargeable under § 523(a)(15), the debt must (1) be to a spouse, former spouse, or child of the debtor, (2) not be a domestic support obligation, and (3) have been incurred during a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.

The parties agreed that the debt at issue was owed to a former spouse and did not qualify as a domestic support obligation, so the sole question before the District Court was whether the debt at issue was incurred in connection with a separation agreement. 11 U.S.C. § 523(a)(15). The District Court noted that the Bankruptcy Code does not define "in connection with" as it relates to § 523(a)(15), and that there was no binding case law directly addressing the meaning of this statutory language. The District Court concluded that the most natural reading of "in connection with" in this statutory context would require the debt to be logically or causally related to a separation agreement, divorce decree, or other order of a court of record, and that this reading is also consistent with § 523(a)(15)'s legislative and drafting history. The District Court quoted the Bankruptcy Court with approval, noting that "courts around the country have recognized that § 523(a)(15) should be broadly and liberally construed to encourage payment of familial obligations rather than to give a debtor a fresh financial start." The District Court held that the plain meaning of the statutory language, its drafting history, and its legislative history support reading "in connection with" liberally to mean a logical or causal relationship with a separation agreement.

The District Court then concluded that the separation agreement was a but for cause of the settlement agreement, that the language of Section 523(a)(15) is broad enough to cover this situation, and that this debt was nondischargeable.

6. District Court Affirmed Bankruptcy Court's Allowance of Claimant's Claims.

David v. Summit Community Bank, 2023 WL 5615983 (E.D. Va. August 30, 2023) (Giles, J.).

Debtor objected to Claimant's claims on the grounds that he did not sign the underlying loan documents. Debtor argued that his now deceased wife had forged his signatures on the documents.

The documents at issue, however, were notarized. The Bankruptcy Court held that under Virginia law, a notary acknowledgement can be impeached by showing that the person who is alleged to have executed the instrument in question never appeared before the certifying officer and never actually acknowledged the instrument. Thus, a notary acknowledgment can be impeached under certain circumstances for "fraud or nonappearance." Under both forms of attack, the burden of proving the fraud or nonappearance rests on the party that alleges the deficiency. The Bankruptcy Court also noted that notaries are presumed to properly perform their duties.

The Bankruptcy Court stated that clear and convincing evidence is required to prove "fraud or nonappearance." The Bankruptcy Court noted that clear and convincing evidence is such proof as will establish in the trier of fact a firm belief or conviction concerning the allegations that must be established. The Bankruptcy Court found that Debtor did not prove by clear and convincing evidence that a nonappearance or fraud occurred. The Bankruptcy Court concluded that the only evidence presented in support of nonappearance were Debtor's testimonial denials that he appeared before the notaries in question. The Bankruptcy Court also noted that if mere denials were sufficient to rebut the presumption afforded to notaries and the documents they notarize, the presumption would be worthless. As a result, the Bankruptcy Court denied the claim objection and allowed Claimant's claims.

On appeal, the District Court held that the Bankruptcy Court properly applied Virginia law with respect to the notarized document, noting that a notarized signature is presumed genuine, and that when a party challenges such a signature, the burden rests on the challenging party to present evidence of fraud or nonappearance sufficient to overcome the presumption.

The District Court found that Debtor failed to present clear, cogent, and satisfactory proof of nonappearance that was convincing beyond reasonable controversy because the only evidence Debtor presented was his testimony that he did not sign the relevant guarantees. Additionally, the District Court found that the notaries' testimony identifying their signatures and seals on the relevant documents, but stating that they did not specifically recall the documents or Debtor appearing before them with respect to the documents, likewise does not support a finding of Debtor's nonappearance. Specifically, the District Court stated that just because the notaries do not remember Debtor appearing before them with respect to specific documents fifteen years prior does not foreclose the possibility that it actually occurred, and thus, Debtor's denials together with the notaries' testimony is a far cry from proof of nonappearance that is clear, cogent, satisfactory and convincing beyond reasonable controversy, or that is sufficient to support a finding that the signature is forged or unauthorized.

As a result, the District Court affirmed the Bankruptcy Court's decision.

The Debtor subsequently appealed the District Court's decision and the Fourth Circuit dispensed with oral arguments and affirmed the District Court's decision in a very short per curiam opinion. *David v. Summit Community Bank*, 2023 WL 6290736 (4th Cir. Sep. 27, 2023).

7. District Court Affirmed Bankruptcy Court's Denial of Exemption.

Ruano v. Meiburger, 2023 WL 7222106 (E.D. Va. Nov 2, 2023) (Alston, J.).

Chapter 7 Debtor had routinely transferred approximately $100 from the account that received her wages to another account for a "rainy day fund." Debtor claimed an exemption for funds held in the second account as wages. The Chapter 7 Trustee objected to this claimed exemption. The issue before the Bankruptcy Court was whether the wages exemption, which clearly applied to the first account, continued to apply to the funds in the second account. The Bankruptcy Court held that the wage exemption was invalid as to the second account because it represented a subsequent transfer of the wages.

The District Court noted that when a debtor's paycheck is deposited into one bank and then transferred to another bank, the funds lose their exempt status. Specifically, the District Court noted that the statutory language of Va. Code § 34-299(d)(1) does not apply to subsequent transfers by employees to other financial institutions. As a result, the District Court affirmed the Bankruptcy Court's decision.

8. District Court Affirmed Bankruptcy Court's Denial of Discharge.

Hao v. Vetter, 2024 WL 965610 (E.D. Va. March 5, 2024) (Alston, J.).

The Bankruptcy Court's decision denying the Debtor's discharged is discussed below.

On appeal, the District Court held that the Bankruptcy Court properly granted summary judgment denying the Debtor's discharge for failing to satisfactory explain losses.

The District Court noted that under Bankruptcy Code Section 727(a)(5), the burden is on a debtor to provide a sufficient explanation for a loss or deficit. The District Court further noted that neither a creditor nor the court is required to act as sleuth, ferreting through a debtor's records in an attempt to trace the loss of assets or reconstruct the debtor's financial history, because, once the burden shifts, it is the obligation of the debtor to compile the mass of relevant documents into a concise explanation that explained discrepancies and filled in the gaps.

As Debtor failed to provide a satisfactory explanation for the losses, the District Court held that there were no material disputes of fact that precluded summary judgment and that the Bankruptcy Court appropriately granted summary judgment in favor of the United States Trustee and denied the Debtor's discharge pursuant to Section 727(a)(5).

9. District Court Denied Request for Interlocutory Appeal.

Johnson v. Bankruptcy Court for the Western District of Virginia, 2024 WL 1825018 (W.D. Va. Apr. 25, 2024) (Cullen, J.).

Debtor filed a Chapter 13 petition in 2018, and subsequently filed numerous amended Chapter 13 plans. In January 2024, the Bankruptcy Court confirmed the latest amended Chapter 13 plan with language that stated that if Debtor failed to make payments to the Chapter 13 Trustee as required, the Chapter 13 Trustee was to certify to the Bankruptcy Court that Debtor is in default in plan payments and shall send notice of his certification and the case shall be dismissed without further notice or hearing.

In November 2023, the Chapter 13 Trustee certified to the Court that Debtor failed to pay plan payments and the case was summarily dismissed. Debtor filed a motion to reconsider and after a hearing, the case was reinstated on December 21, 2023. The reinstatement order, however, stated that within sixty (60) days from the entry of the order, Debtor was required to have a contract to sell 390 Romana Drive (the property) to a bona fide third-party purchaser and provide a copy of the contract to the Chapter 13 Trustee, and that from the date of the real estate contract, Debtor had sixty (60) days to close on the sale of the property. The reinstatement order further stated that upon a failure to comply with any of these conditions, the Chapter 13 Trustee shall file a certification of default, the Court shall dismiss the case without opportunity for hearing or notice, and the dismissal of this case shall bar Debtor from refiling a bankruptcy case for 180 days.

On February 20, 2024, Debtor filed a motion to sell the property. The hearing on the motion was rescheduled initially from March 13, 2024, to April 2, 2024. Then, in an April 10, 2024, order again rescheduling the hearing on the sale motion, the Bankruptcy Court included language that provided that at any continued hearing related to confirmation of the plan, approval of a modified plan, or motion to dismiss, upon cause shown by any party, the Court may dismiss the case. The order further provided that although Debtor's counsel had appeared at the hearing, Debtor had not appeared and as there was no agreement as to the entry of the order the hearing was continued. Debtor sought leave to appeal the April 10, 2024 order.

The District Court noted that under 28 U.S.C. § 1292(b) leave to appeal an interlocutory order should only be granted when (1) the order involves a controlling question of law as to which there is substantial ground for a difference of opinion, and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. The District Court further noted that the appellant must demonstrate that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment. The District Court found that these requirements were not met and denied the request for an interlocutory appeal. Among other things, the District Court noted that there were too many uncertainties about what might happen in the bankruptcy case for the interlocutory appeal to materially advance the bankruptcy case.

C. Bankruptcy Court

1. Court Denies Discharge for Failure to Satisfactory Explain Losses

Fitzgerald v. Hao (In re Hao), 2023 WL 3470515 (Bankr. E.D. Va. May 16, 2023) (Kenney, J.).

The Bankruptcy Court denied a discharge based on Bankruptcy Code Section 727(a)(5). The Bankruptcy Court had previously granted the U.S. Trustee's motion to covert or dismiss the Debtor's Subchapter V case for cause in *In re Hao*, 644 B.R. 339 (Bankr. E.D. Va. 2022). In connection with its prior decision, the Bankruptcy Court converted the case to Chapter 7 after finding that conversion would be in the best interest of creditors. In the prior decision the Bankruptcy Court also indicated that it had no confidence that the Debtor's filings were accurate or complete.

This case arose from the U.S. Trustee's complaint objecting to Debtor's discharge and the U.S. Trustee's related motion for summary judgment.

Before addressing the counts in the U.S. Trustee's complaint, the Bankruptcy Court concluded that the Bankruptcy Court's previous findings in connection with the U.S. Trustee's motion to convert or dismiss were entitled to preclusive, collateral estoppel effect. Specifically, the Bankruptcy Court concluded that all of the elements of collateral estoppel were present because

(1) the issues sought to be precluded were the same as in the prior proceeding;

(2) the issues were actually determined in the prior proceeding;

(3) the issues' determinations were a critical and necessary part of the Bankruptcy Court's decision in the prior proceeding;

(4) the order converting the case was a final order and was not appealed; and

(5) Debtor had a full and fair opportunity to litigate the issues (and did so) in the prior proceeding.

Count I of the Complaint was based on Bankruptcy Code Section 727(a)(3), which relates to a debtor's failure to keep or preserve business records. Debtor argued that Section 727(a)(3) only required Debtor to produce records of Debtor, not business records of entities owned by Debtor. The Bankruptcy Court noted that a minority of courts have agreed with Debtor's argument, but sided with the majority of courts and held that the business records of non-debtor entities owned by Debtor were not only relevant, but were essential to determining Debtor's financial condition. However, the Court determined that there was a genuine issue of fact as to what business records had been requested and for what period of time. As a result, the Bankruptcy Court denied without prejudice the motion for summary judgment concerning Section 727(a)(3).

Count II of the Complaint was based on Bankruptcy Code Section 727(a)(4), which relates to a debtor making a false oath or account. The Court concluded that Debtor's failure to disclose certain accounts were material to the administration of the bankruptcy estate. However, to prevail under Section 727(a)(4), fraudulent intent also needs to be established. Here, Debtor asserted in an affidavit that the failure to identify the accounts was "inadvertent." Accordingly, the Bankruptcy Court denied without prejudice the motion for summary judgment concerning Section 727(a)(4).

Count III of the Complaint was based on Bankruptcy Code Section 727(a)(5), which relates to a debtor failing to explain losses satisfactorily. The Bankruptcy Court noted that Section 727(a)(5) contains no intent requirement and that a plaintiff must establish that the debtor at one time owned a substantial identifiable asset, not too remote in time to the date of the commencement of the case; and that on the date of filing the voluntary petition the debtor no longer had the particular asset. The Bankruptcy Court then noted that once the plaintiff establishes that there has been an unexplained loss of assets or deficiency, the burden shifts to the debtor to provide a reasonable explanation that must not consist merely of vague and indefinite explanations. The Bankruptcy Court concluded that Plaintiff established that substantial funds had been held by Debtor and entities owned by Debtor. Debtor, however, only provided vague statements about where the substantial funds went. The Bankruptcy Court noted that after nine (9) meetings of creditors (five (5) when

the case was in Chapter 11 and four (4) in Chapter 7) and multiple amendments to the Schedules, the Chapter 7 Trustee, the Bankruptcy Court and the creditors still do not have a clear picture of Debtor's finances or the use and disposition of millions of dollars. As a result, the Bankruptcy Court held that Debtor failed to explain the loss or deficiency of his assets and granted the motion for summary judgment concerning Section 757(a)(5).

On appeal, the District Court affirmed the Bankruptcy Court's decision. *Hao v. Vetter*, 2024 WL 965610 (E.D. Va. March 5, 2024) (Alston, J.). The District Court's decision is discussed above.

2. Court Held Fraud Judgment Nondischargeable

In re Janosik, 2023 WL 3903789 (Bankr. E.D. Va. Jun. 8, 2023) (Huennekens, J.).

Plaintiff filed a complaint seeking nondischargeability of debts of Chapter 13 Debtor under Bankruptcy Code Section 523(a)(4). The Bankruptcy Court granted Plaintiff's summary judgment motion.

The debt arose from a judgment of the Chesterfield County Circuit Court (State Court) that found Debtor liable to Plaintiff for breach of fiduciary duty, breach of a trust agreement, conversion, and fraud for her misappropriation of funds held in a special needs trust dated February 18, 2016, (the Trust) of which Debtor was the trustee and the Plaintiff was the beneficiary. After extensive litigation in the State Court action, which included the matter being referred to a Commissioner in Chancery and a Commissioner's report of some 800 pages, the State Court concluded "that the Defendant reserved to herself approximately $166,000 of the Plaintiff's money. The remaining funds may or may not have been for the benefit of the Plaintiff, but the $166,000 was just all greed. There's no explanation other than somebody took something that did not belong to them, and they knew it." The State Court further noted that "$166,000 of money that belonged to one person was taken by the other to be used for her purposes. We call that stealing." The State Court also awarded Plaintiff costs, attorney's fees, and post-judgment interest. The State Court judgment was entered on July 13, 2022.

Plaintiff and Debtor both sought summary judgment under Bankruptcy Code Section 523(a)(4) based on the doctrine of collateral estoppel. The Bankruptcy Court noted it needed to determine whether Debtor's liability under the State Court judgment was "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). As the State Court judgment was entered by a Virginia court, Virginia preclusion law applied, which meant that for collateral estoppel to apply (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior proceeding; (3) the factual issue must have been essential to the judgment rendered in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied. The Bankruptcy Court concluded that (1) the parties were the same; (2) the issues were actually litigated; and (4) the State Court judgment was a valid, final judgment. This left issue number (3), whether the issue was essential to the State Court judgment, and whether such the findings underlying the State Court judgment established or negated nondischargeability under Section 523(a)(4).

The Bankruptcy Court concluded that the State Court judgment was entitled to preclusive effect because it was premised upon factual findings of fraud or defalcation while acting in a fiduciary capacity. The Bankruptcy Court noted that to prevail on a claim under the fiduciary capacity prong of Section 523(a)(4), a creditor must prove both that the debt arose while the debtor was acting in a fiduciary capacity and that the debt arose from the debtor's fraud or defalcation. The Bankruptcy Court concluded that the first prong was met because the State Court found that Debtor owed Plaintiff a fiduciary duty to manage the Trust and that the liability arose while Debtor was acting in her fiduciary capacity. The Bankruptcy Court concluded that the second prong was met because the State Court found that Debtor engaged in both bad faith, moral turpitude, or other immoral conduct, which conduct constitutes an intentional wrong.

Alternatively, the Bankruptcy Court held that the debt also would be nondischargeable under the embezzlement prong of Section 523(a)(4) because the State Court's findings established that the liability arose from embezzlement. The Bankruptcy Court noted that to prove the embezzlement prong of Section 523(a)(4), a plaintiff must establish that the debtor appropriated property for their own benefit with an intent to convert, defraud, or deceive. Here, the State Court found that Debtor appropriated the funds for her own benefit and intended to convert such funds.

As a result, the Bankruptcy Court granted Plaintiff's summary judgment motion and held that the State Court judgment was nondischargeable under Section 523(a)(4).

3. Court Held That All Future Lease Liability Counted Towards Subchapter V Limit.

<u>In re Macedon Consulting, Inc.</u>, 2023 WL 4004484 (Bankr. E.D. Va. June 14, 2023) (Kindred, J.).

The Bankruptcy Court concluded that lease liability was not contingent and liquidated, and therefore resulted in Debtor being ineligible for Subchapter V. Instead of dismissing the case, the Bankruptcy Court simply revoked the Subchapter V designation.

Lessors moved to dismiss Debtor's Subchapter V bankruptcy case. Debtor objected to the motion to dismiss and filed a motion to reject the unexpired office leases and related executory contracts.

Lessors argued that Debtor was not eligible for Subchapter V because its noncontingent liquidated liabilities exceed the Subchapter V debt limits. Debtor argued that the lease liabilities were contingent because they were not yet owing and alternatively argued that the Bankruptcy Court should look to what will be the capped rejection damages in this case to determine Subchapter V eligibility.

The Bankruptcy Court found that the evidence before it established that absent rejection, Debtor owed $14,390,820 under the leases. The Bankruptcy Court noted that the debt at issue was liability under the leases, and that liability arose pre-petition, on the dates the leases were fully executed. The Bankruptcy court further noted that it could not be said that if Debtor vacated the premises on the 31st of one month during the lease term, that it would not still owe the landlord for the next month and the remainder of the lease term. The Bankruptcy Court also found that the timing of lease payments is simply that – timing, and that absent the end of the world, we know the future

date will occur. As a result, the Bankruptcy Court concluded that liability under the leases must be considered noncontingent and liquidated, and therefore Debtor was above the debt limits for Subchapter V, which were capped at $7.5 million of aggregate noncontingent liquidated debts.

With respect to Lessors' request to dismiss the bankruptcy case as having been filed in bad faith, the Bankruptcy Court noted that the Fourth Circuit's standard for dismissing a chapter 11 case for lack of good faith requires that both objective futility and subjective bad faith be shown.

After noting that Lessors admitted that they did not make a showing under the objective futility prong, the Bankruptcy Court turned to the subjective bad faith prong. The Bankruptcy Court concluded that the evidence before it also did not establish subjective bad faith. Instead, the Bankruptcy Court noted a landscape of economic uncertainty and Debtor seeking to limit its liabilities and pay its creditors what they're entitled to under the Bankruptcy Code so that it can service its debt, pay and retain its employees, pay trade creditors and turn a profit. The Bankruptcy Court noted that the desire to do so is not bad faith on the part of Debtor. Thus, the Bankruptcy Court concluded that Lessors did not establish subjective bad faith or objective futility, and did not dismiss the bankruptcy case.

4. Court Held Claimant's In Rem Claim Could Be Cured Through a Chapter 13 Plan.

In re Stevenson, 2023 WL 7401456 (Bankr. E.D. Va. Nov. 8, 2023) (Huennekens, J.).

Claimant objected to Debtor's Chapter 13 Plan on the grounds that Debtor is not in privity of contract with Claimant and that the plan seeks a de facto assumption of the mortgage loan without Claimant's consent. The Bankruptcy Court overruled the objection.

Debtor inherited real property encumbered by a deed of trust. Under Debtor's Chapter 13 Plan, Debtor proposes to retain the property, cure the pre-petition date arrearage over 34 months, and continue to make post-petition date payments directly to Claimant on the terms set forth in the Note. The parties agreed that Debtor had no contractual privity with Claimant, that Debtor was not personally liable on the note, and that Debtor had an interest in the property. The issue for the Bankruptcy Court was whether Claimant's in rem rights against the property constitute a "claim" as defined by section 101(5) of the Bankruptcy Code, which claim could properly be included in the Plan.

The Bankruptcy Court noted that the majority of courts apply the Supreme Court's broad interpretation of "claim" in *Johnson v. Home State Bank*, 501 U.S. 78 (1991), to permit confirmation of Chapter 13 Plans that cure arrears where there are only in rem rights and no contractual privity between the debtor and creditor. The Bankruptcy Court adopted the majority approach.

The Bankruptcy Court noted that Claimant had a claim against property of Debtor and that such a claim, under the broad definition provided in section 101(5), could be properly included in Debtor's Plan. Thus, the Bankruptcy Court held that even in the absence of in personam liability against Debtor, Claimant's in rem claim against the property is a "claim" for purposes of section 101(5) of the Bankruptcy Code and could be cured through Debtor's Plan in accordance with Sections 1322(b)(2) and (3) of the Bankruptcy Code.

5. Court Denies Chapter 13 Trustee's Motion to Intervene.

Advancial Federal Credit Union v. Cruz (In re Cruz), 2023 WL 8897827 (Bankr. W.D. Va. Dec. 26, 2023) (Santoro, J.).

The Chapter 13 Trustee sought to intervene in a nondischargeability adversary proceeding. The Bankruptcy Court denied the Trustee's motion to intervene.

This case arose from an alleged internet scam. Debtor alleged that an internet scammer (1) persuaded Debtor to send him gift cards of $100 each from retailers and to share Debtor's Advancial card information with him; (2) paid off Debtor's purchases of these cards on the credit card through ACH fraud by using a bank account he did not own; and (3) left Debtor to face the consequences when the reimbursement payments were "clawed back" in the ACH process and debited back to Debtor's credit card with Plaintiff.

Debtor filed a voluntary Chapter 13 petition on July 7, 2023, listing the debt to Plaintiff as her only unsecured debt in her schedules. Debtor's descriptions of her credit card debt to Plaintiff in her schedules and in her Statement of Financial Affairs reflect her contention that she was the victim of a scam, and her Chapter 13 Plan was confirmed with disclosure of her contentions.

In the dischargeability adversary proceeding, Plaintiff sought to have the Bankruptcy Court determine that the debt owed to Plaintiff was non-dischargeable under Bankruptcy Code Sections 523(a)(2) and (4), because it was a debt for money or credit obtained by fraud or larceny. Plaintiff also alleged that Debtor acted in furtherance of the fraud and willfully participated in the scam.

In the motion to intervene, the Chapter 13 Trustee asserted that: (1) he has an interest in the outcome of the Adversary Proceeding due to his trustee duties under 11 U.S.C. § 1302(b); (2) the purpose of the Bankruptcy Code is to provide debtors with a fresh start and, as Trustee, he has an interest in the success of each debtor's case; and (3) if the Court finds in favor of Plaintiff in this case, it will have a chilling effect upon debtors who are victims of scams, impeding their right to a fresh start. The Trustee further contended that his intervention would not prejudice or unduly delay Plaintiff's rights and that intervention would be in the best interest of the estate.

The Bankruptcy Court noted that to intervene as a matter of right under Rule 24(a)(2) in the Fourth Circuit, a proposed intervenor must file a timely motion that shows: (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation. The Bankruptcy Court also noted that courts in the Fourth Circuit have stated that a proposed intervenor must demonstrate a "direct" interest in the proposed action that bears a close relationship to the dispute between the existing litigants instead of one that is remote or contingent. The Bankruptcy Court concluded that the Trustee did not meet his burden under Rule 24(a)(2).

The Bankruptcy Court then addressed permissive intervention under Rule 24(b)(1)(B). The Bankruptcy Court noted that a court has the discretion to permit a party to intervene if the court finds that the movant has established the following: (1) the movant's claims or defenses have a question of law or fact in common with the main action and (2) intervention will not result in undue delay or prejudice to the existing parties. The Bankruptcy Court also concluded that the Trustee did not meet his burden under Rule 24(b)(1)(B).

6. Court Denied Motion to Stay Order Pending Appeal.

Schelin v. Malloy (In re Malloy), 2024 WL 169172 (Bankr. E.D. Va. Jan. 12, 2024) (Huennekens, J.).

Debtor removed certain litigation from the Circuit Court for Powhattan County to the Bankruptcy Court, thereby commencing this adversary proceeding. Thereafter, the Bankruptcy Court remanded the litigation to the Circuit Court for Powhattan County and modified the automatic stay to permit Plaintiffs to proceed with the state court litigation to a final judgment. Debtor appealed the remand order and filed a motion to stay the remand order pending the appeal.

The Bankruptcy Court noted that in order to obtain a stay of a judgment, order, or decree of the bankruptcy court pending appeal, ordinarily the party must move first for such relief in the bankruptcy court. *See* Fed. R. Bankr. P. 8007(a). The Bankruptcy Court then noted that in order to obtain a stay pending appeal, the Fourth Circuit requires the movant to demonstrate: (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay. The Bankruptcy Court further noted that while all four requirements must be satisfied, the first two factors are the most critical.

The Bankruptcy Court concluded that it was highly unlikely that Debtor would succeed on its appeal. Specifically, the Bankruptcy Court noted that Debtor had not cited any new facts or law that would alter the Court's opinion or suggest that the Court came to an incorrect legal conclusion or abused its discretion, either through Debtor's pleadings or during oral argument at the hearing.

With respect to the second factor, the Bankruptcy Court found that Debtor failed to show that he would suffer irreparable harm if a stay is denied. The Bankruptcy Court noted that the only harm Debtor identified was the threat that action by the state court pertaining to the state court litigation could effectively moot the appeal. The Bankruptcy Court further noted that mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough to satisfy this element.

With respect to the third factor, the Bankruptcy Court found that Debtor failed to show that other parties will not be substantially harmed by the stay, and instead found that further delaying the prompt resolution of the state court litigation poses the risk of substantial injury to both Plaintiffs and Debtor.

Finally, the Bankruptcy Court found that the public interest weighed against granting a stay pending appeal. The Bankruptcy Court noted that a stay would delay Debtor's ability to perform under a confirmable plan, as well as the Chapter 13 Trustee's ability to effectively administer Debtor's bankruptcy estate.

7. Bankruptcy Court Found Claims Nondischargeable Under Section 523(a)(2)(A).

Wingenbach v. Gray (In re Gray), 2024 WL 150624 (Bankr. E.D. Va. Jan. 12, 2024) (Phillips, J.).

Debtor was the sole member and employee of an LLC that performed general contracting work for Plaintiffs. After determining that the work on the project was deficient, Plaintiffs learned that Debtor had misrepresented his qualifications to them, including that he held a valid contractor's license and that he was insured and competent to perform the work required by the contract. In accordance with the contract Plaintiffs initiated an arbitration proceeding. The arbitrator entered an award against the LLC and Debtor, jointly and severally, and Plaintiffs obtained a state court judgment in Missouri affirming the arbitration award.

Subsequently, Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. Plaintiffs initiated an adversary proceeding seeking to have their claim determined to be nondischargeable under Bankruptcy Code Section 523(a)(2)(A).

The Bankruptcy Court noted that the doctrine of collateral estoppel is applicable to Section 523 dischargeability cases and to judicially confirmed arbitration proceedings. The Bankruptcy Court noted that a party seeking to apply collateral estoppel is required to establish five elements: (1) that the issue sought to be precluded is identical to one previously litigated; (2) that the issue was actually determined in the prior proceeding; (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding; (4) that the prior judgment is final and valid; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. The Bankruptcy Court concluded that all of these elements were met and that collateral estoppel applied to the issues of the amount of the indebtedness and Debtor's liability therefor.

The Bankruptcy Court then turned to the nondischargeability issue and noted that a plaintiff seeking to have a debt determined to be nondischargeable pursuant to Section 523(A)(2) must prove by a preponderance of the evidence that: (1) the debtor made a representation; (2) the debtor knew the representation was false when he made the representation; (3) the debtor made the false representation with the intent to deceive the creditor; (4) the creditor relied on the representation; and (5) the creditor sustained the alleged loss and damages as a proximate result of the debtor making the representation. The Bankruptcy Court concluded that each of these elements were established by a preponderance of the evidence.

The Bankruptcy Court found that Plaintiffs established by a preponderance of the evidence that Debtor made representations concerning his status as a licensed contractor, that he knew or should have known that his representations were false at the time they were made, that he made the representations with the intent to deceive Plaintiffs, that Plaintiffs reasonably relied on Debtor's misrepresentations, and that they suffered damages that were the proximate result of Debtor's misrepresentations. The Bankruptcy Court concluded that Plaintiffs' underlying claim was fully litigated and that pursuant to the doctrine of collateral estoppel, the Court was bound by the prior decision. The Bankruptcy Court held that the state court judgment, in its entirety, is nondischargeable pursuant to Section 523(a)(2)(A).

8. Bankruptcy Court Granted Motion to Dissolve LLC.

Meiburger v. DGP Holdings, LLC (In re Parker), 658 B.R. 381 (Bankr. E.D. Va. 2024) (Kindred, J.).

The Chapter 7 Trustee initiated an adversary proceeding to dissolve a limited liability company in which Debtor had a 50% interest. Following an evidentiary hearing, the Bankruptcy Court held that dissolution was the appropriate remedy for the deadlock between the members of the LLC that rendered it unable to operate in a reasonably practicable and lawful manner.

The LLC owned a duplex and rented the duplex units to third-party tenants. The LLC employed a management company to collect rents, pay expenses, and deposit profits into a bank account controlled by the LLC. The LLC did not have an operating agreement and according to the LLC's Articles of Organization, the stated purpose of the LLC was to conduct any business in a lawful manner.

After Debtor filed for bankruptcy, the other member of the LLC continued to operate the LLC but withheld from the Trustee funds representing post-petition net distributions of the LLC to which the estate was entitled. During the life of the main bankruptcy case, the other member made managerial decisions for the LLC, including the decision of whether to renew leases and whether to increase the rent. The Trustee's consent was not sought with respect to these decisions. The Bankruptcy Court noted that the other member wanted to continue the LLC in its current form and did not want to sell the property while conversely, the Trustee sought to dissolve the LLC due to the other member's misappropriation and ultra vires managerial decisions.

The Trustee sought dissolution of the LLC under Va. Code §§ 13.1-1046, -1047, which provides in relevant part, that a court "may decree dissolution of a limited liability company if it is not reasonably practicable to carry on the business in conformity with the articles of organization and any operating agreement." The Bankruptcy Court noted that the question before the Court was not one that merely inquires into any past bad acts on the part of the other member, but was instead whether present circumstances showed that it was not reasonably practicable to continue to operate the business in conformity with the Articles of Organization and any operating agreement.

Based on the Articles of Organization, the Bankruptcy Court found that the purpose of the LLC was to conduct any business in a lawful manner. The Bankruptcy Court then turned to the arguments and cited authorities of the parties as to the propriety of the dissolution of the LLC and whether it was reasonably practicable for the LLC to carry on its business in a lawful manner.

The Bankruptcy Court noted that the reasonably practicable standard requires inquiry into present circumstances, and that any purported deadlock must be real and for it to justify dissolution, it must render the entity incapable of operating in a reasonably practicable way in accordance with its stated purpose. After analyzing the evidence, the Bankruptcy Court found that a deadlock existed between the members of the LLC that rendered the entity unable to operate in a reasonably practicable and lawful manner. Accordingly, the Bankruptcy Court found that dissolution was the appropriate remedy under the statute.

9. Bankruptcy Court Allowed Increase in 401k Contributions of Up to Twice Prior Contributions.

In re Parquet, 657 B.R. 829 (Bankr. E.D. Va. 2024) (Kenney, J.).

The Bankruptcy Court overruled the Chapter 13 Trustee's objection to the Chapter 13 Plan on the disposable income ground, but sustained the objection on the good faith ground. The Bankruptcy Court granted Debtors leave to amend their Plan and their Means Test within 21 days.

The Chapter 13 Trustee objected to Debtors' Line 46 (unusual circumstances) adjustments because they all came about as the result of Debtors' voluntary actions. Specifically, one of the adjustments arose because one Debtor requested that his parents stop the payments on his student loans. Another of the adjustments was an increase to the Debtor's 401k contributions.

Line 46 is designed to reflect the Supreme Court's ruling in *Hamilton v. Lanning*, 560 U.S. 505, 517, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010), which the Bankruptcy Court had previously noted is intended to apply "only in unusual cases;" in most cases, nothing more than the application of the Means Test is required. The Bankruptcy Court found that the two adjustments fit neatly into *Lanning*'s "known or virtually certain to occur" test and its "unusual" requirement, and that these adjustments were better addressed under the good faith test.

The Bankruptcy Court noted that Bankruptcy Code Section 1325(a)(3), made applicable to Debtors' Plan by Section 1329(b)(1), required that Debtors propose the Plan in good faith. The Bankruptcy Court further noted that a comprehensive definition of good faith is not practical, but that broadly speaking, the basic inquiry should be whether under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of the Chapter in the proposal or plan.

Addressing first Debtors' request that one Debtor's parents stop paying his student loans, the Bankruptcy Court found that this change in circumstances was not made in bad faith. The Bankruptcy Court noted that Debtors realized that because the contributions constituted income, and that the contributions, in effect, would require them to pay their creditors an additional $210.00 per month, and that in their counsel's view, Debtors would be "crazy" not to request that these contributions cease (although they no longer enjoy the benefit of having the student loans paid down). The Bankruptcy Court noted that the contributions were not a legally enforceable obligation and that Debtor's parents could stop making these contributions at any point in the case.

With respect to the increase in Debtor's 401k contributions, the Bankruptcy Court noted that Debtor proposed to increase his voluntary contribution to $600, which was 3.75 times the amount of his previous contribution of $160.00 per month. Although the Bankruptcy Court noted that the good faith inquiry is a fact-specific one, tailored to meet the needs of individual cases, the Bankruptcy Court concluded that it is useful for the public and the Bar to have a benchmark against which increases in voluntary contributions can be measured. The Bankruptcy Court held that, absent highly unusual circumstances that may justify a greater increase in voluntary contributions, the Bankruptcy Court would allow deductions in cases assigned to the undersigned Judge for increased voluntary contributions made during the six months preceding the filing of the bankruptcy case, or after the filing of the case and before confirmation, of the greater of: (a) 100% of the debtor's previous contributions (i.e., if the debtor was contributing $300.00 per month, she will be entitled to an increased contribution of up to $600.00 per month); or (b) the amount of an employer's matching contributions (thus, if the Debtors in this case were not making any contributions, they would be entitled to contribute up to $158.31 per month). Thus, the Bankruptcy Court held that in this case, as the Debtors contributed $79.15 per pay period, or approximately $160.00 per month, the Court would allow voluntary contributions on the Means Test of up to $320.00 per month.

10. Bankruptcy Court Granted Relief From The Automatic Stay

Randesi v. Reyna (In re Reyna), 657 B.R. 845 (Bankr. E.D. Va. 2024) (St. John, J.).

Claimants moved for relief from automatic stay so they could adjudicate non-personal injury torts in state court with defamation claim against Chapter 7 Debtor that fell firmly within category of personal injury tort under Virginia law that Bankruptcy Court did not have jurisdiction to hear. The Bankruptcy Court granted Claimants relief from the automatic stay.

Prior to the Chapter 7 bankruptcy, Claimants filed three lawsuits in Virginia Beach Circuit Court. The lawsuits remained pending as of the initiation of the bankruptcy case, and Claimants sought relief from stay to pursue the lawsuits in Virginia Beach Circuit Court.

The Bankruptcy Court noted that while it could adjudicate the claims in two of the three lawsuits, the defamation claims asserted in the third lawsuit constituted a personal injury tort under Virginia law. As a result, the Bankruptcy Court found that it did not have jurisdiction to hear such personal injury tort.

The Bankruptcy Court then noted that the factors for the court to consider in determining whether cause existed to lift the automatic stay were (1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court. The Bankruptcy Court found that each of the factors weighed in favor of granting relief from stay.

With respect to the first factor, the Bankruptcy Court found that state court complaints contain no counts involving bankruptcy law, and any issues concerning the dischargeability of debt arising from the state court proceedings would remain undecided upon the conclusion of the three pending lawsuits.

With respect to the second factor, the Bankruptcy Court found that permitting the Virginia Beach Circuit Court to continue its adjudication of the three pending lawsuits would ensure an efficient resolution of the cases without the waste of judicial resources and that the three lawsuits were intertwined to such extent that they should be adjudicated by the same court.

With respect to the third factor, the Bankruptcy Court found that the interests of the bankruptcy estate could be protected if the pending litigation remains in state court because the Chapter 7 Trustee could intervene in the state court proceedings and upon the ultimate rulings by the state court, enforcement of any judgment awarded could be stayed until it is presented to the Bankruptcy Court and a determination of whether the debt is dischargeable can be made.

11. Bankruptcy Court Ruled Discharge Exception for Willful and Malicious Injury Did Not Apply to Chapter 13 Debtor.

Deaver v. Johnson (In re Johnson), 657 B.R. 836 (Bankr. E.D. Va. 2024) (Phillips, J.).

Claimant filed an adversary proceeding seeking a determination that his claims against Debtors were non-dischargeable. The husband and wife Debtors filed a motion to dismiss the adversary proceeding.

This matter arose out of an alleged consensual extramarital relationship between Claimant and Mrs. Johnson. The Bankruptcy Court noted that the facts alleged by Claimant were long and complex. The allegations included the Claimant ending the relationship and then numerous further communications and encounters with Debtors, including (i) Mrs. Johnson seeking to continue the relationship with Claimant; (ii) Mr. Johnson visiting Claimant's home while intoxicated and demanding to fight the Claimant; (iii) Debtors egging the Claimant's home; (iv) Claimant obtaining a protective order against Debtors and swearing out a warrant for defacing his property; (v) Mr. Johnson contacting Claimant's employer and making allegations about Claimant's treatment of other women in his office; (vi) Claimant losing his job; (vii) Mrs. Johnson and a friend of hers alleging to the police that Claimant committed sexual battery and rape, which resulted in charges being brought against Claimant; (viii) the charges against Claimant being dismissed in general district court; and (ix) Debtors contacting Claimant's new employer with allegations about the criminal complaints.

Claimant filed an unsecured claim in the amount of $850,000 in Debtors' Chapter 13 case, and attached to the claim summonses from a lawsuit Claimant filed in state court. Debtors objected to the Claim, arguing that it was baseless and frivolous. Claimant did not respond to the objection. After expiration of the required thirty-day period to respond to the objection, the Bankruptcy Court entered an order disallowing the claim.

The Bankruptcy Court noted that Bankruptcy Code Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Claimant's Complaint relied solely on § 523(a)(6) as the basis for the claim of nondischargeability.

The Bankruptcy Court further noted, however, that Bankruptcy Code Section 1328(a) governs discharge in Chapter 13 cases and Section 1328 does not exclude from discharge debts covered by Section 523(a)(6). As a result, the Bankruptcy Court granted the Debtors' motion to dismiss.

The Bankruptcy Court also addressed whether it would be appropriate to allow Claimant to amend the Complaint in light of Bankruptcy Code Section 1328(a)(4), which includes a disrcharge exception "for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual." The Bankruptcy Court noted that in the Eastern District of Virginia, to meet the "physical injury" requirement of Section 1328(a)(4) there must be an actual physical injury. The Bankruptcy Court noted that Claimant did not allege an actual physical injury, and therefore granted the motion to dismiss without leave to amend.

12. Debtor Authorized to Claim Exemptions Under Virginia Law.

In re Poullath, 658 B.R. 394 (Bankr. W.D. Va. 2022) (Connelly, J.).

Chapter 13 Debtor claimed an exemption pursuant to Va. Code § 34-4 in her interests in real property (used as her residence) in the amount of $1.00 and personal property (not used as her residence) in the combined amount of $6,262.67, for a total dollar amount of exemptions pursuant to Va. Code § 34-4 of $6,263.37. Debtor also claimed as exempt certain property interests pursuant to Va. Code § 34-13 in the amount of $24,999. The Chapter 13 Trustee objected to Debtor's ability to exempt the $24,999 under Va. Code § 34-13.

The Bankruptcy Court noted that the starting point of the analysis was the text of Va. Code § 34-13, which states

> [i]f the householder does not set apart any real estate as before provided, or if what he does or has so set apart is not of the total value which he is entitled to hold exempt, he may, in addition to the property or estate which he is entitled to hold exempt under §§ 34-26, 34-27, 34-29, and 64.2-311, in the first case select and set apart by the writing required by § 34-14 to be held by him as exempt under §§ 34-4 and 34-4.1, so much of his personal estate as shall not exceed the total value which he is entitled to hold exempt and, in the latter case, personal estate, the value of which, when added to the value of the real estate set apart, does not exceed such total value.

Based on this language, the Bankruptcy Court concluded that by its terms, when a householder is entitled to an exemption under Va. Code §§ 34-4 or 34.1, but has not exhausted it, then she may use Va. Code § 34-13 to exempt any personal property up to the exemption value allowed under Va. Code §§ 34-4 or 34-4.1.

The Bankruptcy Court also noted that Va. Code § 34-4 states that

> [e]very householder shall be entitled, in addition to the property or estate exempt under §§ 23.1-707, 34-26, 34-27, 34-29, and 64.2-311, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $5,000 in value or, if the householder is 65 years of age or older, not exceeding $10,000 in value, and, in addition, real or personal property used as the principal residence of the householder or the householder's dependents not exceeding $25,000 in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary *400 obligations or liabilities due the householder, not exceeding $500 in value for each dependent.

The Bankruptcy Court noted that Va. Code § 34-4 contains a limitation on the exemption of $25,000 by noting that it is for real or personal property used as the principal residence of the householder. The Bankruptcy Court further noted, however, that Virginia Code § 34-13 contains no such language and that although the General Assembly amended Va. Code § 34-4 to add the $25,000 exemption for "real or personal property used as the principal residence of the householder or the householder's dependents," it did not amend Va. Code § 34-13. Accordingly, the Bankruptcy Court did not read into the statute language that is not present or enacted by the legislature.

The Bankruptcy Court concluded that because Va. Code § 34-13 by its terms permits a householder in Virginia to claim an exemption in personal property up to the value of any unused portion of the exemption to which she is entitled to claim under Virginia Code § 34-4, the Debtor was entitled to claim an exemption under Va. Code § 34-13 in her personal property up to the unused value of $24,999 that was the subject of the Chapter 13 Trustee's objection.

13. Defendant's Motion for Summary Judgment Granted Based on Collateral Estoppel.

Gold v. Rhanime (In re El Rafaei), 658 B.R. 387 (Bankr. E.D. Va. 2024) (Kindred, J.).

The Chapter 7 Trustee initiated an adversary proceeding against Defendant alleging that the note and corresponding proof of claim were fraudulent. Defendant filed a summary judgment motion and the Bankruptcy Court granted the motion.

Defendant filed a proof of claim in the amount of $708,994.48 based on an original note made by Debtor, dated December 1, 2019, less payments received plus interest.

The Chapter 7 Trustee previously had filed an adversary proceeding against Defendant seeking to avoid as preferential transfers two transfers Debtor made to Defendant in 2019 and 2020. At the trial on the prior adversary proceeding, the Bankruptcy Court found that the alleged preferential transfers occurred and that they were on account of an antecedent debt, but because the Chapter 7 Trustee failed to prove insolvency, the Bankruptcy Court entered judgment for Defendant.

The Bankruptcy Court noted that in the Fourth Circuit the proponent of collateral estoppel, or issue preclusion, must demonstrate that: (1) the parties to the two proceedings, or their privies, are the same; (2) the factual issue sought to be litigated must have been actually litigated in the prior action and must have been essential to the prior judgment; and (3) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action. The Bankruptcy Court further noted that in Virginia issue preclusion requires the fourth element of mutuality, which provides that the parties to the prior action and to the present action are the same, then mutuality exists.

The Bankruptcy Court found that the Trustee and Defendant were clearly the same parties from the prior avoidance action so the mutuality requirement and the first element are met. The Bankruptcy Court also found that the Trustee had a full and fair opportunity to litigate the note's enforceability and the nature of the $475,000 transfer--indeed, the Trustee proved, and the Bankruptcy Court found that the debt existed and that the transfer was made on account of that debt. The Bankruptcy Court noted that this finding was essential to the judgment because it was a finding on a necessary element of the avoidance action. The Bankruptcy Court then found that the prior action resulted in a judgment for Defendant and against the Trustee.

Accordingly, the Bankruptcy Court held that in addition to its analysis supporting the note's enforceability under Virginia law, collateral estoppel barred re-litigation of the enforceability of the note or the nature of the $475,000 transfer on account thereof. As a result, the Bankruptcy Court granted Defendant's motion for summary judgment

14. Court Denied Motion to Vacate Order Disallowing Claim.

In re Pier 1 Imports, Inc., 2024 WL 1059317 (Bankr. E.D. Va. Mar. 11, 2024) (Huennekens, J.).

Following confirmation of Debtors' Plan, on September 4, 2020, Reorganized Debtors filed a notice of rejection seeking to reject the lease at issue as of September 25, 2020. No objection was received in connection with the notice and the effective date of the rejection of the lease was September 25, 2020.

On October 23, 2020, Lessor filed a proof of claim related to the rejection of the lease. Between September 2020 and January 2021, counsel for Reorganized Debtors and Lessor communicated about the claim, and counsel for Reorganized Debtors stated via email that most of the claim was unsecured, for which they expected no distribution. Communications then ceased.

On April 25, 2023, Reorganized Debtors filed an objection which sought to reduce the claim to $0. Lessor did not respond to the objection. On June 22, 2023, the Court entered an order sustaining the objection reducing the claim to $0. On September 13, 2023, Reorganized Debtors filed a notice of allowed claims. The claims agent served the claim objection, the order, the notice of allowed claims, and a resolved claims notice on Lessor.

Lessor alleged that an email inquiry from an unrelated third party prompted Lessor to contact Reorganized Debtors about the claim on November 14, 2023. Reorganized Debtors informed Lessor that although an interim distribution would be made on allowed unsecured claims, because Lessor's claim had been reduced to $0, there would be no distribution for Lessor's claim. On January 31, 2024, Lessor filed a motion to vacate the order disallowing the claim.

The Bankruptcy Court noted that to prevail Lessor would need to show both that Lessor's failure to act was neglectful and that such neglect was excusable. The Bankruptcy Court further noted that the burden of proving excusable neglect rests on Lessor.

The Bankruptcy Court found that rather than demonstrating neglect, the evidence showed that Lessor withdrew its participation in the cases upon learning that a distribution to unsecured creditors was not anticipated. The Bankruptcy Court concluded that Lessor's intentional choice to sit back and ignore the bankruptcy did not constitute neglect and as such could not constitute cause for reconsideration.

The Bankruptcy Court further found that even if Lessor had shown neglect, such neglect was not excusable. The Bankruptcy Court noted that circumstances that constitute excusable neglect include (1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; and (4) whether the creditor acted in good faith. The Bankruptcy Court concluded that Lessor failed to submit any evidence as to the fourth factor and that Lessor failed to satisfy any of the other three factors. As a result, the Bankruptcy Court concluded that Lessor failed to meet its burden of proving excusable neglect.

15. Bankruptcy Court Strikes Statute of Limitations Defense.

Ferguson Enterprises, LLC v. Blubagh (In re Blubaugh), 2024 WL 958282 (Bankr. E.D. Va. Mar. 5, 2022) (Kenney, J.).

Plaintiff timely filed a dischargeability complaint against Debtor for actual fraud under Bankruptcy Code Section 523(a)(2)(A). The Bankruptcy Court noted that under Section 523(a)(2)(A) it is Plaintiff's burden to prove (1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing harm to Plaintiff; and (4) Plaintiff's justifiable reliance on the misrepresentation.

Debtor argued that the dischargeability complaint should be dismissed because the statute of limitations for fraud claims had run under applicable state law. The Bankruptcy Court found that Plaintiff timely filed the dischargeability complaint and that Plaintiff's state court action was timely filed for breach of contract and remained pending on the petition date. Debtor argued, however, that the state court cause of action did not include a fraud claim and therefore the statute of limitations should bar the dischargeability complaint.

The Bankruptcy Court noted that the first sentence of Section 523(a) speaks in terms of any debt incurred by fraudulent conduct and other non-dischargeable acts. Accordingly, the Bankruptcy Court noted that the first inquiry is whether there is any debt at all, and then if there is a debt, Plaintiff is entitled to bring a Section 523(a) claim. The Bankruptcy Court concluded that where either Plaintiff has a non-fraud-based judgment, or the debt is still alive in the sense of at least one claim not being time-barred, then Plaintiff is entitled to bring a Section 523(a) claim for the debt. As a result, the Bankruptcy Court held that the statute of limitations defense would be stricken.

16. Court Dismissed Bankruptcy Case And Barred Debtor From Filing Again For 365 Days.

In re Hayes, 2024 WL 994245 (Bankr. E.D. Va. Mar. 7, 2024) (Connelly, J.).

Debtor filed a Chapter 13 petition pro se, which was the Debtor's fourth voluntary bankruptcy petition in the prior eighteen months and sixth overall bankruptcy petition.

Debtor failed to file his required schedules, statements, Chapter 13 plan, and other required documents. Debtor also did not pay the filing fee in full. Based on these failures, the Bankruptcy Court entered an order directing that the bankruptcy case be dismissed unless Debtor filed his schedules, statements, and plan, and pays his filing fee installments. At around the same time, both the Chapter 13 Trustee and the United States Trustee filed motions to dismiss the bankruptcy case and for an order prohibiting Debtor from filing any bankruptcy petition for a period of 365 days.

The Bankruptcy Court noted that as Debtor had in his prior cases, on the eve of the scheduled hearing, Debtor filed a letter with the Court noting he would be unable to appear and asking for a continuance. The Bankruptcy Court accommodated Debtor's request, despite opposition from the Chapter 13 Trustee. The Bankruptcy Court's order continuing the hearing, however, also informed Debtor that cause to dismiss his case existed and so the continued hearing would be to determine whether to dismiss the case with prohibitions and conditions or to dismiss the case without any prohibitions or conditions.

The Bankruptcy Court then noted that on the morning of the continued hearing date, the Bankruptcy Court received another letter from Debtor, in which he noted that he would be unable

to appear at the continued hearing (at which parties were permitted to appear by telephone, video, or in person) and asked for another continuance to a later date. The Bankruptcy Court did not continue this hearing.

The Bankruptcy Court found that cause existed to dismiss the bankruptcy case based on Debtor's failure to file schedules and statements and his Chapter 13 plan, and his failure to pay the filing fees. The Bankruptcy Court then found based on the record before the Court that it was appropriate to grant the request to bar subsequent filings for a period of 365 days.

17. Chapter 7 Debtor Denied Discharge Under Section 727(a)(4).

Egyptian Department of Defense v. Alboghady (In re Alboghady), 2024 WL 1628836 (Bankr. E.D. Va. Apr. 15, 2024 (Kenney, J.).

Plaintiff initiated an adversary proceeding seeking to deny Chapter 7 Debtor a discharge based on Debtor allegedly failing to list numerous assets in his Schedules.

The Bankruptcy Court noted that Bankruptcy Code Section 727(a)(4) provides that the Court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case— (A) made a false oath or account. The Bankruptcy Court further noted that to prevail under § 727(a)(4)(A), Plaintiff must prove that Debtor had the intent to defraud either through direct evidence or by pointing to specific facts and circumstances that, in the aggregate, demonstrate a pattern of reckless disregard for the truth sufficient to warrant an inference of fraudulent intent. Additionally, the Bankruptcy Court noted that the false oath or account must be material in that it adversely affects the ability of the trustee or creditors to fully discover the debtor's assets and financial condition, and that a material omission from a debtor's sworn schedules or statement of affairs is a false oath and may be grounds for denying a discharge.

The Bankruptcy Court found that Debtor made the following false oaths or accounts in his Schedules: (i) failing to identify a bank account in Egypt; (ii) failing to list ownership of a life insurance company; (iii) underreporting his income for 2021; and (iv) understating the value of his membership interest in a limited liability company. The Bankruptcy Court then found that the misstatements in his Schedules were knowingly and fraudulently made because the statements were incompatible with Debtor's own knowledge. The Bankruptcy Court also found that the misstatements were material to the administration of the bankruptcy estate. As a result, the Bankruptcy Court denied Debtor a discharge under Bankruptcy Code Section 727(a)(4).

18. Motion to Strike Expert Report Granted.

Wee v. Yangzhou Putian Shoemaking Co., Ltd. (In re Unimex Corporation), 2024 WL 2141540 (Bankr. E.D. Va. May 13, 2024) (Huennekens, J.).

The Chapter 11 Plan Trustee sought to avoid certain transfers made to Defendant. The Plan Trustee proffered an expert to prove Debtor's solvency at the time of the transfers at issue. At the time of each of the transfers Debtor's stated equity was in excess of $400,000, but the expert testified that the adjusted equity at the time of each of the transfers was less than negative $200,000. The expert adjustments that resulted in the reduction of the Debtor's equity consisted of (i)

subtracting $140,000 for a contingent liability; (ii) using the Debtor's inventory reports instead of the inventory numbers reported on the Debtor's balance sheets; and (iii) a 50% discount to inventory value to reflect liquidation value of the inventory.

The Bankruptcy Court noted that under Federal Rule of Evidence 702, expert testimony must be both reliable, and must "fit," or assist the trier of fact on one or more disputed issues in the case. The Bankruptcy Court further noted that the four guideposts for the reliability analysis are (1) whether the expert's theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error inherent in the theory or technique; and (4) whether the expert's methodology is generally accepted in his or her field of expertise.

As the transfers were more than two years before the petition date, the Plan Trustee brought the avoidance action pursuant to Bankruptcy Code Section 544(b) and Va. Code Section 55.1-401. The Bankruptcy Court noted that the test for insolvency under Va. Code Section 55.1-401 is the balance sheet test.

The Bankruptcy Court found that the adjustment of $140,000 was reasonable and could be the subject of cross-examination. The Bankruptcy Court refused to strike the $140,000 adjustment.

With respect to the 50% discount to the inventory value to reflect liquidation value of the inventory, however, the Bankruptcy Court found that this was a flawed assumption. The Bankruptcy Court noted that Debtor was not being liquidated on the dates of the transfers and instead Debtor was a going concern at that time. The Bankruptcy Court also noted that Debtor was not on its "deathbed" on the dates of the transfers. Further, the Bankruptcy Court noted that Debtor's Chapter 11 plan was a plan of reorganization and that Debtor continued to operate as of the date of the opinion. The Bankruptcy Court also found that the expert provided no substantiation for the 50% discount rate.

As a result, the Bankruptcy Court found that the use of the 50% discount rate for the inventory could not be tested, nor could the Court discern whether the use of this particular discount rate could be subjected to a known or potential rate of error. Thus, the Bankruptcy Court granted the motion to strike the expert's testimony.

19. Court Deferred Ruling on Claim Objection.

In re Meridien Energy, LLC, 2024 WL 2471792 (Bankr. E.D. Va. May 23, 2024) (Phillips, J.).

Debtor' objected to Claimant's claim on the basis that the terms of the Plan and the Confirmation Order provided that the resolution of litigation in Colorado would determine the amount of Claimant's claim.

The parties engaged in arguments about the effect of the *Rooker-Feldman* doctrine on the instant dispute but the Bankruptcy Court found that the *Rooker-Feldman* doctrine was inapplicable because neither party was attempting to interfere with or exercise appellate jurisdiction over the Colorado litigation.

Instead, the Court viewed Debtor's objection to the Claim as an effort to ensure that the amount of the Claim would not become allowed as filed but would remain subject to the outcome of the Colorado litigation.

Consistent with the language of the Plan and the Confirmation Order, the Bankruptcy Court reserved the final determination of the appropriate amount of the Claim until the conclusion of the Colorado litigation and ordered that a ruling on the objection would be deferred pending the final disposition of the Colorado litigation.

20. Court Ordered Appointment of One Indenture Trustee To Creditors' Committee.

In re Enviva Inc. LLC, 2024 WL 2349623 (Bankr. E.D. Va. May 22, 2024) (Kenney, J.).

An Indenture Trustee filed a motion seeking to have itself appointed to the Creditors' Committee and another Indenture Trustee filed a joinder to the motion and a supplemental statement seeking to be appointed to the Creditors' Committee. The U.S. Trustee opposed these requests. The Bankruptcy Court ordered the U.S. Trustee to appoint one of the Indenture Trustees to the Creditors' Committee.

As originally constituted, the Creditors' Committee had three members. The Indenture Trustees represented approximately $750,000,000 (Senior Notes) and $250,000,000 (Epes Green Bonds), respectively, of bond debt. Approximately 95% of the noteholders of the Senior Notes had signed a Restructuring Support Agreement (RSA) with the Debtors. Approximately 78% of the noteholders of the Epes Green Bonds had signed the RSA with the Debtors. Neither of the Indenture Trustee had signed the RSA and each of the Indenture Trustees asserted that they were not bound by the terms of the RSA.

The Bankruptcy Court noted that Bankruptcy Code Section 1102(a)(4) provides that on request of a party in interest and after notice and a hearing, the Court may order the U.S. Trustee to change the membership of a committee appointed under this subsection, if the Court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The Bankruptcy Court also noted that Courts have employed several factors to consider in the adequacy of representation, including the ability of the committee to function, the nature of the case, the standing and desires of the various constituencies, the ability for the creditors to participate in the case without an official committee, the possibility that different classes would be treated differently under a plan and need representation, and the motivation of the movant. Additionally, the Bankruptcy Court noted that some cases hold that the Courts should review a reconstitution motion under an "arbitrary and capricious" standard, or for an abuse of discretion, but that the origins of the abuse of discretion standard are unclear and that such a standard is not implied by the text of Section 1102(a)(4). Nevertheless, the Court found that even under an abuse of discretion standard, the motion should be granted.

The Bankruptcy Court held that adequate representation required at least one of the Indenture Trustees to be appointed to the Committee. The Bankruptcy Court noted that the overwhelming majority of the debt of the Debtors is bond debt. The Bankruptcy Court also concluded that the RSA was not a reason to exclude the Indenture Trustees. The Bankruptcy Court noted that the RSA had not been approved by the Bankruptcy Court and that it was still being

negotiated among the parties. The Bankruptcy Court also noted that neither of the Indenture Trustees were parties to the RSA and that there was no evidence that the holders of the bonds who had signed the RSA would attempt to improperly influence the decisions of the Indenture Trustees as members of the Committee with fiduciary obligations to all the creditors.

As a result, the Bankruptcy Court found that adequate representation in this case required the appointment of at least one Indenture Trustee to the Committee, and that without at least one Indenture Trustee, the Committee simply was not representative of the type of debt in this case. The Bankruptcy Court indicated that the U.S. Trustee could choose which Indenture Trustee to appoint.

21. Court Held Debtors' Proposed Counsel Was Not Disinterested.

In re Enviva Inc., 2024 WL 2795274 (Bankr. E.D. Va. May 30, 2024) (Kenney, J.).

The U.S. Trustee objected to the retention of Debtors' proposed counsel on the grounds that proposed counsel was not disinterested. The U.S. Trustee argued that proposed counsel failed to disclose certain connections to Debtors. The U.S. Trustee also argued that proposed counsel represented certain of Debtors' officers and directors in shareholder and derivative litigation, that proposed counsel had received pre-petition transfers that could be preferences, and that proposed counsel represents Riverstone, which together with its affiliates own 43% of the equity of Debtors. The Bankruptcy Court noted that Riverstone was a $14 million a year client of proposed counsel, which represented 0.8% of proposed counsel's billings for the prior year and 1.4% of proposed counsel's collections.

The Bankruptcy Court noted that the burden is on proposed counsel to demonstrate that it meets the disinterestedness standard. The Bankruptcy Court noted that Section 101(14) of the Bankruptcy Code defines the term "disinterested person" as a person that: (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason. Further, the Bankruptcy Court noted that an adverse interest means either (1) the possession or assertion of any economic interest that would tend to lessen the value of the bankruptcy estate or create an actual or potential dispute with the estate as a rival claimant, or (2) a predisposition of bias against the estate.

The Bankruptcy Court held that proposed counsel's disclosures were sufficient, that the disclosures satisfied Bankruptcy Rule 2014(a), and that the disclosures were not a reason to disqualify proposed counsel from representing the Debtors.

The Bankruptcy Court held that proposed counsel's representation of certain officers and directors did not present an impermissible conflict. The Bankruptcy Court noted both that the fees for such representation would be paid from directors and officers insurance policies and that even though the Debtors' management would be entitled to equity under the terms of the Restructuring Support Agreements, the RSAs were subject to continuing negotiations with the Committee and had not been submitted to the Court for approval.

With respect to the pre-petition transfers, the Bankruptcy Court noted that proposed counsel offered to waive any possible Bankruptcy Code Section 502(h) claims if they are forced to disgorge any preference payments. The Bankruptcy Court noted that it would consider granting the Committee standing to pursue preference claims against proposed counsel should the Committee seek such standing, and that the alleged preference claims were not a reason to disqualify counsel particularly considering proposed counsel agreed to waive any Section 502(h) claims.

The Bankruptcy Court held that the simultaneous representation of Riverstone, however, rendered proposed counsel not disinterested. The Bankruptcy Court noted that proposed counsel had not implemented any ethical walls between their representation of Debtors and their representation of Riverstone. The Bankruptcy Court further noted that the evidence from proposed counsel was that an ethical wall would be impossible. The Bankruptcy Court also noted that under the proposed RSA, existing equity would retain 5% of the equity of the reorganized entities.

The Bankruptcy Court stated that it could not see how proposed counsel could possibly negotiate a plan adversely to Riverstone's position. The Bankruptcy Court further stated that proposed counsel could not delegate the plan negotiation process related to Riverstone to its co-counsel because all of the parts of the plan would depend on the other parts of the plan, and proposed counsel could not delegate this core function to its co-counsel.

As a result, the Bankruptcy Court held that where: (a) Riverstone owns 43% of Debtors' equity; (b) Riverstone has two of Debtors' thirteen directors; (c) Riverstone is a $14 million a year client of proposed counsel; and (d) no ethical walls have been imposed, and no ethical walls can be constructed because proposed counsel's attorneys continue to represent Debtors and Riverstone simultaneously, the Court must conclude that proposed counsel is not disinterested within the meaning of Section 327(a).

22. Court Denied Motion to Reconsider Concerning Disinterestedness.

In re Enviva Inc., 2024 WL 3285781 (Bankr. E.D. Va. July 2, 2024) (Kenney, J.).

Proposed counsel filed a motion to reconsider the Bankruptcy Court's disinterestedness decision. The Bankruptcy Court denied the motion to reconsider.

In discussing the background of these issues, the Bankruptcy Court noted that on April 3, 2024, it had issued an order, *sua sponte*, setting the retention application for a hearing, noting that: (a) proposed counsel represented Debtors' officers and directors in shareholder and derivative litigation; and (b) proposed counsel also represented the Riverstone entities, which owned 43% of Debtors' common stock. The Bankruptcy Court noted that it had stated in its Order: "There does not appear to be any reference to a wall of separation in the Meyer Declaration." The Bankruptcy Court then stated "[a]pparently unwilling to take the hint, [proposed counsel] did not address the issue of an ethical wall in its Reply Memorandum. Rather, it argued that it represented Riverstone in unrelated matters, and therefore, it was disinterested." The Bankruptcy Court then quoted proposed counsel's repeated statements at the initial hearing on the retention application to the effect that an ethical wall would be harmful and detrimental to the Debtors.

Proposed counsel argued that reconsideration was appropriate because (a) a limited ethical wall would be established including a compensation limitation for Riverstone work; and (b) a plan evaluation committee was formed on the Debtors' board that would consist of six non-Riverstone board members.

The Bankruptcy Court found that the proposed limited ethical wall did not render proposed counsel disinterested. The Bankruptcy Court found that the information provided by proposed counsel only identified the amount of time timekeepers had billed to both the Debtors and Riverstone post-petition, and did not inform the Court about how much overlap occurred pre-petition during the negotiation of the RSA. The Bankruptcy Court also found that the proposed compensation arrangement limiting profiting from Riverstone work did not fix the deficiencies of the proposed ethical wall.

With respect to the plan evaluation committee, the Bankruptcy Court noted (1) the resolution establishing the plan evaluation committee was not irrevocable so it could be revoked; (2) the plan evaluation committee was not able to hire its own financial advisers and would be completely depended on the board's financial advisers; (3) the plan evaluation committee is not tasked with the primary responsibility of negotiating the plan, which continues to reside with the Debtors' board, management, and proposed counsel; and (4) instead, the plan evaluation committee would only act as a "check" on the board's discretion.

As a result, the Bankruptcy Court held that proposed counsel was not disinterested and denied the motion to reconsider.

The Bankruptcy Court noted, however, that proposed counsel still could have an important role to play in the Debtors' cases as counsel under Bankruptcy Code Section 327(e), including on tax matters or securities law compliance. The Bankruptcy Court noted that Section 327(e) is not to be employed as an end-run around Section 327(a)'s more general requirement of disinterestedness, and that the Court anticipated that proposed counsel would respect the limits of any employment under Section 327(e) and that proposed counsel would not duplicate efforts by Section 327(a) counsel.

Virginia State Bar Public Case Digest
2024 Fiscal Year
Updated June 24, 2024[1]

I. DISHONESTY

In the Matters of Christopher Louis Contreras
VSB Docket Nos. 23-042-127395, 23-042-1274245, 23-042-127768, 23-042126886, 23-042-127699
Consent to Revocation
August 10, 2023

- Contreras did not use a trust account for advanced fees or costs and treated all flat fees as earned upon receipt. Contreras also did not keep records regarding advanced fees or provide accountings to clients.

- In one matter, Contreras scheduled an *ore tenus* hearing for a divorce but failed to appear for it and failed to confirm the date with his client. Contreras forged a judge's signature on a final divorce decree and provided the decree to his client. When responding to the bar complaint, Contreras said he was unsure what happened.

- In a second matter, the court authorized funds for Contreras to hire experts for a criminal defense client, but Contreras never retained an expert. Although Contreras took over the case from the public defender, he never discussed the case with the public defender or picked up the public defender's complete file. The client and the public defender asked Contreras to contact his client regarding filing an appeal. Contreras visited his client 28 days after the sentencing but misrepresented to the court that he had visited his client the previous week.

- In a third matter, Contreras represented a client on aggravated sexual battery charges and failed to file a discovery motion, respond to a motion regarding admission of hearsay statements, discuss with his client whether his client wanted a jury trial, thoroughly cross-examine complaining witness, cite law in his motion to strike, and properly advise witnesses regarding the

[1] Disciplinary cases are included in these written materials shortly after the Memorandum Orders are published. For some matters, the time to note an appeal may not have expired, or an appeal may have been noted after a case was included. For recent information regarding pending appeals, check the Virginia State Bar's website.

Rule on Witnesses. The public defender subsequently obtained a new trial based on ineffective assistance of counsel.

Virginia State Bar ex rel Eighth District Committee v. Dale Reese Jensen
Case No. CL23-342
VSB Docket Nos. 22-080-124753, 22-080-125016, 22-080-125134, 22-080-125221, 22-080-125485, 22-080-125529, 22-080-125496, 23-080-126976
Revocation
Hearing Before Three-Judge Court
October 26, 2023

- Despite existing law that defective indictments are procedural in nature and could be waived, Jensen developed a legal theory that a client has a constitutional right to a proper indictment, and therefore any convictions based on defective indictments are void.

- After losing this argument on behalf of a client in 2016, Jensen continued to charge other clients thousands of dollars to file similar motions, without advising those clients that the argument had been rejected by at least one Circuit Court, the Court of Appeals Virginia, and twice by the Supreme Court of Virginia and the United States Supreme Court.

- Jensen charged several advanced legal fees that he failed to place into trust. He also failed to keep proper receipts and disbursement journals and failed to properly reconcile his trust account. In some cases, where a client was due a partial refund, Jensen refused to provide one.

- In several of the cases, Jensen failed to keep his clients apprised of developments and missed deadlines to file pleadings.

- In some of the cases, Jensen provided the bar with timekeeping records that contained false statements of work he had performed. In particular, he billed for creating pleadings that were copied from past pleadings filed on behalf of other clients.

- Rules Violated (across all eight cases): 1.1 (Competence); 1.2(a) (Scope of Representation); 1.3(a) (Diligence); 1.4(a-b) (Communication); 1.5(a-b) (Fees); 1.15(a)(1), (b)(3-5), (c)(1-4), (d)(2-4) (Safekeeping Property); 1.16(d-e) (Declining or Terminating Representation); 5.3 (a-c) (Responsibilities Regarding Nonlawyer Assistants); 8.1(a) (Bar Admission and Disciplinary Matters); 8.4(a-c) (Misconduct).

- Respondent filed more than 30 pages of objections.

In the Matter of Chandra Harris Snyder
VSB Docket No. 23-010-128451
One-Year and One-Day Suspension
Agreed Disposition Before Disciplinary Board
December 15, 2023

- Snyder accepted simultaneous employment with two different law firms. She did not disclose to either firm the fact that she was employed at another firm.
- After Snyder's dual employment was discovered and a bar complaint was filed, Snyder claimed that she disclosed her simultaneous employment to both firms; however representatives of both law firms disputed this.
- Snyder maintained client documents belonging to one law firm on a laptop owned by the other firm.
- Rules Violated: 1.6(d) (Confidentiality of Information); 8.1(a) (Bar Admission and Disciplinary Matters); 8.4(b-c) (Misconduct).

In the Matter of Reginald Robert Yancey
VSB Docket No. 23-090-126593
One-Year and One-Day Suspension
Hearing Before Disciplinary Board
September 28, 2023

- Yancey received a $30,000 advanced legal fee to represent a client and his business in their bankruptcy proceedings but did not deposit the advanced fee in a trust account.
- Yancey then misrepresented the amount of the fee he had received to the bankruptcy court.
- During a four-month period in which Yancey filed approximately 35 bankruptcy cases, his trust account had a balance of $33.92. Yancey acknowledged receiving advanced fees and/or costs from at least six clients during this timeframe, but he did not deposit any of those fees or costs into his trust account. During a subsequent 14-month period, Yancey filed more than 75 bankruptcy cases but did not deposit any fees or costs related to those cases into his trust account.
- Yancey made inconsistent representations regarding the nature of the fee he received and how it was applied. He also failed to maintain receipts and disbursements journals or a client ledger for at least one of his clients.

- Yancey agreed to resign from the bankruptcy court bar.
- Rules Violated: 1.15(a)(1), (b)(5), (c) (1-2), (4) (Safekeeping Property); 3.3(a)(1) (Candor Toward the Tribunal); 8.4(b-c) (Misconduct).

In the Matter of John Kedrich Evans, III
VSB Docket No. 24-000-130255
365-Day Suspension
Agreed Disposition Before Disciplinary Board
January 11, 2024

- Reciprocal discipline from the District of Columbia.
- While working as a member of the Council of the District of Columbia and Chair of the Board for the Washington Metropolitan Area Transit Authority, Evans did not accurately report his financial interests.

In the Matter of Jibran Muhammad
VSB Docket Nos. 23-041-126374, 23-041-128914
Six-Month Suspension With Terms
Agreed Disposition Before Disciplinary Board
May 6, 2024

- After working in private practice for several years, Muhammad took a job as an Assistant Commonwealth's Attorney. Although his new position prohibited him from remaining in private practice, he failed to advise his clients that they needed to retain new counsel and failed to continue protecting their interests. Mohammad also failed to advise his employer that he remained in private practice, contrary to office policy.
- Mohammad also failed to deposit advanced legal fees into his trust account, failed to provide an accounting for an advanced legal fee when requested, and accepted one advanced legal fee after he was no longer permitted to work in private practice.
- Rules Violated: 1.3(a-b) (Diligence); 1.4(b) (Communication); 1.15(a)(1), (b)(3-5) (Safekeeping Property); 8.4(b-c) (Misconduct).
- Terms: Read Lawyers and Other People's Money and Legal Ethics Opinion 1606, Six hours of CLE in ethics.
- Alternate Sanction: one-year suspension.

In the Matter of Jennifer Terrell Dilworth

VSB Docket No. 24-021-129645
Public Reprimand Without Terms
Agreed Disposition Before Subcommittee
March 1, 2024

- Dilworth told her supervisor that she had filed a motion to withdraw in a case when she had not. The supervisor then contacted the presiding judge about the motion and proposed order, and the judge told the supervisor that no order had been entered.

- When Dilworth's supervisor questioned her about the motion, Dilworth said that the motion and proposed order must have been lost in the clerk's office. When the supervisor confronted Dilworth again, she admitted that she had never filed the motion and proposed order.

- Dilworth was terminated by her law firm.

- Rules Violated: 4.1(a) (Truthfulness in Statements to Others); 8.4(b-c) (Misconduct).

In the Matter of Melissa D. Johnson
VSB Docket No. 23-060-126832
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
April 8, 2024

- Johnson represented the beneficiaries of the trust, who sought the resignation of the trustee. Johnson revised a draft resignation for the trustee and instructed her clients to give the draft directly to the trustee, even though Johnson knew that the trustee was represented in the dispute.

- The trustee signed the resignation outside of Johnson's presence. Nonetheless, Johnson notarized the signature, stating that the document was "acknowledged before me."

- Rules Violated: 4.2 (Communication with Persons Represented by Counsel); 8.4(a-b) (Misconduct).

- Terms: one year of probation, six hours of ethics CLE.

- Alternate Sanction: Certification for Sanction Determination.

In the Matter of Ashkira Mohamud
VSB Docket No. 23-053-128611
Public Reprimand With Terms

Hearing Before Disciplinary Board
February 23, 2024

- Mohamud represented a client in a potential lawsuit against another individual and the Prince William County Police Department. After holding herself out as the client's lawyer, Mohamud entered into an engagement agreement in which she charged a contingency fee.

- After entering into the engagement agreement, Mohamud did not do any substantial work on the client's case. She acknowledged she should have sent the client a termination letter, but did not.

- When Mohamud did not respond to the client's efforts to contact her, the client filed a bar complaint.

- VSB Intake counsel contacted Mohamud, who said that she had never agreed to file a lawsuit on the client's behalf. The matter was dismissed.

- The client called Mohamud after receiving a copy of her response to the VSB. Mohamud said that she was "unaware you retained me." In a subsequent interview with a VSB Investigator, Mohamud acknowledged that she had been retained. When testifying during the hearing, Mohamud said that she "never denied having a retainer agreement[.]"

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.16(d) (Declining or Terminating Representation); 8.4(c) (Misconduct).

- Mitigating Factors: no disciplinary record, inexperience, personal and emotional problems, harm limited to the client's loss of faith in the judicial system.

- Aggravating Factors: dishonest and selfish motives, lack of remorse and refusal to acknowledge wrongfulness of actions, vulnerable client.

- Terms: Three-year JLAP contract, six hours of CLE in law practice management, six hours of CLE in legal ethics, Virginia Professionalism Course.

- Alternative Sanction: Three-year suspension.

II. SAFEKEEPING PROPERTY

Virginia State Bar ex rel Sixth District Committee v. Brittani Nata'Lita Baldwin
VSB Docket Nos. 23-060-126301, 23-060-126844, 23-060-126977, 23-060-126996, 23-060-127035, 23-060-127238, 23-060-128020
Case No. CL23001107-00
Revocation
Hearing Before Three-Judge Court
August 17, 2023

- Between 2020 and the end of 2022, Baldwin accepted more than $40,000 in advanced legal fees from seven clients. She did not deposit any of the advanced fees into a trust account, nor did she provide those clients with itemized billing statements. She also failed to refund unearned legal fees to several clients.

- While representing some of these clients, Baldwin failed to perform essential aspects of the representation such as filing a complaint for divorce, serving discovery responses, and attending a settlement conference.

- Baldwin failed to respond to subpoenas duces tecum in four different cases, which led to the administrative suspension of her license.

- Rules Violated: 1.3(a) (Diligence); 1.15(a)(1), (b)(3-5) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation; 8.4(b) (Misconduct).

In the Matters of Gordon H. Shapiro
VSB Docket Nos. 22-080-124926, 23-080-127546, 23-080127937
60-Month Suspension
Agreed Disposition Before Disciplinary Board
April 24, 2024

- Shapiro, who practiced for 56 years with no disciplinary record, employed a paralegal and office administrator with no prior law office experience. Shapiro allowed the paralegal, who was his only employee, to maintain all of his firm accounts and gave her complete control over his trust account.

- The paralegal began embezzling client funds from Shapiro's trust account, routinely transferring unearned client funds in order to pay her personal expenses.

- The paralegal's theft resulted in an overdraft of the trust account, which was reported to the bar and resulted in an investigation. Shapiro provided the bar with purported bank records that had been falsified by the paralegal.

- Even after Shapiro became aware of the problems with his trust account, he initially took no action to terminate the paralegal's employment or restrict her access to the trust account.

- The bar opened a receivership for Shapiro's practice. The receiver indicated that the paralegal stole approximately $450,000 from the firm.

- Rules Violated: 1.15(b)(3), (5), (c)(1-4), (d)(2-4) (Safekeeping Property); 5.3(a-c) (Responsibilities Regarding Nonlawyer Assistants); 8.4(a-b) (Misconduct).

In the Matter of Jessica Ralsten Casey
VSB Docket No. 24-010-129976
Public Reprimand With Terms
Agreed Disposition Before District Committee
March 28, 2024

- Casey agreed to negotiate a Property Settlement Agreement for a flat fee of $1,000.

- Casey deposited the flat fee into her trust account, but transferred the entire amount into a checking account before the representation was completed.

- The bar subpoenaed Casey's trust accounting records and she failed to produce a client ledger for the client.

- Casey delayed the negotiations and failed to communicate with her client, including failing to respond to a request for guidance for three months.

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.15(b)(5), (c)(2).

- Terms: six hours of CLE in trust accounting, read Lawyers and Other People's Money and Legal Ethics Opinion 1606.

In the Matter of David Allen Downes
VSB Docket No. 24-070-129608
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
March 15, 2024

- Downes was appointed as the administrator of a friend's estate.

- Downes failed to reconcile his IOLTA and an account he created for the estate, resulting in an IOLTA overdraft. Downes also kept personal funds in his IOLTA to keep it open.

- During the investigation, Downes provided the bar with updated ledgers and reconciliations for his IOLTA.

- Rules Violated: 1.15(a)(3), (c)(3), (d)(3) (Safekeeping Property).

- Terms: three years of probation as to trust accounting violation, unannounced reviews by VSB investigator.

Virginia State Bar ex rel Fifth District Committee v. Kerr Stewart Evans, Jr.
Case No. CL2023-04019
Public Reprimand With Terms
Agreed Disposition Before Three-Judge Panel
July 26, 2023

- Evans failed to deposit an advanced legal fee into a trust account.

- Evans's client ledgers were incomplete and he failed to produce documentation reflecting that he reconciled his trust account.

- Rules Violated: 1.15(a)(1), (c)(2), (d)(3) (Safekeeping Property).

- Terms: read Lawyers and Other People's Money and Legal Ethics Opinion 1606, one year of trust account inspections.

- Alternate Sanction: 30-day suspension.

In the Matter of Peter L. Goldman
VSB Docket No. 22-070-125043
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
November 6, 2023

- In a litigation matter, Goldman charged his client a fixed fee of $5,000, to be paid in installments during a four-month period. Goldman deposited the first installment into his business checking account.

- More than three years after Goldman was retained, the Court issued a notice that it was removing the case from the active docket because there had been "no orders or proceedings" for two years.

- Goldman sent correspondence to the client purporting to terminate the representation but did not file a motion to withdraw.

- Rules Violated: 1.15(a)(1) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation).

- Terms: One year of probation, six credits of MCLE in legal ethics.

In the Matter of Weon Geun Kim
VSB Docket No. 23-041-127801
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
October 16, 2023

- Kim maintained more than $12,000 of his own funds in his trust account. He said that he did not remove funds from trust after he earned them.

- Kim also acknowledged that he deposited other client fees in his operating account before they were earned and kept client checks in a desk drawer.

- Rule Violated: 1.15(a)(1), (3).

- Terms: Read Rule of Professional Conduct 1.15, Lawyers and Other People's Money, and Legal Ethics Opinion 1606, three hours of CLE in trust accounting.

- Alternate Sanction: Certification for Sanction Determination.

In the Matter of Shalonda Michelle Tillman
VSB Docket No. 22-021-125917
Public Admonition With Terms
Agreed Disposition Before Subcommittee
October 12, 2023

- Tillman, who is licensed in both Virginia and the District of Columbia, represented a client in a custody and visitation matter in DC.

- The client paid a $2,500 advanced legal fee, but Tillman did not maintain any of the advanced fee into a trust account.

- Rule Violated: DC Rule 1.15(a) (Safekeeping Property).

- Terms: Read Lawyers and Other People's Money and Legal Ethics Opinion 1606, four hours of CLE in trust accounting, trust account reviews by VSB investigator.

In the Matter of Robert E. Walker, Jr.
VSB Docket No. 23-060-127352
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
August 2, 2023

- For representation in a criminal matter, Walker charged a "one-time flat fee" of $3,500. Later in the fee agreement, Walker said that the "retainer fee is non-refundable." Walker deposited the advanced fee in his personal bank account.

- The client already had court-appointed counsel, but Walker said he would appear at an upcoming hearing. Walker got stuck in traffic and missed the hearing but refunded only $2,000 of the $3,500 advanced fee. Walker said he earned the remaining $1,500 by communicating with the client but did not provide an accounting.

- Walker also did not maintain a client ledger.

- Rules Violated: 1.3(a) (Diligence); 1.15(a)(1), (b)(3), (c)(2) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation).

- Terms: one year of probation, return of entire flat fee, six hours of CLE in legal ethics.

In the Matter of Melissa Lynch Freeman
VSB Docket No. 22-060-125379
Public Admonition With Terms
Agreed Disposition Before Subcommittee
September 6, 2023

- Freeman accepted a $2,000 advanced fee to represent a client on child custody matters. At the time, Freeman did not have a trust account. Despite this, Freeman's invoices reflected that she had transferred payments "from trust."

- When the representation concluded, Freeman still had $760 in unearned funds. She agreed to represent the client regarding another matter but failed to do so and stopped communicating with her client. Freeman also failed to refund the unearned $760.

- At the time of the disposition, Freeman was subject to an Impairment suspension.

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.15(a)(1), (b)(5) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation).
- Term: Pay $760 in restitution to client.
- Alternate Sanction: Certification for Sanction Determination.

III. COMPETENCE/DILIGENCE/COMMUNICATION/GENERAL NEGLECT

In the Matter of Astrid Lockwood
VSB Docket No. 22-041-126015
Revocation of Privilege to Practice Law in Virginia
Hearing Before Disciplinary Board
August 25, 2023

- Lockwood was not admitted to practice law in Virginia, but she worked for the Legal Aid Justice Center in Virginia, where she practiced immigration law via her Minnesota law license.
- Lockwood failed to perform contracted-for services for several immigration clients. For example, three clients retained Lockwood to apply for protection under the Deferred Action of Childhood Arrivals ("DACA") policy, for which they were *prima facie* eligible. Lockwood failed to act on their applications promptly, and in the meantime, a Texas federal court issued a ruling preventing adjudication of new DACA applications.
- Lockwood also missed a deadline to file a client's asylum application and failed to file for work authorizations for at least three other clients, causing those clients to lose actual or potential income.
- Lockwood represented to her supervisors that she had filed applications for clients when she had not.
- Rules Violated: 1.3(a-b) (Diligence); 1.4(b) (Communication); 8.4(c) (Misconduct).
- Mitigating Factor: no prior disciplinary record.
- Aggravating Factors: dishonest or selfish motive, pattern of misconduct, multiple offenses, vulnerability of the victims, and substantial experience in the practice of immigration law.

VSB ex rel Third District Committee, Section I v. Henry W. McLaughlin, III
VSB Docket Nos. 24-031-130769, 24-031-131415, 24-031-131495, 24-031-131540
Case No. CL 24002065-00
Revocation
Agreed Disposition Before Three-Judge Court
June 7, 2024

- In one matter, McLaughlin failed to file a timely notice of appeal after a verdict was issued in his client's personal injury case. After he received the judgment, McLaughlin did not disburse the uncontested funds to the parties who were entitled to receive them, despite representing that he would do so. Until the eve of the disciplinary hearing, McLaughlin failed to act to disburse the funds.

- In another matter, McLaughlin made three attempts to appeal an order dismissing a client's case. All three attempts were dismissed based on McLaughlin's procedural errors.

- In a third matter, McLaughlin advised a client that a nonsuit tolled the statute of limitations against a defendant who was not a party to the nonsuited case. McLaughlin also failed to file the client's lawsuit as agreed and failed to communicate with the client for several months. McLaughlin transferred the client's advanced fee to himself even though he had not filed suit as agreed, and he failed to issue any refund until after a bar complaint was filed.

- In a fourth matter, Mclaughlin failed to include required arguments in an appeal to the Court of Appeals of Virginia, and then failed to properly assert assignments of error in the subsequent appeal to the Supreme Court of Virginia. He did not timely inform his client when the Supreme Court of Virginia dismissed the appeal, and he did not tell his client that he was filing a Petition for Rehearing.

- Finally, McLaughlin agreed not to represent petitioners seeking relief in the bankruptcy court in the Eastern District of Virginia after he repeatedly failed to comply with that court's rules, including failing to appear for a show cause hearing.

- McLaughlin also failed to produce complete trust accounting records and admitted that he did not reconcile his trust account.

- Rules Violated: 1.1 (Competence); 1.3(a) (Diligence); 1.4(a-b) (Communication); 1.5(a) (Fees); 1.15(b)(4), (d)(3-4) (Safekeeping Property);

1.16(d) (Declining or Terminating Representation); 3.4(d) (Fairness to Opposing Party and Counsel).

In the Matters of Duncan Kenner Brent
VSB Docket Nos. 23-052-126721, 23-052-128128
One-Year and One-Day Suspension With Terms
Agreed Disposition Before Disciplinary Board
October 25, 2023

- In the first of two matters, Brent obtained a default judgment on a client's behalf but then failed to move forward with a damages hearing, ultimately nonsuiting the case without re-filing it. Brent also failed to respond to several of the client's requests for information.
- In the second case, Brent acknowledged a chiropractor's liens in four different cases and settled at least one of them. Brent asserted that he had attempted to pay the chiropractor, but she asserted that she never received payment.
- In both cases, Brent failed to respond to a bar subpoena duces tecum, resulting in administrative suspensions. Brent also failed to respond to the bar investigator's attempts to interview him.
- Rules Violated: 1.1 (Competence); 1.3(a) (Diligence); 1.4(a), (c) (Communication); 1.15(b)(4) (Safekeeping Property); 8.1(c-d) (Bar Admission and Disciplinary Matters).
- Terms: produce trust accounting records from January 1, 2020 to the present.
- Alternative Sanction: additional three-year suspension.[2]

Virginia State Bar ex rel Seventh District Committee v. Bradley G. Pollack
Case No. CL24000-219
VSB Docket No. 23-070-128234
Nine-Month Suspension
Agreed Disposition Before Three-Judge Court
May 28, 2024

- Pollack was appointed to represent a client in a termination of parental rights matter pending in Juvenile & Domestic Relations Court. Both the

[2] On April 26, 2024, the Disciplinary Board imposed the alternate sanction of an additional three-year suspension.

appointment order and relevant statute required Pollack to represent the client at all stages of the proceeding unless terminated or replaced.

- The Circuit Court terminated the client's parental rights. Pollack noted an objection to the order but failed to advise the client fully of her right to appeal and the right to court-appointed counsel for any appeal.

- The client noted her appeal pro se. The Circuit Court emailed Pollack that that the case had been submitted to the Court of Appeals and that if Pollack no longer represented the client, he needed to submit an order withdrawing as counsel. Pollack submitted an order, but it was not endorsed by his client or opposing counsel and therefore was not entered.

- The Court of Appeals subsequently notified Pollack when it received the record. More than a month later, Pollack asked his client, "will you be filing this?" His client said that she would, however, the client did not know what she was required to file or that she was entitled to advice of counsel.

- Even though the client subsequently informed Pollack that she wanted to appeal, Pollack neither withdrew as counsel nor followed up with his client to advise her about the appeal process and filing deadlines. The Court of Appeals dismissed the case for failure to file an opening brief.

- Rules Violated: 1.2(a) (Scope of Representation); 1.3(a-b) (Diligence); 1.4(a-b) (Communication; 1.16(c) (Declining or Terminating Representation).

In the Matter of Matthew Gregory Finley
VSB Docket No. 24-021-129303
Public Reprimand With Terms
Agreed Disposition Before District Committee
March 26, 2024

- While representing a client in a divorce, Finley charged a $4,000 flat fee that he represented was "earned upon receipt." The fee agreement also required the client to agree that legal fees and costs "shall not be bankrupted or claimed on any petition to a bankruptcy court or proceeding from credit relief."

- During the representation, Finley failed to serve responses to the opposing party's discovery, failed to file a motion to compel responses from the moving party, and otherwise failed to take action to move the case forward.

- Finley also failed to communicate with his client for approximately six months, despite receiving communications from his client.
- Rules Violated: 1.3(a) (Diligence); 1.4(a-b) (Communication); 1.5(a) (Fees).
- Terms: Four hours of CLE in legal ethics.

In the Matter of Jason Meyer Krumbein
VSB Docket No. 23-033-126850
90-Day Suspension
Agreed Disposition Before Disciplinary Board
September 19, 2023

- Krumbein agreed to represent a client who was being sued by American Express. Although the case was set for trial, Krumbein did not ote his appearance with the court or contact the attorney for American Express.
- When the client contacted Krumbein for an update, Krumein did not respond. He also did not appear for the trial or otherwise take action on his client's behalf. Default judgments were entered against his client, and Krumbein did not inform his client of the default judgment or respond to subsequent attempts to contact him.
- In response to the bar complaint, Krumbein said that his client failed to provide him with documents and that he had attempted to settle the case but had not received a response from opposing counsel. This was untrue.
- Rules Violated 1.2(a) (Scope of Representation); 1.3(a) (Diligence); 1.4(a-c) (Communication), 1.16(d) (Declining or Terminating Representation); 8.1(a) (Bar Admission and Disciplinary Matters).

In the Matter of Michael Ben Gunlicks
VSB Docket No. 23-031-127969
Public Reprimand Without Terms
Agreed Disposition Before Subcommittee
October 10, 2023

- While representing a client in a personal injury case, Gunlicks filed suit on the day the statute of limitations expired and did not request service of process until six days before the one-year deadline to complete service.

- Service was posted on the defendants, who did not respond to the suit. Gunlicks then filed a motion for default judgment.

- At a hearing on a motion for default judgment, the court's notes reflected that Gunlicks requested and was granted leave to amend the suit to add an additional count. Gunlicks was to serve the amended suit on the defendants and then set a new hearing date. However, Gunlicks did not take any additional action for 3.5 years and did not seek leave to withdraw as counsel.

- The court removed the case from the docket due to inactivity. Gunlicks told the bar investigator that he planned to move to reinstate the case and then seek leave to withdraw as counsel. The client has filed a malpractice suit against Gunlicks.

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.16(a)(2-3) (Declining or Terminating Representation).

In the Matters of Adam Turner Kronfeld
VSB Docket Nos. 23-051-128718, 22-051-125097
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
December 7, 2023

- In the first of two matters, Kronfeld received discovery responses from his client but did not serve the responses until more than two months later, on the eve of a hearing on a motion to compel. The court awarded the opposing party $3,378 in attorneys' fees because of discovery violations.

- In the second matter, Kronfeld also did not submit timely discovery responses. He signed an agreed order in which he agreed to serve responses and pay $900 in attorneys' fees. He paid the $900 but failed to supplement the discovery as ordered. As a result, the court entered an order precluding his client from introducing any undisclosed evidence. Kronfeld did not inform his client of these developments.

- The court then entered an order striking an affirmative defense asserted by Kronfeld's client. The client found out about this ruling from the Commissioner of Sale of her marital home.

- On the trial date, Kronfeld mistakenly believed that the trial had been continued. He admitted to his client that he had "dropped the ball" and convinced her to settle. He said he had notified his firm and their malpractice carrier.

- In fact, Kronfeld had not notified his law firm. When his firm learned of some of these events, Kronfeld was terminated.

- Rules Violated: 1.3(a-c) (Diligence); 1.4(a-c) (Communication); 3.4(d-e) (Fairness to Opposing Party and Counsel); 8.4(c) (Misconduct).

- Terms: Three years of probation, nine hours of CLE in ethics, JLAP evaluation and contract.

- Alternative Sanction: Certification for Sanction Determination.

In the Matters of Patrick Michael McGraw
VSB Docket Nos. 22-080-124934, 22-080-126082
Public Reprimand Without Terms
Agreed Disposition Before Subcommittee
August 22, 2023

- In the first of two cases, McGraw was retained to handle a motion to modify spousal support based on change in economic circumstances. He accepted a $5,000 advanced legal fee without specifying whether it was a flat fee. McGraw advised his client to begin paying a reduced amount without the court making any modification to the order. McGraw also failed to tell his client that his ex-wife had filed a motion to hold the client in contempt for failing to pay the full amount of spousal support. McGraw also failed to produce trust account records to the bar on a timely basis.

- Rules Violated: 1.3(a) (Diligence); 1.4(a-b) (Communication); 1.5(b) (Fees); 1.15(b)(3), (c) (Safekeeping Property).

- In the second case, McGraw was hired to collect outstanding child support for a client. When the client asked for the status, McGraw said he was waiting for the court to act on filings he had made, when in fact McGraw had not made any filings. When the client learned McGraw had not filed anything, the client terminated McGraw and demanded a refund, which McGraw issued shortly after the client filed a bar complaint.

- Rules Violated: 1.3(a) (Diligence); 1.4(a-b) (Communication); 8.4(c) (Misconduct).

In the Matter of Patrick Michael McGraw
VSB Docket No. 24-080-130817
Public Reprimand With Terms
Agreed Disposition Before Subcommittee

June 20, 2024

- In a divorce matter, McGraw failed to provide revisions to a Final Decree of Divorce for five months and the failed to ensure that the Final Decree was entered by the Court.

- When the Final Decree was finally entered, McGraw did not tell his client it was entered and did not provide her with a copy.

- McGraw also allowed earned fees to remain in his trust account.

- Rules Violated: 1.3(a) (Diligence); 1.4(c) (Communication); 1.15(a)(3) (Safekeeping Property).

- Terms: hire an accountant and revise trust accounting procedures to comply with Rule 1.15.

In the Matter of Henry W. McLaughlin, III
VSB Docket No. 23-031-127527
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
July 6, 2023

- McLaughlin accepted a personal injury case but failed to request the client's medical bills and failed to file suit within the statute of limitations.

- McLaughlin did not tell his client that he had not filed suit until more than two years after the statute of limitations expired.

- Meanwhile, McLaughlin agreed to represent the same client in a second personal injury case. McLaughlin filed suit and the defendant did not respond. Nonetheless, McLaughlin took no action in the second lawsuit for more than a year.

- After McLaughlin disclosed that he missed the statute of limitations in the first case, he offered to represent the client for free in a third case regarding another incident. However, McLaughlin and the client subsequently agreed to a 10% contingency fee.

- After bar complaints were filed, McLaughlin moved to withdraw in both matters.

- Rules Violated: 1.3(a) (Diligence); 1.7(a)(2) (Conflict of Interest); 1.16(a) (Declining or Terminating Representation).

- Terms: Six hours of CLE in personal injury litigation.

Virginia State Bar ex rel Fifth District Committee v. Michael Christopher Miller
Case No. CL2023-13042
VSB Docket No. 22-051-125554
Public Reprimand
Hearing Before Three-Judge Court
November 29, 2023

- Miller represented a client in her divorce. To conclude the divorce, the court entered a final divorce decree, orders for distribution of the client's husband's Thrift Savings Plan ("TSP), and a garnishment order for the TSP.

- Although Miller provided the client with a copy of the final divorce decree, he did not give her copies of the other orders, did not send the orders to the appropriate plan administrators, and did not inform his client that he had not sent the orders to the administrators. Meanwhile, the client's ex-husband liquidated the TSP.

- Rule Violated: 1.4(a) (Communication).

In the Matter of James W. Hilldrup
VSB Docket No. 23-060-128458
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
August 22, 2023

- Hilldrup accepted a matter to address title issues regarding real property. After accepting the representation and receiving documentation from his client, Hilldrup performed no work for six months and did not communicate with his client.

- After speaking with the client and agreeing to move the matter forward, Hilldrup still took no substantive action for another four months. The client terminated Hilldrup and demanded a refund, which Hilldrup issued three months after it was requested.

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.16(d) (Declining or Terminating Representation).

- Terms: one year of probation, six hours of CLE in legal ethics.

In the Matter of Erik M. Helbing
VSB Docket No. 23-032-128108
Public Reprimand
Agreed Disposition Before Subcommittee
November 16, 2023

- Helbing has a self-described "national law firm" that provides debt negotiation services. Helbing said that his firm maintained "of counsel" relationships with attorneys in about 40 states who provide legal services when needed.

- Helbing estimated he had 2,000 clients.

- A Virginia client hired Helbing's firm. Although Helbing listed a Virginia lawyer on the retainer agreement, the Virginia lawyer did not sign it and said he was unaware that he was identified on the agreement.

- The client paid Helbing's firm the fee in monthly payments, a significant portion of which Helbing took as his fee and placed in his operating account.

- During the eight months the client was paying Helbing's firm, the client never spoke with an attorney. After continuing to receive collections notices, the client said she negotiated settlement of her debts herself.

- Helbing asserted that his firm is no longer taking on new clients because the firm was not profitable.

- Rules Violated: 1.1 (Competence); 1.3(a) (Diligence); 1.4(a-b) (Communication); 1.15(a)(1), (b)(4-5) (Safekeeping Property).

In the Matters of Ryan Douglas Huttar
VSB Docket Nos. 23-070-127074, 23-070-127981
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
September 28, 2023

- In the first of two matters, Huttar accepted a $3,500 advanced legal fee for estate administration. Huttar failed to produce evidence that he deposited it into a trust account and failed to work on the administration of the estate. Huttar closed his law practice without notifying his client. After the client filed a bar complaint, Huttar attempted to issue a refund, but it was initially

returned due to insufficient funds. Huttar reissued the refund via cashier's check.

- Rules Violated: 1.3(a-b) (Diligence); 1.4(a) (Communication); 1.15(b)(3-5), (c)(4) (Safekeeping Property); 1.16(d) (Declining or Terminating Representation); 8.1(d) (Bar Admission and Disciplinary Matters).

- The second matter arose from an overdraft of Huttar's trust account. Huttar did not keep sufficient records for his trust account, nor did he perform the required reconciliations. Huttar allowed an employee to issue trust account checks and issued draws to individuals not associated with his law firm.

- Rules Violated: 1.15(c)(1), (4), (d)(3) (Safekeeping Property); 5.3(b) (Responsibilities Regarding Nonlawyer Assistants).

- Terms: Read Lawyers and Other People's Money and Legal Ethics Opinion 1606, provide an accounting reflecting he had disbursed all client funds, complete professionalism court, probation for two years.

In the Matter of Dan Dalnamu Park
VSB Docket No. 24-052-130528
Public Reprimand
Agreed Disposition Before Subcommittee
June 3, 2024

- Park represented a client in an appeal of an immigration decision. Park noticed the appeal and secured an extension of the briefing schedule. However, the client did not pay for Park's services.

- Park filed a motion to withdraw eight days before the initial brief was due. The motion was not ruled on before the brief deadline; however, Park neither filed a timely brief nor took any other action to extend the deadline or otherwise preserve the client's ability to file the brief.

- Rule Violated: 1.16(c) (Declining or Terminating Representation).

In the Matter of James Randall Perkins
VSB Docket No. 23-102-128665
Public Reprimand Without Terms
Agreed Disposition Before Subcommittee
November 3, 2023

- In 2016, Perkins filed a partition lawsuit regarding a property dispute with the client's ex-husband.
- In March 2023, the client filed a bar complaint alleging that Perkins had failed to communicate with her about the lawsuit for about 17 months.
- Perkins initially did not respond to requests from intake counsel or bar counsel. Perkins responded only after a bar investigator contacted him.
- Perkins acknowledged he had failed to communicate properly with his client.
- Rules Violated: 1.4(a) (Communication); 8.1(c) (Bar Admission and Disciplinary Matters).

In the Matter of Thomas Joseph Robl
VSB Docket No. 23-053-126874
Public Reprimand Without Terms
Agreed Disposition Before District Committee
November 13, 2023

- A stay-at-home-mother hired Robl to represent her in her divorce. Robl filed the divorce complaint without first allowing his client to review it, and the client asserted that the separation date was incorrect.
- The client urgently needed support payments on which to live. Robl filed a motion for pendente lite relief but withdrew it from the docket without rescheduling it. When asked why he did so, he said that he understood that the court no longer heard pendente lite motions, which was not true.
- Robl also failed to file timely responses to a counterclaim and to discovery.
- Rules Violated: 1.1 (Competence); 1.3(a) (Diligence).

In the Matter of Thomas J. Robl
VSB Docket No. 22-053-124907
Public Reprimand Without Terms
Hearing Before District Committee
August 23, 2023

- Robl represented a client who sought to collect an unpaid loan from her ex-husband.

- Robl testified that he planned to send the ex-husband a demand letter with a draft complaint, but he never did so.

- Nearly three years after he was retained, Robl filed suit against the ex-husband. The complaint contained a breach date that Robl acknowledged was incorrect but said was a typographical error. The complaint also listed an address for the ex-husband that Robl knew was not valid.

- Rule Violated: 1.3(a) (Diligence).

In the Matter of Robert Lee Jenkins, Jr.
VSB Docket No. 24-042-130443
Public Admonition
Agreed Disposition Before Subcommittee
February 9, 2024

- Jenkins qualified his law firm as the executor of an estate. Jenkins attempted to appoint the decedent's son as the attorney-in-fact for the estate and purported to assign all the executor's powers to the son. There was no authority for this, however.

- Jenkins filed the Inventory two months late. The Commissioner of Accounts notified Jenkins of deficiencies with the Inventory, but Jenkins neither responded to the Commissioner nor corrected the deficiencies. Jenkins also failed to timely file a required Affidavit of Notice.

- Jenkins then filed the First Account more than three months late, and only after the Commissioner issued a summons. The First Account also contained deficiencies. Jenkins also failed to timely file the Final Account, resulting in another summons.

- Although the Commissioner asked the court to remove Jenkins's law firm as fiduciary, the firm was not removed and, as of the date of the subcommittee's determination, the issues with the Commissioner were nearly resolved.

In the Matter of Thomas Charles Mason, III
VSB Docket No. 23-032-128934
Public Reprimand
Agreed Disposition Before Subcommittee
January 10, 2024

- In a personal injury case, Mason failed to respond to defense counsel's discovery on time and failed to respond to a follow-up letter seeking the

responses. Mason then failed to file a written opposition to a motion to compel and failed to appear for the motion to compel hearing.

- After his client was ordered to respond to the discovery within 15 days, Mason still did not provide discovery responses by the deadline. Mason responded to the discovery only after defense counsel filed a motion to dismiss for failure to comply with the court's order.

- After Mason did not provide a release that defense counsel requested, defense counsel then filed a second motion to compel. Mason did not appear for the hearing on the second motion to compel either, and it was granted.

- Mason did not file timely expert disclosures for his client. Defense counsel moved to dismiss, but the court extended the deadline for Mason to file the disclosure. An expert Mason disclosed was ultimately excluded.

- Mason attempted to withdraw from the representation, but the court would not allow it. Mason ultimately settled the case and waived his attorney's fee.

- Rules Violated: 1.3(a) (Diligence); 3.4(d-e) (Fairness to Opposing Party and Counsel).

In the Matter of Edward Scott Smalley
VSB Docket No. 23-070-128259
Public Reprimand With Terms
Agreed Disposition Before Subcommittee
March 28, 2024

- In late 2000, Smalley agreed to represent a couple regarding their efforts to consolidate ownership of an historic property. The couple paid Smalley $15,000 to purchase ownership interests from the other owners and $500 as an advanced legal fee.

- Smalley received a quitclaim deed from one of the owners in exchange for $3,000, but he never recorded the deed.

- During an approximately 10-year period, Smalley failed to return his clients' calls and failed to return the remaining $12,500 in his trust account. Smalley also did not maintain the required trust accounting records or perform required reconciliations.

- Respondent did not return the funds held in trust until after a bar complaint was filed.

- Rules Violated: 1.3(a) (Diligence); 1.4(a) (Communication); 1.15(b)(4), (c)(1-2), (d)(3-4) (Safekeeping Property.
- Terms: Read Lawyers and Other People's Money, engage an accountant and provide an accounting.

IV. UNAUTHORIZED PRACTICE OF LAW

In the Matter of Nema Sayadian
VSB Docket No. 23-053-128258
Consent to Revocation
December 27, 2023

- Sayadian, who was not barred in Virginia, maintained an office in Virginia. He was affiliated with a Virginia attorney whose license was suspended.
- When the Virginia lawyer's license was suspended, Sayadian was representing at least eight cases in Virginia matters. Sayadian was not admitted pro hac vice and did not retain substitute local counsel until several months after the original Virginia lawyer's license was suspended.
- Sayadian also signed and filed a summons with the Virginia court.

In the Matter of John Vena, II
VSB Docket No. 22-051-124531
Five-Year Suspension of Privilege to Practice Law in Virginia
Hearing Before Disciplinary Board
May 19, 2023

- Vena, who was licensed to practice law in Connecticut only, appeared in the Fairfax County Circuit Court with a client of his law firm. Vena stood beside the client when the case was called, announced himself as "John Vena on behalf of the Plaintiff," and said he represented the client. The presiding judge determined Vena was not barred in Virginia and filed a bar complaint.
- Vena "repeatedly interrupted other parties and the Board, spoke while other parties were speaking, made rude and disrespectful comments while others were speaking, cursed at one witness, and continuously demonstrated contempt and disrespect for Bar Counsel and the Chair. Although repeatedly warned, the Respondent would not cooperate with requests to maintain decorum and respectful conduct during the hearing."

- Rules Violated: 5.5(c) (Unauthorized Practice of Law); 8.4(b-c) (Misconduct).
- Aggravating Factors: bad faith obstruction of the disciplinary proceeding, deceptive practices during the disciplinary process, refusal to acknowledge the wrongful nature of his conduct, substantial experience in the practice of law.

In the Matter of Denis Charles Englisby
VSB Docket No. 23-032-128726
Three-Year Suspension
Hearing Before Disciplinary Board
January 26, 2024

- Englisby's license to practice law was suspended for two years in November 2022.
- While Englisby's license was suspended, he attempted to collect an allegedly unpaid legal fee owed to Englisby's son, Mark Englisby.
- Although Englisby's original effort to collect the debt occurred just before Mark Englisby's death, Englisby continued to attempt to collect the debt after Mark Englisby died, even though a Receiver had been appointed for Mark Englisby's practice.
- When attempting to collect the debt, Englisby used invoices with the letterhead of "Englisby & Slone" and included remittance envelopes addressed to "Denis C. Englisby, Esq." On one of the communications, Englisby told Mark Englisby's former client that if he did not begin paying the debt, "I will have to sue you in May."
- During the hearing, Englisby claimed that he was operating as a paralegal when he was attempting to collect the alleged debt on his son's behalf.
- Rules Violated: 3.4(j) (Fairness to Opposing Party and Counsel); 5.5(c) (Unauthorized Practice of Law); 8.4(a-c) (Misconduct).
- Aggravating Factors: prior disciplinary record, multiple offenses, seriousness of recent violations, substantial experience, lack of remorse, refusal to acknowledge wrongful nature of conduct.

In the Matter of Patrick Lynn Edwards
VSB Docket No. 23-000-128305
60-Day Suspension

Hearing Before Disciplinary Board
July 14, 2023

- Edwards was suspended for failing to respond to a subpoena *duces tecum* issued by the bar. Edwards was required to comply with the requirements of the Rules of Court, Part 6, § IV, ¶ 13-29, which include notifying his clients, opposing counsel, and judges of his suspension and providing the bar with proof that he had given the required notice.

- Edwards failed to advise certain clients, opposing counsel, and presiding judges of his suspension. He also failed to file proof of compliance with the bar.

- Aggravating factors: prior discipline, bad faith obstruction of the disciplinary proceedings, vulnerability of victim.

- Mitigating factor: absence of dishonest or selfish motive.

Virginia State Bar ex rel Third District, Section III Committee v. Troy Bowlin
VSB Docket No. 22-033-123299
Case No. CL23-005694
Public Reprimand
Agreed Disposition Before Three-Judge Court
February 14, 2024

- Bowlin, who is not admitted in Virginia, was retained to represent a client regarding an alleged sexual assault that took place in a Virginia jail. Bowlin and the client agreed to a 40% contingency fee. The agreement did not disclose that Bowlin was not licensed in Virginia or contemplate local counsel.

- After he was retained, Bowlin said that he tried to reach the client and could not, so he closed the file. However, months later a paralegal at Bowlin's firm successfully communicated with the client regarding a medical release.

- Bowlin provided his client with a form complaint to be filed in federal court. Bowlin said that the "facts you provided were placed on this form at your request. We have not made any legal representations or interpretations and have not charged you any fee for this gratuitous act."

- The client filed the complaint pro se and the defendants moved to dismiss. The client told the court that Bowlin had drafted the complaint. The court

issued a show cause order to Bowlin, but Bowlin was not served and did not appear. Complainant ultimately hired new counsel.

- Rules Violated: 1.3 (a-c) (Diligence); 1.4(a-c), (e) (Communication); 1.5(a) (Fees); 1.15(a)(1), (d) (Declining or Terminating Representation; 5.5(c) (Unauthorized Practice of Law).

V. TERMS VIOLATION

In the Matter of Charles Gregory Phillips
VSB Docket No. 23-000-129036
Consent to Revocation
October 17, 2023

- Pursuant to a prior suspension order, Phillips was required to provide bar counsel with a list of current clients with active matters and to provide written notice of his suspension to all clients, opposing counsel, and presiding judges in pending litigation.
- Phillips did not provide the bar with a list of clients, and two clients notified the bar that Phillips had not notified them of his suspension.
- Phillips consented to imposition of the alternative sanction, which was revocation.

In the Matter of William Hale Thompson
VSB Docket No. 24-000-130322
Six-Month Suspension
Agreed Disposition Before Disciplinary Board
December 11, 2023 (effective January 1, 2024)

- Pursuant to a prior public reprimand with terms, Thompson was required to take six hours of CLE in trust accounting or law office management, and to have an accountant review his recordkeeping and certify compliance with Rule 1.15.
- Thompson did not submit documentation of the CLE.
- Although Thompson engaged an accountant, the accountant determined that Thompson's records were not in compliance.

- Thompson agreed that he failed to comply with the terms of the prior disposition.

VI. CRIMINAL OR DELIBERATELY WRONGFUL CONDUCT

In the Matter of Mark Alan Black
VSB Docket No. 24-000-131157
Consent to Revocation
February 15, 2024

- Black pleaded guilty to conspiracy to produce child pornography and coercion.

In the Matter of Joshua Nathaniel DeBold
VSB Docket No. 24-000-131274
Hearing Before Disciplinary Board
March 22, 2024

- DeBold, a former prosecutor for the Department of Justice, pleaded guilty to attempted assault on a law enforcement officer.

In the Matter of Patrick Lynn Edwards
VSB Docket No. 24-000-130799
Consent to Revocation
February 16, 2024

- Edwards pleaded guilty to burglary, grand larceny, and credit card fraud.

In the Matter of Matt Clay Pinsker
VSB Docket No. 21-033-122719
One-Year Suspension
Hearing Before Disciplinary Board
November 20-21, 2023

- While serving as an adjunct professor at Virginia Commonwealth University, Pinsker provided student internships at his law practice.

- One of his female student interns helped Pinsker move his office and drank alcohol with him. The next morning, the intern woke up alone in a closet in the new office. The intern did not remember having sexual relations with Pinsker, but Pinsker later admitted to police that they did, although he claimed the sex was consensual.

- Pinsker entered an Alford plea to misdemeanor sexual battery and was sentenced to 12 months incarceration.

- Additional evidence revealed that Pinsker had inappropriate sexual conversations with two of his interns, including the intern with whom he had sex.

- At the hearing, Pinsker "continue[d] to maintain that he has been falsely accused, extorted and that he has felt the need for revenge."

- Rule Violated: 8.4(b) (Misconduct).

- Aggravating Factors: selfish motive, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerable victim.

- Mitigating Factors: no prior disciplinary record, only 10 years of experience, served five months of 12-month sentence.

VII. MISCELLANEOUS

In the Matters of Robert Edwin Dean, II
VSB Docket Nos. 23-080-126978, 23-080-128558
Consent to Revocation
July 31, 2023

- Dean met his client's girlfriend's sister (AZ) at a bond hearing. Dean invited AZ to meet him at his office twice, for what AZ believed was a job interview. During the second meeting, Dean offered to provide AZ with gifts and cash in exchange for sexual favors. After AZ declined and left the office, Dean sent her $500 via CashApp. Dean later offered AZ $1,000 for a massage.

- A second matter involved allegations that Dean was engaging in inappropriate sexual relationships with clients.

In the Matter of Kelley Elizabeth Clements Keller
VSB Docket No. 24-000-129579
One-Year and One-Day Suspension
Agreed Disposition Before Disciplinary Board
October 23, 2023

- Reciprocal disciplinary matter from Pennsylvania.

- Regarding her representation of six different clients, Keller stipulated to violating Pennsylvania rules regarding diligence, communication, fees, safekeeping property, terminating representation, unauthorized practice of law, and misconduct. Keller also stipulated to failing to provide proper notice of her administrative suspension and engaging in the unauthorized practice of law.
- Keller agreed to a one-year and one-day suspension in Pennsylvania, and she consented to the imposition of reciprocal discipline in Virginia.

In the Matter of Denise Ann Daniels
VSB Docket No. 24-000-129642
30-Day Suspension
Hearing Before Disciplinary Board
October 27, 2023

- Reciprocal disciplinary matter from District of Columbia Bar, which suspended Daniels for 30 days but required her to prove her fitness to practice before she could be readmitted.
- An attorney-in-fact notified the bar that Daniels was not in a position to contest the discipline. Because Daniels was unable to show cause why the same discipline should not be imposed, the Disciplinary Board imposed reciprocal discipline.

In the Matter of Paul Robert Smollar
VSB Docket No. 22-051-124275
Public Admonition With Terms
Hearing Before District Committee
July 26, 2023

- While representing a client in a custody proceeding, Smollar was served with discovery requests seeking medical records for his client. Smollar asked his client for responsive documents, but the client did not provide them.
- Opposing counsel issued subpoenas *duces tecum* for the medical records. After the subpoenas were issued, the client produced medical records to Smollar, of which Smoller conducted a "cursory and partial review."

- Smollar moved to quash the subpoenas. The court denied the motion, finding that the records were "critical" to the proceedings. Nonetheless, Smollar did not produce them.

- Rule Violated: 3.4(e) (Fairness to Opposing Party and Counsel).

In the Matter of Steven M. Oser
VSB Docket No. 23-010-126950
Public Reprimand
Hearing Before District Committee
September 11, 2023

- While representing a client in a worker's compensation claim against her employer, Oser called a representative of the employer and discussed the merits of the case.

- Oser said he called the client representative directly because he could not get in touch with the client's attorney.

- Rule Violated: 4.2 (Communicating with Persons Represented by Counsel).

In the Matter of John Edward Williams
VSB Docket No. 24-041-129498
Public Reprimand
Agreed Disposition Before Subcommittee
February 20, 2024

- Williams charged a client $1,890 for time spent responding to a bar complaint. Williams filed a lawsuit and obtained a default judgment against the client for a total of $3,906.25, including the $1,890 for responding to the bar complaint.

- In response to a question from Williams, the bar's ethics hotline advised him that it was not appropriate to charge a client for responding to a bar complaint.

- The court granted the client's subsequent motion to set aside the default judgment, and Williams filed a new lawsuit in which he no longer sought to recover for time spent responding to the bar complaint.

- Rule Violated: 1.5(a) (Fees).

[Virginia State Bar ex rel Third District, Section III Committee v. Ernest M. Holleman, Jr.]
VSB Docket No. 23-033-127783
Case No. CL 23-469
Public Reprimand With Terms
Agreed Disposition Before Three-Judge Court
January 23, 2024

- Even though he was not admitted in Arkansas, Holleman charged a client $17,180.90 for basic legal research in connection with an Arkansas estate.

- In his written fee agreement, he purported to charge a contingency fee of 30% of a verdict or settlement, even though there was no possibility of a verdict or settlement in the estate matter.

- Rules Violated: Virginia and Arkansas Rules 1.5(a-c) (Fees); 8.4(b) (Misconduct).

- Terms: Holleman must stop taking new clients, stop all advertising, and take Retired status with the bar. Holleman was also required to refund $17,180.90 to the client.

- Alternate Sanction: revocation.

Recent Developments in Attorney Discipline

Renu Brennan, Bar Counsel

Elizabeth K. Shoenfeld,
Senior Assistant Bar Counsel

Virginia Disciplinary Statistics

Complaints Received:

- 2,979 FY 2024
- 3,046 FY 2023
- 3,115 FY 2022
- 2,924 FY 2021
- 3,091 FY 2020
- 3,123 FY 2019
- 3,156 FY 2018
- 3,304 FY 2017
- 3,162 FY 2016
- 3,346 FY 2015
- 3,546 FY 2014

FY 2024

68.5% were resolved summarily at the initial Intake level after review and evaluation

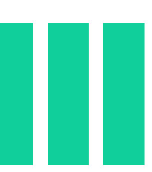
13.5% were resolved through proactive investigations by Intake.

18% were formally opened and assigned to bar counsel for investigation.

Most Common Practice Areas

Complaints Received

- Criminal Defense - 852
- Family Law – 512
- Civil Litigation – 199



Most Common Practice Areas For Discipline Imposed – 138

- Family Law - 45
- Criminal Defense – 20
- Estate Planning – 10
- Personal Injury – 10

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Top Public Rule Violations

Diligence/Communication/Competence

Trust Accounting

Dishonesty

Revocations Based on Criminal Convictions

Patrick Lynn Edwards – Burglary, Grand Larceny, and Credit Card Fraud

Mark Alan Black – Conspiracy to Produce Child Pornography and Coercion

Joshua DeBold – Misdemeanor Domestic Assault and Battery and Felony Attempted Assault of a Law Enforcement Officer

VSB ex rel. Eighth District Committee v. Dale Reese Jensen
Revocation
Eight Cases
Three Judge Panel

Defective Indictment Argument

4/21/16

Jensen filed motion to vacate Philip Ostrander's convictions in Chesapeake Circuit Court. Indictments defective b/c (1) not properly returned in open court or (2) recorded in the records of the Clerk's office.

5/17/16

Chesapeake Circuit Court rejected Jensen's DIA in Ostrander.

5/31/16

The Court of Appeals of Virginia held that defects in indictments are procedural and can be waived.

***Epps v. Commonwealth*, 66 Va. App. 393, 785 S.E.2d 792 (2016)**

6/16/16

Chesapeake Circuit Court denies Jensen's motion to rehear the motion to vacate the Ostrander convictions.

About the same time Jensen filed an appeal with the Supreme Court of Virginia (SCV) on behalf of Ronald Cooke.

6/1/17

SCV affirms *Epps v. Commonwealth*. 293 Va. 403, 799 S.E.2d 516 (2017).

Defective Indictment Argument

6/5/17

Jensen downloaded *Epps v. Commonwealth*. 293 Va. 403, 799 S.E.2d 516 (2017).

8/23/17

SCV, citing *Epps*, refused the Cooke Petition for Appeal.

10/5/17

SCV refused the Ostrander Petition for Appeal.

Jensen filed petitions for writ of certiorari with the Supreme Court of the United States (SCOTUS) seeking review of the SCV decisions refusing the appeals of his DIA argument for both Cooke and Ostrander.

1/8/18

3/5/18

SCOTUS denied the petitions in both Cooke and Ostrander.

3/18 and 4/18

SCOTUS denied petitions for rehearing in both Cooke and Ostrander.

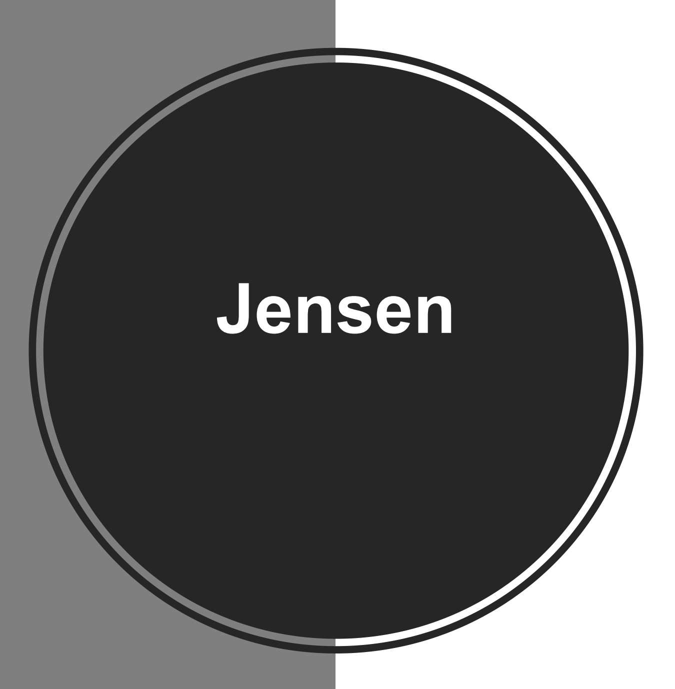
VSB ex rel. Eighth District Committee v. Dale Reese Jensen
Revocation
Eight Cases
Three Judge Panel
April 9, 2020 statement to Flora Skipwith and Michael Robinson

Client: "I know you can't guarantee me anything and it's your job to make money, I know how all this works, but do we have a chance to win this motion? How strong of case do we have? Because for my family 25 k is a substantial amount[.]"

Paralegal: "We would not suggest filing a motion that did not have a chance of going somewhere, and we do not want people to waste their money."

Jensen 2021 Case Summary for Albert

Albert qualifies for a motion to void his sentence as the Circuit Court of Charles City did not properly indict him, and therefore lacks jurisdiction. The Fifth Amendment to the United States Constitution provides in pertinent part: No person shall be held to answer for a capital, or otherwise infamous crime, *unless on a presentment or indictment of a Grand Jury*. The right to a grand jury indictment conferred by the Fifth Amendment to the United States Constitution applies to state indictments via the Fourteenth Amendment. Changes in constitutional law that have occurred since *Hurtado v. California*, 110 U.S. 516, 519 (1884) require this result. *Due to Albert's defective indictments, we recommend that Albert file a motion to void his sentence, and immediately be released from incarceration.* (VSB Ex. D5).



227. A review of the documents filed on E. Fredo's behalf (VSB Ex. F14) reveals the following:

a. less than one (1) page of the 38 total pages filed pertains to E. Fredo's case specifically;

b. the remaining 37 pages are directly copied from pleadings that Respondent previously filed for other clients[7];

c. the copied sections contain many errors, including typographical errors carried over from previous pleadings and details not relevant to E. Fredo's case that were not changed or removed;

d. only one (1) case is cited that was not part of the copied arguments and, thus, could be considered new legal research, and the analysis of that case is one sentence long;[8] and

e. the arguments raised are not those discussed in the case review or other communications with the client. (VSB Exs. F8, F9, and J6 at ¶¶21 and 22)

VSB ex rel. Third District Committee, Section I v. Henry W. McLaughlin
Revocation – Agreed Disposition
Three-Judge Panel
Receivership

Dennis Eugene Pryba II
Barry Taylor
Five-Year Suspensions and then Revocations
Disciplinary Board

Another form of suffering, perhaps more broadly damage inflicted, was pretty touchingly . . . stated by Ms. Rizzo. She's lost faith in the legal system. "What kind of system can let this happen?" That, too, is a form of damage.

VSB ex rel. Sixth District Committee v. Brittani Nata'lita Baldwin

Revocation

Three-Judge Panel

I do want to give you an update, I just called Juan to let him know you will be calling, and he informed me that he called USCIS today and was told that they did not receive an application to renew his DACA. He contacted another organization, because he was not getting a response from us, and was told to call USCIS. He was also told that because his DACA expired over a year ago, he could be in jeopardy of losing his ability to renew. His DACA expired on 07/18/2020.

In the Matter of Astrid Lockwood

Revocation
Disciplinary Board

In the Matters of Christopher Louis Contreras

Consent to Revocation

ENTERED THIS ____ day of ___

JUDITH L. WHEAT
JUDGE

CIRCUIT COUT JUDGE

I ASK FOR THIS:

Christopher L. Contreras, Esq.
Counsel for Plaintiff
The Law Office of Orlando A. Gamarra
313 North Glebe Rd., Suite 200
Arlington, VA 22203
Tel: 703-243-9555
Fax: 703-243-0092
VSB 94175

In the Matter of Nema Sayadian

Consent to Revocation

Lack of Supervision and Safekeeping Property
Five-Year Suspension
Agreed Disposition
Disciplinary Board

In the Matter of Gordon H. Shapiro, VSB Docket Nos. 22-080-124926, 23-080-127546, and 23-080-127937

- Agreed Disposition before Disciplinary Board

In re: Gordon H. Shapiro, Roanoke Circuit Court, Case No.CL23-280

- Receivership Pursuant to Va. Code § 54.1-3936.B

In the Matter of Denis Englisby

Three-Year Suspension

Disciplinary Board

JAMES - WE JUST FOUND YOU.

PLEASE START PAYING AT LEAST 100/MO

STARTING THIS MONTH - MARCH.

OR

WE WILL HAVE TO SUE YOU

FOR $1041 PLUS COURT COSTS

In the Matter of Reginald Robert Yancey One-Year and One-Day Suspension Disciplinary Board

The Board considered and found the following aggravating factors in this case:

(1) Respondent acted with a dishonest or selfish motive when he took fees in excess of what was reported on financial statements and fee disclosures filed with the Bankruptcy Court;

(2) Respondent engaged in a pattern of misconduct by committing the same rule violations involving multiple clients. Respondent committed multiple offenses involving multiple Rule violations over a period of at least two years;

(3) Respondent apologized, but he did not acknowledge the serious and wrongful nature of the misconduct, which was supported by the evidence and to which he has stipulated; and

(4) Respondent's substantial experience in the practice of law, and in particular his specialization in bankruptcy.

Yancey – Mitigation and Other Considerations

In mitigation, the Board considered and found the following mitigating factors:

(1) Respondent's absence of a prior disciplinary record and lack of prior malpractice cases; and

(2) Respondent's willingness to stipulate to substantial facts prior to the hearing and all of the facts and rule violations at the hearing demonstrates a cooperative attitude towards these proceedings.

Additionally, the Board considered but did not give substantial weight to the following:

(1) Respondent's payment of restitution because restitution was paid so long after Respondent promised to provide a refund;

(2) Respondent's agreed settlement in the Adversary Proceeding resulting in his one-year retirement from the Bankruptcy Court in the Western District of Virginia because that sanction was not sufficient to meet the wrongfulness of his admitted conduct and did not take the violations related to the First Six Clients and the Second Six Clients into consideration; and

(3) Respondent's demonstration of remorse because he was unwilling to acknowledge the wrongfulness of his actions when provided the opportunity to do so by Bar Counsel.

Finally, the Board considered Respondent's proffer that he would pursue a medical retirement.

4. On or about August 8, 2022, B&M offered Respondent a full-time salaried position. Respondent accepted and began employment on September 12, 2022.

5. Notwithstanding her acceptance of the position with B&M, Respondent accepted an attorney position at FR&R in late August 2022 with a start date of September 6, 2022. Respondent's pay was commission-based.

In the Matter of Chandra Harris Snyder
One-Year and One-Day Suspension
Agreed Disposition
Disciplinary Board

In the Matters of Duncan Brent

One-Year and One-Day Suspension With Terms followed by Three-Year Suspension

May 17, 2021 Grand Jury

The Grand Jury charges that, in the County of Henrico,

an adult female

MATTHEW CLAY PINSKER by force threat or intimidation

on or about February 5, 2021, ~~feloniously~~ did sexually abuse K.B., ~~through the use of the complaining witness's mental incapacity or physical helplessness~~, in violation of §18.2-~~67.3~~ 67.4 of the Code of Virginia.

Witness sworn and sent by the Court to the Grand Jury to give evidence.

D. E. Stone - 730
Henrico Police Department 210209176

(✓) **A True Bill**
( ) **Not a True Bill**

6-6-2022 amended to sexual battery, a class 1 misdemeanor

EHC

In the Matter of Matt Clay Pinsker
One-Year Suspension

In the Matters of Eppa Hunton, VI
One-Year Suspension with Terms
Agreed Disposition
Disciplinary Board

VSB ex rel. Third District Committee Section III v. Arnold Reginald Henderson
One-Year Suspension
Three-Judge Panel

In the Matter of Jibran Muhammad
Six-Month Suspension with Terms
Agreed Disposition
Disciplinary Board

In the Matter of Melissa D. Johnson
Public Reprimand with Terms
Sixth District Subcommittee
Agreed Disposition

I'm going to see to it that you are for a fact rot in prison next to all your lying conniving buddies with the police and court. Your a coward, a witch, a snake, and SUCCUBUS DEVIL. I pray you repent and turn in your law degree because people like you...women like you DON'T DESERVE IT. You know for a fact you retained me. I can't prove it but you and I both know the copy of that retainer was indeed stolen from my apartment. I pray for your sake that I'm never able to prove it. Go slide back under whatever filthy rock you and yours came from and go to hell. Do not ever contact me or go anywhere near anyone I know or love.

In the Matter of Ashkira Mohamud
Public Reprimand With Terms
Disciplinary Board

VSB ex rel. Third District Committee, Section III v. Ernest M. Holleman, Jr. Public Reprimand with Terms Agreed Disposition Three-Judge Panel

Mishandling of Appeals

In the Matter of Marlene A. Harris – Criminal Appeals
One-Year Suspension with Terms
Disciplinary Board

In the Matter of Bradley Pollack –Termination of Parental Rights
Nine-Month Suspension
Agreed Disposition
Three-Judge Panel

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Resources for Criminal Appeals

- Rules at Issue: 1.1 (Competence); 1.2 (Scope of Representation); 1.3 (Diligence); 1.4 (Communication) Sometimes at issue: Rules 1.7 (Conflict of Interest); 1.16 (Duty to Withdraw)
- Legal Ethics Opinions 1817 and 1880
- Virginia CLE
- Virginia Indigent Defense Commission
- Bar Counsel Column by Catherine French Zagurskie

Reciprocal Discipline – Disciplinary Board

In the Matter of Kelley Elizabeth Clements Keller

- One Year and One Day Suspension based on Pennsylvania Suspension

In the Matter of John Kedrich Evans, III

- One Year Suspension based on District of Columbia Suspension

In the Matter of Francis H. Koh

Six-Month Suspension based on the United States Patent and Trademark Office Suspension

In the Matter of Denise Ann Daniels

Thirty-Day Suspension based on District of Columbia Suspension

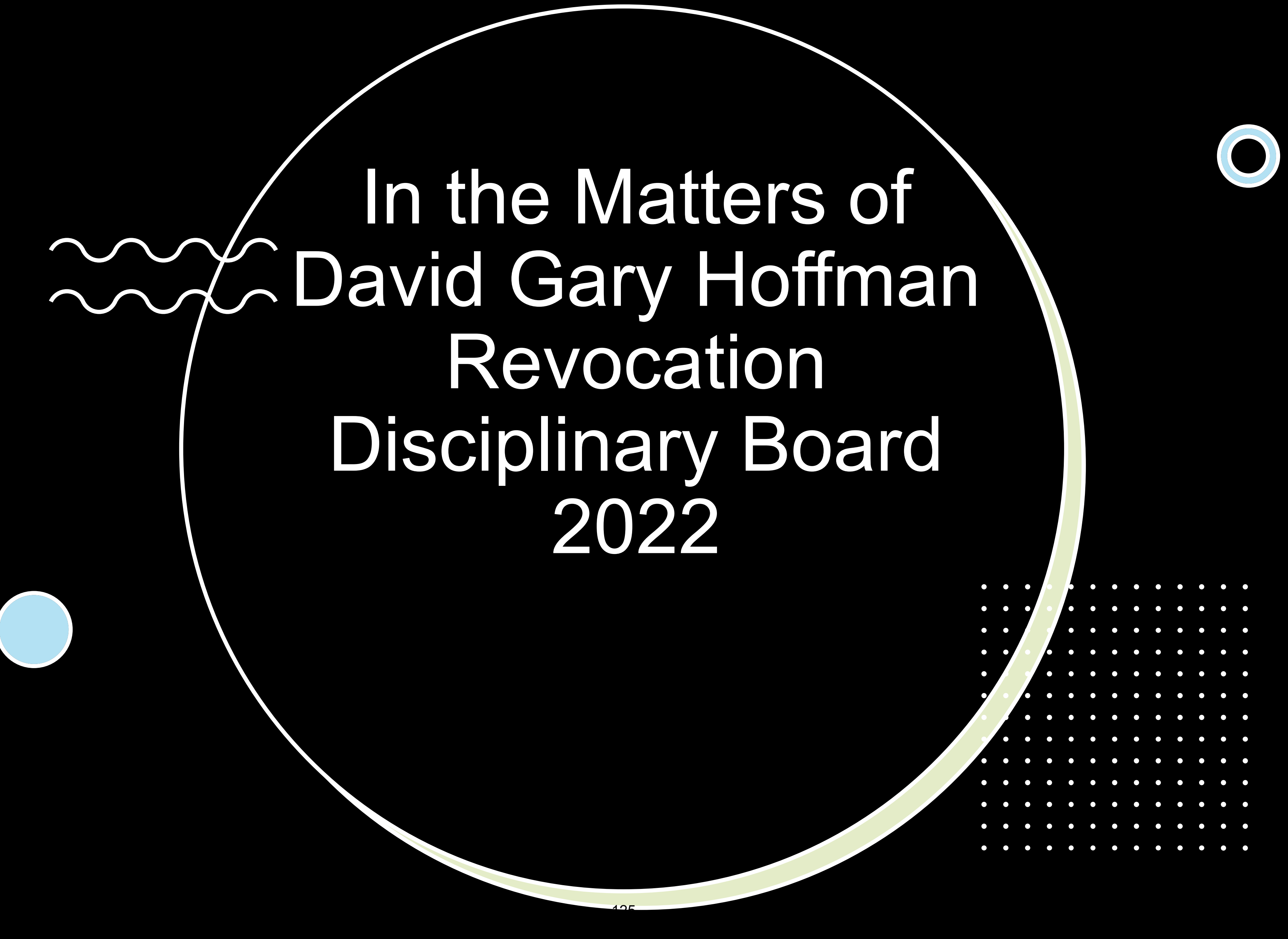
Clients Protection Fund

Monetary awards to persons who suffer **financial losses** due to **dishonest conduct** of Virginia lawyers

Covers lawyers who are **suspended** or **revoked** for disciplinary reasons OR **deceased** without sufficient resources to make petitioners whole.

Maximum payment: $75,000 per petitioner

Managed by **14-member board** of volunteers that investigates and decides all claims.


In the Matters of
David Gary Hoffman
Revocation
Disciplinary Board
2022

Thank you!

Your interest in these cases and collective, meaningful participation is critical to effective self-regulation.

2024 DEVELOPMENTS IN VIRGINIA TAXATION

Last Updated
July 18, 2024

A Summary Review of Tax Legislation, Court Decisions, Opinions of the Attorney General and Published Rulings of the Tax Commissioner

Stephanie Anne Lipinski Galland
Miles Stockbridge

Kyle Wingfield
Williams Mullen

This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with questions on specific issues should retain the services of competent counsel. For more information, please contact the author.

I. <u>CORPORATE INCOME TAXES</u>

A. 2024 Legislation

1. <u>Registration</u>. Item 258 (U)(3) of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) requires that businesses registering with the Department of Taxation on or after July 1, 2024 file Virginia Form R-1 electronically.

B. Court Decisions:

1. *<u>Commonwealth v. 1887 Holdings, Inc.</u>*, 77 Va. App. 653, 887 S.E.2d 176 (Ct. App. 2023). The taxpayer, 1887 Holdings, Inc., f/k/a C.F. Sauer Company, is a Virginia corporation. The Department of Taxation audited the taxpayer's 2014 and 2015 corporate income tax returns. During the audit, the taxpayer advised the Department that it wished to elect the manufacturer's apportionment method permitted by Va. Code § 58.1-422. The Department denied the taxpayer's request taking the position that a corporation cannot make such an election in an amended return. The taxpayer filed an administrative appeal with the Department, which was denied. The taxpayer then filed suit in circuit court, which granted summary judgment in favor of the taxpayer. The Department then filed an appeal with the Virginia Court of Appeals. The Court of Appeals noted that Va. Code § 58.1-422 does not require that the manufacturer's apportion method be made on or before the due date for filing the original return. Furthermore, the Court of Appeals held that the statute "does not prevent a taxpayer . . . from electing to use the manufacturer's apportionment method in a timely amended return." Because the statute was unambiguous, the Department's interpretation was afforded no weight. The Court of Appeals also found that the Department's Guidelines were afforded no weight because they do not have the force and effect of a regulation and therefore, do not control the court's analysis. See also PD 23-75 (May 23, 2023).

C. Docketed Court Cases

1. *Kohl's Department Stores, Inc. v. Virginia Department of Taxation*, Case No. CL17003275-00 (Richmond Cir. Ct. July 14, 2017).

2. *R.J. Reynolds Tobacco Company v. Virginia Department of Taxation*, Case No.CL13000509-00 (Danville Cir. Ct. July 22, 2013).

3. *Commonwealth of Virginia, Department of Taxation v. FJ Management Inc., d/b/a FJI, Inc.*, No. 0701-23-2 (Va. Ct. App. April 26, 2023).

II. PASS-THROUGH ENTITY TAXES

A. 2024 Legislation

1. None.

B. Court Decisions: None

C. Administrative Rulings

1. Pass-Through Entity Tax – Trust Beneficiaries. An irrevocable business trust (Trust) owned an interest other pass-through entities (PTEs). The Trust requested a ruling that PTET credits passed through by the PTEs after making an election to be taxed at the entity level under Va. Code § 58.1-390.3 to the Trust beneficiaries. The Tax Commissioner ruled that only an "eligible owner" is entitled to claim the PTET credits. Va. Code § 58.1-390 provides that an "eligible owner" is a direct owner of a PTE who is a natural person, estate, or trust. Based on these rules, the Tax Commissioner ruled that while the Trust was an eligible / direct owner of the PTE and could use the PTET credits its tax liability, the credits could not be passed through to the Trust beneficiaries because they were indirect owners. P.D. 24-13 (March 12, 2024).

D. Administrative Guidelines:

1. Pass-Through Entity Tax (2022 and After). The Department issued guidelines addressing how to make a pass-through entity tax election for taxable year 2022 and after. P.D. 24-1 (Jan. 4, 2024).

2. Pass-Through Entity Tax (2021). The Department issued guidelines addressing how to make the pass-through entity tax election for taxable year 2021, file the taxable year 2021 return, and claim a retroactive credit. P.D. 24-12 (Feb. 19, 2024).

III. INDIVIDUAL INCOME TAXES

A. 2024 Legislation: See Credits, Section IV (Below)

B. Court Decisions: None

C. Docketed Court Cases: None

D. Administrative Rulings:

1. Change of Domicile. The following rulings deal with who is an actual or domiciliary resident for Virginia individual income tax purposes: P.D. 24-7 (February 28, 2024); P.D. 24-11 (February 24, 2024); P.D. 24-15 (March 12, 2024); P.D. 24-17 (March 13, 2024); P.D. 24-21 (March 13, 2024); P.D. 24-24 (March 12, 2024); P.D. 24-30 (March 21, 2024).

2. Statute of Limitations for Outstanding Taxes. A decedent did not file individual income tax returns for 1997, 1998, 1999, 2000, 2006, 2007, 2010 and 2011. As a result, the Department issued assessments. The Decedent died in 2021. The decedent's estate (the taxpayer) sought a ruling that the assessments were not collectable because the 7-year statute of limitations (SOL) had expired, no liens had been filed, or other legal action take that may extend the SOL. On appeal, the Tax Commissioner briefly recited the history of Va. Code § 58.1-1802.1, noting that until 1990, there was no limit on the Department's ability to collect assessments. In 1990, legislation was passed that required the Department to institute collection action within 20 years from the date of assessment. In 2010, this period was reduced from 20 years to 10 years, and in 2012, it was reduced to 7 years. In 2016, legislation was enacted that required the Department to cease all collection efforts, even if a collection action was taken during the prescribed period. In this case, the Tax Commissioner found that with respect to tax years 1997 through 2006, the Department had made a collection effort within the 20-year period. Such efforts included a consolidated bill, liens, and Treasury Offset letters. Similar efforts were made with respect to the 2010 and 2011 tax years. The Department also concluded that the 2007 assessment was valid on other grounds (a new assessment was issued in 2010 within the SOL and because the taxpayer had never filed a return, it was deemed valid). P.D. 24-9 (Feb. 28, 2024); see also P.D. 24-23 (March 12, 2024).

3. Nonresident – Credit for Tax Paid to Another State. During 2021, an individual taxpayer was a Virginia resident until he moved to California in November. The taxpayer filed a 2021 part-year Virginia resident return and a 2021 California part-year resident return. On his Virginia return, he claimed a credit for income tax paid to California. The Department disallowed the credit, and the taxpayer appealed. The Tax Commissioner ruled that the taxpayer was not eligible to claim a credit on his part-year Virginia return for any tax paid to California on income that was earned after his Virginia residency end date in November 2021. Also, the taxpayer was not eligible to claim a credit for any tax paid to California on California source income the taxpayer earned while he was a resident of Virginia. Instead, the taxpayer should have claimed a credit on his California return for any tax paid to Virginia on such income. P.D. 24-19 (March 13, 2024).

4. Part-Year Resident: Credit for Taxes Paid to Another State. PD 23-107 (October 5, 2023). The taxpayers, a husband and wife, filed a part-year Virginia resident income tax return for 2020 claiming both a credit for taxes

paid to Maryland and a subtraction for income attributable to their period of residence outside of Virginia. The Department denied the credit and subtraction. Because their Maryland return showed that they had requested a refund of all Maryland income taxes withheld, the auditor concluded that the taxpayers should not have allocated any income to Maryland. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-103, any individual who becomes a resident of Virginia during a taxable year can only be taxed on that portion of the year in which the person was a resident of Virginia. Thus, while the Tax Commissioner respected the allocation, he ruled that no credit was available for the following reasons: (1) Va. Code § 58.1-332 allows a credit for taxes paid to another state, and because the taxpayer's Maryland return indicated no income tax liability, they were not entitled to a credit in Virginia; (2) Va. Code § 58.1-332 prohibits a part-year resident from claiming a credit against their Virginia tax liability for taxes paid to another state; and (3) under Virginia's reciprocity agreement with Maryland, withholding should have been made in Maryland, but in any event, no credit would be permitted for the reasons stated above.

5. Taxes Paid to Another State. PD 23-69 (June 7, 2023). The Taxpayers, a husband and wife, were Virginia residents, and the husband was a shareholder in a Subchapter S Corporation that paid corporate franchise tax to New York and corporate excise tax to Tennessee for the 2020 and 2021 taxable years. The S Corporation did not make the election under Virginia Code § 58.1-390.3 to be taxed at the entity level. The Taxpayers claimed a credit for payment of their proportionate share of the taxes on each of their 2020 and 2021 Virginia individual income tax returns. The Department denied the credits. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-332(A), Virginia residents may claim a credit on their Virginia return for income taxes paid to another state. In this case, the Tax Commission ruled that the taxes paid to New York and Tennessee were not "income taxes" and therefore, no credit would be permitted in Virginia.

6. Gambling Losses. The taxpayer claimed gambling loss and mortgage interest deductions on her Virginia individual income tax returns for 2020 and 2021. When the taxpayer could not provide supporting documentation, the Department disallowed the deductions and applied the standard deduction. The taxpayer appealed. The Tax Commissioner noted that while casinos are required to issue federal Form W-2G to report gambling winnings, they are not required to keep track of gambling losses. The Tax Commissioner then cited authority providing that gambling losses may be substantiated through casino ATM receipts, cancelled checks, and credit statements. The Tax Commissioner ordered the case to be returned to the audit staff to make the necessary adjustments. (P.D. 24-20 March 13, 2024).

7. Death of Spouse, Pandemic, and Medical Issues. The taxpayers, a husband and wife, filed an amended return for tax year 2017 in 2021, requesting a

credit for an overpayment of taxes, which the Department disallowed. The wife appealed, contending that her husband's death, the COVID-19 pandemic, and her medical issues contributed to the late filing of the return. The Tax Commissioner noted that under Va. Code § 58.1-499(A), an application for refund must be made within three (3) years from the last day by law for timely filing the return. Going through the taxpayer's reasons fir filing late, the Tax Commissioner ruled as follows: (i) as to the husband's death, Va. Code § 58.1-341(E) requires that the return must be timely filed by the taxpayer's executor, administrator, or other fiduciary; (ii) COVID-19 occurred in 2020, long after the 2017 return was due; and (iii) pursuant to Va. Code § 58.1-341(F), an individual who is unable to make a return because of a disability has the responsibility of having such return filed by a fiduciary or duly authorized agent. P.D. 24-22 (March 13, 2024).

8. Federal Determination of Non-Collectability. The Department assessed an individual taxpayer for unpaid tax, penalties, and interest for the taxable years at issue. The taxpayer contends that because the Internal Revenue Service determined that his federal income tax debt is uncollectible, the Department must cease its collections actions. Va. Code § 58.1-301 provides, with certain exceptions, that terminology and references used in Title 58.1 of the Code of Virginia will have the same meaning as provided in the IRC unless a different meaning is clearly required. The Tax Commissioner found that conformity does not mean that every provision of the IRC is imported directly into Virginia law. Procedural matters such as the collection of unpaid taxes are not in conformity with the IRC because Title 58.1 of the Code of Virginia has specific statutes setting forth the collection procedures for delinquent taxes administered by the Department. For these reasons, the Tax Commissioner denied the taxpayer's request. P.D. 24-32 (March 21, 2024).

9. Charitable Deductions. PD 23-114 (October 19, 2023). The Department requested documentation to support charitable deductions and business expenses claimed by a taxpayer on his federal income taxes. No response was received by the taxpayer, so the Department issued an assessment. The taxpayer appealed. The Tax Commissioner noted that while Virginia generally conforms to the terminology and references in the Internal Revenue Code (the "IRC"), the Department is authorized under Va. Code § 58.1-219 to look behind the computations reported on a federal return and make appropriate adjustments. The Tax Commissioner gave the taxpayer an additional 30 days to provide documentation that would support his deductions.

IV. INCOME TAX CREDITS

A. 2024 Legislation

1. Sunset Dates for Income Tax Credits and Sales and Use Tax Exemptions. Item 3-5.13 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) prohibits the General Assembly from advancing the sunset date on any existing sales tax exemption or tax credit beyond June 30, 2030. Any new sales tax exemption or tax credit enacted by the General Assembly after the 2019 regular legislative session, but prior to the 2029 regular legislative session, must have a sunset date of not later than June 30, 2030. Under prior law, such sunset dates were to be set no later than June 30, 2025. The requirement excludes tax exemptions for non-profit entities, tax credits or exemptions with sunset dates after June 30, 2022, as enacted or advanced during the 2016 regular legislative session, the Virginia Housing Opportunity Tax Credit, and the Motion Picture Production Tax Credit. This legislation became effective July 1, 2024.

2. Research & Development Credits. House Bill 1518 amends Va. Code § 58.1-439.12:08 by reducing the annual aggregate tax credit cap for the Major Research and Development Expense Tax Credit by $8 million (from $24 million to $16 million) and increasing the annual aggregate tax credit cap for the Research and Development Expenses Tax Credit by this same amount (from $7.77 million to $15.77 million). The bill also introduces both a step-rate structure and a per taxpayer annual credit cap to the Major Research and Development Expenses Tax Credit. The legislation is effective for tax years beginning on or after January 1, 2023.

3. Land Preservation Tax Credit – Tax Credit Cap. Item 3-5.22 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) imposes a $20,000 limitation on the amount of Land Preservation Tax Credits. Beginning on and after January 1, 2024, the amount of the Land Preservation Tax Credit that may be claimed by each taxpayer, including amounts carried over from prior taxable years, shall not exceed $20,000. Because items contained in an appropriation act generally supersede conflicting provisions in the Code of Virginia, the Act's $20,000 annual per taxpayer limitation supersedes the $50,000 limitation specified in Va. Code § 58.1-512. For taxable years 2017 through 2022, the credit continues to be subject to an annual per taxpayer limitation of $20,000, and for taxable year 2023, it is subject to an annual per taxpayer limitation of $50,000.

4. Historic Rehabilitation. House Bill 960 and Senate Bill 556 amend Va. Code § 58.1-339.2 to increases from $5 million to $7.5 million, beginning in taxable year 2025, the maximum amount of the historic rehabilitation tax credit, including amounts carried over from prior taxable years, that may be

claimed by a taxpayer in any taxable year. The legislation is effective for tax years beginning on an after January 1, 2025.

5. Communities of Opportunity Tax Credit: The Communities of Opportunity Tax Credit provides a tax credit to landlords with qualified housing units located in all census tracts located in Virginia with poverty rates of less than 10%. The credit is 10% of the fair market value of the rent for the unit, computed for that portion of the taxable year in which the unit was rented by such landlord to a tenant participating in a housing choice voucher program. House Bill 1203 amends Va. Code § 58.1-439.12:04 by extending the sunset date of the tax credit from January 1, 2025 to January 1, 2026 and increasing the maximum amount of tax credits that may be issued from $250,000 to $500,000 each fiscal year beginning on and after July 1, 2024. This legislation is effective for taxable years beginning on or after January 1, 2024.

6. Firearm Safety Device Tax Credit. House Bill 35 amends § 58.1-339.14 by expanding the definition of "firearm safety device" as it relates to the firearm safety device tax credit to include any device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device. The legislation is effective for taxable years beginning on and after January 1, 2024.

7. Agricultural Best Management Practices Credit. House Bill 1015 and Senate Bill 297 amend Va. Code §§ 58.1-337, 58.1-339.3, 58.1-436, and 58.1-439.5 by extending from January 1, 2025, to January 1, 2030, the sunset date of the individual and corporate agricultural best management practices income tax credit and extends from January 1, 2026, to January 1, 2030, the sunset date of the individual and corporate income tax credit for the purchase of conservation tillage and precision agricultural application equipment. This legislation is effective for taxable years beginning on and after January 1, 2025 and before January 1, 2030.

8. Conservation Tillage and Precision Agricultural Application Equipment. SB 298 amended Va. Code §§ 58.1-337 and 58.1-436 by extending the sunset date of the individual and corporate tax credit for purchase of conservation tillage and precision agricultural application equipment from January 1, 2026, to January 1, 2030. The legislation became effective July 1, 2024.

9. Education Improvement Scholarship Tax Credits. The second enactment of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) extends the sunset date of certain disability-related provisions of the Education Improvement Scholarships Tax Credit program from January 1, 2024 to January 1, 2028. This includes the following provisions:

- An increase in the aggregate amount of scholarships that may be provided by all eligible scholarship foundations to an eligible student with a disability for any single school year from 100 percent to 300 percent of the per pupil amount;

- A broadening of the definition of "eligible student with a disability" to include any child who is a resident of Virginia for whom an Individualized Education Plan has been written and finalized in accordance with the federal Individuals with Disabilities Education Act;

- A removal of the requirement that "eligible students with a disability" meet the articles definition of "student" and that the household income of such students is required to be in excess of 400 percent of the current poverty guidelines; and

- A requirement that an eligible student with a disability may only receive the increased amount of scholarship funds if they attend a school for students with disabilities that meets certain specified criteria.

10. Neighborhood Assistance Act Tax Credit. Item 3-5.18 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) provides that the Neighborhood Assistance Act Tax Credit available under § 58.1-439.18 et seq., Code of Virginia, shall be limited to $20 million allocated as follows: $12.0 million for education proposals for approval by the Superintendent of Public Instruction and $8.0 million for all other proposals for approval by the Commissioner of the State Department of Social Services. The legislation also sets forth certain requirements to be eligible for the credit.

B. Court Decisions: None

C. Docketed Court Cases: None

D. Administrative Rulings: None

V. RETAIL SALES & USE TAXES

A. 2024 Legislation

1. Sales and Use Tax Holiday. House Bill 25 and Senate Bill 116 create and amend Va. Code 58.1-639.1 by extending the sunset date applicable to the annual three-day retail sales and use tax holiday for school supplies, clothing and footwear, Energy Star or WaterSense products, portable generators, and hurricane preparedness equipment from July 1, 2025 to July 1, 2030. This legislation became effective July 1, 2024.

2. Erroneously Collected and Remitted Sales Taxes. House Bill 1508 and Senate Bill 709 amend Va. Code § 58.1-1812 by providing that upon application of a taxpayer, any retail sales tax payment erroneously remitted by the taxpayer to the Department of Taxation shall be applied to the taxpayer's delinquent use tax accounts. The taxpayer must provide evidence of the erroneous sales tax collected and remitted in each transaction. The provisions of this bill do not apply in the case of (i) the taxpayer already applying for and receiving the relief described in this bill or (ii) a false or fraudulent action by the taxpayer with the intention of evading the payment of the tax. The legislation also provides that no taxpayer will be entitled to a refund of any retail sales tax payments erroneously remitted unless or until the taxpayer can affirmatively show that the tax has since been refunded to the purchaser or credited to such purchaser's account. The legislation became effective July 1, 2024.

3. Exemption for Non-Profit Entities. House Bill 464 amends Va. Code § 58.1-609.11 by increasing from $1 million to $1.5 million the minimum threshold for gross revenue of a nonprofit entity that allows the Department of Taxation to require such entity to provide a financial audit before receiving a federal income tax exemption. The legislation became effective July 1, 2024.

4. Exemption for Certain Drilling Equipment – Extension of Sunset Date. Item § 3-5.23 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) extends the retail sales and use tax exemption provided in Va. Code § 58.1-609.3 for raw materials, fuel, power, energy, supplies, machinery or tools or repair parts therefor or replacements thereof, used directly in the drilling, extraction, or processing of natural gas or oil and the reclamation of the well area from July 1, 2024 to July 1, 2025. This legislation became effective July 1, 2024.

5. Exemption for Federally Funded Research and Development Centers. Item 3-5.11 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) . provides that notwithstanding any other provision of law, beginning July 1, 2018, tangible personal property purchased by a federally

funded research and development center sponsored by the U.S. Department of Energy shall be exempt from the retail sales and use tax. However, taxpayers are not relieved of any liability for retail sales and use tax due for the purchase of tangible personal property pursuant to the law in effect at the time of the purchase.

6. Entitlement to Certain Sales Tax Revenues. Item §3-5.24 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) clarifies that the revenue a municipality is entitled to under Virginia's public facility entitlement program (Va. Code § 58.1-608.3) is limited to the revenue generated by the 2.025% unrestricted sales and use tax under the Virginia Retail Sales and Use Tax Act. This legislation became effective July 1, 2024.

B. Court Decisions: None

C. Administrative Rulings

1. Required Taxpayer Records. The taxpayer operated a restaurant and bar in Virginia and was audited for sales and use taxes by the Department of Taxation. The taxpayer's records did not demonstrate if sales tax had been paid or use tax accrued and remitted to the Department. Citing Va. Code §§ 58.1-102, 58.1-103, and 58.1-633, the Tax Commissioner held that it was the taxpayer's duty to keep suitable records and documentation for three (3) years substantiating all information reported on its tax return. In the absence of that, the Department was entitled to determine the taxpayer's liability using the best available information. Accordingly, the Tax Commissioner upheld the assessment against the taxpayer. P.D. 24-2 (Feb. 21, 2024).

2. Failure to Establish a Refund Claim. The taxpayer, a regional provider of telecommunication services in Virginia and wholly owned subsidiary of its parent, filed a refund claim for the taxable period at issue asserting it erroneously accrued and paid tax on exempt internet equipment. Along with its claim, a spreadsheet was submitted with purchase orders and transaction data associated with each transaction. A use tax reconciliation was also provided to show that use tax was remitted on each transaction. The taxpayer also purchased equipment from the Parent and invoices were not issued because the transactions were between related entities. On appeal, the Tax Commissioner cited Va. Code § 58.1-602 and various administrative rulings in holding that intercompany transfers between related entities is considered a sale. Noting that tax assessments are deemed prima facie correct under Va. Code § 58.1-205, the Tax Commissioner gave the taxpayer 30 days to provide additional information showing proof of payments for the transactions. P.D. 24-4 (Feb. 21, 2024).

3. True Object – Services Provided with Portable Toilets. The taxpayer provided portable toilet rentals and related services. Under audit, the Department found numerous errors, including that the taxpayer did not charge, collect, or remit tax on service charges related to the rental of tangible personal property. The Department issued an assessment for the unpaid tax and interest. The Taxpayer appealed, alleging that services are not subject to tax when itemized separately from any tangible personal property. Citing the Virginia Supreme Court's decision in *LZM Inc. v. Department*, 296 Va. 105 (2005), the Tax Commissioner ruled that it has been the Department's longstanding policy to treat the lease or rental of portable toilets as a taxable transaction because the "true object" of a portable toilet operation is the provision of tangible personal property. Accordingly, the Tax Commissioner upheld the assessment. P.D. 24-5 (Feb. 21, 2024).

4. Exemption – Medicine and Drugs. The taxpayer, an operator of medical diagnostic laboratories in Virginia, timely submitted a refund request for the period at issue. The auditor denied the refund credit for tax accrued on reagents used in testing human blood, urine, and other bodily specimens on the basis that they did not qualify for the medicines and drugs exemption. On appeal, the Tax Commissioner noted that Va. Code § 58.1-609.10(9) provides an exemption from sales and use taxes for "medicines and drugs purchased for use and consumption by a licensed hospital, nursing home, clinic or similar corporation." Although the Tax Commissioner found that the reagents were "medicine and drugs," he ruled that the taxpayer's operations were not a "similar corporation" to those provided under the statute. P.D. 24-6 (Feb. 28, 2024).

5. Manufacturing Exemption. PD 23-26 (March 15, 2023). The taxpayer was an industrial manufacturer. Following an audit, the Department found that several purchases and fixed assets were taxable because the taxpayer could not show that tax and been properly charged and paid. On appeal, the taxpayer argued that the purchases and assets were not subject to retail sales and use tax because they qualified for the manufacturing exemption under Va. Code § 58.1-609.3. After examining each of the items under appeal, the Tax Commissioner determined that they did not qualify for the manufacturing exemption under Va. Code § 58.1-609.3 or 23 Va. Admin. Code § 10-210-920.

6. Medicines and Drugs Exemption. PD 23-22 (March 1, 2023). The taxpayer, an operator of medical diagnostic laboratories, was denied a refund during an audit by the Department on certain reagents used in its facilities in Virginia. Va. Code § 58.1-609.10(9) provides an exemption for "medicines and drugs purchased for use or consumption by a licensed hospital, nursing home, clinic, or similar corporation." The Tax Commissioner ruled that the taxpayer did not qualify for this exemption

because it provided diagnostic testing in a laboratory setting and does not provide direct medical treatment and care to individuals on an inpatient or outpatient basis.

7. Additional Information Provided in Appeal. PD 23-20 (March 1, 2023). The taxpayer, an operator of gas stations in Virginia, was audited for the periods at issue relating to sales and use taxes on cigarettes. During the appeal, the taxpayer provided additional information showing that the exceptions identified by the auditor may have been overstated and that sales taxes may have been paid on some of its inventory. The Tax Commissioner returned the audit to the field audit staff for revision.

8. No Adjustments to Audit. PD 23-18 (February 21, 2023). The Tax Commissioner ruled that the taxpayer, a seller and installer of HVAC units and fireplaces, was required to remit all sales taxes it erroneously collected from its customers on its installation jobs to the Department unless it refunded the taxes to its customer. Second, the Tax Commissioner ruled that the taxpayer should have collected and remitted sales taxes on sales of tangible personal property to customers without installation. Third, the Tax Commissioner ruled that because the taxpayer had not provided any evidence that it had already paid sales or use taxes on tangible personal property used in installation jobs, no adjustment would apply to those items.

9. Taxes Erroneously Paid to Another State. PD 23-17 (February 21, 2023). The taxpayer, a physician's office with two locations in Virginia, was audited for the period at issue. During an audit, the Department found that the taxpayer had erroneously paid sales taxes to another state on asset purchases that were taxable in Virginia. The taxpayer appealed. 23 Va. Admin. Code § 10-210-450 allows a credit for sales and use taxes paid elsewhere, but the credit does not apply to taxes erroneously charge or incorrectly paid to another state. Therefore, the Tax Commissioner ruled that no relief could be granted to the taxpayer. The taxpayer must apply to the out-of-state seller for a refund.

10. Credit Card Fees. PD 23-16 (February 21, 2023). The taxpayer, a dealer that sells plumbing supplies, was audited for the periods at issue. During an audit, the Department determined that the taxpayer was liable for sales tax on credit card fees charged to customers in connection with the sale of tangible personal property. On appeal, the Tax Commissioner ruled that pursuant to Va. Code § 58.1-603, any charge in connection with the sale of tangible personal property is subject to tax unless it is specifically exempt. Accordingly, the Tax Commissioner offered no relief to the taxpayer.

11. Sales Price / Rental of Tangible Personal Property. PD 23-9 (January 18, 2023). The taxpayer rented party inflatables, table games, and other entertainment items to customers in Virginia. The Department audited the

taxpayer and assessed tax on transactions where inflatables were rented, and no tax was collected. The taxpayer contended the items should not be taxable, as they were rentals with an operator or attendant and many rentals were made to churches. The Tax Commissioner noted that under Va. Admin. Code § 10-210-4040, the true object of the rental was the rental of tangible personal property. "The attendant did not utilize specific skills required to maintain safety and control over the games." In addition, the rentals did not fall under the specific list of exemptions available to churches provided on Form ST-13A.

12. Exemption for Non-Profit Organizations. PD 23-38 (April 12, 2023). The taxpayer, a 501(c)(3) organization, plans to operate a "donate what you can" restaurant in Virginia and requested a ruling on its sales tax liability. Meals will be offered to customers, who are asked to either make a monetary donation or volunteer their time as payment. The Tax Commissioner noted that prepared food and meals are tangible personal property and thus generally subject to retail sales and use tax. In general, no exemptions applied. Because the taxpayer must charge tax on the sales price of any non-exempt sales, the Tax Commissioner stated that it must have a method of accounting that separates the sales price from any donation received. If the taxpayer does have a method of accounting to separate payments made in one lump sum, the entire amount is taxable.

13. Exemption Certificates. PD 23-40 (April 12, 2023). The taxpayer, a producer of corrugated packaging in Virginia, was audited for the period at issue. The taxpayer appealed the assessment, contending that sales made to two customers were exempt because it had a valid exemption certificate on file for both sales. On appeal, the Tax Commissioner observed that under 23 Va. Admin. Code § 10-210-280, a certificate that is incomplete is subject to greater scrutiny and will only be accepted if the Department can confirm that the customer's use of the certificate was valid and proper. The exemption certificate provided by Customer #1 was incomplete. The certificate provided by Customer #2 was not presented to the auditor during the audit and therefore, was subject to greater scrutiny. In both cases, because he could not ascertain whether the customers' use of the certificate was proper, the Tax Commissioner ruled that they must remain in the audit. *See also* PD 23-41 (April 12, 2023).

14. Exemption Certificates Provided During Audit. PD 23-68 (June 1, 2023). The taxpayer provided 353 exemption certificates and corrected ST-10Cs during the audit, but the auditor refused to review the documentation. On appeal, the Tax Commissioner noted that the Department more closely scrutinizes exemption certificates received during an audit receive than at the time of sale. The Department's inquiry in such instances is to review the customer's registration and filing history to see if it can reasonably conclude whether the purchases made by the customer would be exempt

sales for resale. As no review was done by the Department, the Tax Commissioner returned the documentation to the auditor for review.

15. Exemption Certificates – Standard of Review. PD 23-99 (August 17, 2023). The taxpayer, a wholesaler of clothing and apparel products, did not provide sale-for resale exemption certificates during the audit. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner noted the general rule under Va. Code § 58.1-623 that the dealer has the burden of proving a sale is not taxable unless he receives an exemption certificate from the customer. Va. Admin. Code § 10-210-280 states the certificate must be received in good faith by the dealer and that "reasonable care and judgment" must be exercised by all to prevent false or fraudulent certificates. *International Paper Company v. Virginia Dept. of Taxation*, CL-20090260 (2010) states the good faith and reasonable care standard is met if, upon examining the certificate, the dealer is able to reasonably conclude that the items could be used for the exempt purpose stated on the certificate. The *International Paper* standard is only acceptable when the certificate is received at the time of the transaction and produced at the time of the audit. Otherwise, the Department's position is that the certificate was never accepted in good faith and that the dealer has the burden to prove the transaction was exempt. The Department provides greater scrutiny to certificates obtained during the audit or in an appeal. This scrutiny includes ascertaining whether the customer has a registration number and reviewing its sales and use tax filing history. Once this search is performed, the Department concludes whether the purchase was exempt. Turning back to the case, the Commissioner determined that some exemption certificates were acceptable while others were not because the customers were not registered with the Department to collect Virginia sales and use taxes.

16. Agricultural Exemptions – Structural Construction Materials. PD 23-8 (January 18, 2023). The taxpayer, a controlled indoor environment agriculture farm, asked the Department for a ruling on the application of Virginia retail sales and use tax to certain materials affixed to real property and other items of tangible personal property. The Tax Commissioner noted that while the agricultural exemption under Va. Code § 58.1-609.2.1 may apply to the taxpayer's tangible personal property, it explicitly does not apply to structural construction materials affixed to real property. *See* House Bill 1563 and Senate Bill 1240, which now provide an exemption to agricultural property, regardless of whether it is affixed to real property, effective July 1, 2023.

17. Exemption for Pollution Control Equipment. PD 23-6 (January 11, 2023). The taxpayer was awarded a contract for the construction of a bridge and tunnel system in Virginia. Va. Code § 58.1-609.3(9) provides an exempt from the retail sales and use tax for certified pollution equipment and

facilities defined in § 58.1-3660, except for any equipment that has not been certified to the Department of Taxation by a state certifying authority pursuant to such section." The Department of Environmental Quality (DEQ) is the state agency that certifies the type of equipment for which the exemption is requested by the taxpayer. The Tax Commissioner ruled that the "Department's position is that any property certified by the appropriate state certifying authority as pollution control equipment and facilities qualify for exemption from tax."

18. Cabinet Installation. PD 23-48 (April 26, 2023). The taxpayer was an operator of a chain of convenience stores located in Virginia that purchased cabinets, including installation from an out of state vendor. The transaction occurred prior to July 1, 2017, which removed language from Va. Code § 58.1-610(D) treating sellers of items such contractors who sell and install cabinets as retailers instead of consumers. Pursuant to the law change, contractors are now the end consumers and pay sales or use tax on such items, rather than collecting tax from their customers.

19. Exemption for Veterinary Drugs. PD 23-55 (May 17, 2023). The Taxpayer requested a ruling on the application of the retail sales and use tax exemption provided in Virginia Code § 58.1-609.10(22) to all vaccinations purchased and administered by veterinarians to companion animals (canine, feline, equine). The Tax Commissioner ruled that pursuant to Va. Code § 58.1-609.10(9), medicines and drugs dispensed by or sold on prescriptions or work orders of veterinarians are exempt from the retail sales and use tax under. Also, Va. Code § 58.1-609.10 22 exempts veterinarians from retail sales and use tax on their purchases of prescription medicines and drugs that are administered or dispensed to patients within a veterinarian-client-patient relationship beginning July 1, 2022, and ending July 1, 2025.

20. Maintenance Contracts. PD 23-115 (October 19, 2023). The taxpayer requested a ruling on the application of retail sales and use tax on optional vehicle service contracts (parts and labor) that can be added to a customer's loan. The taxpayer indicated there are four parties involved in the facilitation of optional vehicle service contracts: Dealer A (the taxpayers) markets, negotiates, and sells the service contracts to the customers; Dealer B provides the actual maintenance (parts and labor); Dealer C is an insurance company that underwrites the contracts. In its ruling request, the taxpayer asked who was responsible for remitting sales taxes to the Department. The Tax Commissioner ruled that Dealer A was responsible, since it was the one making the sale and collecting sales taxes from the customer. The Tax Commissioner further noted that pursuant to Va. Code § 58.1-609.5(1), contracts which provide for labor and replacement parts are subject to 50% sales tax on the total charge.

21. Installation of Security Systems and Home Entertainment Systems. PD 23-116 (October 19, 2023). The taxpayer sells, installs, services, and monitors security alarm systems, camera systems, smart home systems, and low voltage structured cabling. It requested guidance regarding the application of the Virginia retail sales and use tax to various transactions. In the first scenario, the taxpayer installed security systems while the home was under construction. The monitoring of the alarm system would be contracted directly with the homeowner. Tax Commissioner noted that pursuant to Va. Admin. Code § 10-210-230(B), dealers making sales of non-monitored alarm systems are treated as making retail sales of such components and must collect and remit tax on the charge for the components. However, the dealer should pay tax at the time of purchase on all items used by it in the installation (e.g., wiring, nails, and other items that become part of the building). In the second scenario, the dealer inquired about wireless systems that it installed. Unlike the first scenario, the Tax Commissioner found it doubtful that such a system would become part of the real property. Consequently, he stated that it would likely be treated as a sale of tangible personal property subject to sales tax. In scenario three, the taxpayer asked about its installation of entertainment systems. The Tax Commissioner stated that he would have to better understand the installation and whether it was annexed to real property before providing any guidance.

22. Data Center Exemption. PD 23-67 (June 1, 2023). The Tax Commissioner ruled that there is no requirement that equipment be delivered to a data center in order to qualify for the exemption under Va. Code § 58.1-609.3(18).

23. Event Venue – True Object Test. PD 23-74 (June 23, 2023). The taxpayer, and event venue in Virginia, charged one lump sum amount for rental of the venue and any tangible personal property. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner gave the taxpayer a final opportunity to provide records. The taxpayer then appealed the revised assessments, arguing that they are not taxable because the provision of the space is not taxable and the tangible personal property included in the rental is not the true object of the transactions. On Appeal, the Tax Commissioner ruled that the true object test does not apply because the taxpayer did not provide a non-taxable service. Also, the Department's policy has been that when a dealer charges a lump sum amount for both taxable and nontaxable items in a transaction, the tax is applied to the entire transaction. For these reasons, the assessment was correct. *See also* PD 23-73 (June 23, 2023).

24. Request for Reconsideration. PD 23-120 (October 26, 2023). The taxpayer in 23-74 requested reconsideration of the Tax Commissioner’s final determination pursuant to Va. Code § 58.1-1822. Although the request was timely filed within 45 days, the Tax Commissioner determined that the

request did not satisfy the requirements for reconsideration. Specifically, the taxpayer alleged that the Tax Commissioner misstated the law because he failed to consider prior rulings holding that the rental of real estate facilities was a non-taxable service. The Tax Commissioner ruled that those rulings did not apply here, as this case involved the rental of tangible personal property, which is subject to tax.

25. Statute of Limitations on Refund Claims. PD 23-77 (July 6, 2023). The taxpayer, a truck dealership with locations inside and outside Virginia. The taxpayer filed amended returns with the Department to get a refund for sales taxes it overpaid. The Department sent a letter with questions to the taxpayer, but it did not respond before the three-year statute of limitations for claiming a refund expired. When the Department declined to extend the limitations period, the taxpayer filed an appeal. The Tax Commissioner ruled that for purposes of the three-years statute of limitations, an incomplete refund claim is not sufficient. Furthermore, the date of the request is the date when a complete refund claim is filed. As the taxpayer did not file a complete refund claim until after the statute had expired, the Tax Commissioner denied the taxpayer's refund claim.

26. Repair Charges Bundled with Tangible Personal Property. PD 23-76 (July 6, 2023). The taxpayer, a tractor-trailer repair shop, invoiced its customer on a lump sum basis for sales of tangible personal property (repair parts) and charges for labor. The Department issued an assessment, and the taxpayer appealed. The Tax Commissioner noted that Va. Code § 58.1-609.5(2) provides an exception from retail sales tax if the charge for labor or services rendered in installing property sold is separately stated on the customer's invoice. When the charges are not separately stated, the entire amount is taxable.

27. Use Tax: Real Property vs. Tangible Personal Property. PD 23-81 (July 6, 2023). The taxpayer operated a marine cargo terminal at the Port of Virginia. The Department assessed the taxpayer and assessed use taxes on the cost price of cranes installed by third parties and used by the taxpayer in handling crates at the Port. In PD 21-36, the Department rejected the taxpayer's alternative arguments that the sale was not taxable because it was an occasional sale, was a gift, or occurred outside the statute of limitations. The taxpayer requested reconsideration and asserted that the use tax cannot apply after the installation because the cranes had become affixed to real property. Applying the three-part test to determine real vs. tangible property provided by the Virginia Supreme Court in *Danville Holding Corp. v. Clement*, 178 Va. 223 (1941), the Tax Commissioner determined that the cranes became real property upon their installation. Furthermore, because the contractor who installed the cranes is treated as the consumer for use tax purposes, the Commissioner ruled the taxpayer was not liable for the tax.

28. Exemption – Non-Profit Schools / Book Fairs. PD 23-87 (July 14, 2023). The taxpayer made retail sales of books at a fundraiser at Virginia schools and requested a ruling whether sales tax should be charged on the transactions. The Tax Commissioner ruled that Va. Code § 58.1-609.4(8) provided an exemption for non-profit secondary schools for fundraising, but the exemption was repealed in 2003. Va. Code § 58.1-609.11 grandfathered the repealed exemptions. After July 1, 2007, entities qualifying for the exemption under Va. Code § 58.1-609.4(8) had to renew their exemption. The Department has a long-standing policy of granting exemptions to non-profit secondary schools. Accordingly, the Tax Commissioner ruled that the transaction was not subject to sales tax, as long as the school received the commission or net proceeds from the sale.

29. Direct Pay Permit. PD 23-59 (May 24, 2023). The taxpayer, a supplier of industrial, medical, and specialty gases along with welding equipment was audited and assessed by the Department. The taxpayer appealed, contending it received documentation (a direct pay permit) supporting an exemption after the audit was closed. When a direct pay permit is used, the customer is to pay the sales taxes directly to the Department instead of the vendor. The Tax Commissioner referred the additional documentation to the field audit staff for review and any adjustment.

30. Refund Application. PD 23-89 (August 3, 2023). The taxpayer, a Virginia-based subsidiary of a coal company, utilized a direct pay and front-end agreement to accrue and pay use taxes. Under the direct pay agreement, which is authorized by Va. Code § 58.1-624 and Va. Admin. Code § 10-210-920(F), taxpayers may pay Virginia sales and use taxes directly to the Department when it is not known at the time of the transaction how the item will be used. Under a front-end agreement signed by the Department, a taxpayer may pay tax based on an error factor on certain accounts payable for which taxability cannot be determined at the time of purchase. Front-end agreements are not provided by statute but have been respected and utilized by the Department. In this case, however, the taxpayer was using an error factor calculated in the late 1990s. Accordingly, while the refund claim was timely filed, the Tax Commissioner ordered a new audit to determine the correct error factor. *See also* PD 23-90 (August 3, 2023).

31. Failure to Retain Records. PD 23-96 (August 9, 2023). The Taxpayer, a moving business, was assessed use tax on purchases for which it could not provide documentation that sales tax had been paid to vendors or that the Taxpayer had accrued and remitted the use tax. The Department issued an assessment based on the information it had. On appeal, the Tax Commissioner noted that pursuant to Va. Code § 58.1-102, taxpayers are required to maintain records substantiating its tax liability for three years following the required date for filing the return. Va. Code § 58.1-103 further provides that such records shall be available during regular business

hours for inspection by the Tax Commissioner or his agents. Also Va. Code § 58.1-205(1) provides that the taxpayer has the burden of proof to prove an assessment is incorrect. As the taxpayer did not meet its burden, the Tax Commissioner ruled the assessment was correct.

32. Erroneously Collected Tax. PD 23-100 (August 17, 2023). The taxpayer, a restaurant equipment maintenance provider, was audited and assessed for sales and use taxes it failed to remit to the Department. On appeal, the taxpayer argued that some of the items were not taxable. The Tax Commissioner rejected this argument as Va. Code § 58.1-625(C) requires that taxpayers remit to the Department all sales and uses taxes they collect. The Tax Commissioner also refused to waive penalties. Although penalties are generally waived on a first-generation audit, Va. Admin. Code § 10-210-2032(B)(3) provides penalties are not waived if the taxpayer collects sales taxes and fails to remit them to the Department.

33. Sample Methodology. PD 23-101 (August 24, 2023). The taxpayer was an electrical contractor with headquarters and operations in Virginia. In a second generation audit, the Department found that the taxpayer did not pay sales tax on various transactions and assessed tax, penalties, and interest. On appeal, the taxpayer agreed with the items in the exceptions list but disagreed with the sample because it included atypical transactions. The Tax Commissioner stated the Department's policy is that a transaction will not be removed from an audit sample unless the taxpayer establishes that the transaction is an isolated event and not part of its normal operations. Because the taxpayer regularly made similar purchases from other vendors, the Tax Commissioner declined to remove them from the audit. Regarding penalties, the Tax Commissioner noted that in a second generation audit, penalties will only be waived unless the taxpayer's compliance ratios meet or exceed 85% for sales tax and 60% for use tax. The Commissioner instructed the taxpayer to calculate its compliance ratio and provide supporting documentation to determine if the alternative method was met.

34. Agricultural Exemption. PD 23-102 (August 24, 2023). That taxpayer, a Virginia farm that produces apples and grapes for market, requested a ruling on whether its purchase of salt-treated wood, used as support posts, qualified for the agriculture exemption from retail sales and use tax. Va. Code § 58.1-609.2(1) provides an exemption from tangible personal property, except structural construction materials affixed to real property owned or leased by a farmer, necessary for use in agricultural production for market and sold to or purchased by a farmer or contractor. Pursuant to additional analysis in the ruling, the Tax Commissioner determined that support posts qualified for the exemption.

35. Direct-Pay Permits / Front-End Agreements. PD 23-108 (October 5, 2023). The taxpayer, a Virginia based subsidiary of a coal company that

manufactures products derived from coal, filed amended returns for the periods at issue. The taxpayer claims it overpaid its use tax pursuant to its direct pay permit and front-end agreement that it inherited from its predecessor. The taxpayer believed that the error ratio in the front-end agreement was overstated. The Department agreed that the error ratio was likely incorrect due to the passage of time and stated that an audit was necessary to confirm its accuracy. Accordingly, the Tax Commissioner ordered an audit, which he said should be completed in 3-year cycles.

36. Exemption for Bullion. PD 23-117 (October 19, 2023). The taxpayer purchased sterling silver flatware and requested a ruling to determine if it met the criteria for the exemption. The Tax Commissioner noted that Va. Code § 58.1-609.1(19) provides an exemption from sales and use tax for gold, silver, or platinum or legal tender coins whose sales price exceeds $1,000. In evaluating the requirements for the exemption, the Tax Commissioner found it was questionable that the items contained at least 90% gold, silver, platinum or some combination thereof. Also, looking at another requirement, the Tax Commissioner found that the seller did not appear to limit the sales price to fluctuation based on the price of the underlying metal.

37. Manufacturing Exemption. PD 23-118 (October 26, 2023). The taxpayer was a manufacturer of hardwoods that it sold to vendors who produce furniture, flooring, and other like items. The auditor determined that certain items of tangible personal property purchased without paying sales or use tax were not directly used in manufacturing or processing. The taxpayer appealed, contending that including two items, kiln decking and a picture tally system, should qualified for the exemption. The Tax Commissioner, noted that Va. Code § 58.1-609.3(2)(iii) provides an exemption for machinery and repair parts used directly in processing, mining, or converting products for sale or resale. Regarding the kiln decking, which was used to regulate airflow inside of a kiln chamber that holds wood, the Tax Commissioner ruled that was not directly used in the production process or an immediate part of the production process. Instead, it merely aided the drying of raw wood before it was put into production. As to the tally system, the Tax Commissioner found that it was primarily used as a way of tracking and managing inventory after the raw wood had been processed into usable lumber. Accordingly, the Tax Commissioner ruled that it did not qualify for exemption.

38. Failure to File Returns. PD 23-119 (October 26, 2023). The taxpayer failed to file returns for the periods at issue, so the Department issued a substitute return and assessed the taxpayer. On appeal, the Tax Commissioner instructed the taxpayer to file original returns within 60 days and consider making adjustments based on the new information provided. The Tax Commissioner noted that if the taxpayer did not submit the original returns

within 60 days, the Department's estimated assessment will be considered correct and collection action may resume.

VI. MISCELLANEOUS TAXES

A. 2024 Legislation

1. Military Centered Community Zones; Local Designation. House Bill 619 and Senate Bill 343 amend Va. Code § 58.1-3853.1 by authorizing localities to create A "military centered community" zone means a zone, designated by a locality, to contain a significant presence of living or working military personnel whose significant presence drives, or has the potential to drive, significant economic activity. Inside of these zones, localities are permitted to grant tax incentives, such as but not limited to: (1) reduction of permit fees; (ii) reduction of user fees; and (iii) notwithstanding any other provision of law, reduction of any type of gross receipts tax. The legislation became effective July 1, 2024.

2. Income Validation for Toll Relief Program. Item 441 (C)(5) of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) authorizes the Department of Taxation to provide to the Department of Transportation the adjusted gross income and any additional information supporting validation of the income of drivers eligible to participate in a toll relief program. Before any tax information is provided, the parties must enter into a written agreement consistent with the provisions of Va. Code § 58.1-3(C). This legislation became effective July 1, 2024.

3. Local Incentives for Motor Sports Facilities. Senate Bill 17 amends Va. Code § 59.1-542.1 by allowing localities that are home to a motor sports facility to propose local incentives that address economic conditions and help stimulate real property improvements including a reduction of business, professional, and occupational license taxes or partial exemption from taxation of substantially rehabilitated real estate. This legislation became effective July 1, 2024.

4. Assessment from the Sale of Soybeans. House Bill 1377 amends Va. Code § 3.2-2307 and 3.2-2312 by changing the amount of the assessment for research, education, publicity, and the promotion of the sale and use of soybeans from $0.02 per bushel to a rate of one half of one percent of the net market price per bushel. This legislation became effective July 1, 2024.

B. Court Decisions: None

C. Administrative Rulings: None

VII. TOBACCO TAXES

A. 2024 Legislation

1. Registration of Tobacco Products Retailers: House Bill 790 and Senate Bill 582 amend various provisions of the Code of Virgnia effective July 1, 2024 related to the registration of tobacco products retailers, as follows:

- The legislation broadens the definition of "retail dealer" to also include any person that holds an approved Retail Sales and Use Tax Exemption Certification for Stamped Cigarettes Purchased for Resale or an Other Tobacco Products ("OTP") Distributor's License issued by the Department;

- It establishes that no tobacco retailer can operate a tobacco retail establishment unless such tobacco retailer has obtained a license for each location or place of business from the Department. However, any retail dealer who holds an approved Retail Sales and Use Tax Exemption Certificate for Stamped Cigarettes Purchased for Resale or an Other Tobacco Products Distributor's License issued by the Department is not required to obtain a license.

- It provides that every application for a liquid nicotine and nicotine vapor products license must include specified information and be accompanied by a fee as prescribed by the Department. Upon receipt of the application, the Department must conduct a background investigation and may refuse to issue a license or to suspend, revoke, or refuse to renew a license if the principals and managers at the licensable location of the applicant have been convicted of specified crimes.

- The legislation allows the Department to impose penalties on (A) retail establishments that (i) sells liquid nicotine or nicotine vapor products to a person who has not attained the legal age for that purchase or (ii) makes a sale without a valid liquid nicotine and nicotine vapor products license; and (B) Any retail dealer that sells retail tobacco product to a person under 21 years of age who has not attained the legal age.

- It provides that the Department is required to collaborate with the Virginia Alcoholic Beverage Control Authority and local law enforcement to enforce and administer the tax and licensing of liquid nicotine and nicotine vapor products. This includes enforcement of age verification, product verification, advertising restrictions, licensing, and collection of the tax.

- The legislation also creates the Tobacco Retail Enforcement Fund ("the Fund"). Revenues generated by the penalties above are to be deposited

into the Fund. Moneys in the fund are allowed to be used solely for the purposes of funding the Department's direct and indirect costs of the license administration and enforcement program, and the administrative costs of education and training, retail inspections, and unannounced compliance checks.

2. Taxation of Liquid Nicotine. Item 3-5.19 of the of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) increase the rate at which the Tobacco Products Tax is imposed on liquid nicotine from $0.066 per milliliter to $0.11 per milliliter. The legislation became effective July 1, 2024.

3. Liquid Nicotine and Nicotine Vapor Products: Penalties. House Bill 1069 and Senate Bill 550 amend various provisions of the Code of Virgnia effective July 1, 2024 related to liquid nicotine and nicotine vapor products, as follows:

   - The legislation requires that any person who receives, stores, sells, handles, or transports liquid nicotine or nicotine vapor products must preserve all records relating to the purchase, sale, exchange, receipt, or transportation of all liquid nicotine or nicotine vapor products for a period of three (3) years. The records are subject to audit or inspection at any time by any duly authorized representative of the Attorney General. Any person who violates the recordkeeping provisions of these Acts is guilty of a Class 2 misdemeanor.

   - It provides that the Department of Taxation, the Attorney General, any other law-enforcement agency of the Commonwealth, or any federal law-enforcement agency conducting a criminal investigation involving the trafficking of liquid nicotine or nicotine vapor products may access at any time such records. The legislation requires the Department of Taxation to impose a penalty of $1,000 for each day that a person fails or refuses to allow or cooperate with an audit, inspection, or investigation. Such penalty will be collected like other taxes.

   - The legislation also allows the Attorney General to apply to the Circuit Court for the City of Richmond for injunctive relief when a person refuses to cooperate with an audit, inspection, or investigation.

4. Cigarette Taxes. House Bill 1099 amends Va. Code §§ 58.1-1000, 58.1-1001, and 58.1-1021.01 by redefining "cigarette" for state cigarette tax purposes to include "cigarettes intended to be heated" as defined in the bill and distinguished from "heated tobacco products." The bill also subjects such cigarettes intended to be heated to an excise tax of 2.25 cents per stick on and after July 1, 2024, and subjects other cigarettes to an excise tax of 3

cents on and after July 1, 2024. This legislation became effective July 1, 2024.

B. **Court Decisions**: None

C. **Administrative Rulings**: None

VIII. PROCEDURAL / COLLECTIONS

A. 2024 Legislation

1. Local Installment Agreements. House Bill 1503 amends Va. Code § 58.1-3916 by allowing the governing body of a locality to authorize its treasurer or other collecting official to enter into installment agreements with taxpayers who have been assessed with omitted taxes, including any penalty and interest, over a term of up to 72 months. The bill also requires that the installment agreement provide for the payment of current tax obligations, with payments credited to current tax obligations as they come due. This legislation became effective July 1, 2024.

2. Clarification of Meaning of a Collection Effort. Va. Code § 58.1-1802.1(A) provides that where the assessment of any tax imposed has been made within the period of limitation properly applicable thereto, such tax may be collected by levy, by a proceeding in court, or by any other means available to the Tax Commissioner under the laws of the Commonwealth, but only if such collection effort is made or instituted within 7 years from the date of the assessment of such tax. Except as otherwise provided, effective for assessments made on and after July 1, 2016, all collection efforts shall cease after such seven-year period even if initiated during the seven-year period. The third enactment clause of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) and Item 3-5.30 of the 2024 Amendments to the 2023 Special Session I Amendments to the 2023 Appropriation Act (House Bill 6002, Special Session I, Chapter 1) amend Va. Code § 58.1-1802.1 by stating the participation of the Department in any capacity in any pending or future administrative or judicial proceeding in which the validity of a tax assessment is an issue is considered to be a collection effort for purposes of determining whether the Department acted within the applicable period for collecting assessments. The legislation states that it is declarative of existing law and is effective May 13, 2024.

B. **Court Decisions**: None

C. **Administrative Rulings**:

1. Amended Return – Statute of Limitations. The taxpayer, through his representative, filed a refund claim and amended returns with the Department for the taxable period at issue, July 2017 through December 2017. The refund claim was denied on the basis that the claim was filed outside the statute of limitations period and that the power of attorney (POA) submitted with the claim was not properly signed. The Taxpayer appealed, contending that the refund claim was timely filed. The Tax Commissioner ruled in favor of the taxpayer, finding (1) the taxpayer had presented a certified mail receipt showing the amended returns was timely filed even thought the postal tracking showed the package was received on a later date and (2) nothing in the Code of Virginia requires that a valid POA be filed with the Department. P.D. 24-3 (February 21, 2024).

2. Appeal Not Timely Filed. The Department assessed an individual taxpayer for tax years 2007, 2008, and 2017 and collected payments through one or more liens. The taxpayer filed an appeal under Va. Code § 58.1-1821 and argued that he was had not lived in Virginia since 2017. Based on this information, the Department abated the assessment for 2017 and refunded the amounts collected. However, the Department would not make any adjustment for 2007 and 2008. On appeal, the Tax Commissioner noted that Va. Code § 58.1-1821 requires that an appeal must be filed within 90 days of the date of assessment. In this case, the assessments for 2007 and 2008 were in June 2010 and 2011, but the taxpayer did not file his appeal in 2023 – well past the 90 day period. The Tax Commissioner also noted that the period to file a protective claim under Va. Code § 58.1-1824 expired three (3) years after the date of assessment. (P.D. 24-16 March 13, 2024).

3. Appeal Not Timely Filed. The Department issued assessments to the taxpayer between July 2009 and September 2018 for failure to file Virginia individual income tax returns for 2006, 2007, 2010, 2011, and 2018. The taxpayer contacted the Department in May 2021 to inquire about the assessments. In June 2022, the auditor instructed the taxpayer to file an appeal or make an offer based on doubtful collectability. Pursuant to this instruction, the taxpayer filed an appeal. The Tax Commissioner ruled that pursuant to Va. Code § 58.1-1821, a taxpayer has 90 days from the date of an assessment to file an appeal. Accordingly, the taxpayer's appeal was well outside the 90-day period. The Tax Commissioner advised the taxpayer to file an offer-in-compromise if doubt as to collectability were an issue. P.D. 24-10 (Feb. 28, 2024).

4. Request for Reconsideration. In P.D. 23-50, the Department assessed additional withholding taxes after determining that the taxpayer had underreported the number of employees it had. On appeal, the Tax Commissioner found in favor of the Department and noted that under Va. Code § 58.1-111, the Department may make an estimate of the tax due when the taxpayer fails to provide a correct and proper return. Subsequent to this

ruling, the taxpayer filed a request for reconsideration with the Department. The Tax Commissioner held that none of the four (4) criteria warranting reconsideration under Va. Admin. Code 10-20-165(F) were present in this case. Specifically, although the taxpayer argued that facts were misrepresented, it never followed up on the Department's multiple requests for documentation. P.D. 24-14 (March 12, 2024).

IX. REAL PROPERTY TAXES

A. 2024 Legislation

1. Nonjudicial Sale of Tax Delinquent Real Properties. House Bill 258 amends Va. Code § 58.1-3975 by allowing the nonjudicial sale of tax delinquent property when such property is (i) unimproved, (ii) one-half acre or less in size, and (iii) located within a designated urban redevelopment or revitalization zone. The legislation became effective July 1, 2024.

2. Recordation Tax. House Bill 574 amends Va. Code § 58.1-801 to provide that for purposes of recordation taxes, the value of a property interest conveyed shall be the most recent property tax assessment for such property at the time the property is conveyed. The legislation became effective July 1, 2024.

3. Notice of Rate and Assessment Changes. House Bill 639 and Senate Bill 677 amend Va. Code § 58.1-3330 to provide that in certain localities, in the event that the total assessed value of real property would result in an increase of one percent or more in the total real property tax levied, the notice of assessment changes shall state the tax rate that would levy the same amount of real estate tax as the previous year when multiplied by the new total assessed value of real estate. This legislation became effective July 1, 2024.

4. Tax Assessment Districts: House Bill 1211 amends Va. Code § 15.2-2405 by permitting the owners of three-fourths of the affected parcels of land to petition a city or town for the establishment of a tax assessment district. Under current law, three-fourths of the owners of land within the affected area can petition a city or town for the establishment of a tax assessment district. Tax assessment districts are districts within a locality wherein the locality may impose additional taxes or assessments within the district for the purposes of building local improvements such as sidewalks, alleys, water management facilities, retaining walls, curbs, gutters, waterlines, streetlights, canopies, benches, and waste receptacle. The legislation became effective July 1, 2024.

5. Local Historic District – Tax Incentives. House Bill 914 amends Va. Code § 15.2-2306 to allow a locality that establishes a local historic district to provide tax incentives for the conservation and renovation of historic structures in such district. The bill provides that such incentives may include tax rebates to the extent allowed by the Constitution of Virginia. The legislation became effective July 1, 2024.

6. Constitutional Amendment – Exemption for Surviving Spouses. House Bill 558 and Senate Bill 4 provides for a referendum at the November 5, 2024, election to approve or reject an amendment to the Constitution of Virginia that would expand the real property tax exemption that is currently available to the surviving spouses of soldiers killed in action to be available to the surviving spouses of soldiers who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense. This legislation would become effective January 1, 2025.

7. Exemption for Surviving Spouses of Armed Forces Members. Senate Bill 240 amends Va. Code §§ 58.1-3219.9 and 58.1-3219.10 by changing the standard required for a surviving spouse of a member of the armed forces to qualify for the real property tax exemption on their principal place of residence by requiring a Line of Duty determination from the U.S. Department of Defense, rather than a killed in action determination. The bill also repeals a locality's ability to declare real property owned by a surviving spouse of a member of the armed forces with a Line of Duty determination from the U.S. Department of Defense, where such death was not the result of criminal conduct, to be a separate class of property for local taxation of real property. If a majority of those voting in the referendum at the November 5, 2024, election approve an amendment to the Constitution of Virginia that would expand this real property tax exemption, it would become effective on January 1, 2025.

8. Fixtures in Data Center. Item 3-5.21 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) states that Virginia Code § 58.1-3295.3 requires fixtures in a data center, when classified as real estate, to be valued by a locality based on the cost approach (cost less depreciation) rather than the income generated. Fixtures in a data center, when classified as real estate, shall be assessed at one-hundred percent fair market value as determined by the cost approach and consistent with § 58.1-3201.

B. Court Decisions

1. *Mekeithen vs. City of Richmond*, Dkt. No. 210389 (Va. October 19, 2023). At the time of his death in 2006, Charles H. Davis, Sr. owned a parcel of property in Richmond, Virginia. Payment of the local property taxes ceased after his death. The City filed an action in 2017 seeking a judicial sale of the property to satisfy its statutory lien for 10 years of unpaid taxes. Two

prior liens had been recorded. The earliest lien, a deed of trust recorded in 2001, had been filed by Dixie Jones, who subsequently died, but the lien remained subject to the claim of her unknown heirs. The later lien, recorded in 2012, existed in favor of the Caldwell Trust and its unsecured debt of $100,000.

After proper notice was given, the property was sold at auction. Under Va. Code § 58.1-3340, the City's tax lien took property over all prior liens on the property. The City was paid in full, along with attorneys' fees. The remaining funds (about $21,000) were set aside for the unknown Jones heirs ($14,000) and the Caldwell Trust ($7,000). When the unknown Jones heirs did not come forward within the 2 years provided under law to claim their share, the Caldwell Trust asserted that the remaining $14,000 should be distributed to the Trust and applied against the decedent's unsecured $100,000 debt. The City balked, asserting that the unclaimed funds were escheated to the City under Va. Code § 58.1-3967. The circuit court agreed with the City.

On appeal, the Supreme Court of Virginia ruled that the circuit court's interpretation of Va. Code § 58.1-3967 was correct. The $14,000 unclaimed by the Jones escheated to the City and could not be distributed to the Caldwell Trust. However, the Court also ruled that it involved an unconstitutional "taking" that violated Art. I, Sect. 11 of the Constitution of Virginia. The Court then remanded the case back to the circuit court.

C. Administrative Rulings

1. Recordation Tax. PD 23-49 (April 26, 2023). An individual acquired four condominium units between 2000 and 2004. Each unit was encumbered by a different deed of trust with different lenders. The four units were transferred to the taxpayer, a single member limited liability company owned by an individual. The taxpayer negotiated with a bank to issue a single loan secured by a deed of trust to pay off the four existing loans. The new deed of trust provided that the bank had made a commercial loan mortgage loan to the taxpayer to refinance the four units. The County assessed the general rate for recording a deed of trust or mortgage, and the taxpayer contended that the lower rate for refinancing applied. On appeal, the Tax Commissioner noted that the terms "refinance" or "refinancing" are not defined by the Virginia Code and that the determination must be based on all facts and circumstances. The Tax Commissioner also noted that Va. Code § 58.1-320 provides that "every deed of trust . . . is in the nature of a contract and shall be construed according to its terms to the extent not in conflict with the requirements of law." Because the sole member of the taxpayer was the original borrower and the deed stated that it was intended to be a refinance, the Tax Commissioner ruled that the rate for refinancing the deed should have been applied and ordered a refund.

X. TANGIBLE PERSONAL PROPERTY TAXES / MACHINERY & TOOLS TAXES

A. 2024 Legislation

1. Classification of Certain Vehicles. House Bill 1502 and Senate Bill 194 amend the second enactment of Chapter 30 and the second enactment of Chapter 578 of the Acts of Assembly of 2022 by removing the January 1, 2025, sunset date on the authorization for localities to assign a rate of tax or assessment different from the general tangible personal property rate on certain automobiles, passenger trucks, motor vehicles with specially designed equipment for use by the handicapped, motorcycles, mopeds, all-terrain vehicles, and off-road motorcycles, campers, and other recreational vehicles. This legislation became effective on July 1, 2024.

2. Indoor Agriculture Equipment and Machinery – Exemption. House Bill 1429 and Senate Bill 483 amends Va. Code § 58.1-3505 by providing that farm machinery, farm equipment, and farm implements (other than farm machinery designed solely for the planting, production or harvesting of a single product or commodity) used by an indoor, closed, controlled-environment commercial agricultural facility are a class of farm machinery and implements that a locality may exempt from personal property taxation. The legislation became effective July 1, 2024.

B. Court Decisions: None

C. Administrative Rulings

1. Appeals Procedure. P.D. 23-34 (March 29, 2023). The taxpayer received an assessment of business tangible personal property taxes from the locality and filed an appeal with the Department claiming that the subject property was overvalued. The Tax Commissioner declined to intervene, citing lack of jurisdiction. Pursuant to Va. Code § 58.1-3983.1, taxpayers who wish to appeal an assessment from a locality must first file an administrative appeal with the locality. Only when the locality has issued a final determination can a taxpayer file an administrative appeal with the Department.

2. BTTP Tax – Classification. PD 23-43 (April 12, 2023). The taxpayer operated a business that extracts limestone from open pit quarries in the County. The County audited the taxpayer and determined that it was subject to M&T tax on all of its equipment as a processor resulting in an assessment for 2020 and 2021. The taxpayer appealed to the County contending that it was only subject to tax on M&T used in its mining operations and that all other assets were exempt from tax. The County issued a final local determination concluding that the taxpayer was engaged in quarrying, not mining, and therefore, all of its equipment not used in mining was subject to M&T tax. On appeal to the Department of Taxation, the Tax

Commissioner first shot down the County's contention that the taxpayer was barred from appealing the County's classification because it had not appealed such classification in prior tax years. According to the Tax Commissioner, there is nothing in the statutes or regulations prohibiting a taxpayer from appealing an assessment or amending a prior year return simply because the issue was not asserted in prior years. Second, addressing the County's substantive argument, the Tax Commissioner found that under Va. Code § 58.1-1101, "mining" is specifically listed as personal property that is intangible and reserved for state taxation only. The Tax Commissioner also found that the taxpayer's activities constituted "mining" under the definition provided by NAICS and Virginia's regulatory regime for mine safety. Accordingly, any of taxpayer's machinery and tools used in the mining process would be subject to M&T tax, and any property not used in such mining process would be exempt. The Tax Commissioner remanded the case to the locality for a determination as to what property was used in the mining operations.

XI. BUSINESS LICENSE TAXES

A. 2024 Legislation: None

B. Court Decisions: None

C. Administrative Rulings

1. Assessment Procedure. PD 23-29 (March 16, 2023). The taxpayer filed his federal income tax (Form 1040) and used Schedule C to report income from his truck-driving activities. This information was reported to the County, which concluded that the taxpayer was operating a business from his home address. The taxpayer asserted they were wages, not business income. Tax Commissioner noted that reporting income on Schedule C creates a rebuttable presumption that a business is being operated. The Tax Commissioner returned the case to the County's Commissioner of Revenue to issue a valid final determination after finding flaws in the original determination issued to the taxpayer.

2. Situs: Apportionment – Payroll. PD 23-36 (April 5, 2023). The taxpayer provided counseling services at definite places of business in City A and City B. The taxpayer divided its Virginia offices into regions. The activities for City A and City B were reported in the same profit & loss statement. The taxpayer was audited by City A, which attributed all of that region's gross receipts to City A, resulting in an assessment. The taxpayer filed an appeal. In determining the situs of gross receipts, Va. Code § 58.1-3703.1 states that receipts from services are to be taxed based on (in order): (i) the definite place of business where the service is performed, or if not

performed at any definite place of business, (ii) the place from which the services is directed or controlled; or as a last resort (iii) by payroll apportionment between the two businesses. Based on the available information, the Tax Commissioner ruled that it was questionable whether all gross receipts from that region should have been waived. Accordingly, the Tax Commissioner remanded the case to City A. The Commissioner also observed that unlike a penalty, interest assessed for the underpayment of BPOL cannot be waived. [Va. Admin. Code § 10-500-570].

3. Reimbursed Travel Expenses. PD 23-80 (July 6, 2023). The taxpayer negotiated a consulting agreement to provide services to a single corporate client. Pursuant to the agreement, the client reimbursed the taxpayer for travel expenses. The County audited the taxpayer and determined that the reimbursements for travel expenses should have been included in gross receipts for BPOL tax purposes. On appeal, the Tax Commissioner agreed, finding that the travel expenses were "gross receipts" and therefore subject to BPOL.

4. Situs. PD 23-98 (August 17, 2023). The taxpayer was a corporation that provided linguistic services and performed software development. It leased a virtual office from Company, which also provided administrative services to the taxpayer in the City. The taxpayer's mail was delivered to the Company. The Company's location in the City was listed as the taxpayer's principal office in Virginia. The taxpayer maintains no employees, officers, or directors in the City. The taxpayer requested an advisory opinion on whether it was subject to BPOL in the City. That Tax Commissioner ruled that the taxpayer would be classified as providing "other services" under Va. Admin. Code § 10-500-480 and the City's Code. It also would be treated as having a definite place of business in the City under Va. Code § 58.1-3700. Pursuant to Va. Code § 58.1-3703.1, the Tax Commissioner ruled that unless the taxpayer had a definite place of business in another jurisdiction, all of the taxpayer's gross receipts would be attributed to its definite place of business in the City.

5. Sales by an Affiliate Entity. PD 23-112 (October 19, 2023). Taxpayer operated retail stores throughout the country. The taxpayer reported its gross retail sales at these locations to the City as its BPOL tax base. The taxpayer was a wholly-owned subsidiary of Parent. The Parent also owned an affiliate (the "Affiliate"), which was responsible for the Parent's online sales. The taxpayer and the Affiliate were separate legal entities. The Affiliate's retail-to-customer (RTC) sales were facilitated by the taxpayer's employees at its retail locations using the local stores' computers. Such sales were made using the Affiliate's online billing system, rather than the taxpayer's point of sale system, and were fulfilled and warranted by the Affiliate. The taxpayer filed an appeal with the Department, contending that it properly reported all retail sales from its locations within the City,

and that the RTC sales legally belonged to the Affiliate and could not be attributed to the Taxpayer. On appeal, the Tax Commissioner ruled that the Affiliate likely had a definite place of business under Va. Code § 58.1-3700.1 and that the situs of gross receipts from the Affiliate's sales were sourced to such definite place of business under Va. Code § 58.1-3703.1. The Tax Commissioner ordered the Affiliate to obtain a BPOL license and pay related taxes. If it did not, the Tax Commissioner determined that the assessment against taxpayer would be deemed correct.

6. Office at Residence / Apportionment / Out of State Deduction. PD 23-113 (October 19, 2023). The taxpayer, a business that collected and distributed data for a specific industry, had a definite place of business in the County. It appears that the taxpayer had several employees working outside of Virginia and the United States. The taxpayer filed amended BPOL tax returns for the 2016 through 2019 tax years requesting refunds for tax previously paid. The amended returns sitused gross receipts using payroll apportionment and claimed the out-of-state deduction for gross receipts attributable to business conducted in other states or countries in which it filed income tax returns. The County determined that the taxpayer only had one definite place of business and denied the out-of-state deduction on the basis that the taxpayer either lacked nexus or did not attribute any income to those particular states. On appeal, the Tax Commissioner ruled as follows: (1) the determination of whether as to whether a home office is a definite place of business must be made by the locality in which the home office is located; (2) the taxpayer had provided income tax returns in other states and countries reporting payroll taxes there, which may indicate a definite place of business there; (3) the fact that a virtual office is not a traditional lease does not disqualify it as a definite place of business; (4) situsing the taxpayer's gross receipts based on where the services were performed would be difficult if not impossible (thus payroll tax apportionment may be appropriate); and that an out-of-state deduction is only permitted if the taxpayer is required to file a tax return in another state, even if no income tax is owed. The Tax Commissioner remanded the case back to the locality with instructions on how to recalculate the taxpayer's BPOL taxes for the applicable period.

XII. LEGISLATIVE STUDIES / REPORTS

A. 2024 Legislation

1. Joint Subcommittee on Tax Policy. Item 1 (N)(4) of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) directs the Joint Subcommittee to explore efforts to modernize the Commonwealth's income and sales and use taxes during the 2024 interim. The goals and objectives shall include: (i) evaluating existing sales and use tax exemptions; (ii) applying sales and use tax to digital goods and services,

including transactions involving businesses; (iii) evaluating efforts to increase the progressivity of the income tax; (iv) and long-term revenue growth to maintain core government services.

2. Study on Tax Relief in Qualified Virginia Localities. Senate Bill 564 directs the Department of Taxation and the Commission on Local Government to assess the need for income tax relief in double distressed localities in the Commonwealth that have experienced significant loss of population since 2013. The Department and the Commission must report on their recommendations to the Governor and the Chairmen of the Senate Committee on Finance and Appropriations and the House Committees on Finance and Appropriations by November 1, 2024.

3. Assessment of Department's Computer Systems. Item 257 (D) of the 2024 Appropriation Act continues efforts regarding modernization of the Department's Integrated Revenue Management System ("IRMS") computer system. This includes establishment of a workgroup to include the Secretary of Finance or his designee, staff from the House Appropriations and Senate Finance and Appropriations Committees, the Director of the Department of Planning and Budget, and the Chief Information Officer of the Virginia Information Technologies Agency. The workgroup is required to submit an update on its findings and recommendations to the Governor and the Chairs of the House Appropriations and Senate Finance and Appropriations Committees by November 1, 2024, with an annual executive summary of the interim activity of the project implementation by November 1 of each subsequent year until implementation of a new system is complete.

4. Tobacco Tax Study. Item 3-5.16 of the 2024 Appropriation Act (House Bill 6001, Special Session I, Chapter 2) directs the Joint Subcommittee to continue studying options for the modernization of Va. Code § 58.1-1001(A) to reflect advances in science and technology in the area of tobacco harm reduction, and the role innovative non-combustible tobacco products can play in reducing harm, including products that produce vapor or aerosol from heating tobacco or liquid nicotine. In addition, the Joint Subcommittee is directed to study possible reforms to the taxation of tobacco products that will provide fairness and equity for all local governments and also ensure stable tax revenues for the Commonwealth.

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5 Intellectual Property Law Updates in 40 Minutes

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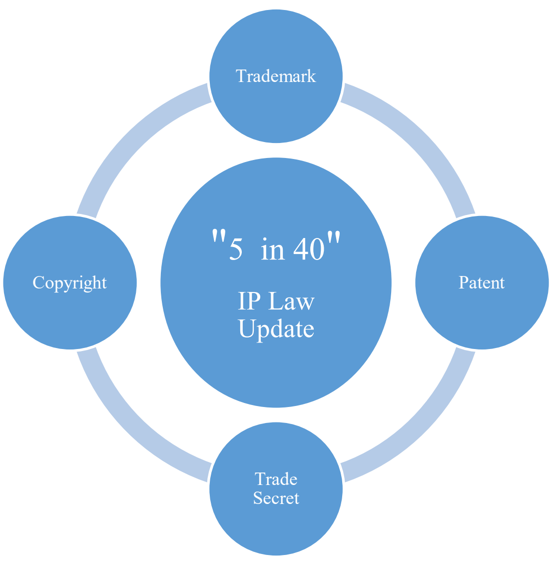
"5 IN 40" UPDATES IN INTELLECTUAL PROPERTY LAW[1]



Virginia CLE
July 23, 2024
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[1] © Copyright 2024, Stephen E. Noona, all rights reserved. The presenters would like to thank Helen E. Gehle for her assistance in preparing these materials. Helen is a rising 3L at William & Mary Law School, where she is the Executive Editor of the Bill of Rights Journal.

[2] As head of the Litigation Section and the Intellectual Property Law Practice Group at Kaufman & Canoles, Stephen Noona has spent 39 years trying complex commercial cases in federal and state courts. Known for his hard work, Mr. Noona has a long and successful record as a trial lawyer who focuses his trial practice on intellectual property law cases in the federal courts across the nation. As a former President of the Virginia State Bar's Intellectual Property Law Section and the local Federal Bar Association, he is particularly well known for his knowledge and ability to navigate the complexities of the Eastern District of Virginia's "rocket docket" and has appeared in over 150 patent cases in all four of the District's Divisions. As co-counsel, he garnered several of the largest patent infringement verdicts ever awarded in the Eastern District of Virginia. He is a permanent member of the Fourth Circuit Judicial Conference, the President Elect of the Board of Directors of and a Fellow in the Virginia Law Foundation, and the Past President of the I'Anson-Hoffman American Inn of Court. He is consistently ranked in the Top 100 Lawyers in Virginia. Based on his trial experience and professionalism, Stephen has been inducted as a Fellow in the prestigious American College of Trial Lawyers. His resume may be found at: Stephen E. Noona > Attorney > Kaufman & Canoles (kaufcan.com).

[3] Savannah L. Kimble is an associate and member of the Intellectual Property Law Practice Group at Kaufman & Canoles. She graduated *magna cum laude* from Washington & Lee University and holds her law degree from William & Mary Law School, where she served as the Senior Articles Editor for the William & Mary Law Review. She also practices in the areas of Mergers and Acquisitions, Franchise, and Sports and Entertainment Law. Savannah's resume may be found at Savannah L. Kimble > Attorney > Kaufman & Canoles (kaufcan.com).

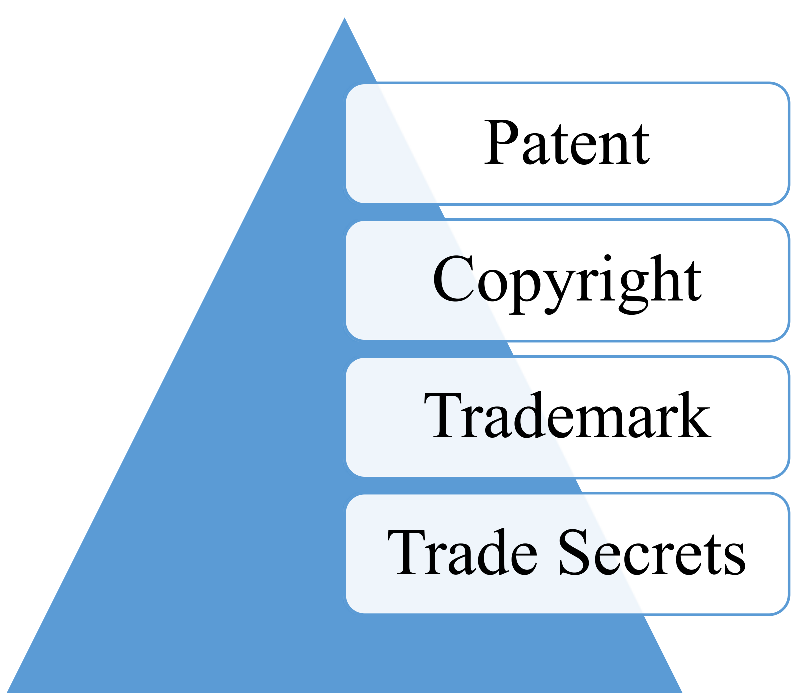
I. Introduction:

"Intellectual property law" ("IP Law") is a stilted, legal term that, at times, takes on an almost mystical connotation. While the subject matter can be dense, at bottom, the area of law covers property rights of four basic types and seeks to balance these rights with the rights of the consumer. Many shy away from practicing in the area because they fear they will get lost, marooned by the many perceived Byzantine rules that accompany the area. But, with increased regularity, all practitioners are faced with understanding IP Law issues even if they seek more specialized help in handling those issues. This outline will provide you with a quick update of five (5) recent changes in the various areas of IP Law that impact the general practitioner. The cases discussed derive principally from the federal courts of the Fourth Circuit and Federal Circuit Court of Appeals.[4]

II. The Four Basic Food Groups of IP Law:

In surviving any situation, one must understand the food groups available. In IP Law, there are four basic food groups:

[4] Trademark, copyright, and trade secret claims are governed in Virginia by the Fourth Circuit Court of Appeals while all patent claims are subject to the law of the Federal Circuit Court of Appeals. 28 U.S.C. § 1295. Because copyright (exclusive jurisdiction in federal court under 28 U.S.C. § 1338 and state law preempted by 17 U.S.C. § 301(a)) and patent claims are dictated by federal law and because state law trademark claims typically follow federal law, this outline will focus on federal court decisions. Trade secrets are governed by Virginia statute and the federal Defend Trade Secrets Act of 2016 ("DTSA")—18 U.S.C. § 1836.



An easy way to remember these areas is to think about protecting an idea for a new business or product. Each IP Food Group protects different aspects of the intellectual property:

1. ***The actual idea: Patent law is the only public way to protect a pure idea:*** patents provide an approximate 20-year monopoly in making, using, or importing products or services that practice the idea;

- **Purpose of Patent Law:** Like copyrights, patent law is rooted in both the U.S. Constitution and Title 35 of the U.S. Code. Similarly, just as copyright law balances the protection of the individual's rights in the expression of ideas with the policy of advancing the arts and society's interest therein, patent law seeks to protect an individual's inventions while encouraging the promotion of science and the useful arts.[5] In exchange for explaining an invention, the patent law gives the patentee an exclusive right to practice the invention to the exclusion of others for a period of roughly 20 years.
    - *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 632 (2019) discusses the constitutional basis for patent law with the language: "The United States Constitution authorizes Congress 'to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' Art. 1, § 8, cl. 8. Under this grant of authority, Congress has crafted a federal patent system that encourages 'the creation and disclosure of new, useful, and nonobvious advances in technology and design' by

[5] U.S. CONST. art. I, § 8, cl. 8.

granting inventors 'the exclusive right to practice the invention for a period of years.'"

- **Patent Law:** Title 35 sets forth the rights of a patentee. Section 271 prohibits the infringement of patent rights and successive sections, particularly Section 284, govern the remedies available in the event that the patentee proves infringement.

2. ***The expression of the idea*—not the idea itself:** Copyright law (Title 17) provides protection for an author's expression of an idea—the way the work is expressed, giving a monopoly on the display, performance, and use of that expression for a long time.

- **Purpose of Copyrights:** Copyrights protect the expression of ideas. This protection is based upon both the U.S. Constitution[6] and Title 17 of the U.S. Code. Like the protection of trademarks, the protection of copyrights must balance the rights of the individual with those of society. While an author receives a copyright upon creation of the expression of the idea, there are profound reasons to register the work as set forth below.

- **Copyright Act:** The Copyright Act of 1976, codified as amended in Title 17 of the United States Code, provides in relevant part that "an infringer of copyright is liable for either . . . the copyright owner's actual damages and any additional profits of the infringer . . . or . . . statutory damages." 17 U.S.C. § 504(a). *Tattoo Art, Inc. v. TAT Int'l, LLC*, 794 F. Supp. 2d 634, 648 (E.D. Va. 2011), *aff'd*, 498 F. App'x 341 (4th Cir. 2012).

    - *ME2 Prods. v. Ahmed*, 289 F. Supp. 3d 760, 763 (W.D. Va. 2018) discusses statutory damages and holds that courts enjoy wide discretion to set the amount of statutory damages, which 17 U.S.C. § 504(c)(1) provides may not be "less than $750 or more than $30,000 as the court considers just." The factors that the court considers in this determination are "(1) the expenses saved and profits reaped by defendants in connection with the infringements; (2) revenues lost by the plaintiffs; and (3) whether the infringement was willful and knowing or whether it was accidental or innocent." *Id.* The *ME2* court also recognized a "recent trend" to award the minimum $750 award to copyright holders who seek copyright infringement damages "as a primary or secondary revenue stream" by filing mass lawsuits against anonymous Doe defendants hoping to coerce settlement. *Id.* at 764.

[6] U.S. CONST. art. I, § 8, cl. 8, known as the Copyright Clause, empowers the United States Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

3. Things that evoke the *source of the idea* or products that use the idea: Trademark law:

- **Purpose of Trademark Law:** The principal purpose of trademark law is to protect against consumer confusion. As the Supreme Court has explained, "In principle, trademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions," 1 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 2.01[2], p. 2-3 (3d ed. 1994) (hereinafter MCCARTHY), for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby 'encourage[s] the production of quality products,' *ibid.*, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale." *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995) (alterations in original).
    - "'The principle underlying trademark protection is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others.' A trademark 'designate[s] the goods as the product of a particular trader' and 'protect[s] his good will against the sale of another's product as his.' It helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid." *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (internal citations omitted).
- **The Lanham Act:** Under federal law, trademarks are governed by the Lanham Act, 15 U.S.C. § 1051, *et seq*.[7] Under the Lanham Act, one acquires trademark rights in anything used to identify the source of the product or service through use. Registration of the trademark is not a prerequisite: a trademark owner's right to bring claims asserting trademark infringement does not depend on registration but instead focuses on use. *Emergency One, Inc. v. Am. Fire Eagle Engine Co., Inc.*, 332 F.3d 264, 267 (4th Cir. 2003). Accordingly, owners of unregistered, but used trademarks may claim damages for infringement or other causes of action, typically termed "unfair competition." *See id.*
    - "'[I]t is not registration, but only actual use of a designation as a mark that creates rights and priority of others.' MCCARTHY § 16:1. 'Neither application for nor registration of a mark at the federal level wipes out the prior nonregistered, common law rights of others.' *Id.* The only exception to this rule is that since 1989, a priority of 'constructive use' can be obtained

[7] The United States Court of Appeals for the Fourth Circuit has recognized that "the test for trademark infringement and unfair competition under the Lanham Act is essentially the same as that for common law unfair competition under Virginia law because both address the likelihood of confusion as to the source of the goods or services involved." *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 n.10 (4th Cir. 1995); *accord Synergistic Int'l, LLC v. Korman*, 470 F.3d 162, 170 n.9 (4th Cir. 2006).

by filing an application for federal registration. MCCARTHY, § 16:1. But constructive use can be trumped by evidence of another party's actual use." *Daniel Grp. v. Serv. Performance Grp., Inc.*, 753 F. Supp. 2d 541, 546 (E.D.N.C. 2010) (citations omitted).

- Owners of unregistered but valid trademarks may enforce their trademark against infringers through several ways, such as through a federal cause of action for trademark infringement under the Lanham Act, available remedies under the Anticybersquatting Consumer Protection Act, or through remedies under state common law. *Matal*, 137 S. Ct. at 1752-53.

- Federal registration, however, "'confers important legal rights and benefits on trademark owners who register their marks.' Registration on the principal register (1) 'serves as constructive notice of the registrant's claim of ownership of the mark,' (2) 'is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate,' and (3) can make a mark 'incontestable' once a mark has been registered for five years. Registration also enables the trademark holder to 'stop the importation into the United States of articles bearing an infringing mark.'" *Id.* at 1753 (citations omitted).

4. Trade Secrets: ***The "how and the why" of the idea that are kept reasonably secret:*** **Virginia's Uniform Trade Secrets Act ("VAUTSA"):[8]** Often ignored as junk food in the hierarchy of the *four basic food groups of intellectual property law*,[9] trade secret law harbors immense power and potency for those who dare to understand and harness it. Like the secrets it protects, common law-based trade secret law is simple but shrouded in unjustified mystery and shunned for the sexier trademark, copyright, and patent law protections provided under federal statutory law. Unlike their more touted cousins, however, trade secrets require little more than common sense to create and to protect. For the commercial practitioner, a basic understanding of this law and its economic value is essential in today's competitive world.

- **Purpose of the VAUTSA:** "The plain language of the Act reflects the General Assembly's decision to protect the owner of a trade secret from another's misuse of that secret. Because the General Assembly has enacted legislation addressing this subject, the role of the courts is limited to construing and applying the terms set forth in the Act." *MicroStrategy Inc. v. Li*, 268 Va. 249, 263, 601 S.E.2d 580, 588 (2004).

    - "[I]n order for a plaintiff to establish that [its alleged trade secret] has been the subject of a trade secret violation, two statutory elements must be proved, namely, the existence of a 'trade secret' and its 'misappropriation'

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[8] For an in-depth discussion of the VAUTSA and its liability provisions, *see* Milton E. Babirak, Jr., *The Virginia Uniform Trade Secrets Act and Case Law*, 5 Va. J.L. & Tech. 15 (2000) ("Babirak Article") and Stephen E. Noona, *SHHHHHH—Can you Keep A Secret?: A Commercial Lawyer's Guide to Basic Trade Secret Law,* Va. CLE (2005).
[9] *See* Stephen E. Noona and John B. Farmer, *Analyzing Commonplace IP Scenarios*, Va. CLE (2004).

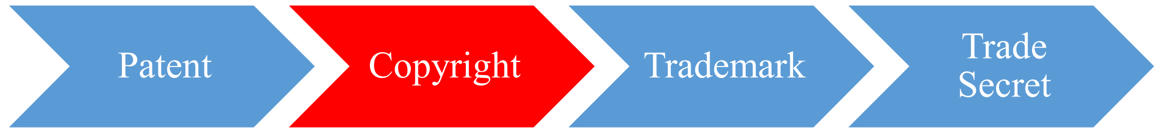
by the defendant." *Collelo v. Geographic Servs.*, 283 Va. 56, 68, 727 S.E.2d 55, 60 (2012) (quoting *MicroStrategy Inc.*, 268 Va. at 263).

- **What does it protect:** ***Anything of economic value that you take reasonable precautions to keep secret.***

Although they are similar in some regards, each food group has its own set of rules and remedies and each can affect the clients of even the most general of practitioners.

2024 IP Updates

1. COPYRIGHT UPDATE I – (Not) George Carlin's Latest Special: A Case Study of Artificial Intelligence ("AI") and Copyright Infringement



Main Sequence, Ltd., et al. v. Dudesy, LLC, et al., 2:24-cv-00711, (C.D. Cal. 2024).

I. Introduction

As you may remember from last year, there are two types of intellectual property at work in the creation of an artificial intelligence ("AI"): one is the input data, the data that is used to generate a product. The input data consists of whatever the user inputs to instruct the AI. For instance, if the user wanted the AI to generate the *Mona Lisa* as painted by Monet, the input data would consist of the *Mona Lisa* itself and various paintings illustrating Monet's style. The use of input data begs the question of whether the use of another's IP in generating something new is an infringement of the IP rights in that input. The output data -the product of the AI -is the second type of intellectual property at play in AI creation.

As you may imagine, and as we predicted, copyright holders whose work is being used as input data are not taking kindly to having the products of their blood, sweat, and tears turned into output data with a few clicks of a mouse. Currently, several cases against various AI companies are pending, from Sarah Silverman,[10] The New York Times,[11] and a group of major record labels[12]. Most have not progressed enough to answer the glaring legal questions on this topic. Here, however, we will be using a case that has settled as a case study for what it actually looks like when a copyright holder in input data sues the creator of output data. In this situation, there was no dispute over whether the copyrighted material was actually used as input data, as there has been in other cases.

You may remember the late, great George Carlin, whose "Filthy Words" monologue (commonly referred to as "Seven Words You Can Never Say on Television") spurred a Supreme Court case.[13] Even though he died in 2008, he is still ahead of his time --it was his material that was used as the input data for an AI Work, and has led to one of the first concrete outcomes of an AI copyright infringement case.

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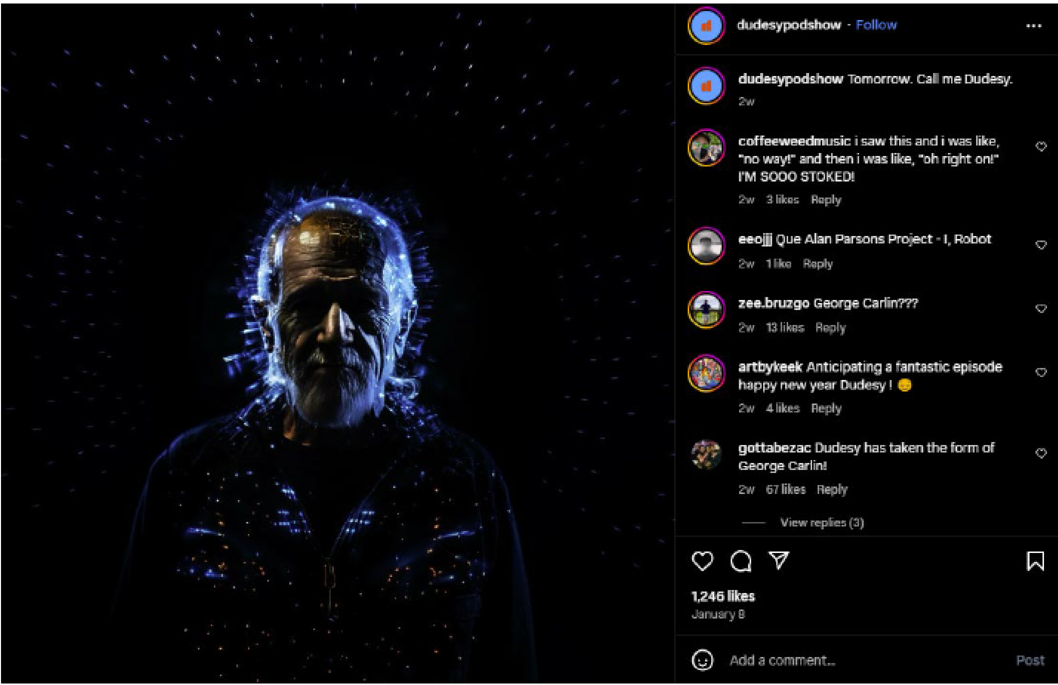
[10] *Silverman v. OpenAI, Inc.*, 3:23-cv-03416, (N.D. Cal. filed July 7, 2023).
[11] *New York Times Co. v. Microsoft Corp.*, 1:23-cv-11195, (S.D.N.Y. filed Dec. 27, 2023).
[12] *UMG Recordings, Inc. et al v. Uncharted Labs, Inc. et al*, 1:24-cv-04777 (S.D.N.Y. filed June 24, 2024); *UMG Recordings, Inc. et al v. Suno, Inc. et al*, 1:24-cv-11611 (D. Mass. filed June 24, 2024).
[13] *See FCC v. Pacifica Found.*, 438 U.S. 726, 98 S. Ct. 3026 (1978).

II. The Complaint

The Dudesy ("Dude—sy") podcast is purportedly written and directed by an AI called "Dudesy" and presented by comedian Will Sasso and writer Chad Kultgen.[14] The premise of the podcast is that the Dudesy AI has access to the online lives of Sasso and Kultgen (emails, browsing activities, etc.) and generates a show particular to the two of them. However, on January 8, 2024, the Dudesy Instagram account displayed the below promotional, AI-generated image of George Carlin, captioned "Tomorrow. Call me Dudesy."[15]



The next day, a new episode of Dudesy was posted, entitled "George Carlin Resurrected." The show featured a few minutes of an AI-generated soundalike of George Carlin performing material that bore a striking resemblance to Carlin's style; this was followed by a discussion between Sasso and Kultgen of how similar to Carlin the AI was.[16] Later the same day, Dudesy social media pages posted an hour-long video containing an AI-generated "George Carlin Special" titled "George Carlin: I'm Glad I'm Dead (2024) – Full Special." "The video used an AI-generated soundalike of George Carlin to read out and perform an AI-generated script written in Carlin's style of humor."[17] Additionally, the thumbnail of the video featured yet another AI-generated image of Carlin.

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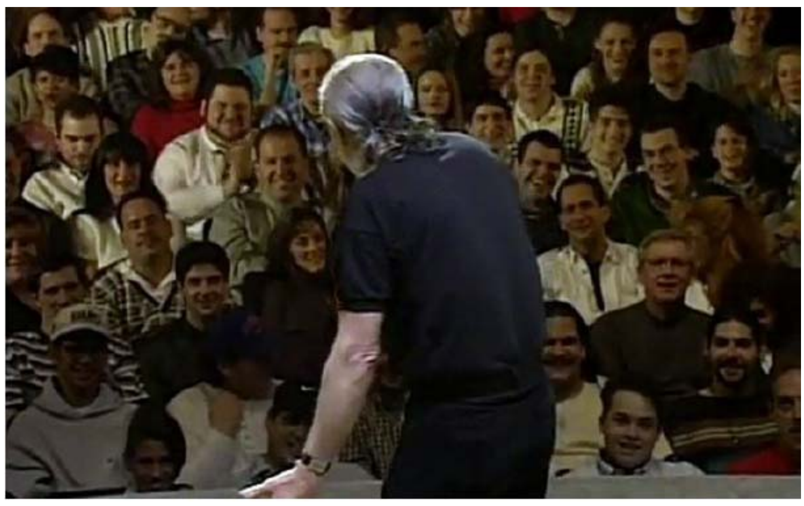
[14] Because of *Main Sequence v. Dudesy*, however, a spokesperson for Kultgen and Sasso stated that the podcast is not actually AI-generated and that Kultgen was responsible for authoring the entire fake-Carlin special. Because the case settled, there was no discovery conducted, and so it is unclear to what extent Dudesy is actually AI-generated. We have chosen to proceed with the case study assuming that Dudesy is a true AI. *See* Christopher Kuo, *George Carlin's Estate Sues Podcasters Over A.I. Episode*, N.Y. Times, (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/arts/carlin-lawsuit-ai-podcast-copyright.html.

[15] Compl., 9:13-27, *Main Sequence, Ltd v.Dudesy, LLC*, 2:24-cv-00711 (C.D. Cal. filed Jan. 25, 2024).

[16] *Id.* at 10:1-11:12.

[17] *Id.* at 11:15-17.



Above, the real Carlin onstage, featuring his “hallmark gray ponytail.”[18]

Below, the AI-generated thumbnail for “George Carlin: I’m Glad I’m Dead (2024) – Full Special”[19]

The introductory voiceover for the video stated that Dudesy AI had “listened to” thousands of hours of Carlin’s specials (the input data) in order to create “I’m Glad I’m Dead” (the output data).[20] The Complaint, filed by the George Carlin’s estate and the company holding his intellectual property, asserted that, “...Defendants have unlawfully used Plaintiffs’ copyrighted works for building and training a dataset for purposes of generating an output intended to mimic Plaintiffs’ copyrighted work (i.e., Carlin’s stand-up comedy). Such actions infringe Plaintiffs’ exclusive rights in the copyrighted works.”[21] Essentially, the Complaint alleged, by ingesting the

[18] *Id.* at 7:13-25.
[19] *Id.* at 12:1-15.
[20] *Id.* at 12:16-21.
[21] *Id.* at 21:17-21.

Carlin specials, and spitting out "I'm Glad I'm Dead," Dudesy had created unauthorized copies of Carlin's copyrighted works.[22]

We are of course omitting from the above argument an essential part of the picture -the use of Carlin's name, image, and likeness to promote "I'm Glad I'm Dead." The right of publicity is regulated by widely varying state laws, and the post-mortem right of publicity is a subject diverging even more across those states, especially regarding soundalikes.[23] Because of our focus on copyright, we are only addressing the copyright infringement aspect of the claims, but the right of publicity as it intersects with AI is rife with its own complications.[24]

III. The (Hypothetical) Answer

We unfortunately do not have an answer to the Complaint because the case was settled before an answer was filed. So allow us, then, to present the argument that we believe an answer would have given. It is relatively straightforward.

Pooling together and ingesting the input data of Carlin's specials is no different than a person listening to all of Carlin's specials and attempting to recreate his humor, style, and unique perspective. The Complaint states that what an AI does is not "listening," but "apply[ing] algorithms to data inputs in order to generate an output."[25] Perhaps what an AI does is not listening, the Answer might state, but inputting the data is equivalent; an AI's algorithms are the equivalent of a human considering how best to use the Carlin specials in order to create something similar. And the output is the equivalent of a human-produced mock-Carlin special. The copyrighted input data is therefore not being copied and re-presented to the public; the AI is simply using it to learn a particular pattern of presenting humor.[26]

The Complaint states that "the artificial intelligence model's unauthorized ingestion of George Carlin's entire life's work is not analogous to how a 'human impressionist' would have developed a work inspired by Carlin."[27] But the Complaint does not state why this is the case. Is it because it would be difficult for a human to listen to that much material? Because a human is presumed to add something undefinable, yet simply *more* to the outcome of such a process than an algorithm? Or some unknown third reason? If a human were to listen to all of Carlin's material and create a special echoing his distinctive brand of humor, why would that be any different than what Dudesy accomplished?[28]

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[22] *Id.* at 12:19-20.
[23] *See* Prachi Patel, *AI Voice Enters the Copyright Regime: Proposal of a Three-Part Framework*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 451, 474 (2024).
[24] *See* Christopher T. Zirpoli, *Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity*, Congressional Research Service (Jan. 29, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11052.
[25] Compl., 13:9, *Main Sequence, Ltd v.Dudesy, LLC*, 2:24-cv-00711 (C.D. Cal. filed Jan. 25, 2024).
[26] *See* Jenny Quang, *Does Training AI Violate Copyright Law?*, 36 BERKELEY TECH. L.J. 1407, 1409 (2021).
[27] Compl., 13:13-15.
[28] *See generally* Michael D. Murray, *Generative AI Art: Copyright Infringement and Fair Use*, 26 SMU SCI. & TECH. L. REV. 259 (2023).

IV. The (Hypothetical) Outcome

Here, the actual outcome was a settlement enjoining Dudesy from using Carlin's name, image, and likeness and requiring that all trace of the matter be erased from Dudesy's various accounts. This case is a good case study because the facts are abnormally clear. There was (a) a statement by the party using the AI that the AI ingested particular copyrighted material followed by (b) an output directly mimicking that material. This is not usually the case in what we have seen of AI copyright infringement cases thus far. Some cases have had to rely on additional software to make case for the use of specific materials and copying. Ingestion alone has yet to yield infringement.

Copying in the Scraping Process:

The basics of how AI systems work may lend itself to copyright infringement. Indeed, the whole basis of ingesting vast amounts of copyrighted text, images and other materials to "train" the AI engine to make its creations is based on "copying" copyrighted materials. Vast amounts of text, images and other materials are scraped from the internet—i.e., copied, by computer bots in the process. Copying these materials without permission or licensing arguably infringes the copyright holder's rights. A prima facia case for infringement is shown when the plaintiff establishes a valid copyright and proves copying. One basic problem to proving infringement is that there is not reliable way to tell if a specific work has been copied, ingested and used by a an AI engine.

In response, assuming that copying is admitted are can be proven, AI companies argue that such copying is "Fair Use" under 17 U.S.C. § 107, and in particular have argued that the use is transformative. That provision provides a defense to infringement through the analysis of four factors:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

One collecting source summarized arguments as:

> Plaintiffs have filed multiple lawsuits claiming the training process for AI programs infringed their copyrights in written and visual works. These include lawsuits by the Authors Guild and authors Paul Tremblay, Michael Chabon, Sarah Silverman, and others against OpenAI; separate lawsuits by Michael Chabon, Sarah Silverman, and others against Meta Platforms; proposed class action lawsuits against Alphabet Inc. and Stability AI and Midjourney; and a lawsuit by Getty Images against Stability AI. The Getty Images lawsuit, for instance, alleges that "Stability AI has copied at least 12 million copyrighted images from Getty Images' websites . . . in order to train its Stable Diffusion model." This lawsuit appears to dispute any characterization of fair use,

> arguing that Stable Diffusion is a commercial product, weighing against fair use under the first statutory factor, and that the program undermines the market for the original works, weighing against fair use under the fourth factor.
>
> In September 2023, a U.S. district court ruled that a jury trial would be needed to determine whether it was fair use for an AI company to copy case summaries from Westlaw, a legal research platform, to train an AI program to quote pertinent passages from legal opinions in response to questions from a user. The court found that, while the defendant's use was "undoubtedly commercial," a jury would need to resolve factual disputes concerning whether the use was "transformative" (factor 1), to what extent the nature of the plaintiff's work favored fair use (factor 2), whether the defendant copied more than needed to train the AI program (factor 3), and whether the AI program would constitute a "market substitute" for Westlaw (factor 4). While the AI program at issue might not be considered "generative" AI, the same kinds of facts might be relevant to a court's fair-use analysis of making copies to train generative AI models….[29]

But, recent Supreme Court cases have severely undermined the position that the works are transformative especially where the result is used for commercial gain—especially since most Generative AI Engines have a commercial purpose.[30].

Substantial Similarity after Copying:

Obviously, if a case for copying can be made and the resulting work is "substantially similar" (various tests by circuit, but, in general, has the "look and feel" of the original work) to the original work copied, then there would be an argument for copyright infringement just as in cases involving music[31]. However, the output from Generative AI rarely regenerated original materials and usually produces a product that is far different from the original material—think Fake Drake rap song, Generative Images or art in style of famous author—Surreal candy bar riding bike in style of Salvator Dali. Matching up works for the comparison can be difficult if what comes out is conglomeration or "inspired by" many different works.

Derivative Work:

But when the facts are this clear, it is also clear that the output is a derivative work, which is protected under copyright law.[32] "A derivative work is a work based on or derived from one or more already existing work."[33] As one commentator has stated:

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[29] Christopher T. Zirpoli, *Generative Artificial Intelligence and Copyright Law*, Congressional Research Service (Sept. 29, 2023), LSB10922 (congress.gov).

[30] *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023); Baker Donelson, *The Fast-Moving Race Between Gen-AI and Copyright Law*, JD Supra (July 11, 2024), https://www.jdsupra.com/legalnews/the-fast-moving-race-between-gen-ai-and-2746417/.

[31] *See, e.g. Copeland v. Bieber*, 789 F.3d 484 (4th Cir. 2015) (analyzing two works for substantial similarity under copyright law art motion to dismiss stage).

[32] 17 U.S.C. § 106(2).

[33] Circular 14: Copyright in Derivative Works and Compilations, U.S. Copyright Office (reviewed July 2020), https://www.copyright.gov/circs/circ14.pdf?loclr=blogcop.

> The statutory definition of derivative work is "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization...or any other form in which a work may be recast, transformed, or adapted." Because a derivative work is subject to the copyright of the original work, the copyright owner of the original work has a right of action against the producer of the derivative work who did not obtain permission[34].

It would have been very difficult for the Defendants in this case to contest the fact that they had used Carlin's work to produce something derived from his oeuvre, as they themselves had stated that such was the case in the voiceover introduction to "I'm Glad I'm Dead."

Again, however, this is rare. It is not always easy, obvious, or even possible to determine what the particular inputs into an AI are. Therefore, proving that a work is in fact derivative will be the challenge of future plaintiffs bringing suit against AI companies that may have utilized their copyrighted works as input data. But the pending cases from Sarah Silverman,[35] The New York Times,[36] and major record labels[37] may yet provide the next step of how calculating input data - and whether the output data is therefore derivative -may unfold in the future.

Claims Under the Digital Millennium Act (1998 Amendment to the Copyright Act)

One final claim may be statutory. As a one commentator notes:

> When training their generative AI tools with copyrighted works, AI companies may also violate the Digital Millennium Copyright Act (DMCA) by removing the copyright management information (CMI) from the inputted data. In order to bring a claim under the DMCA, copyright owners must identify what the removed or altered CMI was, and that the defendant knew, or had reasonable grounds to know, that intentionally removing CMI would induce, enable, facilitate, or conceal infringement. These requirements present difficulties for copyright owners because they have to identify the particular removal of CMI among millions of works included in training datasets.

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[34] Baker Donelson, *The Fast-Moving Race Between Gen-AI and Copyright Law*, JD Supra (July 11, 2024), https://www.jdsupra.com/legalnews/the-fast-moving-race-between-gen-ai-and-2746417/.

[35] *Silverman v. OpenAI, Inc.*, 3:23-cv-03416, (N.D. Cal. filed July 7, 2023).

[36] *New York Times Co. v. Microsoft Corp.*, 1:23-cv-11195, (S.D.N.Y. filed Dec. 27 2023).

[37] *UMG Recordings, Inc. et al v. Uncharted Labs, Inc. et al*, 1:24-cv-04777 (S.D.N.Y. filed June 24, 2024); *UMG Recordings, Inc. et al v. Suno, Inc. et al*, 1:24-cv-11611 (D. Mass. filed June 24, 2024).

Conclusion:

For now, we can only guess at how the courts will resolve the adaptation of this new technology to the many years of jurisprudence surrounding copyright law. Perhaps, Congress will get involved too. In the prophetic words of George Carlin:

> I've been uplinked and downloaded. I've been inputted and outsourced. I know the upside of downsizing; I know the downside of upgrading. I'm a high-tech lowlife. A cutting-edge, state-of-the-art, bicoastal mutlitasker, and I can give you a gigabyte in a nanosecond. (from his "Ode to the Modern Man," 2004)

AN INTERSECTION OF ACRONYMS: AI, IP, and the USPTO

In the past year, artificial intelligence ("AI"), has become bigger and better than ever before, and the legal world has attempted to adjust. Twice in the past year, the United States Patent and Trademark Office ("USPTO") has released guidance on the use of AI for both patents and trademarks.[38]

I. February 2024

Last year, the Federal Circuit Court of Appeals considered *Thaler v. Vidal*, and concluded that an invention that had no human input into its invention process was not patentable, while specifically reserving the question of whether inventions created by a humans with the assistance of AI could be patented.[39] The first set of guidance, released by the USPTO on February 13, 2024, sought to address patent inventorship analysis for AI-assisted inventions.[40] The guidance stated that "while AI-assisted inventions are not categorically unpatentable, the inventorship analysis should focus on human contributions, as patents function to incentivize and reward human ingenuity."[41] The guidance did not preclude the use of AI in the invention process, however. For an invention to be awarded a patent, the guidance suggested, a human must have provided a "significant contribution" to the inventing process.[42] But what does a "significant contribution" constitute? The USPTO turned toward *Pannu v. Iolab Corp*., 155 F.3d 1344, 1351 (Fed. Cir. 1998), and the factors it articulated, which state that each inventor must:

> (1) contribute in some significant manner to the conception or reduction to practice of the invention, (2) make a contribution to the claimed invention that is not insignificant in quality, when that contribution is measured against the dimension of the full invention, and (3) do more than merely explain to the real inventors well-known concepts and/or the current state of the art.[43]

The guidance stated that in order for a human to have made a "significant contribution" to an AI-assisted invention, the *Pannu* standards must be met for each claim of the patent.[44]

Finally, the February guidance gave inventors five guiding principles:

1. The use of AI in an invention does not preclude patent registration so long as a human has "contribute[d] significantly" to the invention.[45]

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[38] Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043 (Feb. 13, 2024); Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office, 89 Fed. Reg. 25609 (Apr. 11, 2024).
[39] 43 F.4th 1207, 1211 (Fed. Cir. 2022).
[40] Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043 (Feb. 13, 2024).
[41] *Id.* at 10044
[42] *Id.*
[43] *See id.* at 10046–48; 155 F.3d 1344, 1351 (Fed. Cir. 1998).
[44] Inventorship Guidance, *supra* note 36, at 10046.
[45] *Id.* at 10048.

2. Merely presenting an AI with a problem, general goal, or research plan is generally not enough for a human to be considered to have invented the output. "However, a significant contribution could be shown by the way the person constructs the prompt in view of a specific problem to elicit a particular solution from the AI system."[46]

3. "Reducing an invention to practice alone is not a significant contribution that rises to the level of inventorship." However, if a person takes the output of an AI and makes a significant contribution to it may be an inventor for the purposes of patentability. [47]

4. A human who creates a foundational component from which the claimed invention is derived may have provided a significant contribution to the conception of the claimed invention. Further, "[i]n some situations, the natural person(s) who designs, builds, or trains an AI system in view of a specific problem to elicit a particular solution could be an inventor, where the designing, building, or training of the AI system is a significant contribution to the invention created with the AI system."[48]

5. A person who simply owns or oversees an AI that is used in the creation of an invention, without providing a significant contribution to the conception of the invention, is not an inventor.[49]

II. April 2024

While the February guidance considered patentability, the April guidance considered the mechanics of applying for a patent or a trademark. The April guidance clarified that while AI tools can be helpful to practitioners before the USPTO, relying too heavily on AI can endanger a practitioner's ability to comply with USPTO standards.[50]

First, the guidance explains that its rules give rise to a duty to use AI in a limited way in connection with applications:

1. Practitioners have a duty of candor and good faith when proceeding before the USPTO, in patent or trademark matters. This includes a duty to disclose all matters relating to patentability -including the use of AI.[51]

2. All patent correspondence and most trademark correspondence must bear a person's signature, which testifies that that individual inserted her own signature. If this function is performed by AI, this testimony is false.[52]

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[46] *Id.*
[47] *Id.* at 10048-49.
[48] *Id.* at 10049
[49] *Id.*
[50] *See* Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office, 89 Fed. Reg. 25609, 25610 (Apr. 11, 2024).
[51] *Id.* at 25611.
[52] *Id.* at 25611-12.

3. Practitioners have a duty of confidentiality to their clients except in limited circumstances. This means that practitioners should be wary of inserting a client's information into AI in order to draft an application.[53]

The above rules give rise to the USPTO's guidance regarding the use of AI through the patent and trademark application processes:

1. When a practitioner uses AI to draft documents, she must review and verify the contents of the document that is being submitted.[54] Further, if a practitioner uses AI to draft a patent application, she must ensure that all required disclosures regarding patentability have been made. Specifically, if the invention was itself created with AI, the application must state that fact. For trademark application submissions, practitioners should ensure that specimens show actual use of the trademark in commerce, and must not be AI-generated.[55]

2. Filings must be signed by a real person and not an AI. Further, practitioners may not use an AI to obtain a USPTO.gov account to make filings for the practitioner.[56]

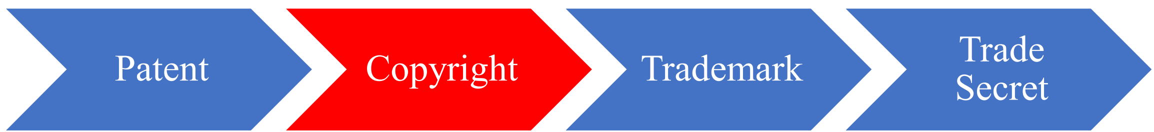
3. AIs cannot be considered authorized users of the USPTO IT systems. Additionally, those who use AI to "data mine" information from the USPTO's systems may face criminal and civil penalties.[57]

4. Practitioners using AI should be very wary of inserting confidential client information into an AI tool. Disclosure of a client's data because of AI might implicate export controls, foreign filing licensing issues, and even national security.[58]

5. Violating the duty of candor and good faith, even if the violation occurs because of a practitioner's use of AI, can still amount to fraud and intentional misconduct. However, the guidance does not provide examples of precisely what conduct would constitute a violation.[59]

[53] *Id.* at 25612.
[54] *Id.* at 25614.
[55] *Id.* at 25614-15.
[56] *Id.*
[57] *Id.* at 25616-17
[58] *Id.* at 25617.
[59] *Id.*

2. COPYRIGHT UPDATE II – Beat the Clock or Not under the Copyright Law?



*Warner Chappell Music, Inc. v. Nealy, 601 U.S. ____, **144 S. Ct. 1135** (2024)*

When does the "fat lady" sing on a copyright claim? When does the ability to bring a copyright infringement suit end? That is the central question posed in the now infamous *Warner Chappell* case. **The easy part: The Copyright Statute provides a three-year statute of limitations[60] that disallows any claim that is not brought within three years of the accrual of the claim.** However, in a majority of circuits, courts impose a **"discovery rule"** for accrual of the claim that allows copyright claims to be brought outside of the 3 year limitation[61]. Though these judicially created rules vary in application, the basics are similar: the claim does not accrue and thus the statute of limitations does not start to run until the claim *is discovered or should have reasonably been discovered.* A minority of circuits (the Second Circuit) deems the claim to accrue when injury or violation occurs *regardless of knowledge by the plaintiff* and bars claims outside of the statutorily set limitation. Should a plaintiff that discovers within three years of filing suit much older infringements be allowed to sue for them or are they time-barred? This circuit split primed the Supreme Court pump to answer this important question.

On May 9, 2024, in a 6-3 decision, Justice Elena Kagan and five other justices issued a narrowly crafted, tautological answer that leaves a lot up in the air. Clarifying broad language from a 2014 case that seemed to limit damages to the three year period and *assuming without deciding that a discovery may be applied under the Copyright Act*,[62] **the Court found that any claim brought within 3 years of its accrual was valid.** This intellectual jujitsu avoided the main question and garnered criticism from a three justice dissent[63] as discussed below.

I Issue Presented to Court:

Under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), may a copyright plaintiff recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit?

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[60] 17 U.S.C. § 507(b) provides: "(b) Civil Actions.—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued…"

[61] The Fourth Circuit has adopted such a discovery rule. *See Werner v. BN Media, LLC*, 477 F. Supp. 3d 452, 456 (E.D. Va. 2020); *Hoey v. Dexel Sys. Corp.*, 716 F. Supp. 222, 223-4 (E.D. Va. 1989).

[60] *Warner Chappell Music, Inc. v. Nealy*, 144 S.Ct. 1135 (2024).

[62] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 672 (2014). The Court deemed the language cited taken out of context.

[63] Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito authored the scathing dissent which concludes that the Copyright Act does not support a discovery rule. *Warner Chappell*, 144 S. Ct. at 1140-41 (Gorsuch, J., dissenting).

II. Facts of the Case

In 1983, Sherman Nealy and Tony Butler formed Music Specialist, Inc.[64] Music Specialist recorded and released one album and several singles, including "*Jam the Box,*" a song we all know by sound if not by name.[65] The venture failed and Nealy went to prison for drug-related offenses for two terms: one prison term from 1989 to 2008, and another from 2012 to 2015.[66] Unbeknownst to Nealy, his partner "entered into an agreement with Warner Chappell to license works from the Music Specialist catalog."[67] As a result, the venture's work *Jam the Box* was incorporated into Flo Rida's hit "*In the Ayer"* which sold millions of copies and reached No. 9 on the Billboard chart.[68] Use of that song was in turn licensed to "So You Think You Can Dance" and several other popular television shows.[69] Other Music Specialist songs found their way into recordings by the Black Eyed Peas and Kid Sister.[70]

In 2018, after his second prison stint, Nealy sued Warner Chappell for copyright infringement. "Nealy alleged that he held the copyrights to Music Specialist's songs and that Warner Chappell's licensing activities infringed his rights."[71] Nealy claimed that the infringing activity, "dated back to 2008—**so ten years before he brought suit.**"[72] Nealy sought damages and profits for the alleged misconduct under the Copyright Act authorizes.[73] Warner Chappell contended that the claims were time-barred under the Copyright Act's statute of limitations.[74] As the Court noted:

> Under the Copyright Act, a plaintiff must file suit "within three years after the claim accrued." §507(b). On one understanding of that limitations provision, a copyright claim "accrue[s]" when "an infringing act occurs." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U. S. 663, 670 (2014). So a plaintiff can complain about infringements going back only three years from the time he filed suit. If that rule governed, many of Nealy's claims would be untimely, because they alleged infringements occurring as much as ten years earlier. But under an alternative view of the Act's limitations provision, a claim accrues when "the plaintiff discovers, or with due diligence should have discovered," the infringing act. *Ibid.*, n. 4. That so-called discovery rule, used in the Circuit where Nealy sued, enables a diligent plaintiff to raise claims about even very old infringements if he discovered them within the prior three years. Nealy urged that all his claims were timely under that rule because he did

[64] Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito authored the scathing dissent which concludes that the Copyright Act does not support a discovery rule. *Warner Chappell*, 144 S. Ct. at 1140-41 (Gorsuch, J., dissenting).
[65] *Id.* at 1137.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

not learn of Warner Chappell's infringing conduct until 2016—just after he got out of prison and less than three years before he sued.[75]

The district court limited Nealy's damages to those that reached back only 3 years from the date of filing suit.[76] Relying on *Sohm* v. *Scholastic Inc.*, 959 F. 3d 39, 51–52 (2nd Cir. 2020) from the Second Circuit, the district court held that "even when claims for old infringements are timely, monetary relief is "limited" to "the three years prior to the filing" of the action."[77] The Eleventh Circuit reversed and rejected the three-year damages bar on a timely claim. **The court "assume[d] for the purposes of answering" the certified question that all of Nealy's claims were "timely under the discovery rule."**[78] Based on that conclusion, the court allowed Nealy to recover full damages.[79] Relying on *Starz Entertainment* v. *MGM*, 39 F. 4th 1236, 1244 (9th Cir. 2022) from the Ninth Circuit (and rejecting the Second Circuit's line of cases), the court held that a plaintiff with a timely claim under the discovery rule may obtain "retrospective relief for [an] infringement" even if it "occurr[ed] more than three years before the lawsuit's filing." *Id.* The split between circuits was clear and *certiorari* was granted.

III. Holding of Court

Justice Kagan, writing for the 6 to 3 majority,[80] held that a copyright owner is entitled to damages for any timely claim, *even if those claims occurred more than 3 years from the filing of the lawsuit.* In doing so, the Court ***assumed without deciding that the discovery rule was valid*** stating: "we assume without deciding that a claim is timely under that provision if brought within three years of when the plaintiff discovered an infringement, no matter when the infringement happened…."[81] The Court carefully and narrowly circumscribed its decision and ***did not decide the validity of the discovery rule:***

> The question on which this Court granted certiorari is '[w]hether, under the discovery accrual rule applied by the circuit courts,' a copyright plaintiff 'can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.' That question which the Court substituted for Warner Chappell's, incorporates an assumption: that the discovery rule governs the timeliness of copyright claims. We have never decided whether that assumption is valid—i.e., whether a copyright claim accrues when a plaintiff discovers or should have discovered an infringement, rather than when the infringement happened. See *Petrella*, 572 U. S., at 670, n. 4. But that issue is not properly presented here…And as noted above, a division exists among the many Courts of Appeals applying a copyright discovery rule (11 at last count) about whether to superimpose a three-year limit on damages. *See supra*, at 1138-39; *Petrella*, 572 U. S., at 670, n. 4; Pet. for Cert. 4.

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[75] *Id.* at 1137-38.
[76] *Id.* at 1138.
[77] *Id.*
[78] *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1331 (11th Cir. 2023) (emphasis added).
[79] *Id.*
[80] The opinion was joined by Chief Justice Roberts and Justice Sotomayor, Kavanaugh, Barrett, and Jackson. *Warner*, 144 S. Ct. at 1137.
[81] *Id.*

> We therefore confined our review to that disputed remedial issue, excluding consideration of the discovery rule and asking only whether plaintiff with a timely claim under the rule can get damages going back more than three years.[82]

To support its decision, the Court looked specifically to the language of the Copyright Act finding that the statute's language "establishes no separate three-year period for recovering damages" and having such a limit would be counterintuitive.[83] Indeed, having a discovery rule to permit claims to be filed based on old infringements but then barring a plaintiff from recovering any damages for those infringements—due to such a separate bar—would be "essentially self-defeating," as it would eliminate the benefits of a discovery rule.[84]

In reaching its decision, the Court was also careful to clarify (rewrite) the broad language of *Petrella* and make sure it was taken in context such that it did not answer the question at hand:

> There we noted, as the Second Circuit emphasized, that the Copyright Act's statute of limitations allows plaintiffs 'to gain retrospective relief running only three years back from' the filing of a suit. 572 U. S., at 672; *see id*., at 677. Taken out of context, that line might seem to address the issue here. But in making that statement, we merely described how the limitations provision works when a plaintiff has no timely claims for infringing acts more than three years old. That was the situation in *Petrella*….[there, due to the knowledge that the plaintiff had of the earlier claims, no discovery rule could apply, and as such]….we did not go beyond the case's facts to say that even if the limitations provision allows a claim for an earlier infringement, the plaintiff may not obtain monetary relief. To the contrary: The plaintiff in *Petrella* could get damages "running only three years back" from filing because she could sue for infringements occurring only within that timeframe.[85]

106 U.S. at 1140. The Court assumed away the main question and rebuilt clear law to avoid having to decide the question it assumed away. This conclusion is a nice segway into the dissent.

IV. The Dissent:

Writing for the dissent[86], Justice Gorsuch criticized the majority for sidestepping the real issue at hand and assuming away the white elephant in the room:

> The Court discusses how a discovery rule of accrual should operate under the Copyright Act. But in doing so it sidesteps the logically antecedent question whether the Act has room for such a rule. Rather than address that question, the Court takes care to emphasize that its resolution must await a future case. The trouble is, the Act almost certainly does not tolerate a discovery rule. And that fact promises soon enough to make anything we might say today about the rule's operational details a dead letter.[87]

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[82] *Id.* at 1138-39 (citations omitted) (footnote omitted).
[83] *Id.* at 1139.
[84] *Id.*
[85] *Id.* at 1140.
[86] Justice Gorsuch was joined in the dissent by Justices Thomas and Alito.
[87] *Id.* (Gorsuch, J., dissenting).

Id.

The Court noted that discovery rules are not "applicable across all contexts."[88] The general rule is that "[u]nless the statute at hand directs otherwise, we proceed consistent with traditional equitable practice and ordinarily apply the discovery rule only "in cases of fraud or concealment."[89] Indeed, the Court has long warned lower courts against the "expansive approach to the discovery rule."[90] *Rotkiske v. Klemm,* 589 U. S. 8, 14 (2019); see *TRW Inc*., 534 U. S., at 27–28. The dissent concluded that there is little in the Copyright Act that supports the adoption of a discovery rule and the Court was wasting its time creating law around a rule that should not stand:

> Respectfully, rather than devote our time to this case, I would have dismissed it as improvidently granted and awaited another squarely presenting the question whether the Copyright Act authorizes the discovery rule. Better, in my view, to answer a question that does matter than one that almost certainly does not.[91]

Ironically, the fate of the copyright infringement discovery rule was already before the court. The Supreme Court had queued up that challenge in a Fifth Circuit appeal in the case of *Hearst Newspapers, L.L.C., v. Martinelli,* 65 F.4th 231 (5th Cir. 2023). The case squarely challenged the application of a discovery rule as antithetical to the Copyright Act.[92] But unfortunately, after much anticipation, on May 20, 2024, ***the Court denied the petition for certiorari***[93]. Sadly, by doing so, the Court failed to take up the issue it highlighted as important and implicitly endorsed a judicially created rule that at least 3 justices (possibly more) have determined is not supported by the Copyright Act or any exception to well-established doctrine.

V. Effect:

Most commentators believe that the Court's decision is favorable for Copyright plaintiffs and will encourage more and larger claims for longer periods of time, especially in the Second Circuit.[94]

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[88] *Id.* (citing *TRW Inc. v. Andrews, 534 U. S. 19, 27* (2001)).
[89] *Id.* at 1141 (citing *TRW Inc.*, 534 U.S. at 27).
[90] *Id.* (citing *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019); see *TRW Inc*., 534 U.S., at 27–28).
[91] *Id.*
[92] *Id.*
[93] *See, e.g.*, Ivan Moreno, *Justices Reject Hearst's 'Discovery Rule' Petition In Pics Case,* Law 360 (May 20, 2024, 11:53 AM) https://www.law360.com/ip/articles/1803662/justices-reject-hearst-s-discovery-rule-petition-in-pics-case.
[94] For commentary on the decision, see, for example, Zvi Rosen, *Warner Chappell Music v. Nealy: Clarity on Damages, Still Hazy on the Discovery Rule*, FedSoc Blog (May 29, 2024), https://fedsoc.org/commentary/fedsoc-blog/warner-chappell-music-v-nealy-clarity-on-damages-still-hazy-on-the-discovery-rule; Jordan Feirman, et al., *Supreme Court Clarifies That Copyright Damages Are Not Limited to Three Years Before Filin of an Infringement Claim*, Skadden (May 10, 2024), https://www.skadden.com/insights/publications/2024/05/supreme-court-clarifies-that-copyright-damages-are-not-limited-to-three-years.

3. TRADEMARK UPDATE I: *Is Preventing the Trademark "TRUMP TOO SMALL" from Registering Constitutional?*

Vidal v. Elster, 602 U.S. 286, 144 S. Ct. 1507 (June 13, 2024).

I. Introduction

Section 1052(c) of the Lanham Act prevents the registration of a trademark that "[c]onsists of or comprises a name...identifying a particular living individual except by his written consent."[95] In *Matal v. Tam*, 582 U.S. 218, 137 S. Ct. 1744 (2017), the Supreme Court decided that the disparagement clause of the Lanham Act, which prohibited trademark registration for trademarks that might disparage individuals was facially invalid under the First Amendment.[96] There is precedent for certain blockages to registration in the Lanham Act being deemed unconstitutional for violating the right to free speech.

II. Issue Decided

Does the refusal to register a mark under Section 1052(c) of the Lanham Act violate the Free Speech Clause of the First Amendment when the mark contains criticism of a government official or public figure?

III. Procedural Posture & Facts

Following a memorable exchange between then-candidate Donald Trump and Senator Marco Rubio at a 2016 presidential primary debate, Steve Elster sought to register the trademark "TRUMP TOO SMALL" to convey, as Elster put it, Elster's opinion "that some features of President Trump and his policies are diminutive."[97] The examining attorney at the United States Patent and Trademark Office ("PTO") refused registration on the grounds that Section 1052(c) of the Lanham Act prevents registration of a mark that "[c]onsists of or comprises a name...identifying a particular living individual except by his written consent."[98] Therefore, the examining attorney refused registration because it used Trump's name without his consent.[99] The examining attorney rejected Elster's First Amendment argument that he was permitted to register

[95] 15 U.S.C. § 1502(c).
[96] *Id.*
[97] *In re Elster*, 26 F.4th 1328, 1330 (Fed. Cir. 2022).
[98] *Id.*
[99] *Id.*

the mark because it expressed his viewpoint because there was no free speech carve out from Section 1052(c).[100]

Elster appealed to the PTO's Trademark Trial and Appeal Board ("TTAB"), arguing that Section 1052(c) was a content-based restriction on speech and therefore impermissible.[101] The TTAB affirmed the examining attorney's decision to refuse the application, stating that Section 1052(c) is narrowly tailored to advance a compelling government interest: "protecting the named individual's rights of privacy and publicity and protecting consumers against source deception."[102]

Elster then appealed to the Federal Circuit Court of Appeals, which reversed the TTAB, reasoning that it was able to extrapolate the invalidation of a content-based restriction on trademark registration under *Matal v. Tam* and *Iancu v. Brunetti*, 588 U.S. 388, 139 S. Ct. 2294, 204 (2019) to what that court saw as a similar content-based restriction within Section 1052(c).[103] The court stated that, under both *Tam* and *Brunetti*, "a trademark represents 'private, not government, speech' entitled to some form of First Amendment protection."[104] The issue, as the court saw it, was "whether section 2(c) can legally disadvantage the speech at issue here."[105] The government had argued before the court that any free speech interests were outweighed by the government's interest in protecting the privacy and publicity rights of the person named within the mark in this case, Trump.[106] The court did not accept the government's argument, instead finding that the government did not have an interest in limiting speech on privacy or publicity grounds if the mark involved the criticism of a government official because "there c[ould] be no plausible claim that President Trump enjoys a right of privacy protecting him from criticism in the absence of actual malice" and because "the right of publicity is particularly constrained when speech critical of a public official is involved."[107] The court did not rule on whether Section 1052(c) was constitutionally overbroad, but raised a concern that it may be.

The government appealed to the Supreme Court.

IV. Holding

Section 1052(c) (the "names clause") does not violate the First Amendment, and it is not necessary to analyze a purely content-based restriction on trademark registration under heightened scrutiny.[108]

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at (quoting *Matal v. Tam*, 582 U.S. at 218, 239 (2017)).
[105] *Id.* at 1332.
[106] *Id.* at 1330.
[107] *Id.* at 1334-38.
[108] *Vidal v. Elster,* 602 U.S. 286, 310 (June 13, 2024).

V. Opinion of the Court: Justice Thomas, except as to Part III

The holding, as it turned out, was less a matter of trademark law than it was a matter of First Amendment law. Content-based restrictions on speech are "presumptively unconstitutional."[109] Lying within the category of content-based restrictions are the even more difficult to justify viewpoint-based restrictions.[110] *Matal v. Tam* and *Iancu v. Brunetti* had both struck down viewpoint-based restrictions on trademark registration. Elster had argued before the Court that the names clause was a viewpoint-based restriction because "obtaining consent [from the individual named in the trademark] for a trademark under the names clause is easier if it flatters rather than mocks a subject."[111] The Court disagreed, stating that there were any number of reasons an individual would not want to give consent for registering a trademark containing her name, only one of which was that the trademark in question was critical of them.[112] The Court was therefore addressing only a content-based restriction on trademark registration, an unprecedented occurrence.

What followed was a dissection of the long history and tradition of trademark law, though the end result was remarkably straightforward: the names clause is not unconstitutional. First, as Justice Thomas wrote, trademark restrictions on names have an extensive history of coexistence with the First Amendment because (a) there has long been a recognized property right over a person's name and (b) restricting the trademarking of names serves the purpose of trademark law -that of properly identifying the source of goods.[113]

First, the Court said, history showed that a person had a common-law right to use his own name as a trademark and to exclude others from interfering with his business or his reputation by using his name without his consent. When the Lanham Act was encoded, it adopted the main features of common law trademark protections, and it is from this adoption of the common law right for a person to control his own name that the names clause originates.[114]

Second, the purpose of trademark law is to protect a consumer's reliance on a mark as identifying the source of goods or services. According to the Court, a person's name is perhaps the strongest source indicator there is, which justifies restricting the issuance of a trademark containing it to someone who has the person's permission to use it. Otherwise a person applying for a trademark while using another's name could "piggyback off the goodwill another entity has built in its name."[115]

The Court was careful to specify the narrowness of the ruling, stating that "We do not set forth a comprehensive framework for judging whether all content-based but viewpoint-neutral

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[109] *Id.* at 293.
[110] *Id.* (quoting *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 564, 573 (2002)).
[111] *Id.* at 294.
[112] "No matter the message a registrant wants to convey, the names clause prohibits marks that use another person's name without consent." *Id.* at 293-94.
[113] *Id.* at 299-300.
[114] *Id.* at 288.
[115] *Id.* (citing *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm'n*, 483 U.S. 522, 528 (1987)).

trademark restrictions are constitutional. Nor do we suggest that an equivalent history and tradition is required to uphold every content-based trademark restriction."[116]

VI. Concurring Opinion -Justice Barrett, with Justices Kagen, Sotomayor, and Jackson Joining

The concurring Justices took issue with Justice Thomas's history-and-tradition approach, stating that the Court should have focused on trademark law itself, specifically the Lanham Act and stating that "[in our] view, such restrictions [as the names clause], whether new or old, are permissible so long as they are reasonable in light of the trademark system's purpose of facilitating source identification."[117]

VII. Takeaways

The names clause is constitutional.[118]

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[116] *Id.* at 310.
[117] *Id.* at 312 (Kavanaugh, J., concurring).
[118] The more notable takeaway from this case, it has been argued, is that there might be "a developing split among the justices on how to conduct a First Amendment analysis." Laura Heymann, *"Trump Too Small" Trademark Case Morphs Into Free Speech Debate*, Bloomberg Law (June 18, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/trump-too-small-trademark-case-morphs-into-free-speech-debate.

4. PATENT UPDATE I – When is a Design Patent Obvious? Let's Make a Deal or a Mess!

LKQ Corp. v. GM Glob. Tech. Operations LLC, 102 F.4th 1280 (Fed. Cir. 2024)

Circuit Courts of Appeal in the federal system are all about consistency. This is especially true of the Court of Appeals for the Federal Circuit which is specifically charged with harmonizing patent law. To make matters even more consistent, the Federal Circuit limits the issues it takes *en banc* to only a few choice, law-making cases. In the first such *en banc* decision in almost six years, the Federal Circuit has wrought anything but consistency. In fact, on May 21, 2024, the Court, sitting as a whole, upturned 40 years worth of precedent to rewrite the established test of obviousness for design patents in favor of a new, more flexible test based on the law from utility patents.[119] The result: major uncertainty and inconsistency.

I. Background

In simple terms, design patents protect ornamental features of products—i.e. design patents protect **unique visual qualities of a manufactured item**. Such patents are for products with a distinct shape, configuration, or surface decoration. They are supposed to protect the ornamental aspect of such items[120]. As stated by the USPTO:

> A design consists of the visual ornamental characteristics embodied in, or applied to, an article of manufacture. Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation. A design for surface ornamentation is inseparable from the article to which it is applied and cannot exist alone. It must be a definite pattern of surface ornamentation, applied to an article of manufacture.[121]

A design patent cannot be obtained for a design feature that is "obvious." Before *LKQ,* the USPTO and courts assessed obviousness through the lens of a two-pronged test first set out in *Durling v. Spectrum Furniture Co., Inc.,* 101 F.3d 100 (Fed. Cir. 1996). The Rosen-Durling Test, as it became known, looked at:

[119] *See Federal Circuit Abandons Decades-Old Obviousness Test For Design Patents*, Crowell & Moring LLP (June 4, 2024), https://www.crowell.com/en/insights/client-alerts/federal-circuit-abandons-decades-old-obviousness-test-for-design-patents#:~:text=In%20its%20first%20en%20banc%20decision%20in%20six,rigid%20approach%20to%20assessing%20obviousness%20for%20design%20patents.

[120] *Design patent application guide*, USPTO, https://www.uspto.gov/patents/basics/apply/design-patent (last visited July 10, 2024).

[121] *Id.*

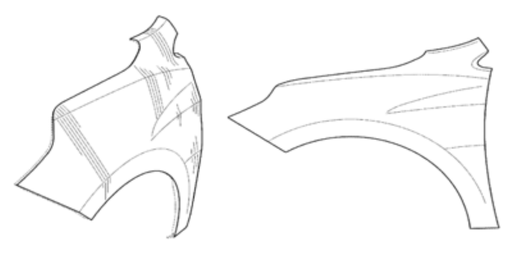
Under this two-part test, first, *In re Rosen* requires that

> “[b]efore one can begin to combine prior art designs ... one must find a single reference, ‘a something in existence, the design characteristics of which are basically the same as the claimed design.’ ” *Durling, id.* at 103 (quoting *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982)). This primary reference is commonly referred to as the *Rosen* reference. As the Board explained, *Rosen*’s “basically the same” test requires consideration of the visual impression created by the patented design as a whole. *Rosen*, 673 F.2d at 391. If no *Rosen* reference is found, the obviousness inquiry ends without consideration of step two. *Durling*, 101 F.3d at 105 (“Without such a primary reference, it is improper to invalidate a design patent on grounds of obviousness.”).
>
> At step two, *Durling* requires that “[o]nce this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design.” *Id.* at 103. But another threshold must be met. Specifically, any secondary references must be “so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.” *Id.* (alteration in original) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)).[122]

For over 40 years, the Courts applied the Rosen-Durling test. In *LKQ*, the test was attacked as being too rigid and out of sync with the law of obviousness for utility patents set out in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).[123]

II. The Facts of the Case

General Motors held a design patent **U.S. Design Patent No. D797,625** (“the ’625 patent”) for the front fender of an automobile and used it on the Chevy Equinox.[124] The Design Patent specifically covered the following design:[125]



US D797,625 S

Two parts competitors, LKQ Corporation and Keystone Automotive Industries, Inc. (collectively, “LKQ”), contended that GM’s Design Patent was “obvious” and filed an *inter parties review*

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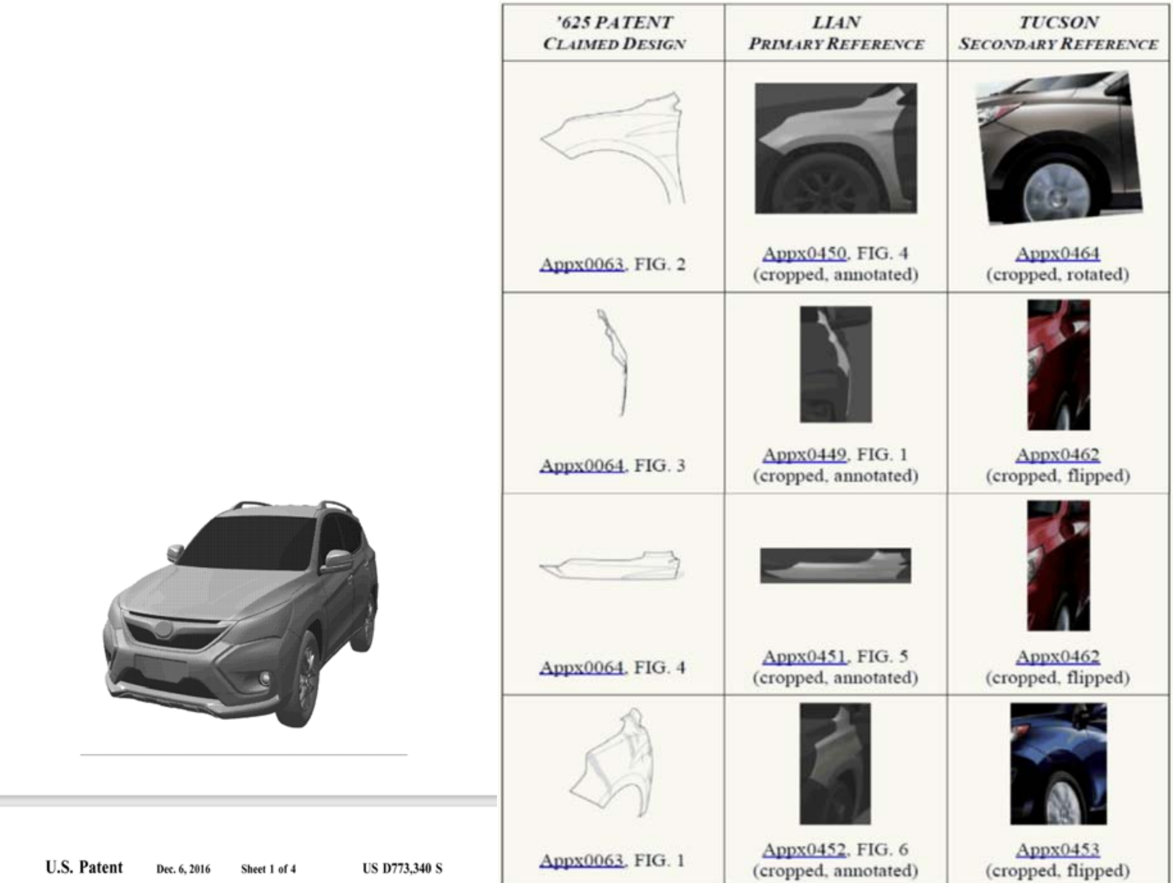
[122] *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1289 (Fed. Cir. 2024).
[123] *See id.* at 1293.
[124] *Id.* at 1287-88.
[125] *Id.* at 1288.

administrative proceeding to invalidate the Design Patent with the USPTO.[126] LKQ argued that the ’625 patent was invalid due to prior art, citing U.S. Design Patent No. D773,340 ("Lian") and a promotional brochure for the 2010 Hyundai Tucson:[127]



’625 PATENT CLAIMED DESIGN	LIAN PRIMARY REFERENCE	TUCSON SECONDARY REFERENCE
Appx0063, FIG. 2	Appx0450, FIG. 4 (cropped, annotated)	Appx0464 (cropped, rotated)
Appx0064, FIG. 3	Appx0449, FIG. 1 (cropped, annotated)	Appx0462 (cropped, flipped)
Appx0064, FIG. 4	Appx0451, FIG. 5 (cropped, annotated)	Appx0462 (cropped, flipped)
Appx0063, FIG. 1	Appx0452, FIG. 6 (cropped, annotated)	Appx0453 (cropped, flipped)

> The Board [Patent Trade and Appeals Board—PTAB] held that LKQ had not established by a preponderance of evidence that Lian anticipates the claim of the D’625 patent. *LKQ Corp. v. GM Glob. Tech. Operations LLC*, IPR2020-00534, 2021 WL 3411458, at *16 (P.T.A.B. Aug. 4, 2021) (“*Board Decision*”). Specifically, the Board applied the ordinary observer test for anticipation of a design patent set forth in *Gorham Manufacturing Co. v. White*, 81 U.S. 511, 14 Wall. 511, 20 L.Ed. 731 (1871), which provides that ‘if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.’ *Board Decision*, 2021 WL 3411458, at *7 (quoting *Gorham*, 81 U.S. at 528) (alteration omitted). The Board found that while ‘there are certain articulable and visible similarities in the overall appearance of the claimed design and Lian that would be apparent

[126] *Id.*
[127] *Id.*; *see also Federal Circuit Overrules Rigid Test for Design Patent Obviousness*, Thompson Coburn LLP (2024) https://www.thompsoncoburn.com/insights/publications/item/2024-05-23/federal-circuit-overrules-rigid-test-for-design-patent-obviousness.

to an ordinary observer,' differences between the designs, including (1) the wheel arch shape and the terminus; (2) door cut line; (3) protrusion; (4) sculpting; (5) inflection line; (6) the first and second creases; and (7) the concavity line, affect the overall visual impression of each design such that they are not substantially the same. *Id.* at *11–16."[128]

LKQ appealed to the Federal Circuit whose original 3 judge panel affirmed the PTAB. Thereafter, LKQ filed a motion for hearing *en banc* and several third parties filed *amicus* briefs. The Federal Circuit granted the Petition and the Court asked the parties to address the following questions:

A. Does *KSR International Co. v. Teleflex Inc*., 550 U.S. 398 (2007), overrule or abrogate *In re Rosen*, 673 F.2d 388 (CCPA 1982), and *Durling v. Spectrum Furniture Co., Inc*., 101 F.3d 100 (Fed. Cir. 1996)?

B. Assuming that *KSR* neither overrules nor abrogates *Rosen* and *Durling*, does KSR nonetheless apply to design patents and suggest the court should eliminate or modify the *Rosen-Durling* test? In particular, please address whether *KSR*'s statements faulting "a rigid rule that limits the obviousness inquiry," 550 U.S. at 419, and adopting "an expansive and flexible approach," id. at 415, should cause us to eliminate or modify: (a) *Durling*'s requirement that "[b]efore one can begin to combine prior art designs . . . one must find a single reference, 'a something in existence, the design characteristics of which are basically the same as the claimed design,'" 101 F.3d at 103 (quoting *Rosen*, 673 F.2d at 391); and/or (b) *Durling*'s requirement that secondary references "may only be used to modify the primary reference if they are 'so related to the primary reference that the appearance of certain ornamental features in one would suggest the application of those features to the other,'" *id*. at 103 (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)) (internal alterations omitted).

C. If the court were to eliminate or modify the *Rosen-Durling* test, what should the test be for evaluating design patent obviousness challenges?

D. Has any precedent from this court already taken steps to clarify the *Rosen-Durling* test? If so, please identify whether those cases resolve any relevant issues.

E. Given the length of time in which the *Rosen-Durling* test has been applied, would eliminating or modifying the design patent obviousness test cause uncertainty in an otherwise settled area of law?

F. To the extent not addressed in the responses to the questions above, what differences, if any, between design patents and utility patents are relevant to the obviousness inquiry, and what role should these differences play in the test for obviousness of design patents?[129]

III. The Federal Circuit *En Banc* Decision

In a stunning reversal of longstanding law, the Federal Circuit brought design patent law in sync with utility patent law. In abandoning the *Rosen-Durling* test, the Court held:

[128] *LKQ*, 102 F.4th at 1288-89.
[129] *LKQ Corp. v. GM Global Tech. Operations LLC*, 71 F.4th 1383, 1384-85 (2023).

> The principal question that this case presents is whether Supreme Court precedent, including *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), should cause us to rethink the long-standing *Rosen-Durling* test used to assess nonobviousness of design patents**.** We answer in the affirmative and overrule the *Rosen-Durling* test requirements that the primary reference must be "basically the same" as the challenged design claim and that any secondary references must be "so related" to the primary reference that features in one would suggest application of those features to the other. We adopt an approach consistent with Congress's statutory scheme for design patents, which provides that the same conditions for patentability that apply to utility patents apply to design patents, as well as Supreme Court precedent which suggests a more flexible approach than the *Rosen-Durling* test for determining nonobviousness.
>
> ***
>
> We conclude that the *Rosen-Durling* test requirements— that (1) the primary reference be "basically the same" as the challenged design claim; and (2) any secondary references be "so related" to the primary reference that features in one would suggest application of those features to the other—are improperly rigid. The statutory rubric along with Supreme Court precedent including *Whitman Saddle*, *Graham*, and *KSR*, all suggest a more flexible approach than the *Rosen-Durling* test when determining obviousness.[130]

Although the Court was "mindful of the differences between design and utility patents, as well as the policy concerns emphasized by the parties and amici…[it agreed and held] that '[i]nvalidity based on obviousness of a patented design is determined [based] on factual criteria similar to those that have been developed as analytical tools for reviewing the validity of a utility patent under § 103, that is, on application of the *Graham* factors.' *Hupp v. Siroflex of Am., Inc.,* 122 F.3d 1456, 1462 (Fed. Cir. 1997)."[131]

The Court went on in length to discuss the application on the *Graham* test for obviousness from utility patents and specifically punched back at the notion that abandoning the *Rosen-Durling* test would cause uncertainty or a reversion " to a rudderless free-for-all [and] will increase confusion, disrupt settled expectations, and leave lower courts and factfinders without the necessary guidelines to properly conduct the obviousness analysis." The longstanding *Graham* test with more flexibility from KSR would provide the necessary guidance.[132]

As a result, the *en banc* Federal Circuit affirmed the PTAB's anticipation ruling but vacated and remanded back to the PTAB for a new obviousness determination under the more flexible test.[133]

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[130] *LKQ*, 102 F.4th at 1287, 1293.
[131] *Id.* at 1295.
[132] *Id.* at 1300-01.
[133] *Id.* at 1301.

IV. Why is the decision important?

In doing so, the Federal Circuit moved the law of design patent obviousness closer to that of obviousness for utility patents and interjected a fair amount of flexibility and uncertainty into applying the rule for the future[134]. Stay tuned for further developments!

[134] Dennis Crouch, *Federal Circuit Overrules* Rosen-Durling *Test for Design Patent Obviousness*, Patently-O (May 21, 2024), https://patentlyo.com/patent/2024/05/federal-overrules-obviousness.html.

5. TRADEMARK UPDATE II: *Do Infringing Acts that Occur Outside of the U. S. Trigger Infringement Claims in the U. S.—Statutorily or Factually?*

Abitron Austria GmbH v. Hetronic International, Inc., 600 U.S. 412, 143 S. Ct. 2522 (2023).

I. Issue:

Do causes of action for infringement under the Lanham Act (Sections 1114 and 1125) extend to extraterritorial sales that occur outside of the U.S. but affect U.S. interstate commerce?[135] Or do they only extend to infringing acts that occur within the United States? Does the Lanham Act rebut the statutory construction canon of a presumption against applying extraterritorially?[136] Or, must any triggering activity that causes the infringement be domestic (in the United States) and constitute "infringing use in interstate commerce"?[137]

II. Facts of the Case:

Hetronic manufactures controls for cranes and other heavy equipment.[138] Abitron was a distributor of Hetronic equipment in Europe.[139] In violation of the parties' distribution agreement, Abitron began making and selling its own controls with the "Hetronic" trademark.[140] Most of Abitron's sales were in Europe; only a small fraction of the sales of these Abitron products (3%) ended up in the United States.[141]

The jury in the district court found against Abitron, awarding damages of almost $100 million on all sales despite most of them occurring in Europe.[142] Abitron appealed, claiming that the Lanham Act did not have extraterritorial effect.[143] The Tenth Circuit Court of Appeals affirmed, holding as a matter of law that the Lanham Act had extraterritorial effect because Hetronic has proven a substantial effect on U.S. commerce.[144] There had been proof of sales in the U.S., confusion in the U. S. market that occurred as a result, and proof of diversion of sales in the U.S. Abitron appealed to the Supreme Court.[145] On June 29, 2023, the Court reversed and remanded.[146]

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[135] *Arbitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 415 (2023).
[136] *Id.* at 433.
[137] *Id.* at 415.
[138] *Id.*
[139] *Id.* at 416.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 416-17.
[145] *Id.* at 417.
[146] *Id.* at 428.

III. Holding of the Court:

To resolve a split in circuits, the Supreme Court limited the reach of U.S. trademark law and held that the Trademark Act (Lanham Act) causes of action for infringement do not rebut the statutory canon of construction of presumption against applying extraterritorially—meaning that any activity causing the infringement must be domestic (in the United States) and must comprise "infringing use in [interstate] commerce."[147] Justice Alito succinctly summarized the Court's holding:

> This case requires us to decide the foreign reach of 15 U. S. C. §1114(1)(a) and §1125(a)(1), two provisions of the Lanham Act that prohibit trademark infringement. Applying the presumption against extraterritoriality, we hold that these provisions are not extraterritorial and that they extend only to claims where the claimed infringing use in commerce is domestic.[148]

Delivering the majority opinion, Justice Alito applied a two-step test to review the long-standing presumption against federal statutes applying extraterritorially. **First, did Congress clearly and unmistakably indicate that the focus of the statute should apply to foreign conduct?[149] If so, the statute applies extraterritorially:**

> At step one, we determine whether a provision is extraterritorial, and that determination turns on whether "Congress has affirmatively and unmistakably instructed that" the provision at issue should "apply to foreign conduct...If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed, subject to "the limits Congress has (or has not) imposed on the statute's foreign application."[150]

Because there is nothing within the Lanham Act that gave a clear, affirmative directive for the statute to apply extraterritorially, the Court moved to step two.[151]

There the Court looked at whether any uses that were the focus of the statute occurred within the United States:

> If a provision is not extraterritorial, we move to step two, which resolves whether the suit seeks a (permissible) domestic or (impermissible) foreign application of the provision.... To make that determination, courts must start by identifying the "focus" of congressional concern" underlying the provision at issue..."The focus of a statute is `the object of its solicitude,' which can include the conduct it `seeks to "regulate,"' as well as the parties and interests it `seeks to "protect"' or vindicate." Step two does not end with identifying statutory focus. We have repeatedly and explicitly held that courts must "identif[y] `the statute's "focus"' *and* as[k] whether the *conduct relevant to that focus* occurred in United States territory....Thus,

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[147] *Id.* at 415.
[148] *Id.*
[149] *Id.* at 417-18.
[150] *Id.* (citations omitted).
[151] *Id.* at 418.

> to prove that a claim involves a domestic application of a statute, "plaintiffs must establish that `the *conduct relevant to the statute's focus* occurred in the United States."[152]

Id. (citations omitted, emphasis added). Since the lower courts did not make this analysis clear, the Court reversed and remanded for further determination on this point.[153] Justices Thomas, Gorsuch, Kavanaugh and Jackson joined.

Rather than clear up a murky topic, the Court made the topic even more murky. In this digital, global market age, it will be harder to apply trademark law to foreign abuse and brand owners will need to take steps to protect their marks in foreign markets separately.

Concurrence: Justices Sotomayor, Kagan, Barrett, and Chief Justice Roberts filed a separate concurrence taking issue with the majority opinion, finding that the Act would apply to activities that occur outside the U.S. so long as they cause a likelihood of confusion within the United States.[154] This should be the real trigger for the extraterritoriality application of the Act. Justice Alito and the other majority justices disagreed. Likelihood of confusion alone, even in the U.S. market, is not enough. For now, the law remains unsettled.

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[152] *Id.* (citations omitted, emphasis added).
[153] *Id.* at 428.
[154] *Id.* at 429 (Jackson, J., concurring).

5 Intellectual Property Law Updates in 40 Minutes

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Generational Comedian: commentator described him as:

a savage satirist and brilliant thinker who was just as much of a writer and a philosopher as he was a comedian. His medium was stand-up, but he touched on issues of race, class, politics and American life — saying the kinds of things no one else dared.

GEORGE CARLIN

PHOTOS FROM *MAIN SEQUENCE* COMPLAINT, COMPL. 7:13-25; 12:1-15, *MAIN SEQUENCE, LTD V. DUDESY*, LLC, 2:24-CV-00711 (C.D. CAL. FILED JAN. 25, 2024).

Copyright Update I: (Not) George Carlin's Latest Special

Main Sequence, Ltd., et al. v. Dudesy, LLC, et al., 2:24-cv-00711, (C.D. Cal. 2024).

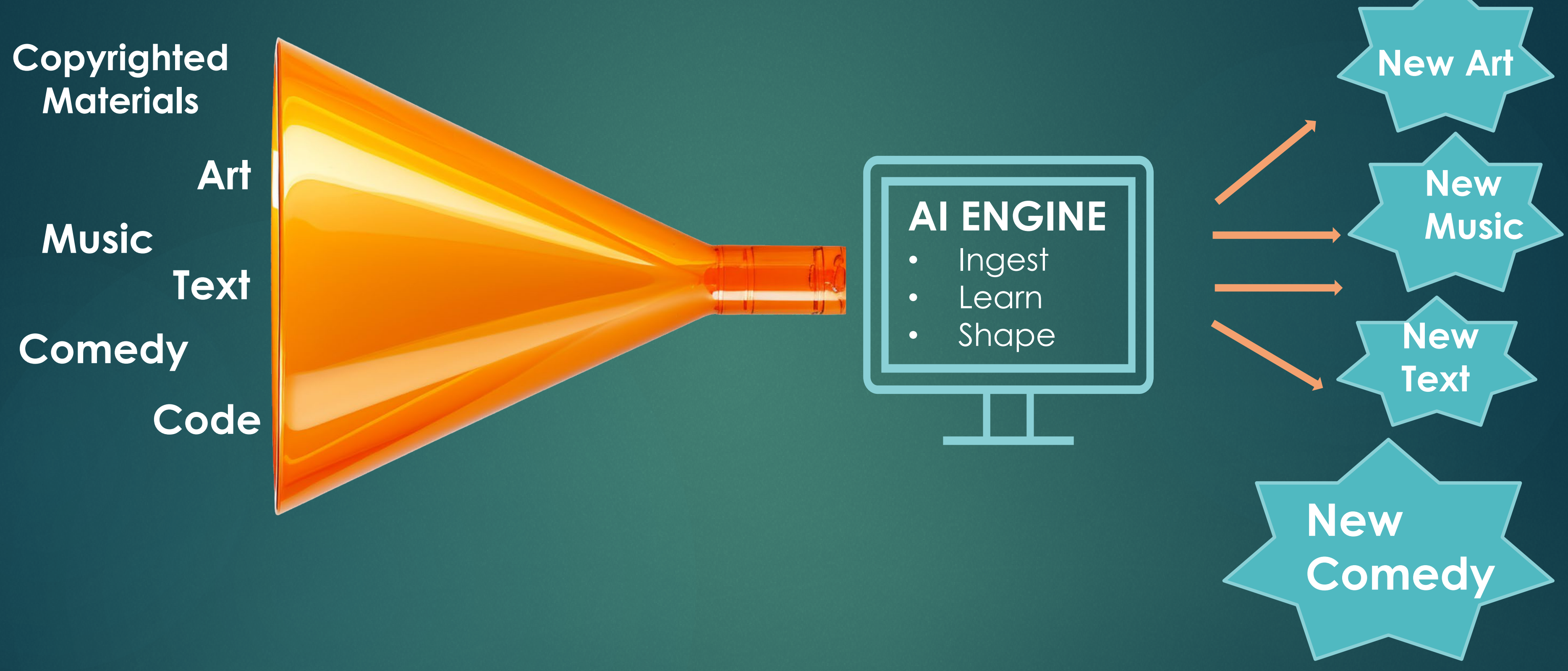
What is Generative AI?

- Generative AI systems create original content **output** based on **input**
- Input data = used to help AI learn what the user wants it to produce
  - Images, text, code
  - If you ask an AI to make the Mona Lisa as painted by Monet, the input would consist of the Mona Lisa itself and other paintings illustrating Monet's style
- Output data = work that is produced by AI

What is Generative AI?

- **How AI works:**
- **In essence, as one commentator says:**
- **"At the heart of Generative AI are algorithms designed to analyze and learn from a vast amount of data. These algorithms, often built upon complex neural networks, are trained to recognize patterns, structures, and correlations within this data. Once the training phase is complete, Generative AI can use this learned information to generate new content that is similar in nature to the original data but is entirely original in its composition."**

How Generative AI Works



Main Sequence v. Dudesy: Background

- Comedian Will Sasso and writer Chad Kultgen used the late George Carlin's comedy material as input for an AI called "Dudesy," which purportedly writes and directs the Dudesy Podcast

Photo from *Main Sequence* Complaint, Compl. 9:13-27, *Main Sequence, Ltd v. Dudesy*, LLC, 2:24-cv-00711 (C.D. Cal. filed Jan. 25, 2024).

Main Sequence v. Dudesy: Background

- The results were a podcast episode titled "**George Carlin Resurrected**" and an hour-long comedy special video "**George Carlin: I'm Glad I'm Dead**." Both featured a strikingly realistic, AI-generated Carlin.

The AI Generated thumbnail for "George Carlin: I'm Glad I'm Dead (2024) – Full Special"

The real George Carlin

Photos from *Main Sequence* Complaint, Compl. 7:13-25; 12:1-15, *Main Sequence, Ltd v. Dudesy*, LLC, 2:24-cv-00711 (C.D. Cal. filed Jan. 25, 2024).

Main Sequence v. Dudesy: The Complaint

- George Carlin's estate, and the company holding his intellectual property, filed suit.

Photo from *Main Sequence* Complaint, Compl. 12:1-15, *Main Sequence, Ltd v. Dudesy*, LLC, 2:24-cv-00711 (C.D. Cal. filed Jan. 25, 2024).

The Complaint alleges that by ingesting the Carlin specials, and spitting out "I'm Glad I'm Dead," **Dudesy had created unauthorized copies of Carlin's copyrighted works.**

***Main Sequence v. Dudesy*: The (Hypothetical) Answer**

- Putting aside NIL/Publicity Problems—Case study to Understand Copyright Issues.
- Technology has outstripped our law;
- What is the material difference between AI and a human impressionist?
- **"Inputting" (copying)** data to generate output is essentially equivalent to **"listening"** and attempting to recreate Carlin's humor and style.

Main Sequence v. Dudesy: The (Hypothetical) Outcome

- **Potential Claims/Defenses:**
  - Copying in Ingestion;
  - Substantial Similarity;
  - Derivative Work;
  - Fair Use Defense (like uploading books or transformative fair use)
  - DCMA for removing copyright notices

Main Sequence v. Dudesy: The (Hypothetical) Outcome

- **The Actual Outcome:** The parties settled.
- **A Hypothetical Outcome:** Dudesy's admission to copying and output as a derivative work, which is protected under copyright law. Defendants state as much in the voiceover intro to "I'm Glad I'm Dead."
- **Not all cases will have such obvious "input," posing a challenge for future plaintiffs.**

Main Sequence v. Dudesy: The (Hypothetical) Outcome

Perhaps Carlin Said it Best:

I've been uplinked and downloaded. I've been inputted and outsourced. I know the upside of downsizing; I know the downside of upgrading. I'm a high-tech lowlife. A cutting-edge, state-of-the-art, bicoastal multitasker, and I can give you a gigabyte in a nanosecond.

(from his "Ode to the Modern Man," 2004)

An Intersection of Acronyms: AI, IP, and the USPTO

USTPO Guidance: Patentability of AI-Assisted Inventions

USTPO: AI-Assisted Inventions

- AI-assisted inventions can be patented IF a human provided a "**significant contribution**" to the inventing process.
- What is a "**significant contribution**"?

USTPO: AI-Assisted Inventions

3 factors from *Pannu v. Iolab Corp.*: The inventor must...

(1) contribute in some significant manner **to the conception or reduction** to practice of the invention,

(2) make a contribution to the claimed invention that is **not insignificant in quality**, when that contribution is measured against the dimension of the full invention, and

(3) do **more than merely explain** to the real inventors well-known concepts and/or the current state of the art

USTPO: AI-Assisted Inventions

- USPTO's Five Guiding Principles for Inventors

1. If a human "contributes significantly," AI in an invention does not preclude patent registration

2. Inventing an output ≠ presenting an AI with a problem, goal, or general research plan

USTPO: AI-Assisted Inventions

3. Reducing an invention to practice alone ≠ a significant contribution for inventorship

4. Creating a foundational component of the AI can qualify as a significant contribution for inventorship

5. Owning or overseeing an AI used to invent will not qualify a person as an inventor

USTPO Guidance: Applying for a Patent/Trademark & AI

USTPO: AI and Applications

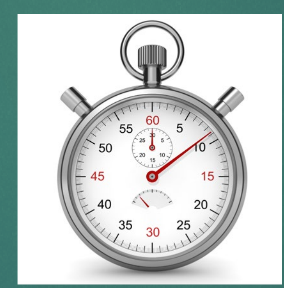
Relevant USPTO rules:

- Duty of candor and good faith
- Signature requirements
- Duty of confidentiality

USTPO: AI and Applications

1. When using AI to draft documents, **review and verify contents**. Ensure all required disclosures have been made, including whether the invention itself was created with AI.
2. **Do not use AI to sign filings** or to obtain a USPTO.gov account
3. AIs are not authorized users of USPTO IT systems. **Do not use AI to "data mine" information** from USPTO's systems
4. Be very wary of inserting **client information** into an AI tool
5. Using AI in a way that violates the **duty of candor and good faith** can amount to fraud and intentional misconduct

Copyright Update II: Beat the Clock or Not under the Copyright Law



Warner Chappell Music, Inc. v. Nealy, 601 U.S. __, 144 S. Ct. 1135 (2024)

Warner Chappell v. Nealy: Background

- The Copyright Statute (17 U.S.C. § 507) provides:
  - "(b) Civil Actions.—No civil action shall be maintained under the provisions of this title unless it is commenced within **three years** after the *claim accrued*." (emphasis added)
- Majority of circuits impose a "discovery rule"
  - the claim does not accrue and thus the statute of limitations does not start to run until the claim **is discovered or should have reasonably been discovered**.

Warner Chappell v. Nealy: Background

26

- Sherman Nealy and Tony Butler formed Music Specialist, Inc.
  - Music Specialist's recordings and releases included copyrighted "*Jam the Box*"
  - Eventually, Music Specialist failed
- Butler entered into an agreement (unbeknownst to Nealy) with Warner Chappell to license Music Specialist's work
  - As a result: "*Jam the Box*" and other Music Specialist tracks were used in popular songs and TV shows
  - Flo Rida's hit "In the Ayer" which sold millions of copies

Warner Chappell v. Nealy: Background

- In **2018**, Nealy (after completing some prison time) sued Warner Chappell for copyright infringement based on activity going back to **2008**
- **Nealy claimed he did not learn of the use until shortly before filing suit;**
- Warner Chappell argued Nealy's claims are time-barred.
- Importance: $$$$$$$$$$$$$

***Warner Chappell v. Nealy*: 11th Cir. Decision**

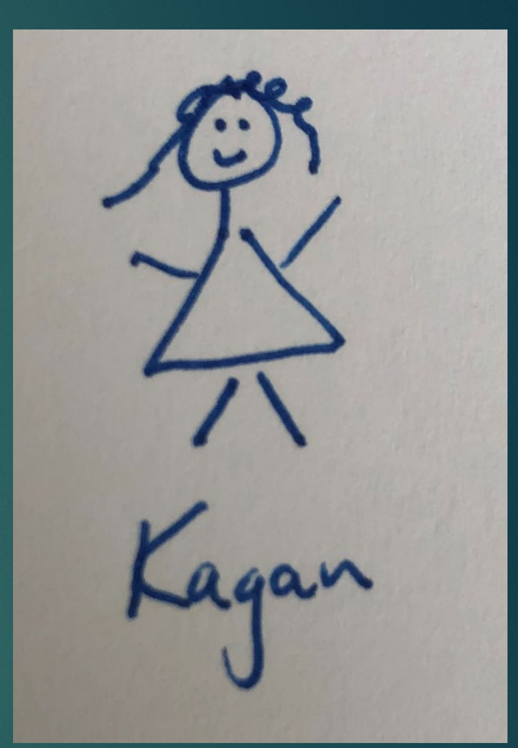
- District Court: limited Nealy's damages to those that reached back only 3 years from the date of filing suit (relied on Second Circuit);
- The Eleventh Circuit reversed and rejected the three-year damages bar on a timely claim.
  - The court "assume[d] for the purposes of answering" the certified question that all of Nealy's claims were "**timely under the discovery rule**." Based on that conclusion, the court allowed Nealy to recover full damages.

Warner Chappell v. Nealy: SCOTUS Decision

- SCOTUS assumed (away the problem) without deciding that the discovery rule was valid.
- Damages recoverable for " any timely claim"
- The Court "clarified" statement in *Petrella,*
  - *Petrella*: the Copyright Act only allows plaintiffs to gain retrospective relief running 3 years back from the filing of the suit.
  - *Warner Chappell*: This language described the SOL only when a plaintiff has no claims for infringing acts less than 3 years old.

Warner Chappell v. Nealy: *SCOTUS Decision*

- **Holding**: a copyright owner is entitled to damages for any timely claim, even if those claims occurred more than 3 years from the filing of the lawsuit.
- **Justified by using the language of the Copyright Act and the Discovery Rule!**



Warner Chappell v. Nealy: SCOTUS Decision

- statute's language "establishes no separate three-year period for recovering damages" and having such a limit would be counterintuitive.
- Indeed, having a discovery rule to permit claims to be filed based on old infringements but then barring a plaintiff from recovering any damages for those infringements—due to such a separate bar—would be "essentially self-defeating," as it would eliminate the benefits of a discovery rule

Warner Chappell v. Nealy: SCOTUS Dissent

- **The Court side-stepped whether the Copyright Act "has room" for the discovery rule:**
- The Court discusses how a discovery rule of accrual should operate under the Copyright Act. But in doing so it sidesteps the logically antecedent question whether the Act has room for such a rule. Rather than address that question, the Court takes care to emphasize that its resolution must await a future case. The trouble is, the Act almost certainly does not tolerate a discovery rule. And that fact promises soon enough to make anything we might say today about the rule's operational details a dead letter...
- This is a problem because: the Act "does not tolerate" a discovery rule
  - Warns against an "expansive approach" to the discovery rule.
  - Finds that the Act itself lacks support for the rule.

***Warner Chappell v. Nealy*: Effect**

- The Court has since **declined the opportunity to answer the Copyright Act discovery rule** question
  - **But, by distinguishing—and rewriting--*Petrella*, the Court has implicitly “approved” a discovery rule—for now;**
  - **Takes away much of the certainty of the SOL in Copyright Cases;**
  - **Leaves an important decision for another day!**
  - **The decision will likely encourage copyright plaintiffs to bring more and larger claims for longer periods of time leading to litigation on the discovery rule**

Trademark Update I: Is Preventing the Trademark "TRUMP TOO SMALL" from Registering Constitutional?

Vidal v. Elster, 602 U.S. 286, 144 S. Ct. 1507 (June 13, 2024).

Trump Too Small: Background

- **The Lanham Act** (15 U.S.C. § 1502)
  - § 1502(c) ("the names clause") prevents the registration of a trademark that "[c]onsists of or comprises a name...identifying a particular living individual except by his written consent."
- ***Matal v. Tam***, 582 U.S. 218 (2017)
  - SCOTUS held that the disparagement clause is facially invalid under the First Amendment

Trump Too Small: *Facts and Procedure*

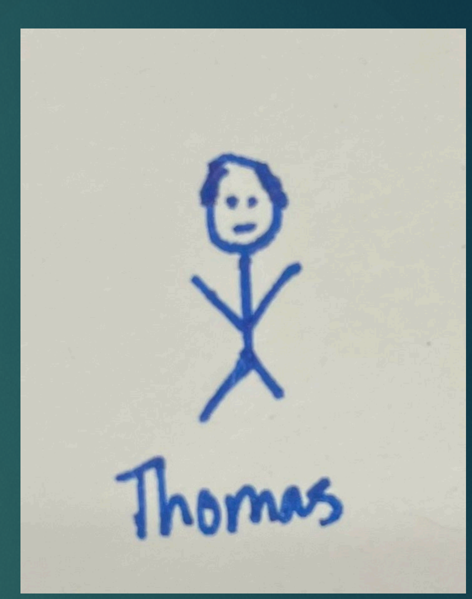
- After a memorable exchange between Donald Trump and Marco Rubio, Steve Elster sought to register the trademark **"TRUMP TOO SMALL"**
- The USPTO refused registration
  - Section 1502(c) of the Lanham Act prohibits the trademark, and the Act has no "free speech" carveout
- The USPTO's Trademark Trial and Appeal Board affirms

Trump Too Small: Facts and Procedure

- The Federal Circuit Court of Appeals reverses, rules for Elster
  - "a trademark represents 'private, not government, speech' entitled to some form of First Amendment protection."
  - The court did not rule on the constitutionality of Section 1052(c), but raised a concern that it may be unconstitutional
- The government appeals to SCOTUS

***Trump Too Small*: SCOTUS Decision**

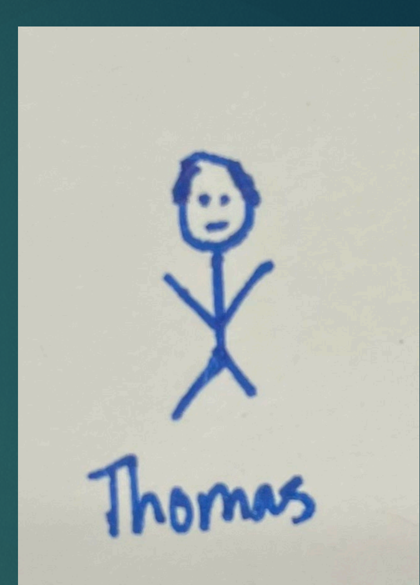
- **Holding**: Section 1052(c) (the "names clause") does not violate the First Amendment.
- Courts do not have to use heightened scrutiny to analyze a purely content-based restriction on trademark registration.



Trump Too Small: SCOTUS Decision

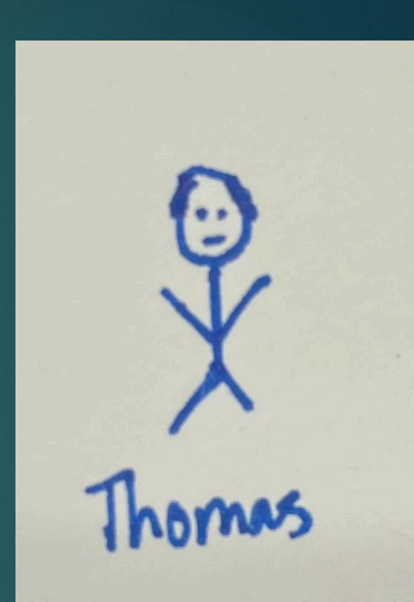
- The holding had more to do with First Amendment law than trademark law
- Elster argued that the names clause was a **viewpoint-based restriction**
  - Content-based restrictions on speech are presumed unconstitutional
    - This includes viewpoint-based restrictions

- Scotus disagreed



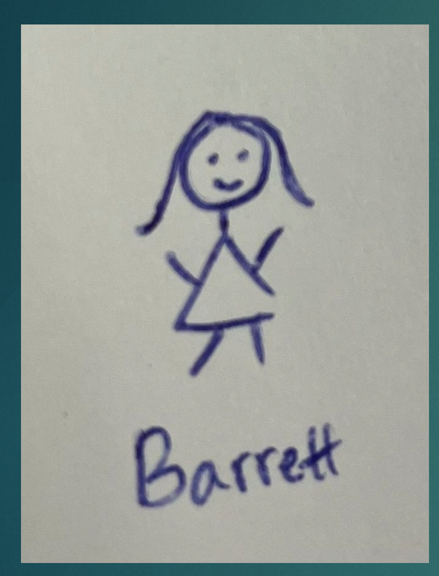
Trump Too Small: SCOTUS Decision

- Thomas relied on history and tradition in his analysis
  - Trademark restrictions on names and First Amendment have long coexisted
    - History of property right in one's name
    - Restricting name trademarks helps properly identify goods – the purpose of trademark law!



- Narrow ruling: not a framework for all content-based but viewpoint-neutral trademark restrictions. History analysis not required for every case.

Trump Too Small: Concurrence



- The concurring Justices took issue with the history and tradition approach
- "[In our] view, such restrictions [as the names clause], whether new or old, are permissible **so long as they are reasonable in light of the trademark system's purpose** of facilitating source identification."

Patent Update I: *When is a Design Patent Obvious? Let's Make a Deal or a Mess!*

LKQ Corp. v. GM Glob. Tech. Operations LLC, 102 F.4th 1280 (Fed. Cir. 2024)

What is a Design Patent?

- Design patents protect ornamental features of products
  - Such as: products with a distinct shape, configuration, or surface decoration

- **A design patent cannot be obtained for an “obvious” design feature (read: one that already exists)**

LKQ v. GM: Background

- "**Obvious**" before *LKQ*: **The Rosen-Durling test for 40 years:**
  - **(1)** Look for **a "primary reference"** where the design characteristics are "basically the same" as the claimed design.
    - If no such reference can be found, the **obviousness inquiry ends** here.
  - **(2)** If so, apply **"secondary references"** to the primary reference to create a design that matches the claimed design.
    - Secondary references must be closely related to the primary reference
  - **In *LKQ*, the Federal Circuit Court of Appeals criticizes and throws out the Rosen-Durling test as *too inflexible***

LKQ v. GM: Background

- General Motors held **U.S. Design Patent No. D797,625** ("the '625 patent")

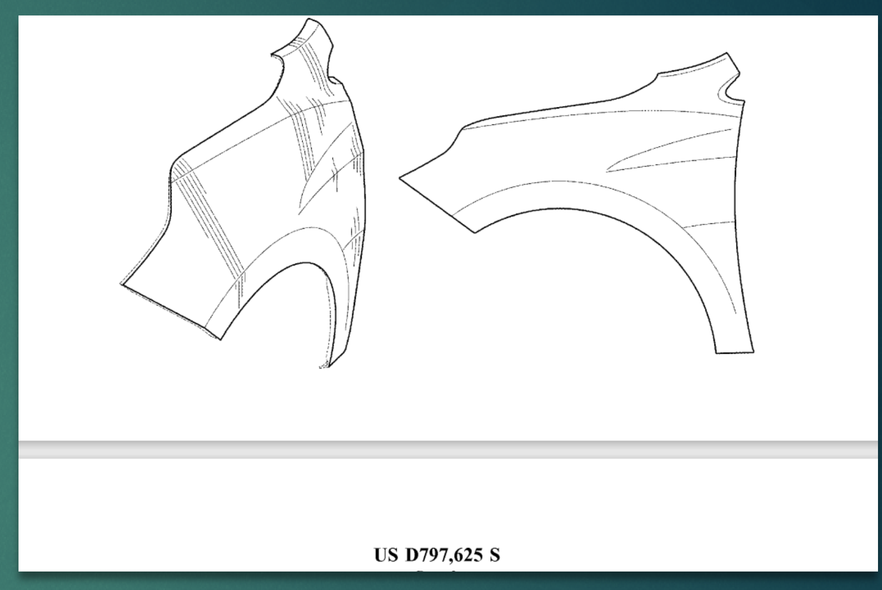


Photo from *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1288 (Fed. Cir. 2024).

LKQ v. GM: LKQ's argument

- LKQ contends that the '625 patent is "obvious" and began proceedings to invalidate the patent

'625 PATENT CLAIMED DESIGN	LIAN PRIMARY REFERENCE	TUCSON SECONDARY REFERENCE
Appx0063, FIG. 2	Appx0450, FIG. 4 (cropped, annotated)	Appx0464 (cropped, rotated)
Appx0064, FIG. 3	Appx0449, FIG. 1 (cropped, annotated)	Appx0462 (cropped, flipped)
Appx0064, FIG. 4	Appx0451, FIG. 5 (cropped, annotated)	Appx0462 (cropped, flipped)
Appx0063, FIG. 1	Appx0452, FIG. 6 (cropped, annotated)	Appx0453 (cropped, flipped)

- Primary Reference: **U.S. Design Patent No. D773, 340 ("Lian")**
- Secondary Reference: **2010 Hyundai Tucson brochure**

Photos from *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1288 (Fed. Cir. 2024).

LKQ v. GM:

- **Patent Trial and Appeal Board finds** LKQ had not established by a preponderance of evidence that Lian anticipates the claim of the D'625 patent.
- **In essence, that *Lian* did not anticipate the GM Design Patent—first [prong of Rosen-Durling test;**

***LKQ v. GM*: Federal Circuit Court of Appeals 3 Judge Panel Decision**

- The Federal Circuit Court of Appeals applied the ordinary observer test
  - The Board found that while 'there are certain articulable and visible similarities in the overall appearance of the claimed design and Lian that would be apparent to an ordinary observer,' differences between the designs, including (1) the wheel arch shape and the terminus; (2) door cut line; (3) protrusion; (4) sculpting; (5) inflection line; (6) the first and second creases; and (7) the concavity line, affect the overall visual impression of each design such that they are not substantially the same.

- The Court affirmed the Patent Trade and Appeals Board's decision.

Photo from *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280, 1288 (Fed. Cir. 2024).

LKQ v. GM: The Federal Circuit En Banc Decision

- **First *en banc decision* in over 6 years!**
- **The Holding: The Federal Circuit reconsiders and overrules the 40-year-old *Rosen-Durling* test** as too inflexible;
- **The court directs application of the *Graham* and *KSR* standards used for utility patent obviousness;**
- **The Effect: more flexibility and uncertainty in the world of design patent law**

Trademark Update II: ***Do Infringing Acts that Occur Abroad trigger U.S. Infringement Claims?***

Abitron Austria GmbH v. Hetronic International, Inc., 600 U.S. 412, 143 S. Ct. 2522 (2023).

Abitron v. Hetronic: *Background*

- Hetronic manufactures controls for cranes and heavy equipment
- Arbitron = distributor of Hetronic equipment in Europe
- Abitron began making and selling its own controls with the “Hetronic” trademark
  - This violated the parties’ distribution agreement

Abitron v. Hetronic: *Background*

- The jury in district court found against Abitron
  - Awarded $100 million in damages on all sales
- Abitron appealed: argued the Lanham Act does not have extraterritorial effect
- 10th Circuit Court of Appeals affirmed: the Lanham Act has extraterritorial effect
- Abitron appealed to SCOTUS

Abitron v. Hetronic: *SCOTUS Decision*

- **The Holding**: SCOTUS remands the case for further findings on the "focus" of the "congressional concern" underlying the Lanham Act

- **Justice Alito applied a two-step test to review the long-standing presumption against federal statutes applying extraterritorially. First, did Congress clearly and unmistakably indicate that the focus of the statute should apply to foreign conduct? If so, the statute applies extraterritorially:**

At step one, we determine whether a provision is extraterritorial, and that determination turns on whether "Congress has affirmatively and unmistakably instructed that" the provision at issue should "apply to foreign conduct...If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed, subject to "the limits Congress has (or has not) imposed on the statute's foreign application."

[At step 2]

We have repeatedly and explicitly held that courts must "identif[y] `the statute's "focus"' and as[k] whether the conduct relevant to that focus occurred in United States territory....Thus, to prove that a claim involves a domestic application of a statute, "plaintiffs must establish that `the conduct relevant to the statute's focus occurred in the United States

Abitron v. Hetronic: *SCOTUS Decision*

- The concurring justices found that the Act would apply to activities that occur overseas so long as they cause a likely of confusion in the U.S., but the majority disagreed.

- **The Effect: an even murkier understanding of how trademark law applies to foreign abuse**

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Questions?

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Recent Updates from the Virginia General Assembly and Courts (2024)

Criminal Law

James Abrenio

LEGISLATIVE UPDATES (2024)

Traffic

- **SB95 (Preliminary breath test)**
  - Amends Va. Code Section 18.2-267 to provide that "If a police officer . . . fails to advise a person of his rights under provisions of this section (the right to refuse a PBT and the results shall not be used in a prosecution), any breath sample obtained pursuant to this section shall not be admissible by the Commonwealth in any motion to suppress for the purposes of determining probable cause."

- **SB6 (Restricted license)**
  - Provides that a person whose driver's license has been revoked for multiple convictions of driving while intoxicated may file a petition for the issuance of a restricted driver's license without having to wait for the expiration of three years from the date of his last conviction, regardless of the date of such conviction, when such person's last conviction resulted from a final order being entered by a court after the successful completion of a Veterans Treatment Court Program, behavioral health docket, or other specialty docket.

Guns & Drugs

- **HB452/SB 362 (Prior marijuana conviction)**
  - Amends Va. Code Section18.2-251 to remove prior marijuana convictions from barring first-time drug offenders from receiving a deferred disposition.

- **HB172 (Child access to firearms)**
  - Amends Va. Code Section 18.2-371.1, abuse and neglect of children, to create a class 5 felony for any parent, guardian, etc. whose "willful act or omission causes or enables" a child to gain possession of a firearm after notice of a threat assessment or who knows or reasonably should know that such child has charges pending against them or has been convicted or adjudicated delinquent of a violent felony, as defined by Va. Code § 16.1-228.
  - Note: this was in response to the 2013 shooting of a teacher by her six-year-old student in Henrico.

Property Crimes

- **HB1256 (Grand larceny & Embezzlement)**
  - Amends Va. Code Sections 18.2-95 & 18.2-111 to allow grand larceny and embezzlement to be prosecuted, not only where the alleged crimes occur, but also where the alleged victim resides.

Crimes Against the Person

- **HB172 (Definition of "family or household member")**
  - Amends Va. Code Section 16.1-228(2) to expand the definition of "family or household member" to include "an individual who is legal custodian of a juvenile."
  - This change will broaden who is subject to many criminal (and other) statutes, to include domestic assault.

- **HB18/SB7 (Hate Crimes)**
  - Amends Va. Code 18.2-57(B) to add "ethnic" to the class of protected individuals.
  - That provision increases assault and batter to a Class 6 felony with a term of confinement of at least 6 months when they assault and battery is committed when the accused selects the victim based upon among other reasons, their ethnic origin.

- **HB895/SB211 (Protective order violations)**
  - Amends Va. Code Sections 16.1-253.2 & 18.2-60.4 to allow proper venue for prosecution of a protective order to be not only in the jurisdiction where the violation occurred, but also where the protected party resided at the time of such violation.

- **SB 394 (Sex with Confidential Informant)**
  - Amends Va. Codes Sections 18.2-64.2 (carnal knowledge) & 18.2-67.4 to create a class six felony when a law enforcement officer has sex or carnal knowledge with someone they know to be a confidential informant.
  - The statute also adds a definition for "confidential informant."

- **SB731 (Child pornography)**
  - Amends Va. Code Section 18.2-374.1 to broaden the definition of "child pornography" to include material that "depicts a minor in a state of nudity or engaged in sexual conduct . . . where such depiction is obscene."
  - It also explicitly states that "the minor depicted does not have to actually exist."

- **HB926 (Unlawful dissemination or sale of images of another)**
  - Amends Va. Code 18.2-386.2 to broaden unlawful images to include those in which "genitals, pubic area, buttocks or female breasts are not exposed but such videographic or still images are obscene . . . " per Va. Code Section 18.2-372.
  - It also amends Va. Code Section 19.2-8 to add onto the statute of limitations "within one year of the date the victim discovers the offense or, through exercise of due diligence, reasonably should have discovered the offense, whichever is later."

- **HB1427 (Sentence suspension)**
  - Allows the court to fix the period of suspension of sentence for a period not to exceed three years for the misdemeanor offenses of sexual battery and sexual

abuse (Va. Code Section 18.2-67.4) of a child 13 years of age or older but under 15 years of age (Va. Code Section 18.2-67.4:2).
  - Current law allows a court to fix the period of suspension for up to the maximum period for which the defendant might originally have been sentenced to be imprisoned.

<u>**Criminal Procedure**</u>

- **HB266 (Child interrogations)**
  - Amends Va. Code Section 16.1-247.1, which requires that law enforcement notify a child's parent, custodian, or guardian, prior to custodial interrogation by law enforcement. The amendment adds a remedy when law enforcement violates this notice requirement. It states that when LEO "knowingly" violates the notice requirements, "any statements made by such child shall be inadmissible in any delinquency proceeding or criminal proceeding against the child, unless the Commonwealth proves by preponderance of the evidence that the statement was made knowingly, intelligently, and voluntarily."

- **HB78/SB (Search warrants for menstrual health data)**
  - Enacts 19.2-60.2 to prohibit any search warrant, subpoena, court order, or other process for the purpose of search and seizure of production of menstrual health data.

- **HB268 (Juvenile transfer hearings)**
  - Among other things, amends Va. Code Section 16.1-2691, which deals with transfer hearings for juveniles to be tried as adults. The bill adds language to allow for the court to consider evidence that the juvenile was the victim of trafficking, sexual abuse, or rape, by complainant prior to or during the commission of the officer for which the juvenile stands trial.
  - For cases which require mandatory transfer hearings, the bill allows the court to consider such evidence, and, when the court finds that the alleged offense was a direct result of such evidence, by a preponderance of the evidence, it allows the court to juvenile court to retain jurisdiction.
  - NOTE: "This subdivision shall be construed to prioritize the successful treatment and rehabilitation of juvenile victims of human trafficking and sex crimes who commit acts of violence against their abusers. It is the intent of the General Assembly that these juveniles be viewed as victims and provided treatment and services in the juvenile system."

- **HB1114 (Failure to appear)**
  - Amends FTA statutes to exclude individuals incarcerated, detained in state or federal facilities, or in custody of law enforcement.

- **HB432 (Jury lists)**
    - Reenacts Va. Code Section 8.01-353 to, upon request, require the Clerk (or other officer) to make the jury list available 5 business days prior to trial. Under the old statute, it was only 3 days.

- **HB430 (Bond violations)**
    - Amends Va. Code Section 19.2-123 to require any bond violation reports to be sent to pretrial, the Commonwealth, and defense counsel (or the accused, themselves, if they are unrepresented)

- **SB424 (Notice of bond to CA)**
    - Amends Va. Code Section 19.2-120 to require notice to the Commonwealth when anyone charged with an act of violence, per Va. Code Section 19.2-297.1, is granted bond.

<u>Other</u>

- **SB20 (Deferred findings and expungements)**
    - Amends Va. Code 19.2-298.02 to clarify that, upon agreement of all parties, a charge dismissed per this Section is expungable, to include an original charge that was reduced or a charge that was dismissed after plea or stipulation of facts that would justify a finding of guilt.
    -
- **HB1443 (Jury Contact)**
    - Enacts Va. Code 18.2-465.2 to create a class I misdemeanor for anyone to knowingly and intentionally contact a juror, after their service, with the intent to harass, intimidate, or threaten them.

- **HB102/SB356 (Increased Pay for Court Appointed Attorneys)**
    - Amends Va. Code 19.2-163 to increase court appointed fees.
        - For Misdemeanors, increase from $120 to $330 for each charge.
        - For Misdemeanor DUIs, set at $448 for each charge.
        - For juvenile charge in the district court, $680
        - For class 3-6 felony, $834
        - For class 2 felonies, $1692
        - For juvenile and misdemeanor probation violation, $180
        - For felony probation violations, $445
        - NOTE: These new rates will come into effect January 1, 2025

- **HB1496 (Surveillance technology)**
    - Enacts Va. Code 9.1-116.9, which requires reporting of a list of the surveillance technology employed by state and local law enforcement to the Department of Criminal Justice Services, which shall then provide such data to the Virginia State Crime Commission and Joint Commission on Technology and Science.

- **Earned Sentencing Credits**
    - Starting July 1, 2024, earned sentencing credits will be expanded to allow individuals to get ESC even if "mixed offenses" where they were convicted of some offenses that qualified for ESC and some that did not.
    - Also, Garcia v. Dotson, Record No. 230514, Virginia Supreme Court (April 2024) held that inchoate offenses qualify for ESC. There, the defendant was initially charged with murder. That charge was later amended to conspiracy to commit murder, to which he plead guilty and was convicted.

CASE LAW UPDATE (2024)[1]

SUBSTANTIVE LAW

I. Traffic

Konadu v. Commonwealth, 79 Va. App. 606 (2024). Reckless driving conviction affirmed where appellant was "looking away and distracted for a significant amount of time while the vehicle was out of control." There, the appellant picked up some takeout food with her daughter when some food spilled on the floor. In response, the appellant reached over to the passenger side of the footwell, did not feel the vehicle change direction, and eventually heard a "boom." As it turns out, at this time, the appellant's vehicle left its lane of travel, crossed over a median and the opposite lanes of traffic, hit a curb, and struck four people, one of whom later died. At trial, the lead detective further testified that the vehicle traveled 280.7 feet from the point when it initially left its lane, and he observed no skid marks. This testimony coupled with the trial court's additional finding that no evidence was presented that appellant took any evasive action, that she looked down for a considerable amount of time when she learned food had spilled, and that she appeared to not even realize that she struck pedestrians until after the crash was enough for the Court of Appeals to affirm a reckless driving conviction.

Palka v. Commonwealth, No. 1716-22-3, 2024 WL 675560 (Va. Ct. App. Feb. 20, 2024). The trial court property excluded evidence of victim's intoxication when appellant was convicted of involuntary manslaughter after he struck the victim who was in the roadway. There, the victim was involved in a car accident with a third driver, which led to a confrontation. During that confrontation, the victim pursued the third driver on foot into the street when the appellant struck and killed the victim. Appellant then fled the scene, was later arrested, and found to have a BAC of .199.

Before trial, appellant moved to introduce a certificate of analysis demonstrating that the victim had a BAC of .082 as well as traces of amphetamines, TCH, and TCH carboxylic acid in her blood system the night of her death. In excluding the evidence, the trial court found *"*[the victim's] conduct — standing in the road while under the influence of drugs and alcohol — 'was a "contributing cause" of the accident, but not an independent, intervening cause.' . . . *"* In affirming this decision, the Court of Appeals found the trial court didn't abuse its discretion because, *"*[t]he trial court properly held that *why* Royston ran into the street — whether due to intoxication or something else — was irrelevant to any jury consideration about the legal effect of her actions."

[1] This presentation will focus on Virginia state case decided in 2024. It does not include federal cases.

<u>Nicholson v. Commonwealth</u>, No. 1431-22-1, 2023 WL 8939183, (Va. Ct. App. Dec. 28, 2023). There was sufficient evidence to convict appellant of involuntary manslaughter due to a car crash that led to the victim's death. There, the victim was pulling out from a parking lot when the appellant struck her. At trial, the court found that appellant was traveling 77/45 mph at the time of impact. It further found that the appellant was accelerating just before impact. The court also noted that the appellant knew that the roadway had multiple curb cuts and businesses. In affirming the conviction, the Court of Appeals opined that this case was not a conviction on speed alone, and implicated "far more" dangerous behavior. "[T]he evidence proved that the appellant drove his Challenger at a very high rate of speed, over a short period of time, while repeatedly changing lanes on a city street bordered by sidewalks in a mixed residential and commercial neighborhood . . ."

<u>Tatusko v. Commonwealth</u>, 79 Va. App. 721, 896 S.E.2d 848 (2024). The trial Court had jurisdiction to amend summons *sua sponte*, and without the parties' consent. There, the appellant was charged with reckless driving by speed (100/60 Laser) in violation of Code Section 46.2-862. The appellant was convicted in GDC and appealed to the Circuit Court. Before trial, the Commonwealth moved to strike the words "100/60 Laser" from the summons so that it was simply "reckless by speed," and the Court allowed this over appellant's objection that the amendment materially altered the underlying charge. The Court of Appeals affirmed the trial Court's amendment citing Va. Code Sections 16.1-129.2 and 161.1-137 and finding that it was "clear that the legislature has granted both district courts and circuit courts broad discretion in determining whether to amend an arrest warrant." Further, under <u>Raja v. Commonwealth</u>, 40 Va. App. 710 (2022), the term "warrant" includes a "summons." Further, Va. Code 16.1-137 explicitly permits a warrant to be amended upon appeal.

II. <u>Guns and Drugs</u>

<u>Coles v. Commonwealth</u>, No. 0110-23-3, 2024 WL 780606 (Va. Ct. App. Feb. 27, 2024). The Court of Appeals found sufficient evidence for appellant's conviction of felony possession of cocaine with intent to distribute, possession of firearm while in possession of drugs, and possession of firearm, after being convicted of a felony where a witness's statement was admitted under hearsay exception forfeiture by wrongdoing when appellant advised her to "keep your mouth closed."

While a convoluted set of facts was presented to the trial court, ultimately, the appellant and witness had several conversations over a recorded jail line. During those conversations, appellant instructed the witness to "put a zip on them lips," "you just gotta keep your mouth closed and you're going to be alright," and "all you have to do is remember this word right here, recant, r-e-c-a-n-t." The Court of Appeals found that the trial court was correct that, "forfeiture by wrongdoing may include defendant's collusion with a witness to ensure that witness will not be heard at trial." Although the appellant did not make any direct threats towards the witnesses, the witness acknowledged that she, "didn't know what he was capable of, and he knows where my family lives." Therefore, the trial court was not plainly wrong in admitting the statements, which tied appellant to charges.

<u>Miner v. Commonwealth</u>, 80 Va. App. 414, 898 S.E.2d 401 (2024). The Court of Appeals found sufficient evidence to convict the appellant of making a materially false statement on a criminal background check when he tried to buy a gun. There, appellant was under a deferred finding for burglary in which the charge was to be amended to a misdemeanor if compliant. During his deferral period, the appellant tried to buy a gun, which required him to fill out a criminal history check. Further, the appellant answered, "no," when he was asked, "are you under indictment or information in any court for a felony?" When a state trooper confronted the appellant about his response, the appellant stated that his, "attorney said he was good as far as trying to purchase a firearm."

At trial, the Commonwealth introduced Exhibit 1, which was "a document that included an indictment and plea agreement . . . " to which appellant's counsel did not object. The commonwealth also included the AFT form as Exhibit 2. At the motion to strike, appellant's counsel argued that the Commonwealth failed to provide a certified copy of the indictment, and that "the evidence only proved that [appellant] entered into a plea agreement on a felony charge but did not establish he remained under indictment at the time he purchased the firearm." The Court of Appeals found that appellant was factually incorrect, and that Exhibit 1 included the indictment. Further, under <u>Richardson v. Commonwealth</u>, 21 Va. App. 93 (1995), appellant was under an indictment, not only a charge, as opposed to <u>Brooks v. Commonwealth</u>, 19 Va. App. 563 (1995).

Further, appellant's purported reliance on his attorney's advice regarding gun purchases was misplaced. And the cases of <u>Palmer v. Commonwealth</u>, 48 Va. App. 457 (2006) and <u>Miller v. Commonwealth</u>, 25 Va. App. 727 (1997) did not apply because, in those cases, the offenders obtained the incorrect advice from their own probation officers.

<u>Camann Jr. v. Commonwealth</u>, 79 Va. App. 427 (2024). The Court of Appeals overturned one of the appellant's two schedule II drug possession convictions when it was proved that he was in possession of a powder containing a mixture of two drugs (etizolam and fentanyl), but that he was only aware of one of them (fentanyl). In reversing the conviction for etizolam, the Court pointed out that violation of Va. Code 18.2-250 required "knowingly and intentionally" possessing the controlled substance. It also noted that <u>Sierra v. Commonwealth</u>, 59 Va. App. 770 (2012) held that someone is guilty of possessing "a" controlled substance even if it turns out the substance was another illegal drug. Likewise, "when the Commonwealth seeks two convictions for possessing a mixture containing more than one controlled substance, the Commonwealth must prove that the defendant knew there were at least two controlled substances in the mixture . . .*Sierra* simply spares the Commonwealth from having to prove that the defendant knew *which* controlled substances were present."

III. Crimes Against the Person

Stilwell v. Commonwealth, 80 Va. App. 278 (2024). The appellant's felony conviction for race-based assault was affirmed. There, the appellant was in a self-checkout line when she perceived that the victim and a co-worker were laughing at her. In response, the appellant yelled racial slurs at the victim, to include the N-word. The appellant then said, "I wish I had something to throw at these black ****es," then picked up a hand scanner and threw it at them, striking the victim in the leg causing a bruise.

At trial, appellant admitted using the term "black b***es", denied using the N-word, then admitted it was possible before recanting. The victim and the co-worker testified to the appellant's statements. While a video of the incident was also introduced at trial, it had no sound. The trial court concluded, "the words that you state right before you take your action I think are more indicative of what the motive was for doing it…But the other statements were directed to them and they were hateful, they were derogatory and I think they also establish the motive for your actions because . . . simply put, I don't think they would have been picked out except for any other reason."

While Virginia's assault statute, Va. Code 18-57, makes an assault a Class I Misdemeanor, the crime is enhanced to a Class 6 Felony with a 6-month minimum sentence, "if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin." In response to appellant's argument that she assaulted the victim, not because she was black, but because she was laughing at her, the Court found, "[l]aughter is not justification for a battery. Stilwell's subjective perception of the situation does not excuse her unprovoked derogatory remarks or aggressive behavior and does not require this Court to find, in light of the evidence, that she did not choose her victim because she was in fact a Black woman."

White v. Commonwealth, No. 0836-22-1, 2024 WL 236571 (Va. Ct. App. Jan. 23, 2024). While appellant was convicted of two counts of assault on law enforcement, the Court of Appeals reversed one of those convictions given that there was no evidence of assault. There, law enforcement tried to arrest appellant for an outstanding warrant when they encountered him during a traffic accident. When the officers attempted to arrest him, the appellant tensed up his body, then pushed one of the officers before attempting to escape from the other who was trying to handcuff him. All three ended up on the ground when the appellant kicked the officer he had pushed with his heels and tried to get back on his feet. Ultimately, the appellant was tasered and arrested.

The appellant challenged both convictions for lack of intent. Regarding the officer whom appellant pushed and kicked, the Court of Appeals found sufficient evidence of intent to uphold the conviction. While it was true that appellant clearly intended to flee the officer, ". . . this Court has held that intent to escape and intent to commit bodily harm are not mutually exclusive . . . this is not a situation where to accept the theory that [appellant] was attempting to escape would necessarily exclude the hypothesis that he was also attempting to injury the officer . . ."

Regarding the officer that appellant did not punch or kick, the Court of Appeals found that "although the evidence was somewhat ambiguous concerning whether [the appellant] and the officers fell . . . no testimony suggested that [the appellant] caused them to fall. Further that officer admitted that he did not know what caused the cut to his hand. Indeed, the trial court noted, "he candidly stated that he knew only that he didn't have it when [he] first encountered [White] and then [he] came out with it . . ." The Court went on to state, "Despite the existence of a corporeal hurt — the cut on his finger — nothing in the record established that an 'unlawful . . . objectively offensive or forcible contact' with [the officer] caused this 'manifestation of a physical consequence or corporeal hurt."

<u>Yellock v. Commonwealth</u>, 79 Va. App. 627, 896 S.E.2d 802 (2024). The trial court erred in finding sufficient evidence that the victim was a "family or household member," in appellant's domestic assault conviction. There, the Commonwealth's evidence regarding the appellant and victim's connection was that they were in a relationship on the date of the incident and that relationship involved touching. In the Court of Appeal's analysis, it considered the case of <u>Rickman v. Commonwealth</u>, 33 Va. App. 550 (2000) which focused on "cohabitation." It noted that Rickman adopted a totality-of-the-circumstances approach and articulated three primary factors: 1) sharing of familial or financial responsibilities, 2) consortium, and 3) length and continuity of the relationship.

In its analysis, the Court of Appeals noted "[T]here was virtually no evidence that Yellock and Thomas shared food, shelter, clothing, or utilities. There was also no evidence of comingled assets. Based on the evidence, this factor does not support a finding of cohabitation . . . Additionally, there is little to no evidence of consortium. The strongest fact for the Commonwealth here is that Yellock and Thomas were in a relationship on the date of the incident and that the relationship involved touching. Further, "Rickman does not suggest that simply being in a relationship on the date of an incident is enough to establish consortium or cohabitation generally . . . "

IV. <u>Property Crimes</u>

<u>Kartozia v. Commonwealth</u>, No. 1633-22-4, 2024 WL 923107 (Va. Ct. App. Mar. 5, 2024). The appellant's conviction for trespass was reversed when the trial court refused to instruct the jury on appellant's "claim of right defense to trespass." There, the appellant was discovered by security guards exercising at an apartment complex. When asked whether a resident of the complex was expecting him, the appellant informed security that he knew a resident who lived there. After much back and forth, instead of security calling the resident, they called the police, and appellant was arrested for trespassing. At trial, the resident testified on appellant's behalf that he knew appellant, appellant had been to his apartment on multiple occasions, but that he was not expecting the appellant on the date of his arrest. In response, appellant sought a jury instruction that indicated that appellant had a good faith belief that he was on the property. In overturning the trial court, the Court of Appeals found more than a "scintilla of evidence," which supported appellant's bona fide belief that he was rightfully on the property. "Although Yang did not know in advance about Kartozia's visit, the evidence supports a reasonable inference that Kartozia believed in good faith that he was welcome to visit Yang that night without advance notice . . ."

Walker v. Commonwealth, 79 Va. App. 737, 896 S.E.2d 855 (2024). The "larceny inference" applicable in ordinary theft cases does not apply to carjacking. In this case, the victim was knocked down and her SUV was stolen with her possessions in the front seat and the handicap ramp to the SUV still extended. Shortly thereafter, the appellant was driving that same SUV with the handicap ramp still extended, causing sparks on the ground. Trying to elude law enforcement, the appellant crashed the vehicle, and the victim's valuables were found in it.

In affirming the appellant's conviction, the Court of Appeals did find that the larceny inference (once larceny is established, the unexplained possession of recently stolen goods permits inference of larceny by the possessor) is inapplicable in carjacking cases based upon Basemore, v. Commonwealth, 210 Va. 351 (1969). With that said, the Court found that the fact finder may still consider an accused's "unexplained possession of stolen property," although it's merely "one circumstance" to be considered. In this case, the appellant's possession of the SUV, with items still in it, the ramp still extended, and his fleeing law enforcement supported that a jury could have reasonably concluded his guilt beyond a reasonable doubt.

Welch v. Commonwealth, 79 Va. App. 760, 896 S.E.2d 867 (2024). Appellant's petit larceny conviction affirmed where she took an unattended computer tablet near a store's soda fountain, given that she concealed it when she was checking out. There, the evidence showed that appellant was shopping at Sheetz when she saw a Samsung tablet near the soda fountain. She picked it up, set it down, then walked around for a bit before picking it up again. She then placed napkins on top of the tablet before she paid for her items and left the store. Law enforcement then used surveillance video to obtain appellant's license plate number, contact her, and recover the tablet.

At trial, appellant (representing herself pro se) testified that she was unaware Sheetz owned it, and "finders' keepers." She further testified that she believed had she turned it in, a store employee would have just stolen it. In affirming her conviction, the Court found that an accused may assert an 'honest belief' that property was abandoned so long as they have a reasonable basis for such a belief. Here, however, the appellant's claim was not reasonable as she concealed the tablet as she left. "In fact, '[t]he willful concealment of goods while still on the premises is prima facie evidence of intent to defraud the owner of the value of the goods or merchandise at issue."

V. Miscellaneous

Commonwealth v. Holmes, Record No. 1404-23-2. March 27, 2024. CAV (unpublished opinion). The Court of Appeals reversed the trial court's dismissal for disorderly conduct in a hospital or training center (in violation of Va. Code 37.2-429). In doing so, the Court of Appeals found that the statute was not invalid simply because it lacked express *mens rea*; such a requirement may be read into the statute by the court when it appeared implicitly intended that it must be proved. The statute provides: "It shall be unlawful for any person to conduct himself in an insulting or disorderly manner on the grounds of any hospital or training center or in any way to resist or interfere with any officer or employee of any hospital or training center in discharge of his duty." The trial court found because there was lack of *mens rea* in the statute, it was Constitutionally vague.

In reversing the trial court, the Court of Appeals referenced May v. Commonwealth, 213 Va. 48 (1972) holding that "*mens rea* or scienter can be read into the statute when it appears that the legislature implicitly intended it must be proved." Here, even though not explicitly stated, the Commonwealth must prove intent. Further, in considering an overbreadth argument, the Court must evaluate the subject matter to be regulated. The Court of Appeals then found this statute had a legitimate, compelling purpose – to protect the sick and injured and avoid unnecessary disruptions in hospitals and training centers. In considering whether a statute is vague, the challenger must show that the statute is vague not only in his case but "would not be constitutional in any context." Because the trial court took no evidence to issue, it erred in concluding it to be vague. There was a concurring/dissenting opinion that would have narrowed the statute to exclude "insulting" speech, as such conduct is too broad and violations First Amendment protected speech.

VI. Expungements (and Criminal Records)

McFadden v. Commonwealth, No. 0312-23-1, 2024 WL 1624692 (Va. Ct. App. Apr. 16, 2024). The Court of Appeals found that the circuit court erred when it required the petitioner to demonstrate a "direct connection" between his *nolle prossed* charge and difficulty finding employment. Instead, the petitioner was only required to show "a reasonably possibility of manifest injustice" arising from the arrest. There petitioner sought an expungement of a 2016 arrest for attempting to possess a firearm after conviction of a non-violent felony. To do so, he employed Va. Code 19.2-392.2(a) assuring that the charge was *nolle prossed*, and "the continued existence and possible dissemination of information relating to the arrest," "causes or may cause circumstances which constitute a manifest injustice to him." In reversing the circuit court, the Court of Appeals stated "[I]n using the word 'may'" in Va. Code § 19.2-392.2(F), "the General Assembly 'plainly signaled that a petitioner need not show actual prejudice." Further, though courts should not favor "fantastical or exaggerated assertions of a potential adverse impact," even "a reasonable fear" of a negative impact on career advancement or other prospects is sufficient to compel an expungement under the statute.

A.M.Z.P. v. Commonwealth, Case No. CL-2023-11261, Feb. 6, 2024. Fairfax County Circuit Court (Oblon). Where petitioner was arrested for domestic assault and battery, the court held that once the original criminal charge is expunged, the court "must include the expungement of any emergency protective order (EPO) 'related to' the expunged charge." There, petitioner filed for expungement of the domestic assault charge, to which the Commonwealth did not object. The petition also sought expungement of the related EPO issued in relation to the warrant. Initially the Commonwealth objected, but at hearing petitioner's counsel represented to the court that "the Commonwealth no longer opposes the expungement of the EPO."

In its reasoning the Court pointed to Va. Code 19.2-392.2(A) that allowed a petitioner to seek expungement of "the police records and the court records ***relating*** to the charge." (*Emphasis added*.) It also looked to the Oxford Dictionary for guidance as to the meaning of relate: The word 'relate' means to 'be causally connected: high unemployment is related to high crime rates.
The Court went on to state: "What is the point of expunging a domestic assault and battery charge while leaving public a protective order that facially reports that the court entered it because of the

assault charge? The protective order would disclose the very assault charge intended to be expunged from the public record."

CRIMINAL PROCEDURE

I. Search and Seizure

Commonwealth v. Clements, Case Nos. CR23-57, CR23-58, March 8, 2024. Arlington County Circuit Court (Fiore II). The trial court denied the defendant's motion to suppress results of a search warrant for his Google search history regarding the complainant's address. There, the complainant had been thrown from a moving vehicle. Apparently, she attempted to order a Lyft, when an SUV picked her up, which was later identified as the same vehicle from which she was later thrown. The complainant's phone was not found on her, so law enforcement obtained cell phone tower record data. From that data, the defendant was identified as a suspect, and law enforcement sought additional information to tie him to the crime. While a first request for search warrant sought geo-fence data held by 3 cell phone providers to "all active mobile evidence within a particular area during a set time," the Commonwealth was granted a search warrant for Google search term data for the complainant's home address.

While the court found that the defendant had a reasonable expectation of privacy of his search engine history, generally, the warrant was sufficiently narrow to not violate that privacy: "Society would reasonably expect privacy in search engine search terms. It is a common experience for persons to search medical terms or medical conditions and there is no question that a person's medical condition, whether physical or mental, is of the most private nature . . . The Court issued the search warrant pursuant to probable cause to believe that a crime had been committed, and that a search of Google's data base would reveal, more likely than not, that had an internet map search been made of the complaining witness's single family home address, only the perpetrator of the crime would have entered that most specific search term, given the very limited date and time governing the data base search, and given the circumstances, including the perpetrator posing as a ride share driver who would need driving directions to the complaining witness's residence. . ."

The court went on to say that while there was probable cause for the warrant, even if that were lacking, the evidence should not be suppressed because the officers were entitled to act in reasonable reliance on the search warrant given the court's rejection of previous warrants but issuance of this one.

<u>Harvell v. Commonwealth</u>, No. 1859-22-1, 2024 WL 1160595 (Va. Ct. App., Mar. 19, 2024). The Court of Appeals found that a motion to suppress was wrongfully denied when the search was based upon officer's hunch after seeing a baggie of marijuana in the appellant's vehicle. There, police encountered appellant "passed out" in his driver's seat. When the officer knocked on the window, appellant awoke; he was "a little groggy but responsive." While speaking to appellant, the officer noted what appeared to be a bag of marijuana on the open center console, "probably 3 or 4 grams." Based upon that, the officer ordered appellant out of his vehicle and searched it, finding illegal drugs.

In the suppression motion, the officer explained that, while he didn't see criminal amounts of marijuana, the presence of marijuana and the fact that appellant was "passed out," led him to believe that there might be more marijuana, paraphernalia, or 'something other than marijuana in that vehicle.' The trial court found probable cause because while small amounts of marijuana had been decriminalized, it was not legalized. In response the Court of Appeals simply said this was not enough for probable cause that there was criminal contraband in the vehicle.

<u>United States v. Moore</u>, Case No. 3:21-cr-42, Feb. 12, 2024. EDVA at Richmond (Gibney). The Accused, a black man, demonstrated that his stop by Richmond Police Department was part of the RPDs efforts to selectively stop black drivers, which lead to his current charges for possession of a firearm and ammunition by a convicted felon, and therefore his charge was dismissed. There, RPD pulled over the Accused, he fled the scene, and was later found with a firearm in his car. In his motion to suppress, the Accused introduced Dr. Eli Coston and Dr. Marvin Chiles, which the Government moved to exclude both.

Using data that RPD provided to the Accused, Dr. Coston found that "[t]hroughout almost every step of a traffic stop, from the likelihood that a driver is pulled over, to the actions taken during the stop, to the eventual outcome of that stop, Black drivers are at a significant disadvantage compared to White drivers." Dr. Chiles further testified about the history of radicalized policing in Richmond and that the RPD failed to maintain documents that would have "presented direct evidence," of racial discrimination. Therefore, the Court admitted the testimony.

The Court further stated that, to show that RPD selectively enforced traffic laws against him due to his race, Moore must prove, by a preponderance of the evidence, that RPD's "enforcement process 'had a discriminatory effect and that it was motivated by a discriminatory purpose." What's more, the data showing that RPD stops Black drivers five times as often as it stops white drivers, coupled with the evidence of Richmond's history of discrimination, reveals that RPD's discriminatory purpose contributed to its officers' decision to stop the accused. The accused therefore succeeded in meeting his burden of showing discriminatory purpose.

<u>Commonwealth v. Jennings</u>, No. 1443-23-3, 2024 WL 236267 (Va. Ct. App. Jan. 23, 2024) The trial court erred in suppressing a car search because no exigency or ready mobility is required by the automobile exception. There, the accused was involved in a multi-vehicle crash where a paramedic treated her. The paramedic noticed that she seemed dazed and confused and asked her if she was under the influence. In response, the accused said that her boyfriend smoked some weed last night. The paramedic placed her in the ambulance and asked for ID, to which she said it was in a pink bag in the car. The paramedic went to the car, found a pink box, opened it and saw what later proved to be drug contraband. He then told the state trooper about the contraband.

The trooper determined that the vehicle was not drivable. Despite failing to create any sort of inventory list and admitting that he went into the vehicle to retrieve what he believed to be drug contraband, the trooper claimed that he was simply conducting an inventory search of the vehicle. Ultimately the Commonwealth conceded that the trooper's actions were indeed a police search, but that he had probable cause to believe drugs were in the car given the accused's impaired condition and the paramedics statements about the contraband. Because the car was not drivable, however, the trial court found that the automobile exception to the warrant requirement did not exist because the car was not mobile and, therefore, no exigent circumstances existed.

In reversing this decision, the Court of Appeals relied on <u>Carroll v. United States</u>, 267 US 132, 147 (1925), that recognized there was a distinction for needing a search warrant when it came to dwellings versus automobiles. Indeed, "the ready mobility of automobiles justifies a lesser degree of protection of those interests." The Court of Appeals, however, found that later decisions from the US Supreme Court, "clarified that exigency was not required in order for the Commonwealth to rely on the auto exception." *See e.g.* <u>Carney</u>, 471 US 386 (1985).

<u>Carter v. Commonwealth</u>, 79 Va. App. 329, 896 S.E.2d 73 (2023). The Court of Appeals found an improper search where appellant agreed to let police search him for weapons, and they conducted broader search of his pockets that was not for weapons. Therefore, the items found in appellant's pockets could not be used to justify a vehicle search. There, the officer asked the appellant if he had "any weapons or anything like that on you?" to which appellant replied no. The officer then asked, "do you mind if I search you real fast just to make sure?" To which appellant agreed. In finding the search improper, the Court of Appeals opined that "a reasonable person considering this exchange would understand [the appellant's] consent to be limited to a search for weapons. The scope of this search was defined by its expressed object – weapons." The scope of appellant's consent was not expanded simply because, as the officer reached into his pocket, the officer asked, "nothing on you is gonna poke, prick, or stab me?" to which the appellant responded no. Further, the officer did not reasonably believe the items found – cash, plastic baggies, keys, etc. – were weapons. And because these items were fruit of the poisonous tree, they could not be used to justify the subsequent search of appellant's vehicle that led to evidence subject to his charges.

<u>Beamon v. Commonwealth</u>, No. 1136-22-1, 2024 WL 85997 (Va. Ct. App. Jan. 9, 2024). A search was found to be proper when based upon a K9 alerting the presence of drugs in appellant's car, and a warrantless search revealed 40 ounces of marijuana, $1,000 in cash, and a firearm. Important to the Court was the timing of the search. Specifically, the officer searched appellant's car in February 2021, when the General Assembly had recently decriminalized simple possession of marijuana, making simple possession a civil penalty.

Therefore, it was unlawful to possess small amounts of marijuana, but not criminal. In upholding the search, the Court of Appeals stated, "[b]ut even if a probable cause search for contraband requires a nexus between the purported contraband and criminal activity, it would not necessarily follow that the trial court erred in denying Beamon's suppression motion . . . Under circumstances where, as here, the applicable laws or legal standards had recently changed, it is appropriate to consider whether a reasonably well-trained officer would have known and understood the constitutional implications of those changes." And it went on to find that, at the time of the search, the caselaw and relevant statutes did not provide unambiguous guidance about whether an unlawful but not criminal possessed substance constituted contraband for purposes of the 4th Amendment, therefore, the exclusionary rule did not apply. **(Note - Later that year, Va. Code Section 4.1-1302 was passed, which prohibits searches of vehicle based solely upon the odor of marijuana.)**

II. <u>Confessions and Self-Incrimination</u>

<u>Thomas v. Commonwealth</u>, No. 1429-22-4, 2024 WL 1055308 (Va. Ct. App. Mar. 12, 2024). The Court of Appeals found that appellant's statements were wrongfully admitted when his probation officer coordinated with law enforcement so that the appellant would be arrested at the PO's office and later instructed him to talk to law enforcement. There, the appellant was on probation for a separate sex crime. As part of probation, the appellant was required to follow his probation officer's instructions or risk revocation of his 7 year suspended sentence. Law enforcement had appellant's PO summon him for an apparently routine meeting, when he was then arrested, and the PO accompanied him to the police station. During appellant's interrogation, the PO instructed appellant to, "go ahead and chat with the detectives today."

In doing so, the Court of Appeals stated, " we are persuaded that the finding also acknowledges the tacit pressure to speak. An expressly spoken 'or else' was unnecessary because Thomas was under compulsion to follow Samluk's instructions as a condition of his probation and Samluk's instruction conflicted with Thomas's Fifth Amendment right to remain silent." And given this coercion, Miranda warnings were ineffective to cure the coercion. What's more, law enforcement knew appellant was intellectually disabled, which made it more "likely that he would have understood [the PO's] instruction as an implied consent."

Johnson v. Commonwealth, No. 1295-22-1, 2024 WL 1055304 (Va. Ct. App. Mar. 12, 2024). The appellant's confession to murder was found to be made voluntary despite a lengthy interrogation. There, Appellant lived with the victim and their 20-month-old twins when victim went missing. When asked, Appellant admitted to leaving their twins alone and he was arrested for four counts of contributing to the delinquency of a minor. He was not told the specific charges and given his Miranda warnings as they drove to the police station. Once at the station, Appellant was interrogated for approximately 19 hours and ultimately made his confession.

In finding the interview not unduly coercive, the Court of Appeals explained that, while 19 hours was longer than most, the appellant was given multiple snacks and a meal, provided water, as well as bathroom and smoking breaks throughout the entire encounter. From the audio, there was also no evidence the detectives raised their voices or threatened the appellant with harm. What's more, appellant's statement of "I don't have anything else to say, man. If you want to take me to jail. I don't have anything else to say, man," was not a clear and unequivocal expression of his desire to cease the interrogation and remain silent. After this statement, detectives again reminded him of his Miranda rights, but appellant then made more statements.

IV. Charges and Pleas

Pompell v. Commonwealth, 80 Va. App. 474, 899 S.E.2d 51 (2024). The Commonwealth was properly allowed to amend a felony to a not-lesser-included misdemeanor despite the statute of limitations for the misdemeanor expiring. On July 19, 2021, defendant was charged with felony breaking and entering with the intent to commit assault and battery. On May 16, 2022, a grand jury indicted him. On November 9, 2022, the Commonwealth moved to amend the felony charge to misdemeanor unlawful entry, despite the new charge not being a lesser included of the felony. On March 15, 2023, the trial court amended the indictment. Relying on Va. Code 19.2-231.3, the trial court found this permissible as the amendment did not "change the nature or character of the offense charged." On appeal, the defendant argued that Va Code 19.2-8 set the statute of limitations for misdemeanors to 1 year. Relying on Hall v. Comm, 2 Va. App. 159 (1986), the Court of Appeals upheld the amendment finding that Hall stood for the proposition that a charge could be amended so long as it did not alter the nature or character of the offense charged. "We hold that Hall's rational extends to amendments charging misdemeanors that are not lesser-included offenses of the originally charged felony."

VI. Double Jeopardy and Collateral Estoppel

Commonwealth v. Carter, No. 1788-23-3, 2024 WL 1624695 (Va. Ct. App. Apr. 16, 2024). The Court of Appeals found that the trial court erred in granting defendant's motion to dismiss double jeopardy grounds when he was charged with aggravated malicious wounding, despite prior indictment for assault and battery of a correctional officer arising out of the same incident, because the new charge required proof of different elements. In reversing the circuit court, the Court of Appeals found that two charges are "the same" when it comes to double jeopardy, if "(1) [they] are identical, (2) the former offense is lesser included in the subsequent offense, or (3) the subsequent offense is lesser included in the former offense." And the real question presented as whether the assault and battery of a correctional officer was the "same" as aggravated malicious wounding.

While simple assault and battery was a lesser included of both assault on correctional officer and aggravated malicious wounding, the two greater offenses – assault on correction officer and aggravated malicious wounding – required proof of two elements the others did not. (Assault on correctional officer required proof that the defendant knew or had reason to know the victim was a correctional officer; aggravated malicious wounding required proof that defendant acted with malice, and caused permanent, significant physical impairment.) Therefore, neither was a lesser included of the other.

Thompson v. Dotson, No. 191075, 2024 WL 1574917 (Va. Apr. 11, 2024). The Supreme Court of Virginia denied Defendant's claim of ineffective assistance of counsel based upon double jeopardy when Defendant was convicted of robbery of the victim's cell phone and attempted robbery of victim's money. There, the Defendant approached victim and asked for his money. When the victim said he didn't have any, the Defendant showed the victim the butt of his gun in his waistband then took the victim's cell phone. Defendant then forced the victim to drive to various ATMs to withdraw cash, but victim was unsuccessful in withdrawing cash. The Court found that robbery of cell phone and attempted robbery of cash were two separate factual circumstances that requires distinct evidence for each.

VII. Trial

Biggs v. Commonwealth, No. 1325-22-2, 2024 WL 1381778 (Va. Ct. App. Apr. 2, 2024). The Court of Appeals found trial court did not err in refusing a continuance request where the appellant was convicted of rape by trial in his absence where the record demonstrated that the appellant was aware of the trial date, cut off communication with his attorney, there already had been an exceptional delay, the appellant (and others) had threatened the victim, and the appellant posted on social media that he was "on the run." The appellant claimed violation of Va. Code 18.2-61(A)(ii) for incapacitation given that he was absent.

The appellant also argued the trial court erred by not granting his attorney's Motion to Withdraw because she has an "actual conflict of interest." There, the attorney asserted in her motion to withdraw she could not effectively represent him because he threatened her and her staff and violated attorney-client privilege. The Court of Appeals said that there was no transcript of the hearing, and the Motion to Withdraw, alone, was not enough to establish an actual conflict of interest. Such a transcript would have been "indispensable" to facilitate review.

Regarding the continuance request, the appellant had signed a notice that he could be tried in his absence. On the trial date, Counsel for the appellant indicated that she did not know of his whereabouts and had no contact with him for 2 months. However, he posted on social media that he was "on the run" and commented that revocation of his bond was unfair. The trial court also noted the exceptional delay in the case, threats made to victim and expense and inconvenience to witnesses.

Faust v. Commonwealth, No. 1345-22-2, 2024 WL 923928 (Va. Ct. App. Mar. 5, 2024). Motion to strike juror properly denied when, during *voir dire* for appellant's trial for rape and aggravated sexual battery, a juror unequivocally stated she could render an impartial verdict despite being abused by her father when she was young. There, the appellant was a family friend whom the victims' parents allowed him to move into their family home, and was alleged to have sexually assaulted to of the children for two years. During *voir dire,* a juror disclosed that her own father had abused both her and her sister when they were young. In response, appellant's counsel asked if that experience would "make it hard for her to give a fair trial today?" She answered "no" and explained that her father "did the right thing" after the abuse by getting "help" and acknowledging what he had done. She also expressed that she had forgiven her father. The Court of Appeals found the trial court did not abuse its discretion because of the juror's responses: "A juror's ability to remain impartial is not determined by the total absence of any preconceived views but rather by her ability to lay aside those views and render a verdict based upon the law and evidence."

Gamez Amaya v. Commonwealth, No. 1141-22-4, 2024 WL 236548 (Va. Ct. App. Jan. 23, 2024). The trial court properly refused a cautionary jury instruction regarding accomplice testimony where the testimony was corroborated by material facts. There, the appellant was convicted of, among other things, first-degree murder. The appellant stabbed the victim multiple times in the presence of others, including the accomplice at issue. The appellant then instructed the accomplice to cut off the victim's ear. Later, the accomplice admitted to these actions and testified to such at trial.

In response, the appellant requested a jury instruction, which advised the jury that the accomplice admitted he was indeed an accomplice. And while the jury can convict the appellant upon uncorroborated testimony, the jury should consider such testimony with great care and is cautioned as to the danger of convicting based upon the uncorroborated testimony of an accomplice. In refusing the jury instruction, however, the trial court found that the testimony was corroborated by statements of the appellant to his sister during a jail call. Specifically, in discussing his charges, the appellant told his sister that he "alone" committed "the sin," though others were present. And in doing so the Court of Appeals found that the trial court did not abuse its discretion.

VIII. Evidence

Sample v. Commonwealth, 303 Va. 2, 897 S.E.2d 68 (2024). When law enforcement showed the victim a single photograph of the appellant after an attempted robbery, the Virginia Supreme Court ruled that this identification was not impermissibly suggestive. There, the appellant was alleged to have attempted to rob the victim with a BB gun, however, the victim recognized it was a BB gun and was able to wrestle the gun away. The victim immediately called 911, and an officer responded in 5-10 minutes. The victim provided law enforcement with a description of the robber and the direction he fled. Based upon this, law enforcement believed the assailant to be the appellant, whom he had prior encounters with, because of appellant's "very distinctive eyes," build, and direction which he fled.

Given that, law enforcement asked dispatch to text him a picture of the appellant and went back to the victim about 15 minutes later and showed him a booking picture of appellant. In response, the victim ID'd the appellant and said, "yeah – those big brown eyes, yup…he's light complected like that. . ." In response, appellant filed a motion to suppress that the photograph was impermissibly suggested under the 5th and 14th Amendments to the US Constitution.

In affirming the trial court's denial of the motion, the Court opined, "The comment was merely an expression of what a photographic identification unavoidably implies–that the officer believed the assailant might be pictured–not that 'this is the man' who did it…The officer's comment acknowledged that he was unsure about his suspicion of Sample and had only provided the photograph of Sample because the officer believed Sample roughly matched the description given by Angiulli . . .In sum, the officer's comments did not create circumstances which induced Angiulli to inevitably identify Sample."

The Court also found the trial court did not abuse its discretion based upon the five factors in evaluating the likelihood of misidentification under Neil v. Biggers, 409 US 188 (1972): (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Further, "The record demonstrates that Angiulli had an adequate opportunity to view his assailant . . . We give deference to the trial court's finding of fact that the area was well lit and bright enough for Angiulli to observe the man clearly . . .The record reflects that Angiulli paid close attention to the assailant throughout the attempted robbery . . . The record shows Angiulli provided a detailed and accurate description of Sample to the officer. . . [I]t was not unreasonable, on these facts, for Angiulli to describe Sample as Caucasian. Angiulli also estimated the man to be about 5'10" tall, 150 to 160 pounds and emphasized the man's big brown eyes, brown hair, and how pale he looked. This estimated height, weight, and age all matched Sample's features."

Cappe v. Commonwealth, 79 Va. App. 387, 896 S.E.2d 351 (2024). Though found to be a harmless error, trial court erroneously excluded lay witness testimony that the appellant was not one of the men depicted in a surveillance video. There, appellant was convicted of first-degree murder, conspiracy to commit first-degree murder, and use of a firearm in commission of a felony. In finding error, the Court of Appeals stated that opinion testimony by a lay witness is admissible if it is reasonably based upon personal experience or observations of the witness and will aid the trier of fact in understanding the witness's perception. Here, the appellant's witness was to give lay opinion that the man who shot the victim in the video was not the appellant. "Using the same logic that allows a lay witness to *identify* a person in a video or photo, we find that a lay witness' testimony that a person is *not* pictured in the video or photo is equally reliable, so long as the lay opinion testimony is based on that witness' personal knowledge, and will assist the trier of fact in understanding the witness' perceptions…" In supporting foundation for the lay witness's opinion, it was established that she had known appellant from birth, spent considerable time with him over the years, and would presumably be able to recognize him more easily that someone who had not seen him bi-weekly for years. Further, she based her opinion on his size, physique, and the shape of his head.

Pair v. Commonwealth, No. 1507-22-1, 2024 WL 157532 (Va. Ct. App. Jan. 16, 2024). Evidence that the murder victim had recently obtained an emergency protective order against the appellant was properly admitted at trial given that its prejudicial effect was outweighed by its probative value. There, evidence was presented that appellant lived with, and was married to, the victim when she informed him that she was moving out. Four days later, she obtained an emergency protective order (EPO) that was served upon him later that day.

It was further presented at trial that that same day, an acquaintance of appellant arrived at his townhouse to visit for the weekend. At 7:15 pm, they went to a nearby hotel and stayed for the weekend. Around noon the next day, a witness was speaking with the victim on the phone when he heard a "banging sound," the victim screaming in pain as well as a male voice. The call then disconnected at 12:07 pm. Data from the residential security system showed the back door of the townhouse was opened at 12:02 pm, the front door opened and closed at 12:08 pm, then back door closed at 12:09 pm. It was further established through testimony from appellant's acquaintance and cell phone data that appellant was around the townhouse from 11:56 am until 12:15 pm.

In upholding the trial court's admission of the EPO, the Court of Appeals recognized that the evidence was certainly prejudicial. However, it was noted that the actual EPO document itself was not admitted, only that the jury heard the EPO was obtained by the victim and served upon the appellant. Further, the trial court cautioned the jury that the EPO was not evidence of appellant's wrongdoing, and that it was probative for a combination of purposes to include the strained state of the parties' marriage and the course and timing of the victim's death.

IX. Sentencing/Disposition

Hamilton v. Commonwealth, 79 Va. App. 699, 896 S.E.2d 837 (2024). The trial court's good time behavior was ordered reversed because the 20-year good time requirement exceeded the term of his suspended sentence. On August 11, 2006, the trial court entered a 30-year suspended sentence, to end on August 11, 2036, which was proper because he could have been sentenced to 30 years imprisonment. In 2014, the appellant also received a 20-year suspended sentence for robbery, which was set to end November 18, 2034. On September 20, 2022, the Trial Court revoked his previously suspended sentences, imposed two years and four months active jail, and resuspended the remainder of his previously suspended sentences. However, it then ordered an additional 20 years of good behavior, to end September 20, 2042. In reversing this good time requirement, the Court of Appeals opined: "We must reverse that requirement in the trial court's order because the trial court will lose jurisdiction over a large portion of that time requiring good behavior no later than August 11, 2036, and the General Assembly has been clear that a court does not have authority to impose requirements for a suspended sentence when the period of suspension for that suspended sentence has expired . . . "

Commonwealth v. Coburn, Case No. FE-2001-100070, Apr. 4, 2024. Fairfax County Circuit Court (Bellows). The Circuit Court dismissed the defendant's *pro se* challenge to his life sentence given that his sentencing order was only voidable, not *void ab initio*. Because the defendant waited 22 years to challenge the sentencing order, the Circuit Court had long lost its subject matter jurisdiction per Rule 1:1(a). In 2001, the defendant plead guilty to robbery. He was sentenced to life in prison. However, the Court failed to impose "a term of incarceration, in addition to the active term, of not less than six months nor more than three years as the court may determine…and the defendant shall be ordered to be placed under post release supervision upon release from the active term of incarceration," in violation of Virginia Code Sections 19.2-295.2(A) and 18.2-10(g). While the Court acknowledged the error in the defendant's sentencing order, it found that a sentencing order is only *void ab initio* if the court imposes a sentence "in violation of the prescribed statutory range of punishment." Rawls v. Commonwealth, 278 Va. 213, 221 (2009). In a footnote, the trial court did not find that a void ab initio order may be attacked at any time and is not subject to Rule 1.1(a). The Court also referred to Eggleston v. Commonwealth, 2017 Va. App. LEXIS 235 (Va. Ct. App. Sept. 12, 2017) where that trial court imposed a period of post-release supervision without imposing a period of suspended post release requirement, as required. The Eggleston court ruled that because the sentence imposed was within the prescribed statutory range, and the court erred merely in the way it structured the post-release confinement, "the error, therefore, is not jurisdictional, and the sentence order was voidable, not *void ab initio*…the court lacked authority more than 21 days after the entry of the unappealed order to graft into it a term of post-release confinement."

Hannah v. Commonwealth, 303 Va. 109, 899 S.E.2d 621 (2024). The Supreme Court affirmed finding that previous version of Va. Code 19.2-306(C) applied when defendant was sentenced and alleged to have violated probation prior to that section being amended. There, the defendant was convicted on one count of felony forging a public record and one misdemeanor count of providing false information to law enforcement. The circuit court partially suspended the Defendant's sentences on, among other things, not unlawfully using and possessing controlled substances. The circuit court specified that Defendant's probation was to last for an "indeterminate period, a minimum of two years supervised." Defendant was released from custody on May 6, 2020, and he tested positive for controlled substances on March 25, 2021, and continued to test positive several times through March 2022. As a result, the circuit court found him guilty of probation on both of his counts, revoked the suspended sentences, and resuspended the sentences for the same period of supervised probation, adding new special conditions. Defendant appealed his "indefinitely" resuspended sentences, arguing they were void *ab initio* given that they exceeded the newly enacted 19.2-306(C) limit of resuspending sentences "for a period up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned. . ." In affirming the Court of Appeals rejection of this argument the Supreme Court found the previous language of 19.2-306(c), allowing the trial court to resuspend sentences for "a reasonable period of time" and "without regard to the maximum period for which a defendant might have been sentenced," controlled given that Defendant first tested positive March 25, 2021, three months prior to the effective date of the amendment. See also Va. Code 19.2-303.1.

<u>Vanmeter v. Commonwealth</u>, 80 Va. App. 324, 897 S.E.2d 722 (2024). Appellant's janitorial work while he was serving his sentence did not constitute "community service," to all "a credit toward the costs imposed by the trial court at sentencing." There, the appellant, an inmate, was employed by the Virginia DOC performing janitorial work while serving out his sentence. He claimed that, per Va. Code 19.2-354(c)(ii), he should have received credit towards his sentence. Originally, he plead guilty to 70 felonies and was sentenced to 1,240 years with 1,180 years suspended, which equated to active sentence of 60 years. At the time of his sentence, he was 46 years old, and could be eligible for geriatric release once he reached 60 years of age and had served 10 years of his sentence. He was also sentenced to costs of $29,350. Before July 1, 2020, Va. Code 19.2-354(c) provided that discharge of all or part of fines or costs by earning credits for community service "before or after imprisonment." That statute was amended to allow for community service work performed "during imprisonment," if in accordance with six provisions, none of which addressed an inmate's work for the Virginia DOC while an inmate. In objecting to this request, the Commonwealth argued the circuit court lacked authority to amend its sentencing order given that the request was well after 21 days per Va. Code 17.1-406(A). However, the Court of Appeals found that statute provided the trial court continuing authority pertaining to a defendant's payment of costs." And further, Va. Code 19.2-354(c)(ii) further allowed continuing jurisdiction to the circuit court for community service options as well as fines and costs. However, the Court of Appeals found the janitorial work did not count given that it was not laid out in one of the six provisions of the amended statute.

X. <u>Appeals</u>

<u>Commonwealth v. Browne</u>, 303 Va. 90, 899 S.E.2d 616 (2024). The Supreme Court found the appeal mooted given that appellant already served any possible active sentence, despite the trial court's error. There, the trial court revoked appellant's suspended sentences and, resuspended portions of the sentences, and ordered him to serve a period of active incarceration. The Court of Appeals reversed the trial court given that Appellant was ordered to serve period of active time that exceeded the maximum period of time permitted under Va. Code 19.2-306.1. In finding the appeal moot, the Supreme Court found that Appellant's incarceration could not be "undone," as he already served it. Further, there was no continuing injury since he already served the time.

FAMILY LAW

RECENT DEVELOPMENTS IN THE LAW

2024

VIRGINIA CLE

Presented by Chandra A. Sheppard
The Geller Law Group, PLLC

SUPREME COURT OF VIRGINIA

POWELL v. KNOEPFLER-POWELL, From the Court of Appeals via Fairfax County Circuit Court

Ruling: The Supreme Court reverses the judgment of the Court of Appeals that the trial court did not rely upon the child's notes, which were only accepted as a demonstrative to the extent the same statements were adopted in the child's testimony.

Facts: This originates from a Fairfax County modification of custody case via the Court of Appeals. Mother called the parties' nine-year-old child to the stand as a witness. The child informed the trial court that she had brought some of her notes with her. The judge asked the child for her notes and informed the parties, "[j]ust so counsel know, I haven't decided whether I will consider this. Let me just review it, and then I will show it to you." Neither party objected. The judge and counsel for the parties each questioned the child. The court then stated it would accept the notes as a demonstrative, with no evidentiary significance, because the child did adopt some of the statements in the notes through her testimony. The trial court then ruled in Mother's favor, citing the child's perception of the Father with quotes and facts taken from her notes, including portions uncorroborated by any other evidence. Father filed a motion to reconsider, highlighting that the trial court improperly relied upon portions of the notes that had not been adopted in testimony in reaching its ruling. The Court of Appeals held that the court had not improperly relied upon the notes in reaching its ruling, but the Supreme Court disagreed and remanded the case.

Analysis: The Supreme Court held that the trial court's ruling referenced specific facts found only in child's notes, including that she was scared of her father, and that her stuffed bear is a pillar of her stability. Although the trial court used the notes as a guide to ask questions of the child and Father about the contents of the notes, not all facts recited by the trial court were also adopted by testimony. The Supreme Court held that it was clear error to rely upon the uncorroborated portions of the notes when the trial court had described the uncorroborated portion of the notes as having "no evidentiary value in and of itself." The Court walked through several issues of failure to preserve the error by failing to contemporaneously object and state the objection with specificity.

COURT OF APPEALS PUBLISHED OPINIONS

CHOI v. CHOI, Circuit Court of Fairfax County

Ruling: The Court of Appeals held it lacks subject matter jurisdiction to hear an appeal of a pendente lite order requiring the payment of spousal and child support and arrearages.

Facts: When the pendente lite order was entered, the Court of Appeals had appellate jurisdiction only over final judgments, orders and decrees, and interlocutory orders entered pursuant to Code §§ 8.01-267.8 (Multiple Claimant Litigation Act), 8.01-626 (injunctions), and 8.01-675.5 (certified orders or immunity orders). Between the pendente lite order and the notice of appeal, the General Assembly amended Code § 17.1-405 to permit appeals from "[a]ny interlocutory decree or order involving an equitable claim in which the decree or order (i) requires money to be paid or the possession or title of property to be changed or (ii) adjudicates the principles of a cause." Then, during the pendency of the appeal, the General Assembly further amended Code § 17.1-405 to prohibit the court from hearing interlocutory appeals in orders involving divorce, custody, support, or "any other domestic relations matter arising under Title 16.1 or 20."

Analysis: The Court of Appeals held that it clearly did not have jurisdiction over an appeal of a pendente lite support order pursuant to Code § 17.1-405. Although the removal of the Court of Appeals jurisdiction occurred after the notice of appeal had been filed, the Court of Appeals held that jurisdiction stripping statutes are procedural, and thus apply retroactively. Further, the Court noted that when the legislature chose not to

include a savings clause in its jurisdiction stripping statutes, which it has previously done in other statutes.

LISANN v. LISANN, Circuit Court of Fairfax County

Rulings: Trial court did not err in granting Wife a divorce under Code § 20-91(A)(9)(a) on the grounds of living separate and apart, without interruption or cohabitation for over one year, because a party seeking a no-fault divorce under Code § 20-91(A)(9)(a) is not required to show that either party continuously maintained, throughout the statutory separation period, an intent to separate permanently.

Facts: Wife sought a divorce based on a separation date of July 2014 but Husband alleged a separation date of December 2018. Husband and Wife were married on May 8, 1993. In 2000, the parties moved to Paris, France for Wife's employment and Husband left his job as a federal prosecutor. Husband did not again resume consistent, full-time employment during the parties' marriage and Wife was the breadwinner. By July 14, 2014, Wife "had grown tired of financially supporting her deliberately underemployed husband" and Wife separated from Husband. Wife moved out, with the intent to separate permanently from Husband. After their separation the parties maintained daily contact to provide for their children, and did activities, had meals, and attended functions together. Both parties had a key to the other's home. Between July 2014 and December 2018, the parties occasionally stayed overnight at each other's homes. Although the parties occasionally shared a bed, they did not have sexual relations. The parties traveled extensively together, always with at least one child. The parties celebrated several birthdays and events and exchanged wedding anniversary cards that used expressions of love and pet names. In 2017, Wife asked Husband to move in with her, but he was not interested. Over the years leading up to December 2018, Wife sent conciliatory statements like "we should be together as we were meant to be" and she hoped it was not too late for them.

Analysis: The Virginia Supreme Court has held that for a divorce under Code § 20-91(A)(9)(a) to be granted, "there must be proof of an intention on the part of at least one of the parties to discontinue permanently the marital cohabitation, followed by physical separation for the statutory period." *Hooker v. Hooker*, 215 Va. 415, 417 (1975). *Hooker* dealt solely with the necessary intention at the initial separation. *Andrews v. Creacey*, 56 Va. App. 606, 623 (2010).

This case presented an issue of first impression in Virginia: whether a party who intends to separate permanently at the commencement of the statutory separation period for a no-fault divorce must – to preserve the separation date – *continuously* maintain the intent to separate permanently throughout the separation period.

The Court of Appeals held that the requirement that a party possess the intent to separate permanently under Code § 20-91(A)(9) is met when, at the commencement of the statutory separation period, a party has the intent to separate permanently. The court considered the purpose of the statutory period, which is to give parties a chance to reconcile and to determine if they desire to be permanently separated. *See Coe v. Coe*, 225 Va. 616, 620 (1983). It would be contradictory to dissuade parties from seeking to reconcile if they thought it would restart their statutory waiting period each time.

The Court of Appeals further held that the parties' actions did not constitute an interruption or cohabitation of the separation during the statutory period. The parties' actions resulted from the continuing obligation to care for their children and did not constitute a reconciliation of the parties.

CHAPHE v. SKEENS, et al., Circuit Court of Scott County

Rulings: The Court of Appeals upheld the order granting the grandparent's adoption petition without Father's consent because the trial court properly considered the factors outlined in Code § 63.2-1205 given Father's "tumultuous, neglectful, sporadic and uneven prior relationship with the children" which sufficiently protected his due process rights.

Facts: Father and Mother had three children, T.C., K.C., and J.C., and this appeal stemmed from Father's appeal of a close-relative adoption entered in favor of the maternal grandparents of the children. In July 2018, because both parents were incarcerated, a juvenile and domestic relations district court awarded the grandparents temporary joint legal and physical custody of the children. The trial court found that the children had been "unquestionably abandoned" in 2017, but the parents had "attempted and made contact" with the children "within six months prior to the filing of the adoption petition" which required the trial court either have the parent's consent to the adoption or the trial court had to find that the parents were withholding their consent contrary to the children's best interests under the factors in Code § 63.2-1205.

Analysis: Father contended the trial court failed to consider "whether the [p]arent has participated in major upbringing decisions of the children such as signing them up for basketball" in its analysis of the factors in Code § 63.2-1205. However, the trial court considered the totality of the facts, including Father's prolonged periods of absence from the children's lives including incarceration, his charge of child endangerment in 2015, his inability to assume custody immediately, his lack of stable housing, and the benefit the children's current custodial arrangement with the grandparents had benefited them in making its ruling. This was proper.

Father also raised an assignment of error stating the trial court's application of Code § 63.2-1205 violated his due process rights by infringing on his fundamental right to the upbringing of his children. The Court of Appeals disagreed, as the Supreme Court held in *Copeland v. Todd*, 282 Va. 183, 197-201 (2011) that the factors in Code § 63.2-1205 adequately protect the fundamental liberty interests of a biological parent in the care, custody, and control of their children. Because the factors focus on *both* the parent and the child, the statute passes constitutional due process scrutiny by providing for consideration of parental fitness and detriment to the child. A parent's right to the care, custody and control of their child is not unassailable, although a court must find more than a best interests of the child analysis, as the court did in this case.

HUMPHRIES v. BUCHANAN, et al., Circuit Court of the City of Norfolk

Ruling: Upon a hearing en banc, the Court of Appeals reversed and remanded the trial court's child support award because the trial court considered SSI benefits received by a disabled child as an independent financial resource of the child in awarding a downward deviation in child support under Code § 20-108.1.

Facts: Mother and Father are divorced parents. In 2018, Mother moved to reinstate child support for their daughter A (a minor) and N their adult son who has Down syndrome, autism, and obsessive-compulsive disorder. The Chesterfield Juvenile and Domestic Relations Court ("JDR") entered a support order of $1,019 for support of A and N due from Father to Mother. In 2020, the Division of Child Support Enforcement ("DCSE") moved on Father's behalf to reduce his child support obligation. JDR entered a support order of $740. On the appeal to the circuit court, the parties stipulated that the guidelines support amount due was $1,103. Father requested a downward deviation from the guidelines, citing N's receipt of SSI benefits because of his disability. The circuit court found that N's SSI benefits qualified as an "independent financial resource" under Code

§ 20-108.1(B)(9) and reduced Father's support obligation by $700, roughly the same amount of N's SSI benefits. Upon Mother's motion to reconsider the trial court renewed its finding regarding the SSI benefits but only credited Father for about half of the amount, ordering Father to pay $766.50 in child support.

Analysis: The Court of Appeals considered only whether a court could consider a child's receipt of SSI benefits as an "independent financial resource" under Code § 20-108.1(B)(9). Child support is due for minor children, and in some cases, a child over 18. The Court of Appeals first walked through the steps a trial court must take in determining child support; namely, a trial court must first calculate the presumptive amount of child support due under the guidelines in Code § 20-108.2. After computing this amount, if a court finds based on the factors listed in Code § 20-108.1 that the application of the guideline amount of support would be unjust or inappropriate, the court may deviate form the guidelines and set a different amount of child support. When deviating, the child support amount must be made in consideration of the factors outlined in Code § 20-108.1, including the "independent financial resources of the child or children." Ultimately the court's paramount concern in child support awards is the best interests of the children.

The Court of Appeals considered the purposes of the SSI program, which is to "assure a minimum level of income for people who are disabled and who do not have sufficient income and resources to maintain a standard of living at the established federal minimum income level." The Court of Appeals read Code § 20-108.1(B)(9) with a strong focus on the use of "independent" in "independent financial resources of the child." The other factors under § 20-108.1(B) focus "primarily on the parent's income, assets, and obligations." Given this, the Court of Appeals read "independent" to mean not dependent or contingent on the child's parents or their financial contributions.

Under this reading, SSI benefits are not "independent" because the amount of SSI benefits the child receives are impacted by a child's receipt of child-support payments from their parents. The Court of Appeals held that the dependence of SSI on the amount of child support, namely that as child support is reduced, the SSI benefits increase in tandem, resulted in an shift on the obligation of support to a child from a parent to the federal government. The Court held this downward spiral is not the intent of legislature and would not be in the child's best interests, leading to a child having less access to resources.

The Court of Appeals next considered previous case law on this issue. In *Bennett*, the Court of Appeals concluded that a parent receiving SSI benefits on behalf of a child

could not be included in the receiving parent's gross income under Code § 20-108.2(C). Namely, SSI benefits could not be considered in the calculation of the presumptive amount of child support due under Code § 20-108.2. The Court of Appeals had previously stated it believed the circuit court could consider the child's SSI benefits as an independent financial resource of the child. *Rinaldi v. Dumsick*, 32 Va. App. 330 (2000). This dictum was expressly overturned by the Court of Appeals. The Court further held that SSI benefits are meant to be additional income, and do not replace any other forms of income. Accordingly, Father cannot rely on the SSI benefits to reduce his child support obligation to his disabled adult son.

Dissent: The term "independent financial resources of the child or children" refers to financial resources available to a child independent of or other than those provided by the parent. Code § 20-108.2(C) carves out four income sources form consideration as a parent's gross income, including SSI benefits, from a parent's income for the presumptive guideline amount of child support. This, however, does not serve as a bar to trial courts considering those four types of income in setting child support levels. SSI is based on the eligibility of the individual, and it is a financial resource of the child. The majority's reading of Code § 20-108.1(B)(9) inappropriately constrains the trial court's discretion in determining a child support amount, after it determines that the presumptive amount of child support is unjust or inappropriate, in consideration of the best interests of the child.

In the nearly 25 years since the language in *Rinaldi*, the General Assembly has only made minor revisions to the provision at issue, which should be considered their acceptance of this precedent. This is the first time the Court has held that a category of information was per se impermissible and can never be considered under Code § 20-108.1.

LEGISLATIVE UPDATE

HB 994: Amended Code §§ 20-48 and 20.89.1 to establish a minimum age of 18 for all marriages occurring after July 1, 2024. Emancipated minors could still marry if the marriage occurred before July 1, 2024.

HB 174: Added an entirely new section, Code § 20-13.2, which states, "No person authorized by § 20-14 to issue a marriage license shall deny the issuance of such license to two parties contemplating a lawful marriage on the basis of the sex, gender, or race of such parties. Such lawful marriages shall be recognized in the Commonwealth regardless of the sex, gender, or race of the parties. Religious organizations and members of the clergy acting in their religious capacity shall have the right to refuse to perform any marriage"

HB 784: Amends Virginia Code §§ 20-60.3(9) (child support) and 20-107.1(H)(5) (spousal support) to require that a support order state "[i]f support overages exist, (i) to whom an overage is owed and the amount of the overage, (ii) the period of time for which such overage is calculated, and (iii) how such overage is to be paid." This language mirrors the arrearages language already required for support orders

HB 294: Adds the bolded language to Code § 16.1-279.1 which allows temporary child support orders entered ancillary to a protective order to terminate upon the determination of support pursuant to Code § 20-108.1 "**or upon the termination of the protective order, whichever occurs first**."

HB 783: Amends Code §§ 20-166, 20-167, 63.2-1201.1, and 63.2-1230. Code §20-166 now requires that the prospective adoptive parents in direct parental placement adoption pursuant to section 63.2-1230 sign a power of attorney executed pursuant to Code § 20-167. Code § 20-167 now includes language delegating the "discharge of a newborn infant from the hospital of birth, the initial physical placement of a child with the prospective adoptive parent in accordance with the provision of the Title 63.2 of the Code" as part of the Power of Attorney to Delegate Parental or Legal Custodial Powers form. Code 63.2-1201.1 is amended to replace "man and woman" with "persons" and the "in the form of one father and one mother" is stricken. Code § 63.2-1230 now allows a parent or legal guardian to execute a power of attorney to the prospective adoptive parent for the discharge of a newborn infant from a hospital or for the initial physical placement of a child with a prospective adoptive parent.

HB 893: Requires the Judicial Council, in conjunction with the Virginia State Bar and Virginia Bar Association, to adopt standards for the qualification and performance of attorneys appointed to represent a parent or guardian of a child when the child is the subject of a "child dependency case." It requires the Judicial Council maintain a list of the attorneys and it set the compensation rate.

HB 194: Adds Space Force as a branch of the military under Code §§ 20-108 and 20-124.7.

SB 509: Added clarification that the statutory bar on interlocutory appeals in domestic matters does not apply to an interlocutory appeal certified by the circuit court under Code § 8.01-675.5.

2024 VIRGINIA GENERAL ASSEMBLY

SELECT REAL ESTATE LEGISLATION

for the

50TH Annual Recent Developments in the Law Seminar

Prepared and Presented by

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2024 VIRGINIA GENERAL ASSEMBLY
COMPILATION OF SELECTED
REAL ESTATE LEGISLATION

Lucia Anna Trigiani
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The 2024 Session of the Virginia General Assembly convened on January 10, 2024 and adjourned on March 9, 2024. This was a "long session" of the General Assembly, 60 days during which much focus is consideration and adoption of the biennial budget. The reconvened session (more commonly referred to as the *veto session*) was held on April 17, 2024.

As predicted, the November 2023 elections brought historic changes in both the House of Delegates and the Senate as a result of redistricting and legislator retirements. The 2024 Session was historic in many ways – a new General Assembly Building, new legislators in significant numbers (18 Senators and 35 Delegates), new leadership in both the House and the Senate with narrow majorities – a shift in the House and like numbers in the Senate. The first African American was elected Speaker of the House. Committees in both houses were under new leadership. Technology investments in the General Assembly Building enabled virtual testimony in committee and subcommittee meetings to continue.

The bill count returned to pre-Pandemic levels. The General Assembly considered 3,594 bills and resolutions (1,046 *legislative* bills excluding commending and memorializing resolutions). The General Assembly continued 405 bills to the 2025 session. Of the bills considered, 2,281 bills passed the Senate and the House of Delegates. A total of 909 bills failed and 838 bills were approved. Unless otherwise noted in the summaries, statutory changes become effective July 1, 2024.

The Governor proposed 242 amendments to the biennial budget. At the Reconvened Session, the budget amendments were ruled specific and separate and referred back to Committee where the amendments "died." A special session to review budget amendments was scheduled for May 13, 2024 with a vote scheduled for May 15, 2024. The Governor and General Assembly reached a compromise on the eve of the special session.

The Governor signed 777 bills and initially vetoed 153 bills. The Governor offered amendments to 116 bills (not including budget amendments). No veto was overridden, but not all Governor recommended amendments were accepted by the General Assembly. The General Assembly accepted amendments to 64 bills and rejected amendments to 54 bills, returning those bills to the Governor. The Governor signed seven of the returned bills and vetoed an additional 48 bills, bringing the total number of bills vetoed to a historic number – 201.

The legislation summaries are intended only to offer a brief description of the bills that passed the General Assembly. Some of the summaries are of bills as introduced, and others are as the bills were passed or amended by the Governor. To gain a complete understanding of the legislation, a review of the language of the legislation is imperative; we do not recommend relying exclusively on the summaries. Much can also be learned from reviewing the bill

histories – the process followed during consideration of the bills. Full history and text of the legislation may be reviewed on the General Assembly website at http://leg1.state.va.us.

The summaries are taken from the summaries prepared by the Virginia Division of Legislative Services. The authors of this compilation express great appreciation to the Division of Legislative Services for their work in facilitating this compilation as well as colleagues who are conversant with the legislation and legislative process, with whom we consult in order to be able to present additional perspective and whose input was essential to identification of bills.

2024 VIRGINIA GENERAL ASSEMBLY

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ALCOHOLIC BEVERAGE CONTROL

House Bill 522 – Alcoholic beverage control; advertisements. *Amends and reenacts §4.1-111 of the Code of Virginia.* Directs the Board of Directors of the Virginia Alcoholic Beverage Control Authority to promulgate regulations that prescribe the terms and conditions under which manufacturers, brokers, importers, and wholesalers may advertise and promote alcoholic beverages via the Internet, social media, direct-to-consumer electronic communication, or other electronic means. This bill is identical to Senate Bill 182. *Patron: Delegate Paul E. Krizek.*

House Bill 688 - Alcoholic beverage control; sale and delivery of mixed beverages and pre-mixed wine for off-premises consumption; third-party delivery license; sunset; repeal. *Amends and reenacts §§4.1-204, 4.1-206.3, and 4.1-212.1, §4.1-230, and §4.1-231.1 of the Code of Virginia and repeals §4.1-212.2 of the Code of Virginia and the second enactment of Chapter 281 and the second enactment of Chapter 282 of the Acts of Assembly of 2021, Special Session I, as amended by the second enactment of Chapter 78 and the second enactment of Chapter 79 of the Acts of Assembly of 2022.* Repeals the July 1, 2024, sunset on provisions that allow (i) distillers that have been appointed as agents of the Board of Directors of the Virginia Alcoholic Beverage Control Authority, mixed beverage restaurant licensees, and limited mixed beverage restaurant licensees to sell mixed beverages for off-premises consumption and (ii) farm winery licensees to sell pre-mixed wine for off-premises consumption. The bill also repeals, effective July 1, 2026, third-party delivery licenses. The bill requires the Authority to convene a work group to review third-party delivery licenses and report its findings and recommendations to the Chairs of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 15, 2024. This bill is identical to Senate Bill 635. *Patron: Delegate James A. "Jay" Leftwich.*

House Bill 1349 – Alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses. *Amends and reenacts §§4.1-100, 4.1-103, 4.1-206.3, 4.1-209, 4.1-231.1, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia.* Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board (i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to Senate Bill 180, Senate Bill 400, Senate Bill 657, and Senate Bill 724. *Patron: Delegate Paul E. Krizek.*

Senate Bill 26 - **Alcoholic beverage control; public consumption; exemption.** *Amends and reenacts §§4.1-128 and 4.1-308 of the Code of Virginia.* Provides that the prohibition on drinking or offering to another an alcoholic beverage in public shall not apply when such acts are conducted on the premises of a campground located on private property at which a majority of the campers use travel or tent trailers, pickup campers, or motor homes or similar recreational vehicles. *Patron: Senator William M. Stanley, Jr.*

Senate Bill 180 – **Alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses.** *Amends and reenacts §§4.1-100, 4.1-103, 4.1-206.3, 4.1-209, 4.1-231.1, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia.* Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board (i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to House Bill 1349, Senate Bill 400, Senate Bill 657, and Senate Bill 724. *Patron: Senator Bill DeSteph.*

Senate Bill 182 – **Alcoholic beverage control; advertisements.** *Amends and reenacts §4.1-111 of the Code of Virginia.* Directs the Board of Directors of the Virginia Alcoholic Beverage Control Authority to promulgate regulations that prescribe the terms and conditions under which manufacturers, brokers, importers, and wholesalers may advertise and promote alcoholic beverages via the Internet, social media, direct-to-consumer electronic communication, or other electronic means. This bill is identical to House Bill 522. *Patron: Senator Aaron R. Rouse.*

Senate Bill 400 – **Alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses.** *Amends and reenacts §§4.1-100, 4.1-103, 4.1-206.3, 4.1-209, 4.1-231.1, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia.* Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board

(i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to House Bill 1349, Senate Bill 180, Senate Bill 657, and Senate Bill 724. *Patron: Senator R. Creigh Deeds.*

Senate Bill 635 - **Alcoholic beverage control; sale and delivery of mixed beverages and pre-mixed wine for off-premises consumption; third-party delivery license; sunset; repeal.** *Amends and reenacts §§4.1-204, 4.1-206.3, and 4.1-212.1, §4.1-230, and § 4.1-231.1 of the Code of Virginia and repeals §4.1-212.2 of the Code of Virginia and the second enactment of Chapter 281 and the second enactment of Chapter 282 of the Acts of Assembly of 2021, Special Session I, as amended by the second enactment of Chapter 78 and the second enactment of Chapter 79 of the Acts of Assembly of 2022.* Repeals the July 1, 2024, sunset on provisions that allow (i) distillers that have been appointed as agents of the Board of Directors of the Virginia Alcoholic Beverage Control Authority, mixed beverage restaurant licensees, and limited mixed beverage restaurant licensees to sell mixed beverages for off-premises consumption and (ii) farm winery licensees to sell pre-mixed wine for off-premises consumption. The bill also repeals, effective July 1, 2026, third-party delivery licenses. The bill requires the Authority to convene a work group to review third-party delivery licenses and report its findings and recommendations to the Chairs of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services by November 15, 2024. This bill is identical to House Bill 688. *Patron: Senator Aaron R. Rouse.*

Senate Bill 657 – **Alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses.** *Amends and reenacts §§4.1-100, 4.1-103, 4.1-206.3, 4.1-209, 4.1-231.1, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia.* Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board (i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to House Bill 1349, Senate Bill 180, Senate Bill 400, and Senate Bill 724. *Patron: Senator Bryce E. Reeves.*

Senate Bill 658 - **Alcoholic beverage control; summary suspension; timeline.** *Amends and reenacts §4.1-225.1, of the Code of Virginia.* Provides that when special agents of the Board of Directors of the Virginia Alcoholic Beverage Control Authority are conducting an initial investigation for purposes of summary suspension and the 48-hour time limit for such initial investigation expires on a Saturday, Sunday, or legal holiday, the special agents may submit their

findings from such initial investigation any time prior to the close of business on the next day that is not a Saturday, Sunday, or legal holiday. *Patron: Senator Bryce E. Reeves.*

Senate Bill 724 - Alcoholic beverage control; annual mixed beverage performing arts facility licenses; on-and-off premises wine and beer licenses. *Amends and reenacts §§4.1-100, 4.1-103, 4.1-206.3, 4.1-209, 4.1-231.1, 4.1-233.1, 4.1-309, and 4.1-325 of the Code of Virginia.* Defines performing arts facility and sports facility and standardizes the eligibility criteria for annual mixed beverage performing arts facility licenses and on-and-off-premises wine and beer licenses for performing arts food concessionaires. Under current law, the eligibility criteria for such licenses varies by location and includes inconsistent ownership, lease, capacity, and seating requirements. The bill also removes provisions that allow the Board of Directors of the Virginia Alcoholic Beverage Control Authority to grant annual mixed beverage motor sports facility licenses and motor car sporting event facility licenses and creates an annual mixed beverage sports facility license, which may be granted to persons operating a sports facility or food concessions at a sports facility and would authorize the licensee to sell mixed beverages during any event and immediately subsequent thereto to patrons within all seating areas, concourses, walkways, concession areas, and additional locations designated by the Board (i) in closed containers for off-premises consumption or (ii) in paper, plastic, or similar disposable containers or in single original metal cans for on-premises consumption. This bill is identical to House Bill 1349, Senate Bill 180, Senate Bill 400, and Senate Bill 657. *Patron: Senator William M. Stanley, Jr.*

BANKING AND FINANCE

House Bill 468 – Financial Services Expansion Grant Fund. *Amends the Code of Virginia by adding in Title 59.1 a chapter numbered 22.22, consisting of a section numbered 59.1-284.43.* Creates the Financial Services Expansion Grant Fund to make grant payments to an eligible financial services company that makes a capital investment of at least $87 million at a facility in Roanoke County and creates at least 1,100 new full-time jobs at the facility. The eligible financial services company would be eligible for an aggregate of $15 million in grants paid out over a 10-year period if it meets such performance parameters. This bill is identical to Senate Bill 156. *Patron: Delegate Joseph P. McNamara.*

House Bill 692 – Financial institutions; reporting financial exploitation of elderly or vulnerable adults. *Amends the Code of Virginia by adding a section numbered 6.2-103.2.* Permits a financial institution to allow an elderly or vulnerable adult, as defined in the bill, to submit and periodically update a list of trusted persons whom such financial institution or financial institution staff, as defined in the bill, may contact in the case of the suspected financial exploitation of such adult. The bill also permits a financial institution to conduct a training to instruct its staff on how to identify and report the suspected financial exploitation of an elderly or vulnerable adult internally at such financial institution, to a designated trusted contact, and to various other authorities. The bill directs the Bureau of Financial Institutions of the State Corporation Commission to develop and publish guidelines for such training by January 1, 2026. The bill provides that no financial institution staff that have received such training shall be liable in any civil or administrative proceeding for disclosing the suspected financial exploitation of an elderly or vulnerable adult pursuant to the bill's provisions if such disclosure was made in good faith and with reasonable care. The bill provides that no financial institution that has provided

such training shall be liable for any such disclosure by financial institution staff. This bill is identical to Senate Bill 174. *Patron: Delegate Michelle Lopes Maldonado.*

Senate Bill 156 – Financial Services Expansion Grant Fund. *Amends the Code of Virginia by adding in Title 59.1 a chapter numbered 22.22, consisting of a section numbered 59.1-284.43.* Creates the Financial Services Expansion Grant Fund to make grant payments to an eligible financial services company that makes a capital investment of at least $87 million at a facility in Roanoke County and creates at least 1,100 new full-time jobs at the facility. The eligible financial services company would be eligible for an aggregate of $15 million in grants paid out over a 10-year period if it meets such performance parameters. This bill is identical to House Bill 468. *Patron: Senator Christopher T. Head.*

Senate Bill 166 – Financial institutions; certain payments required electronically. *Amends the Code of Virginia by adding to Article 2 of Chapter 1 of Title 6.2 a section numbered 6.2-107.1.* Requires any financial institution that initiates an electronic fund transfer as payment for the sale to a consumer of a security issued by such financial institution to make available to the consumer the option of completing any payment of principal, interest, dividend, or other distribution related to the security via an electronic fund transfer. *Patron: Senator Bryce E. Reeves.*

Senate Bill 174 – Financial institutions; reporting financial exploitation of elderly or vulnerable adults. *Amends the Code of Virginia by adding a section numbered 6.2-103.2.* Permits a financial institution to allow an elderly or vulnerable adult, as defined in the bill, to submit and periodically update a list of trusted persons whom such financial institution or financial institution staff, as defined in the bill, may contact in the case of the suspected financial exploitation of such adult. The bill also permits a financial institution to conduct a training to instruct its staff on how to identify and report the suspected financial exploitation of an elderly or vulnerable adult internally at such financial institution, to a designated trusted contact, and to various other authorities. The bill directs the Bureau of Financial Institutions of the State Corporation Commission to develop and publish guidelines for such training by January 1, 2026. The bill provides that no financial institution staff that have received such training shall be liable in any civil or administrative proceeding for disclosing the suspected financial exploitation of an elderly or vulnerable adult pursuant to the bill's provisions if such disclosure was made in good faith and with reasonable care. The bill provides that no financial institution that has provided such training shall be liable for any such disclosure by financial institution staff. This bill is identical to House Bill 692. *Patron: Senator Barbara A. Favola.*

Senate Bill 339 – Joint Commission on Technology and Science analysis; blockchain, digital asset mining, and cryptocurrency; report. *Amends and reenacts §§6.2-1901 and 58.1-322.02 of the Code of Virginia and amends the Code of Virginia by adding sections numbered 13.1-514.3 and 15.2-2288.9 and by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered 59.1-603, 59.1-604, and 59.1-605.* Directs the Joint Commission on Technology and Science to conduct an analysis of and make recommendations regarding the use of blockchain technology, digital asset mining, and cryptocurrency in the Commonwealth. The bill requires the Commission to submit its findings to the Chairs of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and

Appropriations and General Laws and Technology no later than December 1, 2024. *Patron: Senator Saddam Azlan Salim.*

Senate Bill 439 – Joint Commission on Technology and Science; analysis of blockchain technology and cryptocurrency in the Commonwealth; report. *Amends the Code of Virginia by adding in Title 30 a chapter numbered 67, consisting of sections numbered 30-430 through 30-438.* Directs the Joint Commission on Technology and Science (JCOTS) to conduct an analysis of blockchain technology and cryptocurrency in the Commonwealth and the creation of a Blockchain and Cryptocurrency Commission. JCOTS shall submit a report of its findings to the Chairs of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and Appropriations and General Laws and Technology no later than December 1, 2024. *Patron: Senator Saddam Azlan Salim.*

BUSINESS ENTITIES

House Bill 124 – State Corporation Commission; annual report filing requirements. *Amends and reenacts §§13.1-604 and 13.1-804 of the Code of Virginia.* Permits a person authorized by a domestic or foreign stock or nonstock corporation to sign the annual report of such corporation for purposes of the Virginia Stock Corporation Act and the Virginia Nonstock Corporation Act. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

Senate Bill 214 – Service of garnishment summons upon corporation, limited liability company, etc.; garnishment designee. *Amends and reenacts §8.01-513 of the Code of Virginia.* Requires a summons for garnishment against a corporation, limited liability company, limited partnership, financial institution, or other entity authorized to do business in the Commonwealth to be served on the garnishment designee, as that term is defined in the bill, of such corporation, limited liability company, limited partnership, financial institution, or other entity, unless such garnishment designee is also the judgment debtor. The bill provides alternative methods of service if the judgment creditor certifies that such corporation, limited liability company, limited partnership, financial institution, or other entity has no garnishment designee, such garnishment designee cannot be found at the designated address, or such garnishment designee is also the judgment debtor. Before a judgment creditor serves the registered or statutory agent of a financial institution, such creditor shall further certify that after exercising due diligence, no managing employee, as that term is defined in the bill, could be found, that such managing employee is the judgment creditor, or that such service has been authorized or requested by such institution. The bill has a delayed effective date of January 1, 2025. *Patron: Senator Glen H. Sturtevant, Jr.*

CIVIL REMEDIES AND PROCEDURES

House Bill 102 – Compensation of court-appointed counsel. *Amends and reenacts §19.2-163 of the Code of Virginia.* Raises the limitation of fees that court-appointed counsel can receive for representation on various offenses in district and circuit courts. The bill also limits the fees charged for the cost of court-appointed counsel or public defender representation to persons determined to be indigent to an amount no greater than the amount such person would have owed if such fees had been assessed on or before June 30, 2024. The bill has a delayed effective date of January 1, 2025. This bill is identical to Senate Bill 356. *Patron: Delegate Atoosa R. Reaser.*

House Bill 140 – Adoption; award of damages; death by wrongful act. *Amends and reenacts §§8.01-53 and 63.2-1215 of the Code of Virginia.* Provides that, in a case for death by wrongful act, the child of a decedent who has been adopted after the death of such decedent shall be included in the class of beneficiaries entitled to an award of damages resulting from such case, provided that a court had not previously terminated the parental rights of such decedent. This bill is identical to Senate Bill 209. *Patron: Delegate David A. Reid.*

House Bill 156 – Exemptions from jury service upon request; age. *Amends and reenacts §8.01-341.1 of the Code of Virginia.* Increases from 70 to 73 the age at which a person is exempt from jury service upon request. This bill is identical to Senate Bill 638. *Patron: Delegate W. Chad Green.*

House Bill 171 – Signing of pleadings, motions, and other papers; electronic signatures. *Amends and reenacts §8.01-271.1 of the Code of Virginia.* Clarifies that an electronic signature or a digital image of a signature shall satisfy the requirement in current law that every pleading, motion, or other paper of a party be signed by at least one attorney of record. This bill is a recommendation of the Boyd-Graves Conference. *Patron: Delegate Karen Keys-Gamarra.*

House Bill 264 – Legal notices and publications; online-only news publications; requirements. *Amends and reenacts §8.01-324 of the Code of Virginia.* Provides that, where any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such ordinance, resolution, notice, or advertisement instead may be published in an online-only news publication subject to certain requirements specified in the bill. The bill sets out a process by which an online-only news publication shall petition the circuit court of the appropriate jurisdiction to publish such ordinances, resolutions, notices, or advertisements and authorizes the court to grant such online-only news publication the authority to publish such ordinances, resolutions, notices, or advertisements for a period of one year. The bill also describes the process by which an online-only news publication may continue renewing such authority to publish in each successive year. This bill is identical to Senate Bill 157. *Patron: Delegate Patrick A. Hope.*

House Bill 432 – Making copy of jury panel available to counsel. *Amends and reenacts §8.01-353 of the Code of Virginia.* Increases from three to five full business days before a trial the timeframe within which the clerk or sheriff or other officer responsible for notifying jurors to appear in court for the trial of a case must make available to all counsel of record a copy of the jury panel to be used for the trial of such case. *Patron: Delegate Jonathan "Jed" Arnold.*

House Bill 794 – Statutory agents; service of process. *Amends and reenacts §§8.01-285, 8.01-287, 8.01-296, 8.01-299, 8.01-301, 8.01-304, 8.01-306, 8.01-310 through 8.01-313, and 12.1-19.1 of the Code of Virginia; amends the Code of Virginia by adding a section numbered 8.01-304.1; and repeals §8.01-326.1 of the Code of Virginia.* Adds the Clerk of the State Corporation Commission to the definition of "statutory agent" when such Clerk is appointed for the purpose of service of process on any individual, corporation, or limited partnership. The bill further applies certain methods of service of process currently applicable to limited liability corporations to nonstock corporations and domestic stock corporations. The bill provides that domestic or foreign limited liability partnerships may be served by personal service on its registered agent as directed by applicable provisions of Title 50 (Partnerships). The bill further provides that

whenever the Clerk of the State Corporation Commission is appointed as the statutory agent service shall be deemed sufficient upon the person or entity being served and shall be effective on the date when service is made on the Clerk, provided, however, that the time for such person or entity to respond to process sent by the Clerk shall run from the date when the certificate of compliance is filed. This bill is a recommendation of the Boyd-Graves Conference. *Patron: Delegate Rozia A. Henson, Jr.*

House Bill 901 – Interlocutory ruling, order, or action; motion to reconsider. *Amends and reenacts §8.01-384 of the Code of Virginia.* Clarifies that no litigant, after making an objection or motion known to the court, shall be required to move for reconsideration to preserve his right to appeal a ruling, order, or action of the court, even if such ruling, order, or action is without prejudice to a motion to reconsider. This bill is a recommendation of the Boyd-Graves Conference. *Patron: Delegate Kannan Srinivasan.*

House Bill 934 – Small claims court; representation of certain entities. *Amends and reenacts §16.1-122.4 of the Code of Virginia.* Adds limited liability companies and other legal or commercial entities to those parties that may have representation by an owner, a general partner, an officer, a member, or an employee of such company or entity in small claims court. This bill is a recommendation of the Boyd-Graves Conference. *Patron: Delegate Destiny LeVere Bolling.*

House Bill 1114 – Penalties for failure to appear; exclusion. *Amends and reenacts §§16.1-69.24, 18.2-456 and 19.2-128 of the Code of Virginia.* Excludes any person who is (i) incarcerated in any correctional facility or (ii) (a) detained in any state or federal facility or (b) in the custody of a law-enforcement officer at the time such person is required to appear before any court or judicial officer from the penalty for willful failure to appear before any such court or judicial officer as required after such person has been charged with any offense or convicted of any offense and execution of sentence is suspended. *Patron: Delegate Marcus B. Simon.*

House Bill 1248 – Debtor interrogatories; fieri facias; against whom a summons shall be issued. *Amends and reenacts §8.01-506 of the Code of Virginia.* Requires the clerk of the court from which a fieri facias is issued to issue a summons against any person known or reasonably suspected to be a debtor to, or bailee of, the execution debtor in order to ascertain the personal estate of a judgment debtor provided the judgment creditor or his attorney files an affidavit stating as such. Under current law, such clerk of the court shall issue a summons against any debtor to, or bailee of, the execution debtor. As introduced, this bill was a recommendation of the Boyd-Graves Conference. *Patron: Delegate Wren M. Williams.*

House Bill 1249 – Security for costs; suit or action by nonresident. *Amends and reenacts §17.1-607 of the Code of Virginia.* Provides that in any plaintiff's suit or action by a nonresident of the Commonwealth, including a counterclaim plaintiff, cross-claim plaintiff, or third-party plaintiff, the court may order upon a motion made by a party to such suit or action and for good cause shown that such plaintiff must post security, in an amount not exceeding $250, within 60 days of entry of such order. As introduced, this bill was a recommendation of the Boyd-Graves Conference. *Patron: Delegate Wren M. Williams.*

House Bill 1339 – Exemptions from garnishment and lien; householder; total value. *Amends and reenacts §§8.01-512.4, 34-4, and 34-26 of the Code of Virginia.* Increases from $25,000 to $50,000 the amount that a householder may hold exempt from the creditor process for real or personal property that the householder or his dependent uses as a principal residence. The bill also increases from $6,000 to $10,000 the amount a householder is entitled to hold exempt from the creditor process for his motor vehicle. The bill further provides that, beginning on April 1, 2027, any increases in exempt amounts shall be adjusted at three-year intervals to reflect the change in the Consumer Price Index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor. The bill provides that such adjustments shall be calculated by the Department of Planning and Budget. *Patron: Delegate Marcus B. Simon.*

House Bill 1435 – Subpoenas; release of witness. *Amends and reenacts §8.01-407 of the Code of Virginia.* Makes the provisions governing a release of a witness from a subpoena applicable to a subpoena issued at the request of a party or by or at the request of an attorney representing a party. Under current law, these provisions apply to the release of a witness from an attorney-issued subpoena only. This bill is a recommendation of the Boyd-Graves Conference. *Patron: Delegate Bonita G. Anthony.*

Senate Bill 157 – Legal notices and publications; online-only news publications; requirements. *Amends and reenacts §8.01-324 of the Code of Virginia.* Provides that, where any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such ordinance, resolution, notice, or advertisement instead may be published in an online-only news publication subject to certain requirements specified in the bill. The bill sets out a process by which an online-only news publication shall petition the circuit court of the appropriate jurisdiction to publish such ordinances, resolutions, notices, or advertisements and authorizes the court to grant such online-only news publication the authority to publish such ordinances, resolutions, notices, or advertisements for a period of one year. The bill also describes the process by which an online-only news publication may continue renewing such authority to publish in each successive year. This bill is identical to House Bill 264. *Patron: Senator Jennifer B. Boysko.*

Senate Bill 209 – Adoption; award of damages; death by wrongful act. *Amends and reenacts §§8.01-53 and 63.2-1215 of the Code of Virginia.* Provides that, in a case for death by wrongful act, the child of a decedent who has been adopted after the death of such decedent shall be included in the class of beneficiaries entitled to an award of damages resulting from such case, provided that a court had not previously terminated the parental rights of such decedent. This bill is identical to House Bill 140. *Patron: Senator Russet Perry.*

Senate Bill 215 – Virginia Freedom of Information Act; removal of Virginia residency requirement for access to certain criminal investigation files. *Amends and reenacts §§2.2-3706.1 and 8.01-622.2 of the Code of Virginia.* Removes the requirement that persons to whom non-ongoing criminal investigation files shall otherwise be disclosed be citizens of the Commonwealth. Current law limits disclosure of public records to individuals who are citizens of the Commonwealth unless a clear exception applies. *Patron: Senator Russet Perry.*

Senate Bill 356 - Compensation of court-appointed counsel. *Amends and reenacts §19.2-163 of the Code of Virginia.* Raises the limitation of fees that court-appointed counsel can receive for representation on various offenses in district and circuit courts. The bill also limits the fees charged for the cost of court-appointed counsel or public defender representation to persons determined to be indigent to an amount no greater than the amount such person would have owed if such fees had been assessed on or before June 30, 2024. The bill has a delayed effective date of January 1, 2025. This bill is identical to House Bill 102. *Patron: Senator Russet Perry.*

Senate Bill 398 – Protective orders; respondent to notify court of change of address. *Amends and reenacts §§16.1-253.1, 16.1-279.1, 19.2-152.9, and 19.2-152.10 of the Code of Virginia.* Requires the respondent against whom a protective order has been issued to notify the court in writing within seven days of any change of residence while such order is in effect, provided that such order has been properly served upon the respondent. In a proceeding involving a preliminary protective order, the bill provides that the court may require the respondent to notify the court in writing within seven days of any change of residence while such preliminary protective order is in effect. The bill also provides that any failure of a respondent to make such required notification shall be punishable by contempt. *Patron: Senator Russet Perry.*

Senate Bill 509 – Court of Appeals; appeal of interlocutory orders. *Amends and reenacts §17.1-405 of the Code of Virginia.* Provides that certain interlocutory orders shall not be appealable to the Court of Appeals unless the circuit court grants a party's motion to certify such order for interlocutory appeal. *Patron: Senator Scott A. Surovell.*

Senate Bill 637 – Collections of fines, costs, forfeitures, penalties, etc.; duty of attorneys for the Commonwealth; consultation with clerk. *Amends and reenacts §19.2-349 of the Code of Virginia.* Requires that at least 30 days prior to the execution of a contract with a private attorney or private collection agency to undertake the collection of fines, costs, forfeitures, penalties, and restitution, the attorney for the Commonwealth shall consult with the clerk of the circuit court. *Patron: Senator Emily M. Jordan.*

Senate Bill 638 – Exemptions from jury service upon request; age. *Amends and reenacts §8.01-341.1 of the Code of Virginia.* Increases from 70 to 73 the age at which a person is exempt from jury service upon request. This bill is identical to House Bill 156. *Patron: Senator Emily M. Jordan.*

COMMON INTEREST COMMUNITY ASSOCIATIONS

House Bill 105 – Resale Disclosure Act; resale certificate; fees. *Amends and reenacts §55.1-2316 of the Code of Virginia.* Adds condominium associations and real estate cooperative associations to the types of associations under the Resale Disclosure Act that are prohibited from collecting certain fees unless, in addition to other requirements, such associations are current in filing the most recent annual report and fee with the Common Interest Community Board. *Patron: Delegate Atoosa Reaser.*

House Bill 214 – Common interest communities; residents providing certain services exemption. *Amends and reenacts §§54.1-2347 and 60.2-210 of the Code of Virginia.* Provides that a resident of a common interest community association who provides bookkeeping, billing,

or recordkeeping services for such community for compensation shall be presumed to be an independent contractor. The bill also exempts common interest community associations from the definition of "employer" where a resident provides such services. Governor's recommended amendments were not accepted by the House. *Patron: Delegate Vivian E. Watts.*

House Bill 723 – Property Owners' Association Act; meetings of the board of directors; inconsistent provisions. *Amends and reenacts §13.1-866 of the Code of Virginia.* Provides that the provisions of the Property Owners' Association Act govern the conduct of meetings of the board of the directors without regard to whether the property owners' association is incorporated or unincorporated. The bill clarifies that such provisions shall not be interpreted to supersede corporate authorities otherwise established by law or governing documents. *Patron: Delegate Michael J. Webert.*

House Bill 876 – Resale Disclosure Act; delivery of resale certificate; remedies. *Amends and reenacts §§55.1-2308, 55.1-2309, 55.1-2310, 55.1-2312, 55.1-2316, and 55.1-2317 of the Code of Virginia.* Provides that failure to deliver a resale certificate within 14 days, as required by the Resale Disclosure Act, deems the resale certificate unavailable. The bill grants a purchaser three days from the date of ratification of the contract or the date of receipt of the resale certificate or notice that such certificate is unavailable, as applicable, to cancel the contract. Finally, the bill (i) excludes from the resale certificate requirements of the Act an initial disposition of a lot to a person who is not acquiring the lot for his own residence and (ii) allows a resale certificate to be delivered to a purchaser's authorized agent. Current law excludes the resale certificate requirements of the Act for any initial disposition, regardless of its intended use, and only allows a resale certificate to be delivered to a purchaser. This bill is identical to Senate Bill 526. *Patron: Delegate David L. Bulova.*

House Bill 880 – Common interest communities; foreclosure remedy. *Amends and reenacts §§8.01-463, 55.1-1815, 55.1-1833, 55.1-1945, 55.1-1966, 55.1-2148, 55.1-2151, and 55.1-2305 of the Code of Virginia.* Prohibits certain bills to enforce a lien from being entertained if the real estate is the judgment debtor's primary residence and the judgment is for assessments levied by certain common interest community associations if the amount secured by one or more judgments exclusive of interest and costs does not exceed $5,000. The bill also requires such common interest community associations to maintain individual assessment account records and restricts access to such records to the unit owner of the property subject to such assessments, the governing body of the association, the management agent, if there is one, and any legal counsel for such association. Finally, the bill requires such associations to maintain records of any recorded lien during the effective duration of such lien. This bill is a recommendation of the Virginia Housing Commission. *Patron: Delegate David L. Bulova.*

House Bill 1209 – Common interest communities; reserve studies; special assessment rescission or reduction. *Amends and reenacts §§55.1-1800, 55.1-1825, 55.1-1826, 55.1-1900, 55.1-1964, and 55.1-1965 of the Code of Virginia.* Removes certain provisions of the Property Owners' Association Act and the Virginia Condominium Act that authorize associations governed by such Acts to rescind or reduce certain assessments necessary for the maintenance and upkeep of the common area or other association responsibilities, including maintenance, repair, and replacement capital components. The bill also authorizes such associations to borrow money for any valid purpose and assign all revenues to be received by such association to its

creditors. Finally, the bill defines the term "reserve study" as a capital budget planning tool used to determine the physical status and estimated repair or replacement cost of capital components and an analysis of association funding capacity to maintain, repair, and replace capital components. *Patron: Delegate David L. Bulova.*

House Bill 1241 – Virginia Real Estate Time-Share Act; partial termination of certain time-shares. *Amends and reenacts §55.1-2216 of the Code of Virginia.* Allows for the partial termination of a time-share project by a developer or an association and provides the procedures for any such partial termination. The bill also sets a one-year statute of limitations on any legal challenge or action for damages or equitable relief arising out of any termination of a time-share project in accordance with the provisions of the Virginia Real Estate Time-Share Act. The bill's provisions are declared to be effective retroactive in accordance with certain provisions of the Virginia Real Estate Time-Share Act. This bill is identical to Senate Bill 600. *Patron: Delegate Tony O. Wilt*

Senate Bill 341 – Common interest communities; foreclosure remedy. *Amends and reenacts §§8.01-463, 55.1-1815, 55.1-1833, 55.1-1945, 55.1-1966, 55.1-2148, 55.1-2151, and 55.1-2305 of the Code of Virginia.* Prohibits certain bills to enforce a lien from being entertained if the real estate is the judgment debtor's primary residence and the judgment is for assessments levied by certain common interest community associations if the amount secured by one or more judgments exclusive of interest and costs does not exceed $5,000. The bill also requires such common interest community associations to maintain individual assessment account records and restricts access to such records to the unit owner of the property subject to such assessments, the governing body of the association, the management agent, if there is one, and any legal counsel for such association. Finally, the bill requires such associations to maintain records of any recorded lien during the effective duration of such lien. This bill is a recommendation of the Virginia Housing Commission. Patron: *Senator Scott A. Surovell*

Senate Bill 526 – Resale Disclosure Act; delivery of resale certificate; remedies. *Amends and reenacts §§ 55.1-2308, 55.1-2309, 55.1-2310, 55.1-2312, 55.1-2316, and 55.1-2317 of the Code of Virginia.* Provides that failure to deliver a resale certificate within 14 days, as required by the Resale Disclosure Act, deems the resale certificate unavailable. The bill grants a purchaser three days from the date of ratification of the contract or the date of receipt of the resale certificate or notice that such certificate is unavailable, as applicable, to cancel the contract. Finally, the bill (i) excludes from the resale certificate requirements of the Act an initial disposition of a lot to a person who is not acquiring the lot for his own residence and (ii) allows a resale certificate to be delivered to a purchaser's authorized agent. Current law excludes the resale certificate requirements of the Act for any initial disposition, regardless of its intended use, and only allows a resale certificate to be delivered to a purchaser. This bill is identical to House Bill 876. *Patron: Senator Angelia Williams Graves.*

Senate Bill 600 – Virginia Real Estate Time-Share Act; partial termination of certain time-shares. *Amends and reenacts §55.1-2216 of the Code of Virginia.* Allows for the partial termination of a time-share project by a developer or an association and provides the procedures for any such partial termination. The bill also sets a one-year statute of limitations on any legal challenge or action for damages or equitable relief arising out of any termination of a time-share project in accordance with the provisions of the Virginia Real Estate Time-Share Act. The bill's

provisions are declared to be effective retroactive in accordance with certain provisions of the Virginia Real Estate Time-Share Act. This bill is identical to House Bill 1241. *Patron: Senator Mark D. Obenshain.*

Senate Bill 672 – Property Owners' Association Act or Virginia Condominium Act; assessments for legal obligations. *Amends and reenacts §§55.1-1805 and 55.1-1904 of the Code of Virginia, relating to Property Owners' Association Act.* Clarifies that neither the Property Owners' Association Act or the Virginia Condominium Act (the Acts) shall be construed to prevent any association organized pursuant to such Acts from using assessments to pay the association's contractual or other legal obligations in the exercise of the association's duties and responsibilities. The bill also restricts such associations from imposing charges against one or more but less than all unit owners unless otherwise specifically authorized by the Act. Current law prohibits such charges or assessments from being imposed upon any unit or lot owner unless otherwise specifically authorized by the Acts. *Patron: Senator Adam P. Ebbin.*

CONSERVATION AND ENVIRONMENT

House Bill 122 – Department of Environmental Quality; review and authorization of projects; hearing and appeal. *Amends and reenacts §10.1-1197.7 of the Code of Virginia.* Allows any person aggrieved by the final decision of the Department of Environmental Quality regarding the authorization of a project and who has participated in a proceeding for a permit to construct or operate a small renewable energy project under procedures adopted by the Department to seek judicial review of such action in accordance with the Administrative Process Act in the Circuit Court of the City of Richmond within 30 days of such decision. The bill requires the court to hear and decide such action as soon as practicable after the date of filing. This bill is identical to Senate Bill 580. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 309 – Department of Forestry; Forestland and Urban Tree Canopy Conservation Plan required. *Amends the Code of Virginia by adding in Article 1 of Chapter 11 of Title 10.1 a section numbered 10.1-1103.1.* Requires the Department of Forestry, in coordination with a Technical Advisory Committee composed of stakeholders, to develop a Forestland and Urban Tree Canopy Conservation Plan no later than November 1, 2026, and update such plan at least once every five years thereafter. The bill requires the Department to post and maintain on its website the most recent version of the Plan and to submit the Plan to the Governor and Chairs of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources no later than November 30, 2026, and following any update to such plan. This bill is identical to Senate Bill 461. *Patron: Delegate Patrick A. Hope.*

House Bill 459 - Conservation of trees during land development process in certain localities. *Amends and reenacts §15.2-961.1 of the Code of Virginia.* Expands authority of certain localities to adopt an ordinance providing for the planting and replacement of trees during the development process by allowing a tree canopy fund that currently applies to the planting of trees on public property to include maintenance of trees on public property and planting and maintenance of trees on private property. The bill removes a provision that requires that any funds collected for the purposes of the tree canopy fund be returned to the original contributor if not spent within five years but maintains the requirement that such funds be spent within five

years. The bill also includes an expansion of the canopy credit. This bill is identical to Senate Bill 121. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 656 – Regulated land-disturbing activities; submission and approval of erosion and sediment control plan. *Amends and reenacts §62.1-44.15:55, as it shall become effective, of the Code of Virginia.* Prohibits a person from engaging in any land-disturbing activity until, where Virginia Pollutant Discharge Elimination System (VPDES) permit coverage is required, the Virginia Erosion and Sediment Control Program (VESCP) authority has obtained evidence of such permit coverage from the Department of Environmental Quality's online reporting system prior to issuing its land-disturbance approval. Current law requires the VESCP authority to obtain such evidence of VPDES permit coverage prior to approving an erosion and sediment control plan. This bill is identical to Senate Bill 365. *Patron: Delegate Bill Wiley.*

House Bill 673 – Resilient Virginia Revolving Fund; projects; low-income geographic areas; nature-based solutions. *Amends and reenacts §10.1-603.29 of the Code of Virginia.* Provides that the Department of Conservation and Recreation shall give additional weight to projects located in low-income geographic areas and projects that incorporate nature-based solutions when distributing loans or grants from the Resilient Virginia Revolving Fund to particular local governments. *Patron: Delegate Michael B. Feggans.*

House Bill 746 - Energy efficiency programs; incremental annual savings. *Amends and reenacts §§56-576 and 56-596.2 of the Code of Virginia.* Provides that for the 2029 program year and all subsequent years, "in the public interest" for the purpose of assessing energy efficiency programs means that the State Corporation Commission determines that the program is cost-effective. The bill directs the Commission to promulgate regulations no later than September 30, 2025, establishing a single, consistent cost-effectiveness test for use in evaluating proposed energy efficiency programs. The bill requires Dominion Energy Virginia and Appalachian Power Company to track, quantify, and report to the Commission the incremental annual savings, as defined in the bill, achieved by such utility's energy efficiency programs. This bill is identical to Senate Bill 565. Governor’s recommended amendments adopted by the House. *Patron: Delegate Michael J. Webert.*

House Bill 892 – Department of Agriculture and Consumer Services; Department of Forestry; Office of Farmland Preservation transferred. *Amends and reenacts §§2.2-1509.4, 3.2-102, as it is currently effective and as it shall become effective, 10.1-1105.1, 46.2-749.102, and 58.1-512 of the Code of Virginia; amends the Code of Virginia by adding in Chapter 11 of Title 10.1 an article numbered 2.1, consisting of sections numbered 10.1-1119.2 through 10.1-1119.7; and repeals Chapter 2 (§§3.2-200 through 3.2-205) of Title 3.2 of the Code of Virginia.* Transfers from the Department of Agriculture and Consumer Services to the Department of Forestry the Office of Farmland Preservation and its powers and duties and reporting requirements, the Virginia Farm Link Program, the Century Farm Program, and the Virginia Farmland and Forestland Preservation Fund. The bill renames the Office as the Office of Working Lands Preservation. The bill makes technical amendments to effectuate the transfer and requires the Department of Environmental Quality to report to the Department of Forestry by July 1 of each year certain enumerated information about nonpoint source nutrient credits certified in the previous year that involve land use conversion. This bill is identical to Senate Bill 616. *Patron: Delegate David L. Bulova.*

House Bill 944 – Forest Sustainability Fund; fund allocation. *Amends and reenacts §58.1-3242.1 of the Code of Virginia.* Provides that moneys from the Forest Sustainability Fund must be allocated proportionally among localities that forgo tax revenues as a result of the use value assessment and taxation for real estate devoted for forest use. The bill specifies that no locality shall receive an allocation of more than four percent or less than one-half of one percent of available funds from the Fund. This bill is identical to Senate Bill 129. *Patron: Delegate Alfonso H. Lopez.*

House Bill 966 - Chief Resilience Officer of the Commonwealth; Office of Commonwealth Resilience; Interagency Resilience Working Group; Virginia Community Flood Preparedness Fund; Resilient Virginia Revolving Fund; Advisory Review Committee. *Amends and reenacts §§2.2-215, 10.1-104.6:1, 10.1-603.25, 10.1-603.29, and 10.1-659 of the Code of Virginia; amends the Code of Virginia by adding in Title 2.2 a chapter numbered 4.2:3, consisting of sections numbered 2.2-435.13 and 2.2-435.14; and repeals §§2.2-220.5 and 2.2-435.11 of the Code of Virginia.* Moves the position of Chief Resilience Officer (CRO) from under the Secretary of Natural and Historic Resources to under the Governor and creates an Office of Commonwealth Resilience to support the CRO in his functions and duties. The bill requires the CRO to convene an Interagency Resilience Working Group to support the coordination of planning and implementation of resilience efforts, eliminates the position of Special Assistant to the Governor for Coastal Adaptation and Protection, and requires the Director of the Department of Conservation and Recreation to convene an Advisory Review Committee to assist in the distribution of loans and grants from the Virginia Community Flood Preparedness Fund. The bill also requires the Director to convene an Advisory Review Committee to assist in the distribution of loans and grants from the Resilient Virginia Revolving Fund and adds the Secretary of Natural and Historic Resources and the CRO to the list of those with whom the Virginia Resources Authority is required to consult in directing the distribution of loans or grants from the Fund. The bill requires the Department to make available for public inspection at the office of the Department and on a publicly accessible website records of each application for grants and loans from the two Funds and the actions taken thereon. *Patron: Delegate Hillary Pugh Kent.*

House Bill 985 – High polycyclic aromatic hydrocarbon pavement sealants; prohibition; civil penalty. *Amends and reenacts §10.1-2500 of the Code of Virginia and amends the Code of Virginia by adding in Chapter 20 of Title 62.1 a section numbered 62.1-196.1.* Prohibits the sale or distribution of any pavement sealant that contains polycyclic aromatic hydrocarbon concentrations greater than one percent by weight on or after July 1, 2024, except that a retailer may continue to sell any existing inventory that remains in stock on that date. The bill also prohibits the application or use of such sealants on or after July 1, 2025. Any person who violates either prohibition is subject to a civil penalty of $250, to be paid into the Virginia Environmental Emergency Response Fund. *Patron: Delegate Kathy K.L. Tran.*

House Bill 1002 - Division of Renewable Energy and Energy Efficiency; powers and duties. *Amends and reenacts §45.2-1701 of the Code of Virginia.* Requires the Department of Energy's Division of Renewable Energy and Energy Efficiency to identify and monitor any federal grant programs, loan programs, or other opportunities for federal funding to further the Commonwealth's energy efficiency goals. *Patron: Delegate Bonita G. Anthony.*

House Bill 1157 – Consultation with federally recognized Tribal Nations in the Commonwealth; permits and reviews with potential impacts on environmental, cultural, and historic resources. *Amends and reenacts §§2.2-401.01, 5.1-7, 10.1-1003, 10.1-1188, 10.1-2206.1, 10.1-2214, 10.1-2305, 56-46.1, and 62.1-266 of the Code of Virginia and amends the Code of Virginia by adding sections numbered 10.1-104.02, 10.1-1186.3:1, 10.1-2205.1, and 28.2-104.01.* Requires the Department of Conservation and Recreation, the Department of Environmental Quality, the Department of Historic Resources, and the Virginia Marine Resources Commission to establish policies and procedures for consulting with federally recognized Tribal Nations in the Commonwealth when evaluating certain permits and reviews relating to environmental, cultural, or historic resources that potentially impact those federally recognized Tribal Nations in the Commonwealth. The bill directs the Secretary of the Commonwealth to designate an Ombudsman for Tribal Consultation to facilitate communication and consultation with federally recognized Tribal Nations in the Commonwealth and requires the Ombudsman to develop by January 1, 2025, a list of localities in which federally recognized Tribal Nations in the Commonwealth shall be consulted to effectuate the provisions of the bill. The bill codifies Executive Order 82 (2021). *Patron: Delegate Paul E. Krizek.*

House Bill 1379 – Department of Environmental Quality reports; consolidation. *Amends and reenacts §§10.1-1186.1, 10.1-1307, 10.1-1307.04, 10.1-1322, 10.1-1322.5, 10.1-1330, 10.1-1402.1, 10.1-1413.1, 10.1-1425.17, 62.1-44.15:6, 62.1-44.17:3, 62.1-44.34:21, 62.1-44.40, 62.1-69.35:2, 62.1-69.44, 62.1-223.3, and 62.1-256.2 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 10.1-1183.1.* Consolidates varying due dates for certain reports relating to the Department of Environmental Quality to the Governor and the General Assembly to October 1 and requires such reports be submitted as part of one annual report. The bill has a delayed effective date of January 1, 2025. *Patron: Delegate Ian T. Lovejoy.*

House Bill 1458 – Chief Resilience Officer of the Commonwealth; Interagency Resilience Management Team; Virginia Community Flood Preparedness Fund; Resilient Virginia Revolving Fund; Advisory Review Committee. *Amends and reenacts §§2.2-215, 10.1-104.6:1, 10.1-603.25, 10.1-603.29, and 10.1-659 of the Code of Virginia; amends the Code of Virginia by adding in Title 2.2 a chapter numbered 4.2:3, consisting of sections numbered 2.2-435.13 and 2.2-435.14; and repeals §§2.2-220.5 and 2.2-435.11 of the Code of Virginia.* Amends certain provisions relating to the functions and duties of the Chief Resilience Officer (CRO) of the Commonwealth. The bill requires the CRO to convene an Interagency Resilience Management Team to support the coordination of planning and implementation of resilience efforts, eliminates the position of Special Assistant to the Governor for Coastal Adaptation and Protection, and requires the Director of the Department of Conservation and Recreation to convene an Advisory Review Committee to assist in the distribution of loans and grants from the Virginia Community Flood Preparedness Fund. The bill also requires the Director to convene an Advisory Review Committee to assist in the distribution of loans and grants from the Resilient Virginia Revolving Fund and adds the Secretary of Natural and Historic Resources and the CRO to the list of those with whom the Virginia Resources Authority is required to consult in directing the distribution of loans or grants from such Fund. The bill requires, for the two Funds, the Department of Conservation and Recreation to (i) make available for public inspection at the office of the Department and on a publicly accessible website records of each application for grants and loans and the actions taken thereon and (ii) provide an opportunity for a 30-day public comment period prior to each new grant or loan offering to solicit feedback on proposed

revisions to the Funds' manuals. This bill incorporates House Bill 948. *Patron: Delegate Phil M. Hernandez.*

Senate Bill 121 – Conservation of trees during land development process in certain localities. *Amends and reenacts §15.2-961.1 of the Code of Virginia.* Expands authority of certain localities to adopt an ordinance providing for the planting and replacement of trees during the development process by allowing a tree canopy fund that currently applies to the planting of trees on public property to include maintenance of trees on public property and planting and maintenance of trees on private property. The bill removes a provision that requires that any funds collected for the purposes of the tree canopy fund be returned to the original contributor if not spent within five years but maintains the requirement that such funds be spent within five years. The bill also includes an expansion of the canopy credit. This bill is identical to House Bill 459. *Patron: Senator Suhas Subramanyam.*

Senate Bill 129 – Forest Sustainability Fund; fund allocation. *Amends and reenacts §58.1-3242.1 of the Code of Virginia.* Provides that moneys from the Forest Sustainability Fund must be allocated proportionally among localities that forgo tax revenues as a result of the use value assessment and taxation for real estate devoted for forest use. The bill specifies that no locality shall receive an allocation of more than four percent or less than one-half of one percent of available funds from the Fund. This bill is identical to House Bill 944. *Patron: Former Senator Frank M. Ruff Jr.*

Senate Bill 298 – Tax credit for purchase of conservation tillage and precision agricultural application equipment; sunset date. *Amends and reenacts §§58.1-337 and 58.1-436 of the Code of Virginia.* Extends the sunset date of the individual and corporate tax credit for purchase of conservation tillage and precision agricultural application equipment from January 1, 2026, to January 1, 2030. *Patron: Senator Timmy F. French.*

Senate Bill 365 - Regulated land-disturbing activities; submission and approval of erosion and sediment control plan. *Amends and reenacts §62.1-44.15:55, as it shall become effective, of the Code of Virginia.* Prohibits a person from engaging in any land-disturbing activity until, where Virginia Pollutant Discharge Elimination System (VPDES) permit coverage is required, the Virginia Erosion and Sediment Control Program (VESCP) authority has obtained evidence of such permit coverage from the Department of Environmental Quality's online reporting system prior to issuing its land-disturbance approval. Current law requires the VESCP authority to obtain such evidence of VPDES permit coverage prior to approving an erosion and sediment control plan. This bill is identical to House Bill 656. *Patron: Senator Bill DeSteph.*

Senate Bill 461 – Department of Forestry; Forestland and Urban Tree Canopy Conservation Plan required. *Amends the Code of Virginia by adding in Article 1 of Chapter 11 of Title 10.1 a section numbered 10.1-1103.1.* Requires the Department of Forestry, in coordination with a Technical Advisory Committee composed of stakeholders, to develop a Forestland and Urban Tree Canopy Conservation Plan no later than November 1, 2026, and update such plan at least once every five years thereafter. The bill requires the Department to post and maintain on its website the most recent version of the Plan and to submit the Plan to the Governor and Chairs of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources no

later than November 30, 2026, and following any update to such plan. This bill is identical to House Bill 309. *Patron: Senator David W. Marsden.*

Senate Bill 565 – Energy efficiency programs; incremental annual savings. *Amends and reenacts §§56-576 and 56-596.2 of the Code of Virginia.* Provides that for the 2029 program year and all subsequent years, "in the public interest" for the purpose of assessing energy efficiency programs means that the State Corporation Commission determines that the program is cost-effective. The bill directs the Commission to promulgate regulations no later than September 30, 2025, establishing a single, consistent cost-effectiveness test for use in evaluating proposed energy efficiency programs. The bill requires Dominion Energy Virginia and Appalachian Power Company to track, quantify, and report to the Commission the incremental annual savings, as defined in the bill, achieved by such utility's energy efficiency programs. This bill is identical to House Bill 746. Governor's recommended amendments adopted by the Senate. *Patron: Senator R. Creigh Deeds.*

Senate Bill 580 – Department of Environmental Quality; review and authorization of projects; hearing and appeal. *Amends and reenacts §10.1-1197.7 of the Code of Virginia.* Allows any person aggrieved by the final decision of the Department of Environmental Quality regarding the authorization of a project and who has participated in a proceeding for a permit to construct or operate a small renewable energy project under procedures adopted by the Department to seek judicial review of such action in accordance with the Administrative Process Act in the Circuit Court of the City of Richmond within 30 days of such decision. The bill requires the court to hear and decide such action as soon as practicable after the date of filing. This bill is identical to House Bill 122. *Patron: Senator R. Creigh Deeds.*

Senate Bill 581 – Department of Environmental Quality; data; groundwater and surface water withdrawal permits. *Amends and reenacts §§62.1-248 and 62.1-263 of the Code of Virginia.* Authorizes the Department of Environmental Quality to utilize and incorporate comprehensive groundwater, surface water, and aquifer data in its decision-making processes related to the issuance and renewal of groundwater withdrawal permits and surface water withdrawal permits. Such data may include information relating to water levels, flow rates, and water quality. *Patron: Senator Richard H. Stuart.*

Senate Bill 616 – Department of Agriculture and Consumer Services; Department of Forestry; Office of Farmland Preservation transferred. Prefiled January 10, 2024. *Amends and reenacts §§2.2-1509.4, 3.2-102, as it is currently effective and as it shall become effective, 10.1-1105.1, 46.2-749.102, and 58.1-512 of the Code of Virginia; amends the Code of Virginia by adding in Chapter 11 of Title 10.1 an article numbered 2.1, consisting of sections numbered 10.1-1119.2 through 10.1-1119.7; and repeals Chapter 2 (§§3.2-200 through 3.2-205) of Title 3.2 of the Code of Virginia.* Transfers from the Department of Agriculture and Consumer Services to the Department of Forestry the Office of Farmland Preservation and its powers and duties and reporting requirements, the Virginia Farm Link Program, the Century Farm Program, and the Virginia Farmland and Forestland Preservation Fund. The bill renames the Office as the Office of Working Lands Preservation. The bill makes technical amendments to effectuate the transfer and requires the Department of Environmental Quality to report to the Department of Forestry by July 1 of each year certain enumerated information about nonpoint source nutrient credits

certified in the previous year that involve land use conversion. This bill is identical to House Bill 892. *Patron: Senator Todd E. Pillion.*

Senate Bill 674 – Virginia Coastal Resilience Collaborative at The College of William and Mary in Virginia. *Amends and reenacts §§10.1-659, 10.1-660, and 62.1-223.2 of the Code of Virginia.* Changes references relating to coastal resilience policy from the Coastal Policy Center at William and Mary School of Law to the Virginia Coastal Resilience Collaborative at The College of William and Mary in Virginia to reflect the dissolution of the Coastal Policy Center. The bill also adds the Collaborative to the list of entities with whom the Secretary of Natural and Historic Resources may seek input and consultation in setting coastal resilience policies. *Patron: Senator Ryan T. McDougle.*

Senate Bill 737 – Electric utilities; energy efficiency programs. *Amends and reenacts §§56-576 and 56-585.7 of the Code of Virginia.* Provides that, for the purposes of the Virginia Electric Utility Regulation Act, energy efficiency programs include electrification, including measures that electrify space heating, water heating, cooling, drying, cooking, industrial processes, and other building and industrial end uses that would otherwise be served by onsite, nonelectric fuels, provided that the electrification measures reduce site energy consumption and that, to the maximum extent practical, seek to combine with federally authorized customer rebates for heat pump technology. The bill provides that electricity consumption increases that result from State Corporation Commission-approved electrification measures shall not be considered as a reduction in energy savings under the energy savings requirements and that utilities may apply verified total site energy reductions that are attributable to Commission-approved electrification measures to the energy savings requirements. The bill specifies that energy efficiency programs and energy efficiency measures do not include electrification of any process or activity primarily fueled by natural gas. *Patron: Senator Scott A. Surovell.*

CONSUMER PROTECTION

House Bill 744 – Consumer protection; automatic renewal or continuous service offers. *Amends and reenacts §59.1-207.46 of the Code of Virginia.* Requires a supplier making automatic renewal or continuous service offers that automatically renew after more than 30 days and extend the automatic renewal or continuous service offer for a period of more than 12 months to notify the consumer, as defined in the bill, of the option to cancel no less than 30 days and no more than 60 days before the cancellation deadline or the end of the current contract term. *Patron: Delegate Michelle Lopes Maldonado.*

House Bill 906 - Public utilities; municipal utilities; disconnection of service; limitations; consumer protections. *Amends the Code of Virginia by adding in Chapter 21 of Title 15.2 an article numbered 2.1, consisting of sections numbered 15.2-2121.1 through 15.2-2121.6, by adding in Chapter 3.2 of Title 44 a section numbered 44-146.29:4, and by adding in Article 2 of Chapter 10 of Title 56 sections numbered 56-245.1:3 through 56-245.1:6.* Suspends electric, gas, water, and wastewater utilities subject to the regulation of the State Corporation Commission from disconnecting service to a residential customer for nonpayment of bills or fees during a state of emergency declared by the Governor and provides that such suspension lasts for 30 days after such declaration of the state of emergency. The bill suspends such electric and gas utilities from disconnecting service to a residential customer for nonpayment of bills or fees

when the forecasted temperature low is at or below 32 degrees Fahrenheit and suspends electric utilities from disconnecting any such customer from service when the forecasted temperature high is at or above 92 degrees Fahrenheit within the 24 hours following the scheduled disconnection. The bill further suspends electric, gas, water, and wastewater utilities from disconnecting residential customers from service on Fridays, weekends, state holidays, and the day immediately preceding a state holiday. The bill requires each such utility to notify its residential customers of such utility's disconnection for nonpayment policy and to deliver notice of nonpayment of bills or fees to such customers prior to disconnection. This bill is identical to Senate Bill 480. *Patron: Delegate Irene Shin.*

House Bill 1243 – Consumer protection; creation of Unfair Real Estate Service Agreement Act. *Amends and reenacts §§59.1-199 and 59.1-200 of the Code of Virginia and amends the Code of Virginia by adding in Title 55.1 a chapter numbered 32, consisting of sections numbered 55.1-3200 through 55.1-3206.* Creates the Unfair Real Estate Service Agreement Act and adds any violations of the Act to the list of prohibited violations of relevant consumer protection laws in the Commonwealth. The bill prohibits any real estate service agreement, defined in the bill, that is effective and binding for more than one year from its effective date from (i) purporting to run with the land or bind future owners of interests in the residential real property identified in the service agreement; (ii) allowing the service provider to assign or transfer the right to provide services under the service agreement without notice to and written agreement of all parties to the service agreement; or (iii) purporting to create a lien, encumbrance, or other real property security interest on the residential real property identified in the service agreement. This bill is identical to Senate Bill 576. *Patron: Delegate Michelle Lopes Maldonado.*

House Bill 1270 – Virginia Consumer Protection Act; mold remediation. *Amends the Code of Virginia by adding a section numbered 36-99.7:1.* Makes it a violation of the Virginia Consumer Protection Act to sell or offer for sale services as a professional mold remediator to be performed upon any residential dwelling without holding a mold remediation certification from the Institute of Inspection, Cleaning and Restoration Certification (IICRC). *Patron: Delegate Delores L. McQuinn.*

Senate Bill 480 - Public utilities; municipal utilities; disconnection of service; limitations; report; consumer protections. *Amends the Code of Virginia by adding in Chapter 21 of Title 15.2 an article numbered 2.1, consisting of sections numbered 15.2-2121.1 through 15.2-2121.6, by adding in Chapter 3.2 of Title 44 a section numbered 44-146.29:4, and by adding in Article 2 of Chapter 10 of Title 56 sections numbered 56-245.1:3 through 56-245.1:6.* Suspends electric, gas, water, and wastewater utilities subject to the regulation of the State Corporation Commission from disconnecting service to a residential customer for nonpayment of bills or fees during a state of emergency declared by the Governor and provides that such suspension lasts for 30 days after such declaration of the state of emergency. The bill suspends such electric and gas utilities from disconnecting service to a residential customer for nonpayment of bills or fees when the forecasted temperature low is at or below 32 degrees Fahrenheit and suspends electric utilities from disconnecting any such customer from service when the forecasted temperature is at or above 92 degrees Fahrenheit within the 24 hours following the scheduled disconnection. The bill further suspends electric, gas, water, and wastewater utilities from disconnecting residential customers from service on Fridays, weekends, state holidays, and the day immediately preceding a state holiday. The bill requires each such utility to notify its residential

customers of such utility's disconnection for nonpayment policy and to deliver notice of nonpayment of bills or fees to such customers prior to disconnection. This bill is identical to House Bill 906. *Patron: Senator Lashrecse D. Aird.*

Senate Bill 576 – Consumer protection; creation of Unfair Real Estate Service Agreement Act. *Amends and reenacts §§59.1-199 and 59.1-200 of the Code of Virginia and amends the Code of Virginia by adding in Title 55.1 a chapter numbered 32, consisting of sections numbered 55.1-3200 through 55.1-3206.* Creates the Unfair Real Estate Service Agreement Act and adds any violations of the Act to the list of prohibited violations of relevant consumer protection laws in the Commonwealth. The bill prohibits any real estate service agreement, defined in the bill, that is effective and binding for more than one year from its effective date from (i) purporting to run with the land or bind future owners of interests in the residential real property identified in the service agreement; (ii) allowing the service provider to assign or transfer the right to provide services under the service agreement without notice to and written agreement of all parties to the service agreement; or (iii) purporting to create a lien, encumbrance, or other real property security interest on the residential real property identified in the service agreement. This bill is identical to House Bill 1243. *Patron: Senator Adam P. Ebbin.*

COURTS

House Bill 1396 – Days of operation of clerks' offices; clerks' authority to close office. *Amends and reenacts §17.1-207 of the Code of Virginia.* Allows the clerk of the circuit court of any county or city to close the clerk's office on (i) Christmas Eve; (ii) any day or portion of a day that the Governor declares as a holiday for state employees; and (iii) any day or portion of a day on which the Governor, Supreme Court, or Judicial Council authorizes state offices to be closed. Under current law, the clerk may only close the clerk's office once a judge authorizes such clerk to do so in these circumstances. This bill is identical to Senate Bill 736. *Patron: Delegate Patrick A. Hope.*

Senate Bill 736 – Days of operation of clerks' offices; clerks' authority to close office. *Amends and reenacts §17.1-207 of the Code of Virginia.* Allows the clerk of the circuit court of any county or city to close the clerk's office on (i) Christmas Eve; (ii) any day or portion of a day that the Governor declares as a holiday for state employees; and (iii) any day or portion of a day on which the Governor, Supreme Court, or Judicial Council authorizes state offices to be closed. Under current law, the clerk may only close the clerk's office once a judge authorizes such clerk to do so in these circumstances. This bill is identical to House Bill 1396. *Patron: Senator Ryan T. McDougle.*

HOUSING & COMMUNITY DEVELOPMENT

House Bill 285 – Uniform Statewide Building Code; bus shelters. *Amends and reenacts §36-98.1 of the Code of Virginia.* Delegates enforcement of the Uniform Statewide Building Code to the local building official for bus shelters that do not exceed 256 square feet that are to be constructed for transit agencies receiving state money. The bill exempts the state from liability for any such bus shelter constructed on state-owned property. The bill has an expiration date of July 1, 2025. *Patron: Delegate Delores L. McQuinn.*

House Bill 327 – **Commissioner of Behavioral Health and Developmental Services; inclusive housing plan; individuals with disabilities.** *An Act to direct the Commissioner of Behavioral Health and Developmental Services to develop a plan to ensure people with disabilities have an opportunity to access affordable and inclusive housing.* Directs the Commissioner of Behavioral Health and Developmental Services (the Commissioner) to work with stakeholders to develop a plan to ensure that people with disabilities across the Commonwealth, including individuals affected by the Settlement Agreement entered into on August 23, 2012, pursuant to U.S. of America v. Commonwealth of Virginia, have an opportunity to access affordable and inclusive housing, as defined in the bill. The bill requires the Commissioner to present the plan to the Chairmen of the House Committee on Health and Human Services and the Senate Committee on Education and Health by November 1, 2025. *Patron: Delegate Michael B. Feggans.*

House Bill 368 - Board of Housing and Community Development; stakeholder advisory group; report. *An Act to direct the Board of Housing and Community Development to convene a stakeholder advisory group to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit***.** Directs the Board of Housing and Community Development (the Board) to convene a stakeholder advisory group including fire code officials to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit, provided that the building has not more than six stories above grade plane. The bill requires the stakeholder advisory group to submit its findings and recommendations to the Board and to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024. This bill is identical to Senate Bill 195. *Patron: Delegate Adele Y. McClure.*

House Bill 477 – **Virginia Residential Landlord and Tenant Act; Eviction Diversion Pilot Program; expiration.** *Amends and reenacts the fourth enactment of Chapter 355 and the fourth enactment of Chapter 356 of the Acts of Assembly of 2019, as amended by Chapter 797 of the Acts of Assembly of 2022.* Extends the expiration of the Eviction Diversion Pilot Program to July 1, 2025. Currently, the Program is set to expire on July 1, 2024. This bill is a recommendation of the Virginia Housing Commission. This bill is identical to Senate Bill 50. *Patron: Delegate Carrie E. Coyner.*

House Bill 478 - Community revitalization fund; expanding use for all localities. *Amends and reenacts §15.2-958.5 of the Code of Virginia.* Expands the current provisions of law allowing for the establishment of a community revitalization fund for the purpose of preventing neighborhood deterioration to apply to all localities. Currently, only the City of Richmond is authorized to establish such a fund. This bill is identical to Senate Bill 49 and is a recommendation of the Virginia Housing Commission. *Patron: Delegate Carrie E. Coyner.*

House Bill 572 – **Manufactured home parks; resident rights.** *Amends and reenacts §§55.1-1302, 55.1-1308, 55.1-1311, and 55.1-1315 of the Code of Virginia.* Provides that a rental agreement with a term of one year or more will not be automatically renewed if the tenant notifies the landlord in writing 60 days prior to the expiration date of such tenant's intent to not renew the agreement. The bill permits a tenant to not renew a rental agreement due to a change in terms of the agreement by the landlord if such tenant notifies the landlord of his intent to not

renew the rental agreement within 30 days of receiving the notice of the change in terms. The bill allows a landlord to include in a written rental agreement a late fee, not to exceed 10 percent of the amount of the rent due and owed, for unpaid rental payments. The bill removes the right of a tenant or landlord to terminate a rental agreement with a term of 60 days or more by written notice at least 60 days prior to the termination date of the agreement. This bill is identical to Senate Bill 232. *Patron: Delegate Karrie K. Delaney.*

House Bill 578 – Uniform Statewide Building Code; violations; fines. *Amends and reenacts §36-106 of the Code of Virginia.* Increases from $2,500 to $5,000 the minimum amount and from $5,000 to $10,000 the maximum amount that any person, firm, or corporation shall be fined when convicted of a third or subsequent offense of violating the provisions of the Uniform Statewide Building Code committed within 10 years of another such offense after having been at least twice previously convicted of such an offense. The bill also adds penalties for similar violations committed by owners of a blighted multifamily property. This bill is identical to Senate Bill 538. *Patron: Delegate Delores L. McQuinn.*

House Bill 634 - Residential dwelling units; rentals for 30 consecutive days or longer. *Amends the Code of Virginia by adding in Article 5 of Chapter 9 of Title 15.2 a section numbered 15.2-987.* Prohibits a locality from enacting or enforcing an ordinance that bans the rental of residential dwelling units for 30 consecutive days or longer. The bill allows a locality by ordinance to regulate such rental if such regulations (i) are reasonable and (ii) do not exceed the requirements for an owner-occupied residential property or a residential property rented for a lease term of 12 months or more in the same zoning district. This bill is identical to Senate Bill 308. *Patron: Delegate Marcus B. Simon.*

House Bill 950 – Uniform Statewide Building Code; temporary prohibition on modifications. *Amends and reenacts §§36-98 and 36-137 of the Code of Virginia.* Provides that neither the Governor nor the Board of Housing and Community Development shall modify any regulation in the Uniform Statewide Building Code prior to the conclusion of the Commonwealth's next triennial code development process. *Patron: Delegate Alfonso H. Lopez.*

House Bill 1397 – Manufactured Home Lot Rental Act; manufactured home park; notice of sale and relocation expenses. *Amends and reenacts §§55.1-1308.1 and 55.1-1308.2 of the Code of Virginia.* Requires a manufactured home park owner to provide notice to the Department of Housing and Community Development and each manufactured home park tenant 90 days prior to unconditionally accepting an offer to purchase a manufactured home park. The bill grants a right of first refusal for localities located in Planning District 8. The bill provides for $5,000 in relocation expenses for a manufactured home owner if a rental agreement is terminated due to the sale of the manufactured home park to a buyer that is going to redevelop the park and change its use. Governor's recommended amendments adopted by the House. *Patron: Delegate Paul E. Krizek.*

House Bill 1425 – Uniform Statewide Building Code; Virginia Passenger Rail Authority exemption. *Amends and reenacts §36-98.1 of the Code of Virginia.* Exempts railway tunnels and bridges owned by the Virginia Passenger Rail Authority from the Uniform Statewide Building Code and the Statewide Fire Prevention Code Act. The bill requires the Virginia Passenger Rail Authority to report annually to the State Fire Marshal on the maintenance and

operability of installed fire protection and detection systems in its railway tunnels and bridges. *Patron: Delegate Terry L. Austin.*

House Bill 1486 – Vacant buildings; registration. *Amends and reenacts §15.2-1127 of the Code of Virginia.* Permits any county, city, or town to require, by ordinance, the owner of any building that has been vacant for at least 12 months and (i) that meets the definition of "derelict building" in relevant law, (ii) that meets the definition of "criminal blight" in relevant law, or (iii) in which a locality has determined a person is living without the authority of the owner to register such building annually. Under current law, any city and certain towns are permitted to require the owner of any building that has been vacant for at least 12 months and meets the definition of "derelict building" in relevant law to register such building annually. This bill is identical to Senate Bill 48 and is a recommendation of the Virginia Housing Commission. *Patron: Delegate Joshua E. Thomas.*

House Bill 1538 – Conversion of manufactured home to real property. *Amends and reenacts §46.2-653.1 of the Code of Virginia*. Establishes a process whereby a manufactured home owner who is not listed as the owner of such manufactured home on its title may detitle such manufactured home in order to convert the home to real property. *Patron: Delegate Terry G. Kilgore.*

Senate Bill 48 – Vacant buildings; registration. *Amends and reenacts §15.2-1127 of the Code of Virginia.* Permits any county, city, or town to require, by ordinance, the owner of any building that has been vacant for at least 12 months and (i) that meets the definition of "derelict building" in relevant law, (ii) that meets the definition of "criminal blight" in relevant law, or (iii) in which a locality has determined a person is living without the authority of the owner to register such building annually. Under current law, any city and certain towns are permitted to require the owner of any building that has been vacant for at least 12 months and meets the definition of "derelict building" in relevant law to register such building annually. This bill incorporates Senate Bill 478, is identical to House Bill 1486, and is a recommendation of the Virginia Housing Commission. *Patron: Senator Mamie E. Locke.*

Senate Bill 49 – Community revitalization fund; expanding use for all localities. *Amends and reenacts §15.2-958.5 of the Code of Virginia.* Expands the current provisions of law allowing for the establishment of a community revitalization fund for the purpose of preventing neighborhood deterioration to apply to all localities. Currently, only the City of Richmond is authorized to establish such a fund. This bill is identical to House Bill 478 and is a recommendation of the Virginia Housing Commission. *Patron: Senator Mamie E. Locke.*

Senate Bill 50 – Virginia Residential Landlord and Tenant Act; Eviction Diversion Pilot Program; expiration. *Amends and reenacts the fourth enactment of Chapter 355 and the fourth enactment of Chapter 356 of the Acts of Assembly of 2019, as amended by Chapter 797 of the Acts of Assembly of 2022.* Extends the expiration of the Eviction Diversion Pilot Program to July 1, 2025. Currently, the Program is set to expire on July 1, 2024. This bill is a recommendation of the Virginia Housing Commission. This bill is identical to House Bill 477. *Patron: Senator Mamie E. Locke.*

Senate Bill 195 – Board of Housing and Community Development; stakeholder advisory group; report. *An Act to direct the Board of Housing and Community Development to convene a stakeholder advisory group to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit.* Directs the Board of Housing and Community Development (the Board) to convene a stakeholder advisory group including fire code officials to evaluate and recommend revisions to the Uniform Statewide Building Code to permit Group R-2 occupancies to be served by a single exit, provided that the building has not more than six stories above grade plane. The bill requires the stakeholder advisory group to submit its findings and recommendations to the Board and to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than December 1, 2024. This bill is identical to House Bill 368. *Patron: Senator Schuyler T. VanValkenburg.*

Senate Bill 232 – Manufactured home parks; resident rights. *Amends and reenacts §§55.1-1302, 55.1-1308, 55.1-1311, and 55.1-1315 of the Code of Virginia.* Provides that a rental agreement with a term of one year or more will not be automatically renewed if the tenant notifies the landlord in writing 60 days prior to the expiration date of such tenant's intent to not renew the agreement. The bill permits a tenant to not renew a rental agreement due to a change in terms of the agreement by the landlord if such tenant notifies the landlord of his intent to not renew the rental agreement within 30 days of receiving the notice of the change in terms. The bill allows a landlord to include in a written rental agreement a late fee, not to exceed 10 percent of the amount of the rent due and owed, for unpaid rental payments. The bill removes the right of a tenant or landlord to terminate a rental agreement with a term of 60 days or more by written notice at least 60 days prior to the termination date of the agreement. This bill is identical to House Bill 572. *Patron: Senator Ghazala F. Hashmi.*

Senate Bill 308 - Residential dwelling units; rentals for 30 consecutive days or longer. *Amends the Code of Virginia by adding in Article 5 of Chapter 9 of Title 15.2 a section numbered 15.2-987.* Prohibits a locality from enacting or enforcing an ordinance that bans the rental of residential dwelling units for 30 consecutive days or longer. The bill allows a locality by ordinance to regulate such rental if such regulations (i) are reasonable and (ii) do not exceed the requirements for an owner-occupied residential property or a residential property rented for a lease term of 12 months or more in the same zoning district. This bill is identical to House Bill 634. *Patron: Senator Jeremy S. McPike.*

Senate Bill 477 – Blighted and derelict properties in certain localities; rate of tax. *Amends and reenacts §58.1-3221.6 of the Code of Virginia.* Allows the governing body of a locality with a score of 100 or higher on the fiscal stress index to levy a real property tax on blighted and derelict properties at a rate exceeding the rate applicable to the general class of real property by up to 15 percent on blighted properties and by up to 30 percent on derelict properties. *Patron: Senator Lashrecse D. Aird.*

Senate Bill 489 – Department of Housing and Community Development; Virginia residential development infrastructure fund; work group; report. *An Act to direct the Department of Housing and Community Development to convene a work group to assess the feasibility of and options for establishing a Virginia residential development infrastructure fund; report.* Directs the Department of Housing and Community Development to convene a work

group to assess the feasibility of and options for establishing a Virginia residential development infrastructure fund. The bill directs the work group to submit a report of its assessment to the General Assembly no later than the first day of the 2025 Regular Session. *Patron: Senator Jennifer D. Carroll Foy.*

Senate Bill 538 – Uniform Statewide Building Code; violations; fines. *Amends and reenacts §36-106 of the Code of Virginia.* Increases from $2,500 to $5,000 the minimum amount and from $5,000 to $10,000 the maximum amount that any person, firm, or corporation shall be fined when convicted of a third or subsequent offense of violating the provisions of the Uniform Statewide Building Code committed within 10 years of another such offense after having been at least twice previously convicted of such an offense. The bill also adds penalties for similar violations committed by owners of a blighted multifamily property. This bill is identical to House Bill 578. *Patron: Senator Lamont Bagby.*

INSURANCE

House Bill 595 – Insurance; conducting business by electronic means. *Amends and reenacts §§38.2-325 and 38.2-4509 of the Code of Virginia.* Authorizes a plan sponsor of a health benefit plan, including a dental or vision benefit plan, to agree on behalf of a party enrolled in the sponsored health benefit plan to conduct business by electronic means, provided that the plan sponsor, prior to agreeing on behalf of the party, has confirmed that the party routinely uses electronic communications during the normal course of employment and has provided notice to the party regarding the ability to opt out of using electronic means at any time. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 1257 – Insurance; coverage for the diminished value of personal property. *Amends the Code of Virginia by adding in Chapter 3 of Title 38.2 a section numbered 38.2-327.* Requires any insurer who issues or delivers a new or renewal homeowner's insurance policy or a stand-alone policy that covers scheduled personal property in the Commonwealth to offer in writing a provision providing coverage for the diminution in the value of any such scheduled personal property, if the schedule provides for the repair of such property. Under the bill, the diminution in value of the personal property is the amount, if any, by which the market value of the personal property immediately following the completion of repair of the damage to the personal property is less than the market value of the personal property immediately prior to the damage and the change in market value is a direct result of damage from the covered loss. The provisions of the bill shall apply to every such policy that is issued, delivered, or renewed by an insurer licensed in the Commonwealth on or after July 1, 2025. *Patron: Delegate Paul V. Milde.*

House Bill 1392 – Local government employee insurance programs. *Amends and reenacts §15.2-1517 of the Code of Virginia.* Authorizes any locality to include in its group life, accident, and health insurance programs any person to whom coverage could be extended under the provision of current law that sets out who may be covered under a private group accident and sickness insurance policy. *Patron: Delegate Michael J. Jones.*

Senate Bill 256 – Motor vehicle insurance claims; bad faith. *Amends and reenacts §§8.01-66.1, as it is currently effective and as it shall become effective, and 38.2-2206 of the Code of Virginia.* Provides that if an insurance company licensed in the Commonwealth to write motor

vehicle insurance (i) denies, refuses, fails to pay, or fails to make a timely and reasonable settlement offer to its insured under the provisions of any uninsured or underinsured motorist benefits coverage in a policy of motor vehicle insurance applicable to the insured after the insured has become legally entitled to recover or (ii) after all applicable liability policy limits and underlying uninsured and underinsured motorists benefits have been tendered or paid, rejects a reasonable settlement demand made by the insured within the policy's coverage limits for uninsured or underinsured motorist benefits or fails to respond within a reasonable time after being presented with such demand after the insured has become legally entitled to recover, and it is subsequently found by a court of proper jurisdiction that such denial, refusal, or failure to timely pay or failure to make a timely and reasonable settlement offer, rejection of a reasonable settlement demand, or failure to timely accept a reasonable settlement demand was not made in good faith, in addition to the amount due and owing by the insurance company to its insured on the judgment against the tortfeasor, the insurance company shall also be liable to the insured in an amount up to double the amount of the judgment obtained against the underinsured motorist, uninsured motorist, immune motorist, unknown owner or operator, or released defendant in the underlying personal injury or wrongful death action, not to exceed $500,000, together with reasonable attorney fees for bringing the claim, and all costs and expenses incurred by the insured to secure a judgment against the tortfeasor, and interest from 30 days after the date of such denial or failure or the date the reasonable settlement demand. Under the bill, the insured or the insured's representative may seek adjudication of a claim that the insurance company did not act in good faith as a posttrial motion before the court in which the underlying personal injury or wrongful death judgment was obtained or as a separate action against the company. If the insured or the insured's representative seeks adjudication as a separate action and the underlying judgment is appealed, any action filed under this subsection shall be stayed by the court pending final resolution of the appeal of the underlying judgment. *Patron: Senator Scott A. Surovell.*

Senate Bill 705 – Insurance; continuing education board; membership. *Amends and reenacts §38.2-1867 of the Code of Virginia.* Adds a member of the Virginia chapter of the National African American Insurance Association to the insurance continuing education board. Additionally, the bill amends the name of the association of one existing required member, from the Virginia Association of Health Underwriters to the Virginia chapter of the National Association of Benefits and Insurance Professionals, to reflect such association's current name. *Patron: Senator Lamont Bagby.*

LANDLORD TENANT

House Bill 73 – Unlawful detainer; expungement; entering of an order without further petition or hearing. *Amends and reenacts §8.01-130.01 of the Code of Virginia.* Provides that in unlawful detainer actions filed in the general district court, if the 30-day period following the dismissal of such an action has passed or if a voluntary nonsuit is taken and the six-month period following such nonsuit has passed, the court shall, without further petition or hearing, enter an order requiring the expungement of such action, provided that no order of possession has been entered. The bill provides that if a judgment is entered in favor of the defendant, such defendant may petition the court for an expungement pursuant to the petition process under current law. Additionally, the bill retains the petition process existing under current law for unlawful detainer actions commenced prior to July 1, 2024, for which the court still has records. *Patron: Delegate Patrick A. Hope.*

House Bill 86 – Summons for unlawful detainer; hearing date; amendments to amount due; subsequent filings. *Amends and reenacts §§8.01-126 and 8.01-454 of the Code of Virginia.* Specifies a process by which a plaintiff, plaintiff's attorney, or agent in an unlawful detainer action may amend the amount due to him in an unlawful detainer action. The bill further provides that if such an amendment is permitted the plaintiff shall not subsequently file additional warrants in debt against the defendant for additional amounts if those amounts could have been included in such amended amount. The bill provides that if the plaintiff requests all amounts due and owing as of the date of the hearing or if the court grants an amendment of the amounts requested, the plaintiff shall not subsequently file additional unlawful detainers or warrants in debt against the defendant for such additional amounts if those amounts could have been included in the amended amount. *Patron: Delegate Patrick A. Hope.*

House Bill 352 – Virginia Residential Landlord and Tenant Act; early termination for military personnel; stop movement order; emergency. *Amends and reenacts §55.1-1235 of the Code of Virginia.* Allows certain military personnel to terminate a rental agreement upon receipt of a stop movement order issued in response to a local, national, or global emergency that is effective for either an indefinite period or for a period of not less than 30 days and that prevents the service member from occupying the leased dwelling unit for a residential purpose. The bill also allows such military personnel to terminate a rental agreement after receiving any permanent change of station order or temporary duty order in excess of three months' duration. Current law allows such termination only for orders requiring a departure of 35 miles or more from the dwelling unit. The bill contains an emergency clause and became effective when the Governor signed the bill on March 8, 2024. The bill is identical to Senate Bill 213. *Patron: Delegate Jackie H. Glass.*

House Bill 701 – Virginia Residential Landlord and Tenant Act; routine maintenance; notice to tenant. *Amends and reenacts §55.1-1229 of the Code of Virginia.* Requires landlords to include in the tenant's notice of routine maintenance the last date on which such maintenance may possibly be performed. The bill also requires landlords to perform routine maintenance within 14 days of delivering such notice to the tenant. *Patron: Delegate Michael B. Feggans.*

House Bill 764 – Virginia Residential Landlord and Tenant Act; early termination of rental agreement; victims of sexual abuse or criminal sexual assault. *Amends and reenacts §55.1-1236 of the Code of Virginia.* Provides that a tenant who is a victim of family abuse, sexual abuse, or other criminal sexual assault may terminate such tenant's obligations under a rental agreement if the tenant has obtained a permanent protective order and has given proper written notice of termination. Under current law, there must be a family abuse protective order or a conviction before the tenant may terminate such obligations under a rental agreement. *Patron: Delegate Karrie K. Delaney.*

House Bill 957 – Virginia Residential Landlord and Tenant Act; tenant's remedies for exclusion from dwelling unit due to condemnation. *Amends the Code of Virginia by adding a section numbered 55.1-1243.2.* Provides that the landlord shall be liable to the tenant for actual damages and reasonable attorney fees if the tenant gave notice to the landlord during the tenancy that his dwelling unit was in violation of an applicable building code, such violation posed a substantial risk to the health, safety, and welfare of a tenant, and such violation resulted in the tenant being excluded from his dwelling unit due to such unit being condemned. The bill

includes exceptions to such liability, including negligence by the tenant, an act of God, and termination due to certain fire damage. Governor's recommended amendments adopted by the House. *Patron: Delegate Alfonso H. Lopez.*

House Bill 967 – Virginia Residential Landlord and Tenant Act; fee disclosure statement. *Amends and reenacts §§36-139 and 55.1-1204 of the Code of Virginia.* Requires landlords subject to the Virginia Residential Landlord and Tenant Act to include on the first page of a written rental agreement, in bold, 14-point type, a description of any rent and fees to be charged to the tenant. The bill requires that such rental agreement also contain, in bold, 14-point type: No fee shall be collected unless it is listed below. This bill is identical to Senate Bill 405. Governor's recommended amendments adopted by the House. *Patron: Delegate Alfonso H. Lopez.*

House Bill 1271 – Department of Housing and Community Development; Virginia Residential Landlord and Tenant Act; Manufactured Home Lot Rental Act; notice of tenant screening criteria. *Amends and reenacts §§36-139, 55.1-1203, 55.1-1303, and 55.1-1311 of the Code of Virginia*. Requires landlords governed by the Virginia Residential Landlord and Tenant Act or Manufactured Home Lot Rental Act to provide applicants for tenancy with (i) the amount and purpose of fees to be charged to such applicant, (ii) information that will be used to assess such applicant's eligibility for tenancy, and (iii) any criteria that may result in automatic denial of an application. The bill requires such landlords to notify applicants of certain rights protected by the federal Fair Credit Reporting Act prior to performing any background, credit, or other pre-occupancy check on such applicants. Finally, the bill requires the Director of the Department of Housing and Community Development to develop a sample notice of tenant screening criteria and a standardized statement regarding an applicant's rights protected by the federal Fair Credit Reporting Act and to make such sample notice and statement available on the Department's website. *Patron: Delegate Katrina Callsen.*

House Bill 1272 – Virginia Residential Landlord and Tenant Act; copy of rental agreement for tenant. *Amends and reenacts §55.1-1204 of the Code of Virginia.* Requires a landlord to provide a copy of the signed written rental agreement to the tenant within 10 business days of the effective date of the rental agreement and to provide additional hard copies of the rental agreement upon request or to maintain such rental agreement in an electronic format that can be easily accessed by or shared with the tenant upon request. The bill also prohibits a landlord from charging a tenant for any such additional copies of his rental agreement. Governor's recommended amendments adopted by the House. *Patron: Delegate Katrina Callsen.*

House Bill 1482 – Virginia Residential Landlord and Tenant Act; unlawful detainer action; emergency hearings. *Amends and reenacts §8.01-126 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 55.1-1201.1.* Provides for an emergency hearing to occur on a summons for unlawful detainer filed by an owner of a residential single family dwelling unit if the court finds based upon the evidence that (i) no rental agreement exists or has ever existed between the owner and the occupant; (ii) the occupant occupies such dwelling unit without permission of such owner; and (iii) the owner has given such occupant a written notice to vacate such dwelling unit at least 72 hours prior to the date of filing. Under the bill, an emergency hearing on such summons shall occur as soon as practicable, but not more than 14 days from the date of filing. *Patron: Delegate James A. "Jay" Leftwich.*

House Bill 1487 – Department of Housing and Community Development; forms and documents for landlords and tenants; translation into non-English languages. *An Act to direct the Department of Housing and Community Development to translate certain forms and documents posted on its website into the five non-English languages most commonly spoken in Virginia.* Directs the Department of Housing and Community Development to translate all forms and documents that the Department is mandated by law to create and that are posted on its website for use by residential landlords and tenants into the five non-English languages most commonly spoken in Virginia. The bill allows the Department to accept materials translated by volunteers but requires the Department to verify the accuracy of such translations prior to making such translations available on its website. *Patron: Delegate Kathy K.L. Tran.*

House Bill 1519 – Fees for electronic fund transfers; prohibited. *Amends and reenacts §§59.1-199 and 59.1-200 of the Code of Virginia.* Provides that charging any transaction or processing fee or similar surcharge for the purchase of a good or service through the use of an electronic fund transfer is a prohibited practice under the Virginia Consumer Protection Act. The bill also prohibits landlords subject to the Virginia Residential Landlord and Tenant Act from charging a transaction or processing fee for the payment of a security deposit, rent, or any other amounts payable. Provisions of the first enactment of this act shall not become effective unless reenacted by the 2025 Session of the General Assembly. *Patron: Delegate Kannan Srinivasan.*

Senate Bill 213 – Virginia Residential Landlord and Tenant Act; early termination for military personnel; stop movement order; emergency. *Amends and reenacts §55.1-1235 of the Code of Virginia.* Allows certain military personnel to terminate a rental agreement upon receipt of a stop movement order issued in response to a local, national, or global emergency that is effective for either an indefinite period or for a period of not less than 30 days and that prevents the service member from occupying the leased dwelling unit for a residential purpose. The bill also allows such military personnel to terminate a rental agreement after receiving any permanent change of station order or temporary duty order in excess of three months' duration. Current law allows such termination only for orders requiring a departure of 35 miles or more from the dwelling unit. The bill contains an emergency clause and became effective when the Governor signed the bill on March 8, 2024. The bill is identical to is identical to House Bill 352. *Patron: Senator Russet Perry.*

Senate Bill 405 – Virginia Residential Landlord and Tenant Act; fee disclosure statement. *Amends and reenacts §§36-139 and 55.1-1203 and of the Code of Virginia.* Requires landlords subject to the Virginia Residential Landlord and Tenant Act to include on the first page of a written rental agreement, in bold, 14-point type, a description of any rent and fees to be charged to the tenant. The bill requires that such rental agreement also contain, in bold, 14-point type: No fee shall be collected unless it is listed below. This bill is identical to House Bill 967. Governor's recommended amendments adopted by the Senate. *Patron: Senator Jennifer B. Boysko.*

MISCELLANEOUS

House Bill 61 - Enterprise zones; renewal periods. *Amends and reenacts §59.1-542 of the Code of Virginia.* Authorizes the Governor, upon the recommendation of the Director of the Department of Housing and Community Development, to renew enterprise zones for up to four

five-year renewal periods for zones designated on or after July 1, 2005, and for up to two five-year renewal periods for zones designated before July 1, 2005. Under current law, zones designated on or after July 1, 2005, may be renewed for up to three such periods and zones designated before July 1, 2005, may be renewed for up to one such period. *Patron: Delegate Thomas C. Wright, Jr.*

House Bill 128 – Local regulation of door-to-door vendors; political parties exempted. *Amends and reenacts §15.2-913 of the Code of Virginia*. Provides that local ordinances regulating the activities of door-to-door vendors shall not apply to any person participating in certain specified political activities. *Patron: Delegate Vivian E. Watts.*

House Bill 143 - Department of Transportation; Utility work database. *Amends the Code of Virginia by adding in Article 4 of Chapter 2 of Title 33.2 a section numbered 33.2-280.2*. Requires the Department of Transportation to establish and maintain a publicly accessible database and map of all utility work that has been approved by the Department and will occur within a highway right-of-way in a residential neighborhood. The bill has a delayed effective date of January 1, 2025. *Patron: Delegate David A. Reid.*

House Bill 151 - Department of Energy; building standards for certain local buildings. *Amends and reenacts §15.2-1804.1 of the Code of Virginia.* Requires the Department of Energy, upon request, to provide technical assistance to localities, subject to available budgetary resources, as localities implement mandates related to onsite renewable energy generation, energy storage, and resilience standards for construction or renovation of certain public buildings. The bill also makes several technical and clarifying changes to the existing statute, in part by defining or redefining existing terms found in the statute. This bill is identical to Senate Bill 245. *Patron: Delegate Dan I. Helmer.*

House Bill 194 - Virginia Military Parents Equal Protection Act; Space Force; deployment. *Amends and reenacts §§20-108 and 20-124.7 of the Code of Virginia.* Adds members of the Space Force to the list of service members included in the definition of deploying parent or guardian for the purposes of the Virginia Military Parents Equal Protection Act. *Patron: Delegate Marty Martinez.*

House Bill 474 - Restroom Access Act. *Amends the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered 59.1-603 through 59.1-606*. Requires a retail establishment that does not have a public restroom but has an employee toilet facility to allow any customer with an eligible medical condition, as defined in the bill, to use such employee toilet facility during normal business hours if certain conditions are met. A customer who suffers loss as a result of a violation may bring an action to recover damages not to exceed $100. *Patron: Delegate Carrie E. Coyner.*

House Bill 525 – Casino gaming; limits on required local referendums. *Amends and reenacts §58.1-4123 of the Code of Virginia.* Provides that the governing body of any eligible host city that holds a local referendum on the question of whether casino gaming should be permitted in such city that subsequently fails shall be prohibited from holding another referendum on the same question for a period of three years from the date of the last referendum. *Patron: Delegate Paul E. Krizek.*

House Bill 707 - Consumer Data Protection Act; protections for children. *Amends and reenacts [§§59.1-578] and [59.1-580] of the Code of Virginia.* Prohibits, subject to a parental consent requirement, a data controller from processing personal data of a known child (i) for the purposes of targeted advertising, the sale of such personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer; (ii) unless such processing is reasonably necessary to provide the online service, product, or feature; (iii) for any processing purpose other than the processing purpose that the controller disclosed at the time such controller collected such personal data or that is reasonably necessary for and compatible with such disclosed purpose; or (iv) for longer than is reasonably necessary to provide the online service, product, or feature. The bill prohibits, subject to a parental consent requirement, a data controller from collecting precise geolocation data from a known child unless (a) such precise geolocation data is reasonably necessary for the controller to provide an online service, product, or feature and, if such data is necessary to provide such online service, product, or feature, such controller shall only collect such data for the time necessary to provide such online service, product, or feature and (b) the controller provides to the known child a signal indicating that such controller is collecting such precise geolocation data, which signal shall be available to such known child for the entire duration of such collection. The bill prohibits a data controller from engaging in the activities described in the bill unless the controller obtains consent from the child's parent or legal guardian in accordance with the federal Children's Online Privacy Protection Act. This bill has a delayed effective date of January 1, 2025, and is identical to Senate Bill 361. Governor's recommended amendments were not accepted by the House. *Patron: Delegate Michelle Lopes Maldonado.*

House Bill 755 – Civil penalties for certain local property violations; industrial and commercial areas. *Amends and reenacts [§15.2-901] of the Code of Virginia.* Allows localities by ordinance to charge enhanced civil penalties for certain local property violations on property that is zoned or utilized for industrial or commercial purposes. *Patron: Delegate Wendell S. Walker.*

House Bill 778 – Quitclaim and release property rights. *An Act to authorize the Department of Conservation and Recreation to quitclaim and release certain real property rights related to lands of the agency.* Authorizes the Department of Conservation and Recreation to quitclaim and release certain real property rights related to a portion of real estate owned by the Department related to an offsite ingress and egress easement serving the Biscuit Run property in Albemarle County. *Patron: Delegate Katrina Callsen.*

House Bill 800 - Public service companies; pole attachments; cable television systems and telecommunications service providers. *Amends and reenacts [§56-466.1] of the Code of Virginia.* Requires a public utility, as defined in the bill, to establish and adhere to pole attachment practices and procedures that comply with certain requirements, including determining whether an attachment request is complete before reviewing such request on its merits, complying with certain timelines, and providing notice of a rearrangement to affected existing attachers. The bill provides that a public utility shall not apportion to a telecommunications service provider or cable television system the cost of replacing a red-tagged pole, as defined in the bill, provided that such utility may apportion to such provider or system the incremental cost of a taller or stronger pole that is necessitated solely by the new facilities of such provider or system. The bill authorizes the State Corporation Commission to enforce its

provisions and requires the Commission to resolve disputes involving pole access within 90 days and concerning certain other matters within 120 days. This bill is identical to Senate Bill 713. *Patron: Delegate Charniele L. Herring.*

House Bill 816 - Virginia Freedom of Information Act; effective date of procedures for conducting meetings held through electronic communication means during declared states of emergency. *Amends and reenacts the third enactment of Chapter 597 of the Acts of Assembly of 2022.* Provides that the provisions for conducting a meeting by electronic means due to a state of emergency stated in the Virginia Freedom of Information Act (FOIA) are declarative of existing law since March 20, 2020, with respect to the Governor's declared state of emergency due to COVID-19. Under the bill, any meeting by a public body using electronic communication means occurring from that date until July 1, 2021, and any otherwise lawful action taken at it is validated with respect to FOIA if the body provided public notice, public access, and public comment commensurate with the requirements of existing FOIA provisions regarding electronic and closed meetings. The bill is a response to the case Berry v. Bd. of Supervisors (Va. 2023) and is a recommendation of the Virginia Freedom of Information Advisory Council. This bill is identical to Senate Bill 244. *Patron: Delegate Mike A. Cherry.*

House Bill 843 – Pari-mutuel wagering; historical horse racing; percentage retained for distribution. *Amends and reenacts §59.1-392 of the Code of Virginia.* Provides that with respect to all authorized historical horse racing terminals, of the amount that a horse racing licensee retains from wagering on historical horse racing pools, 0.025 percent shall be provided to each of the following: (i) the Virginia Breeders Fund; (ii) the Virginia-Maryland Regional College of Veterinary Medicine, for its equine programs; (iii) the Virginia Horse Center Foundation; and (iv) the Virginia Horse Industry Board. The bill also provides that, in addition to the amount horse racing licensees distribute to localities and the Problem Gambling Treatment and Support Fund under current law, such licensees shall distribute the remainder of the percentage retained to the Commonwealth as a license tax. This bill is identical to Senate Bill 426. *Patron: Delegate Terry L. Austin.*

House Bill 879 – Conveyance of easement. *An Act to authorize the Department of Wildlife Resources to grant and convey an ingress-egress easement and right-of-way at Land's End Wildlife Management Area.* Authorizes the Department of Wildlife Resources to grant and convey an easement and right-of-way at Land's End Wildlife Management Area to Joseph C. Frank III, Betty J. Frank, Jacob C. Ackerman, and Crystal F. Ackerman. The easement will allow ingress and egress from State Route 625 (Salem Church Road) to the grantees' properties. *Patron: Delegate Hillary Pugh Kent.*

House Bill 925 - Towing; vehicles with expired registration; civil penalty. *Amends and reenacts §§ 46.2-1150, 46.2-1231, and 46.2-1232 of the Code of Virginia.* Requires a towing operator for a parking lot of a multifamily dwelling unit, defined in the bill, to post written notice on a vehicle providing at least 48 hours' notice to a resident prior to removing a resident's vehicle, defined in the bill, from such parking lot of the multifamily dwelling unit for an expired registration or expired vehicle inspection sticker and to provide a copy of such notice to the landlord of such multifamily dwelling unit to transmit to the resident. The bill provides that a towing and recover operator or landlord who fails to comply with these requirements shall be

required to reimburse the resident for the cost of the tow and provides that the towing operator shall be subject to a civil penalty not to exceed $100. *Patron: Delegate Irene Shin.*

House Bill 1035 - Places of public accommodation; possession and administration of epinephrine. *Amends and reenacts §§8.01-225, 54.1-3408, and 54.1-3408.5 of the Code of Virginia.* Permits every place of public accommodation, defined in relevant law as all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations, to make epinephrine available for administration and permits any employee of such place of public accommodation who is authorized by a prescriber and trained in the administration of epinephrine to possess and administer epinephrine to a person present in such place of public accommodation believed in good faith to be having an anaphylactic reaction. Current law limits such permission to every public place, defined in relevant law as any enclosed, indoor area used by the general public, and any employee of such public place. *Patron: Delegate Elizabeth B. Bennett-Parker.*

House Bill 1075 - Dolly Parton's Imagination Library of Virginia Program established. *Amends the Code of Virginia by adding in Title 22.1 a chapter numbered 28, consisting of sections numbered 22.1-381 through 22.1-384.* Establishes Dolly Parton's Imagination Library of Virginia Program for the purpose of promoting a comprehensive statewide initiative for encouraging preschool-age children to develop a love of reading and learning whereby one reading selection, as defined in the bill, is provided per month to each registered child from birth to age five in each participating county at no cost to the family of such child. The bill requires the Program to contribute to local programs a 50 percent match of funds, if available, required of such local programs participating in Dolly Parton's Imagination Library in the Commonwealth. The bill requires a nonprofit entity dedicated to statewide early literacy advocacy to serve as the program administrator and be responsible for the development, implementation, and administration of the Program. The bill sunsets on January 1, 2029. *Patron: Delegate Carrie E. Coyner.*

House Bill 1108 - Virginia Public Procurement Act; construction management and design-build contracting. *Amends and reenacts §§2.2-4380 through 2.2-4383 of the Code of Virginia.* Requires state public bodies, covered institutions, and local public bodies to provide documentation of the processes used for the final selection of a construction contract to all the unsuccessful applicants upon request. The bill adds certain requirements for covered institutions, including posting all documents that are open to public inspection exchanged between the Department of General Services and the covered institution on the central electronic procurement website eVA. The bill requires approval by a majority vote of the covered institution's board of visitors or governing board if the covered institution chooses to proceed with construction management or design-build against the recommendation of the Department for (i) projects funded by funds other than those provided from the state general fund or (ii) projects of $65 million or more funded in whole or in part from state general funds. For projects under $65 million funded in whole or in part by state general funds, the bill provides that the covered institution shall obtain approval from the Chairs of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, or their designees, and a representative of the Department. The bill requires a local public body to adopt a resolution or motion to use construction management or design-build, if required by its local governing body, prior to issuing a Request for Qualifications and to publish notice of such resolution or motion on its

website or eVA. The bill provides that the Department shall report annually, for any construction management or design-build project, on the qualifications that made such project complex. Finally, the bill requires the Department, with the assistance of staff of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, to assess the implementation and administration of construction management and design-build projects and report its findings and recommendations to the General Assembly by November 1, 2029. This bill incorporates House Bill 965 and is identical to Senate Bill 18. *Patron: Delegate Betsy B. Carr.*

House Bill 1125 - Virginia Business Ready Expedited Permitting Program established; report. *Amends the Code of Virginia by adding a section numbered 2.2-2240.2:2.* Establishes the Virginia Business Ready Expedited Permitting Program and directs the Virginia Economic Development Partnership Authority to designate up to two sites and four projects for participation in the Program. Sites and projects eligible for the Program shall include only (i) sites eligible for a site development grant under the Virginia Business Ready Sites Program or (ii) projects with significant local, regional, or statewide economic impact that the governing body of the locality in which the project is located has either (a) approved following a public meeting or hearing or (b) submitted, by resolution, for consideration to be included in the Program. No more than two eligible sites or projects shall be designated as part of the Program within any locality annually. The Authority shall complete a review process within 45 days of designating a site to reduce permitting conflicts and provide relevant guidance to applicants. The bill also provides that no project shall be considered eligible to enter the Program after December 31, 2027, and requires annual reporting from the Authority. The bill has a delayed effective date of January 1, 2025, and expires on June 30, 2028. This bill is identical to Senate Bill 217. *Patron: Delegate Betsy B. Carr.*

House Bill 1331 – Conveyance of easement; Department of State Police and Department of Transportation. *An Act to authorize the conveyance of an easement in Campbell County by the Department of State Police in conjunction with the Department of Transportation.* Authorizes the conveyance of an easement in Campbell County by the Department of State Police in conjunction with the Department of Transportation. *Patron: Delegate Wendell S. Walker.*

House Bill 1361 - Virginia Public Procurement Act; Virginia resident preference. *Amends and reenacts §2.2-4324 of the Code of Virginia.* Provides preference as it relates to procurement for a bidder who is a resident of Virginia and then a bidder whose goods are produced in the United States. For the procurement of goods by manufacturers, when the lowest responsive and responsible bidder is not a resident of Virginia and the bid of any Virginia resident is within 10 percent of such bid, the bill gives the lowest responsive and responsible bidder that is a Virginia resident the option to match the price of the lowest responsive and responsible bidder. Furthermore, if the lowest responsive and responsible bidder is a resident of another state and such state allows a resident a percentage preference or price-matching preference for the procurement of goods, the bill grants a like preference to responsive and responsible bidders who are residents of Virginia. Under the bill, an eligible bidder that is a Virginia resident shall be granted the greater of either preference. The bill exempts a public body from the provisions of the bill if such public body is rendered ineligible to receive federal funding due to the provisions of the bill. The bill has an expiration date of July 1, 2027. Finally, the bill directs the Department of General Services to report to the General Assembly regarding the bill's efficacy, including any

retaliatory action taken by other states, no later than the first day of the 2025 Regular Session. This bill incorporates House Bill 164, House Bill 341, and House Bill 1154. *Patron: Delegate Michael B. Feggans.*

House Bill 1376 – Submetering or energy allocation equipment; billing requirements; unit owners. *Amends and reenacts §56-245.3 of the Code of Virginia.* Provides that for the purposes of rules promulgated by the State Corporation Commission related to billing requirements and all other rules related to submetering or energy allocation equipment, those rules applicable to tenants of apartment buildings, office buildings, shopping centers or campgrounds will be applicable to residential and nonresidential unit owners. *Patron: Delegate David A. Reid.*

House Bill 1395 – Historic preservation. *Amends and reenacts §15.2-2306 of the Code of Virginia*. Provides that the filing of a building permit or demolition application shall stay a locality from issuing any permit to raze or demolish a historic landmark, building, or structure until 30 days after the rendering of the final decision of the governing body of the locality pursuant to a historic preservation ordinance. *Patron: Delegate Patrick A. Hope.*

House Bill 1404 – Department of Small Business and Supplier Diversity; Small SWaM Business Procurement Enhancement Program established; disparity study report. *Amends and reenacts §§2.2-1604, 2.2-1605, 2.2-4303, 2.2-4310, 2.2-4310.3, and 23.1-1017 of the Code of Virginia and amends the Code of Virginia by adding in Chapter 16.1 of Title 2.2 an article numbered 4, consisting of sections numbered 2.2-1618 through 2.2-1623.* Establishes the Small SWaM Business Procurement Enhancement Program with a statewide goal of 42 percent of certified small SWaM business utilization in all discretionary spending by executive branch agencies and covered institutions in procurement orders, prime contracts, and subcontracts, as well as a target goal of 50 percent subcontracting to small SWaM businesses in instances where the prime contractor is not a small SWaM business for all new capital outlay construction solicitations that are issued. The bill provides that executive branch agencies and covered institutions are required to increase their small SWaM business utilization rate by three percent per year until reaching the 42-percent target level or, if unable to do so, to implement achievable goals to increase their utilization rate. In addition, the bill provides for a small SWaM business set-aside for executive branch agency and covered institution purchases of goods, services, and construction, requiring that purchases up to $100,000 be set aside for award to certified small SWaM businesses. The bill creates the Division of Procurement Enhancement within the Department of Small Business and Supplier Diversity for purposes of collaborating with the Department of General Services, the Virginia Information Technologies Agency, the Department of Transportation, and covered institutions to further the Commonwealth's efforts to meet the goals established under the Small SWaM Business Procurement Enhancement Program, as well as implementing initiatives to enhance the development of small businesses, microbusinesses, women-owned businesses, minority-owned businesses, and service disabled veteran-owned businesses in the Commonwealth. Finally, the bill requires the Department of Small Business and Supplier Diversity to conduct a disparity study every five years, with the next disparity study due no later than January 1, 2026. The bill specifies that the study shall evaluate the need for enhancement and remedial measures to address the disparity between the availability and the utilization of women-owned and minority-owned businesses. The provisions of the bill other than those requiring a disparity study have a delayed effective date of January 1, 2025, and apply

to covered institutions beginning July 1, 2025. This bill incorporates House Bill 716. *Patron: Delegate Jeion A. Ward.*

House Bill 1461 – Short-term rental property; locality's ability to prohibit lessee or sublessee operator. *Amends and reenacts § 15.2-983 of the Code of Virginia*. Prohibits a locality from barring an operator, as defined in existing law, from offering such property as a short-term rental solely on the basis that the operator is a lessee or sublessee of such property, provided that the property owner has granted permission for its use as a short-term rental. The bill adds an attestation that the property owner has granted such permission if the operator is a lessee or sublessee to the information that an operator must provide to annually register such short-term rental. The bill permits a locality to limit a lessee or sublessee to one short-term rental. *Patron: Delegate Candi Mundon King.*

Senate Bill 18 - Virginia Public Procurement Act; construction management and design-build contracting. *Amends and reenacts §§2.2-4378 through 2.2-4382 of the Code of Virginia.* Requires state public bodies, covered institutions, and local public bodies to provide documentation of the processes used for the final selection of a construction contract to all the unsuccessful applicants upon request. The bill adds certain requirements for covered institutions, including posting all documents that are open to public inspection exchanged between the Department of General Services and the covered institution on the central electronic procurement website eVA. The bill requires approval by a majority vote of the covered institution's board of visitors or governing board if the covered institution chooses to proceed with construction management or design-build against the recommendation of the Department for (i) projects funded by funds other than those provided from the state general fund or (ii) projects of $65 million or more funded in whole or in part from state general funds. For projects under $65 million funded in whole or in part by state general funds, the bill provides that the covered institution shall obtain approval from the Chairs of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, or their designees, and a representative of the Department. The bill requires a local public body to adopt a resolution or motion to use construction management or design-build, if required by its local governing body, prior to issuing a Request for Qualifications and to publish notice of such resolution or motion on its website or eVA. The bill provides that the Department shall report annually, for any construction management or design-build project, on the qualifications that made such project complex. Finally, the bill requires the Department, with the assistance of staff of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, to assess the implementation and administration of construction management and design-build projects and report its findings and recommendations to the General Assembly by November 1, 2029. This bill incorporates Senate Bill 249 and is identical to House Bill 1108. *Patron: Senator Mamie E. Locke.*

Senate Bill 217 - Virginia Business Ready Expedited Permitting Program established; report. *Amends the Code of Virginia by adding a section numbered 2.2-2240.2:2*. Establishes the Virginia Business Ready Expedited Permitting Program and directs the Virginia Economic Development Partnership Authority to designate up to two sites and four projects for participation in the Program. Sites and projects eligible for the Program shall include only (i) sites eligible for a site development grant under the Virginia Business Ready Sites Program or (ii) projects with significant local, regional, or statewide economic impact that the governing

body of the locality in which the project is located has either (a) approved following a public meeting or hearing or (b) submitted, by resolution, for consideration to be included in the Program. No more than two eligible sites or projects shall be designated as part of the Program within any locality annually. The Authority shall complete a review process within 45 days of designating a site to reduce permitting conflicts and provide relevant guidance to applicants. The bill also provides that no project shall be considered eligible to enter the Program after December 31, 2027, and requires annual reporting from the Authority. The bill has a delayed effective date of January 1, 2025, and expires on June 30, 2028. This bill is identical to House Bill 1125. *Patron: Senator Mamie E. Locke.*

Senate Bill 244 – Virginia Freedom of Information Act; effective date of procedures for conducting meetings held through electronic communication means during declared states of emergency. *Amends and reenacts the third enactment of Chapter 597 of the Acts of Assembly of 2022.* Provides that the provisions for conducting a meeting by electronic means due to a state of emergency stated in the Virginia Freedom of Information Act (FOIA) are declarative of existing law since March 20, 2020, with respect to the Governor's declared state of emergency due to COVID-19. Under the bill, any meeting by a public body using electronic communication means occurring from that date until July 1, 2021, and any otherwise lawful action taken at it is validated with respect to FOIA if the body provided public notice, public access, and public comment commensurate with the requirements of existing FOIA provisions regarding electronic and closed meetings. The bill is a response to the case Berry v. Bd. of Supervisors (Va. 2023) and is a recommendation of the Virginia Freedom of Information Advisory Council. This bill is identical to House Bill 816. *Patron: Senator Jeremy S. McPike.*

Senate Bill 245 – Department of Energy; building standards for certain local buildings. *Amends and reenacts §15.2-1804.1 of the Code of Virginia.* Requires the Department of Energy, upon request, to provide technical assistance to localities, subject to available budgetary resources, as localities implement mandates related to onsite renewable energy generation, energy storage, and resilience standards for construction or renovation of certain public buildings. The bill also makes several technical and clarifying changes to the existing statute, in part by defining or redefining existing terms found in the statute. This bill is identical to House Bill 151. *Patron: Senator Jeremy S. McPike.*

Senate Bill 324 - Virginia Freedom of Information Act; charges for production of public records; report. *Amends and reenacts §2.2-3704 of the Code of Virginia.* Prohibits a public body from charging a requester for any costs incurred during the first hour spent accessing, duplicating, supplying, or searching for records requested in conjunction with the requester's first request. The bill provides that for any additional time spent accessing, duplicating, supplying, or searching for such records, or for any additional record requests, the public body shall not charge an hourly rate for accessing, duplicating, supplying, or searching for the records exceeding the lesser of the hourly rate of pay of the lowest-paid individual capable of fulfilling the request or $40 per hour. The bill allows a public body to petition the appropriate court for relief from the $40-per-hour fee cap upon showing by a preponderance of the evidence that there is no qualified individual capable of fulfilling the request for $40 per hour or less and requires such petition to be heard within seven days of when the petition is made, provided that the public body has sent and the requester has received a copy of the petition at least three working days prior to filing. The bill also provides that in certain instances a hearing on any petition shall be given

precedence on a circuit court's docket over all cases that are not otherwise given precedence by law and that the time period the public body has to respond to a record request shall be tolled between the requester's receipt of the petition and the final disposition of the court. The bill prohibits a public body from charging a requester for any court costs or fees resulting from a petition. The bill directs the Virginia Freedom of Information Advisory Council to study whether public bodies should charge requesters pursuant to the bill and report on its findings by December 2024. The provisions of the bill amending the Code of Virginia do not become effective unless reenacted by the 2025 Session of the General Assembly. *Patron: Senator Danica A. Roem.*

Senate Bill 355 – Virginia Self-Service Storage Act. *Amends and reenacts §§55.1-2900 and 59.1-2901 of the Code of Virginia.* Permits a rental agreement for a leased self-service storage space to be delivered and accepted electronically. The bill permits a rental agreement to contain statements that the rental agreement is deemed accepted by the owner where the owner accepts rent or where the occupant accepts possession or delivers rent. Finally, the bill permits towing of any abandoned, immobilized, unattended, or trespassing vehicles or watercraft that are not authorized to be at the self-service storage facility. *Patron: Senator Aaron R. Rouse.*

Senate Bill 361 – Consumer Data Protection Act; protections for children. *Amends and reenacts §§59.1-575 and 59.1-578 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 59.1-577.1.* Prohibits, subject to a parental consent requirement, a data controller from processing personal data of a known child (i) for the purposes of targeted advertising, the sale of such personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer; (ii) unless such processing is reasonably necessary to provide the online service, product, or feature; (iii) for any processing purpose other than the processing purpose that the controller disclosed at the time such controller collected such personal data or that is reasonably necessary for and compatible with such disclosed purpose; or (iv) for longer than is reasonably necessary to provide the online service, product, or feature. The bill prohibits, subject to a parental consent requirement, a data controller from collecting precise geolocation data from a known child unless (a) such precise geolocation data is reasonably necessary for the controller to provide an online service, product, or feature and, if such data is necessary to provide such online service, product, or feature, such controller shall only collect such data for the time necessary to provide such online service, product, or feature and (b) the controller provides to the known child a signal indicating that such controller is collecting such precise geolocation data, which signal shall be available to such known child for the entire duration of such collection. The bill prohibits a data controller from engaging in the activities described in the bill unless the controller obtains consent from the child's parent or legal guardian in accordance with the federal Children's Online Privacy Protection Act. This bill has a delayed effective date of January 1, 2025, and is identical to House Bill 707. Governor's recommended amendments were not accepted by the Senate. *Patron: Senator Schuyler T. VanValkenburg.*

Senate Bill 426 – Pari-mutuel wagering; historical horse racing; percentage retained for distribution. *Amends and reenacts §59.1-392 of the Code of Virginia.* Provides that with respect to all authorized historical horse racing terminals, of the amount that a horse racing licensee retains from wagering on historical horse racing pools, 0.025 percent shall be provided to each of the following: (i) the Virginia Breeders Fund; (ii) the Virginia-Maryland Regional

College of Veterinary Medicine, for its equine programs; (iii) the Virginia Horse Center Foundation; and (iv) the Virginia Horse Industry Board. The bill also provides that, in addition to the amount horse racing licensees distribute to localities and the Problem Gambling Treatment and Support Fund under current law, such licensees shall distribute the remainder of the percentage retained to the Commonwealth as a license tax. This bill is identical to House Bill 843. *Patron: Senator R. Creigh Deeds.*

Senate Bill 645 - Local fiscal distress; determination by Auditor of Public Accounts; state intervention. *Amends the Code of Virginia by adding a section numbered 15.2-2512.1.* Sets out a procedure for determining when localities are in fiscal distress, as defined in the bill, and when state intervention may be necessary. The bill requires the Auditor of Public Accounts to develop criteria for a preliminary determination that a locality may be in fiscal distress. The bill also requires the Director of the Department of Planning and Budget to identify any amounts remaining unexpended from general fund appropriations in the state budget as of June 30 of each year, which constitute state aid to local governments. From such unexpended balances, the Governor may reappropriate up to $750,000 from amounts that would otherwise revert to the balance of the general fund and transfer such amounts as necessary to establish a component of fund balance that may be used for the purpose of providing state assistance, oversight, and intervention actions for localities deemed to be fiscally distressed and in need of state assistance, oversight, or intervention to address such distress. The bill provides that if a report to the Governor concludes that a locality located in Planning District 19 (Crater Planning District Commission) is either unwilling or unable to comply with the conditions necessary to address its fiscal distress, the Commission on Local Government shall appoint an emergency fiscal manager and implement a remediation plan to restore sustainable fiscal health to such locality. The emergency fiscal officer shall give timely notice of any proposed actions to be taken and an opportunity for public input prior to such action and shall establish benchmarks that will allow such locality to exit the state intervention plan upon meeting such benchmarks. *Patron: Senator Lashrecse D. Aird.*

Senate Bill 713 - Public service companies; pole attachments; cable television systems and telecommunications service providers. *Amends and reenacts §56-466.1 of the Code of Virginia.* Requires a public utility, as defined in the bill, to establish and adhere to pole attachment practices and procedures that comply with certain requirements, including determining whether an attachment request is complete before reviewing such request on its merits, complying with certain timelines, and providing notice of a rearrangement to affected existing attachers. The bill provides that a public utility shall not apportion to a telecommunications service provider or cable television system the cost of replacing a red-tagged pole, as defined in the bill, provided that such utility may apportion to such provider or system the incremental cost of a taller or stronger pole that is necessitated solely by the new facilities of such provider or system. The bill authorizes the State Corporation Commission to enforce its provisions and requires the Commission to resolve disputes involving pole access within 90 days and concerning certain other matters within 120 days. This bill is identical to House Bill 800. Governor's recommended amendments adopted by the Senate. *Patron: Senator David W. Marsden.*

NOTARIES

House Bill 1372 - Notarial acts; knowledge-based authentication assessment; requirements. *Amends and reenacts §§47.1-2, 47.1-16, and 47.1-20.1 of the Code of Virginia.* Adds a knowledge-based authentication assessment to the methods by which a notary public may obtain satisfactory evidence of identity of an individual. As defined in the bill, a knowledge-based authentication assessment requires a principal to take a quiz composed of at least five questions related to the principal's personal history or identity and to score at least 80 percent on such quiz. The bill provides that if the principal fails to achieve a score of at least 80 percent, he may attempt up to two additional quizzes within 48 hours following the first failed quiz. The bill also provides that no notarial act shall be invalidated solely based on the failure of a notary public to perform a duty or meet a requirement as required by law; however, the validity of a notarial act shall not prohibit an aggrieved person from invalidating a record or transaction or from seeking other remedies as allowed by law. The bill provides that these provisions shall apply retroactively to any notarial act that was performed before July 1, 2024. *Patron: Delegate Marcus B. Simon.*

Senate Bill 8 - Notary public or electronic notary public; application for recommission. *Amends and reenacts §47.1-5.1 of the Code of Virginia.* Removes the requirement that a person applying for recommission as a notary public or electronic notary public include in his application an applicant oath, provided that such person is in good standing as a notary public or electronic notary public, is not subject to any investigation or proceeding, and has never been removed from office. Under current law, persons applying for recommission are required to include such oath. *Patron: Senator Bryce E. Reeves.*

PROFESSIONS AND OCCUPATIONS

House Bill 120 - Department of Professional and Occupational Regulation; Department of Health Professions; certain suspensions not considered disciplinary action. *Amends and reenacts §54.1-104 of the Code of Virginia.* Prohibits any board of the Department of Professional and Occupational Regulation or the Department of Health Professions issuing a suspension upon any regulant of such board pursuant to such regulant's having submitted a check, money draft, or similar instrument for payment of a fee required by statute or regulation that is not honored by the bank or financial institution named from considering or describing such suspension as a disciplinary action. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 287 - Department of Professional and Occupational Regulation; practice of geology; definitions. *Amends and reenacts §54.1-2200 of the Code of Virginia.* Expands the definition of the practice of geology to include the performance of any professional service or work wherein the principles and methods of geology are applied, including (i) investigating, evaluating, and consulting; (ii) geological mapping; (iii) describing the natural processes that act upon the earth's materials; (iv) predicting the probable occurrence of natural processes; and (v) inspecting, planning, and performing and supervising geological work in order to enhance and protect the health, safety, and welfare of the public and the environment. The bill also defines "geological mapping." This bill is identical to Senate Bill 184. *Patron: Delegate Bill Wiley.*

House Bill 350 - Department of Professional and Occupational Regulation; Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects; quorum and signature requirements. *Amends and reenacts §§54.1-403 and 54.1-405 of the Code of Virginia.* Lowers the quorum requirement for the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects of two engineers, two architects, and two land surveyors to at least one engineer, one architect, and one land surveyor. The bill removes the requirement that licenses issued by the Board be signed by at least four members of the Board. The bill has an expiration date of July 1, 2026. *Patron: Delegate David Owen.*

House Bill 383 - Department of Professional and Occupational Regulation; real estate board; continuing education requirements for real estate brokers and salespersons. *Amends and reenacts §54.1-2105.03 of the Code of Virginia.* Increases from eight to 11 the number of hours of continuing education an applicant for relicensure as a real estate broker or salesperson shall complete in the topics of ethics and standards of conduct, fair housing, legal updates and emerging trends, real estate agency, and real estate contracts. The bill also decreases from eight to five the number of hours of general elective courses such applicants shall complete. The bill directs the Real Estate Board to adopt regulations to implement the provisions of the bill against current licensees beginning in such licensee's next full renewal cycle following the effective date of such regulations. This bill is identical to Senate Bill 330. *Patron: Delegate Atoosa R. Reaser.*

House Bill 917– Department of Professional and Occupational Regulation; definition of a real estate broker. *Amends and reenacts §§6.2-1616, 11-2, 38.2-3521.1, 54.1-2100, and 54.1-2103 of the Code of Virginia and repeals §§54.1-2101 and 54.1-2107 of the Code of Virginia.* Adds to the definition of "real estate broker" any individual or business entity who sells or offers to sell, buys or offers to buy, negotiates, or otherwise deals in real estate contracts, including assignable contracts, on two or more occasions in any 12-month period for compensation or valuable consideration. The bill contains technical amendments and is identical to Senate Bill 358. *Patron: Delegate Irene Shin.*

House Bill 1005 - Virginia Board for Asbestos, Lead, and Home Inspectors; dust sampling technicians, renovators, and accredited renovation training programs. *Amends and reenacts §§54.1-500, 54.1-500.1, 54.1-501, 54.1-503, 54.1-512, 54.1-516, and 54.1-517 of the Code of Virginia.* Removes the responsibility of the Board for Asbestos, Lead, and Home Inspectors to promulgate regulations concerning dust sampling technicians, renovators, and accredited renovation training programs. This bill is identical to Senate Bill 560. *Patron: Delegate David Owen.*

House Bill 1182 - Department of Professional and Occupational Regulation; Board for Professional Soil Scientists, Wetland Professionals, and Geologists; professional wetland delineator certification requirements. *Amends and reenacts §54.1-2206.2 of the Code of Virginia.* Replaces the requirement that an applicant with a bachelor's degree in a relevant field have four years of relevant experience to be certified as a professional wetland delineator with three years of such experience. For applicants seeking certification through experience, the bill reduces to three years the required experience that the applicant must have in wetland science

research or as a teacher of wetlands curriculum in an accredited institution of higher education in order to be certified. *Patron: Delegate N. Baxter Ennis.*

House Bill 1237 – Department of Professional and Occupational Regulation; real estate brokers; places of business. *Amends and reenacts §§54.1-2100, 54.1-2106.1, and 54.1-2110 of the Code of Virginia.* Defines "place of business" for real estate brokers. The bill requires every principal broker to have readily available to the public in his primary place of business the firm license, principal broker license, and the license of every salesperson and broker active with the firm and requires each branch office, defined in the bill, to have readily available to the public the branch office license and a roster of every salesperson or broker assigned to that branch office. Finally, the bill requires any nonresident real estate broker residing in a state that mandates resident real estate brokers of the Commonwealth to maintain a place of business in such mandating state to maintain a place of business in the Commonwealth. This bill is identical to Senate Bill 437. *Patron: Delegate Rodney T. Willett.*

House Bill 1337 - Board of Accountancy; powers and duties. *Amends and reenacts §§2.2-204, 2.2-211, 19.2-389, 54.1-4400, 54.1-4402, 54.1-4403, 54.1-4407, 54.1-4412.1, 54.1-4413.4, 54.1-4421, and 54.1-4425 of the Code of Virginia and repeals §54.1-4420 of the Code of Virginia.* Repeals the requirement for an annual audit of the Board of Accountancy and amends several Code provisions relating to the Board. The bill changes the Secretariat of the Board from the Secretary of Commerce and Trade to the Secretary of Finance. The bill authorizes the Board to initiate complaints against (i) individuals or firms claiming to hold a Virginia license, as defined in the bill, and (ii) unlicensed individuals or firms using the certified public accountant title in Virginia, as defined in the bill. The bill also grants the Executive Director of the Board the power to request and receive reports from the Central Criminal Records Exchange in conjunction with the Executive Director's investigative and enforcement powers. Finally, the bill directs the Board to adopt emergency regulations to implement the provisions of the bill. This bill is identical to Senate Bill 463. *Patron: Delegate Chris S. Runion.*

House Bill 1417 - Contractors; workers' compensation requirements. *Amends and reenacts §58.1-3714 of the Code of Virginia.* Removes the requirements that the governing body of a locality shall forward a signed certification to the Virginia Workers' Compensation Commission and the Commission shall conduct periodic audits of selected contractors to whom such body has issued business licenses, thereby eliminating the need for commissioners of the revenue to send the Commission 61A forms. *Patron: Delegate Terry G. Kilgore.*

Senate Bill 184 – Department of Professional and Occupational Regulation; practice of geology; definitions. *Amends and reenacts §54.1-2200 of the Code of Virginia.* Expands the definition of the practice of geology to include the performance of any professional service or work wherein the principles and methods of geology are applied, including (i) investigating, evaluating, and consulting; (ii) geological mapping; (iii) describing the natural processes that act upon the earth's materials; (iv) predicting the probable occurrence of natural processes; and (v) inspecting, planning, and performing and supervising geological work in order to enhance and protect the health, safety, and welfare of the public and the environment. The bill also defines "geological mapping." This bill is identical to House Bill 287. *Patron: Senator Aaron R. Rouse.*

Senate Bill 330 – Department of Professional and Occupational Regulation; real estate board; continuing education requirements for real estate brokers and salespersons. *Amends and reenacts §54.1-2105.03 of the Code of Virginia.* Increases from eight to 11 the number of hours of continuing education an applicant for relicensure as a real estate broker or salesperson shall complete in the topics of ethics and standards of conduct, fair housing, legal updates and emerging trends, real estate agency, and real estate contracts. The bill also decreases from eight to five the number of hours of general elective courses such applicants shall complete. The bill directs the Real Estate Board to adopt regulations to implement the provisions of the bill against current licensees beginning in such licensee's next full renewal cycle following the effective date of such regulations. This bill is identical to House Bill 383. *Patron: Senator Emily M. Jordan.*

Senate Bill 358 – Department of Professional and Occupational Regulation; definition of a real estate broker. *Amends and reenacts §§6.2-1616, 11-2, 38.2-3521.1, 54.1-2100, and 54.1-2103 of the Code of Virginia and repeals §§54.1-2101 and 54.1-2107 of the Code of Virginia.* Adds to the definition of "real estate broker" any individual or business entity who sells or offers to sell, buys or offers to buy, negotiates, or otherwise deals in real estate contracts, including assignable contracts, on two or more occasions in any 12-month period for compensation or valuable consideration. The bill contains technical amendments and is identical to House Bill 917. *Patron: Senator Schuyler T. VanValkenburg.*

Senate Bill 436 – Department of Workforce Development and Advancement; Director. *Amends and reenacts §§2.2-2035, 2.2-2036, 2.2-2041, 2.2-2043 through 2.2-2046, 2.2-2049, 2.2-2050, 2.2-2052, 2.2-2472.2, 23.1-627.3, and 23.1-2911.2 of the Code of Virginia.* Changes the title of the Director of the Department of Workforce Development and Advancement to the Commissioner of Workforce Development and Advancement. The bill makes the Department, in consultation with the Governor, responsible for developing the formula for providing for 30 percent of WIOA Adult and Dislocated Worker funds. Current law provides that the Virginia Community College System develops such formula in consultation with the Governor. The bill also makes the Office of Education and Labor Market Alignment, in consultation with the Virginia Board of Workforce Development, responsible for establishing the high-demand fields for which noncredit workforce training programs may be offered by eligible educational institutions. *Patron: Senator David R. Suetterlein.*

Senate Bill 437 – Department of Professional and Occupational Regulation; real estate brokers; places of business. *Amends and reenacts §§54.1-2100, 54.1-2106.1, and 54.1-2110 of the Code of Virginia.* Defines "place of business" for real estate brokers. The bill requires every principal broker to have readily available to the public in his primary place of business the firm license, principal broker license, and the license of every salesperson and broker active with the firm and requires each branch office, defined in the bill, to have readily available to the public the branch office license and a roster of every salesperson or broker assigned to that branch office. Finally, the bill requires any nonresident real estate broker residing in a state that mandates resident real estate brokers of the Commonwealth to maintain a place of business in such mandating state to maintain a place of business in the Commonwealth. This bill is identical to House Bill 1237. *Patron: Senator David R. Suetterlein.*

Senate Bill 463 - Board of Accountancy; powers and duties. *Amends and reenacts §§2.2-204, 2.2-211, 19.2-389, 54.1-4400, 54.1-4402, 54.1-4403, 54.1-4407, 54.1-4412.1, 54.1-4413.4, 54.1-4421, and 54.1-4425 of the Code of Virginia and repeals §54.1-4420 of the Code of Virginia.* Repeals the requirement for an annual audit of the Board of Accountancy and amends several Code provisions relating to the Board. The bill changes the Secretariat of the Board from the Secretary of Commerce and Trade to the Secretary of Finance. The bill authorizes the Board to initiate complaints against (i) individuals or firms claiming to hold a Virginia license, as defined in the bill, and (ii) unlicensed individuals or firms using the certified public accountant title in Virginia, as defined in the bill. The bill also grants the Executive Director of the Board the power to request and receive reports from the Central Criminal Records Exchange in conjunction with the Executive Director's investigative and enforcement powers. Finally, the bill directs the Board to adopt emergency regulations to implement the provisions of the bill. This bill is identical to House Bill 1337. *Patron: Senator T. Travis Hackworth.*

Senate Bill 554 – Department of Professional and Occupational Regulation; reciprocal licensing for certain professionals from neighboring states. *Amends and reenacts §54.1-205 of the Code of Virginia.* Requires the Real Estate Appraiser Board, the Real Estate Board, the Board for Waste Management Facility Operators, and the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, upon application, to recognize current and valid licenses or certificates issued by a neighboring state, defined in the bill, as fulfillment of qualifications for licensure in the Commonwealth if there are no pending investigations or complaints, no disqualifying criminal records, and no discipline imposed by another state. *Patron: Senator Emily M. Jordan.*

Senate Bill 560 – Virginia Board for Asbestos, Lead, and Home Inspectors; dust sampling technicians, renovators, and accredited renovation training programs. *Amends and reenacts §§54.1-500, 54.1-500.1, 54.1-501, 54.1-503, 54.1-512, 54.1-516, and 54.1-517 of the Code of Virginia.* Removes the responsibility of the Board for Asbestos, Lead, and Home Inspectors to promulgate regulations concerning dust sampling technicians, renovators, and accredited renovation training programs. This bill is identical to House Bill 1005. *Patron: Senator T. Travis Hackworth.*

Senate Bill 513 - Funeral services; transportation protection agreements. *Amends and reenacts §54.1-2800 of the Code of Virginia.* Defines "transportation protection agreement" as an agreement that provides for the coordination and arranging of all professional services related to transportation of human remains or cremated remains beyond the distance stated in the preneed funeral contract. The bill clarifies that transportation protection agreements are not considered preneed funeral contracts. *Patron: Senator Angelia Williams Graves.*

PROPERTY, CONVEYANCES AND REAL ESTATE SETTLEMENTS

House Bill 184 – Foreclosure procedures; subordinate mortgage; affidavit required. *Amends and reenacts §55.1-321 of the Code of Virginia.* Provides that, when a foreclosure sale is initiated due to a default in payment of a subordinate security instrument, such subordinate mortgage lienholder shall submit to the trustee an affidavit affirming whether monthly statements were sent to a property owner for each period of assessed interest, fees, or other charges and to include in such affidavit an itemized list of the current amount owed. The bill also requires that

any purchaser at a foreclosure sale pay off any priority security instrument no later than 90 days from the date that the trustee's deed conveying the property is recorded in the land records, and, if such purchaser fails to pay, the person originally required to pay such instrument has the right to petition the circuit court of the city or county where the property is located to recover from such purchaser any payments made on such instrument after the date of the foreclosure sale, plus any attorney fees and costs. *Patron: Delegate Marcus B. Simon*.

House Bill 312 – Rental conveyances; leases; assignments. *Amends the Code of Virginia by adding in Chapter 16 of Title 55.1 sections numbered 55.1-1606 through 55.1-1609 and repeals Article 2 (§§55.1-1406 through 55.1-1409) of Chapter 14 of Title 55.1 of the Code of Virginia.* Relocates certain provisions of Title 55.1 (Property and Conveyances) of the Code of Virginia related to assignments of rent from a chapter related to nonresidential tenancies to a chapter related to leases. The bill corrects a technical error from the 2019 recodification of Title 55 of the Code of Virginia. This bill is identical to Senate Bill 589. *Patron: Delegate Debra D. Gardner.*

House Bill 467 – Establishment by localities of certain real estate contract disclosures prohibited. *Amends the Code of Virginia by adding a section numbered 15.2-983.1*. Prohibits localities from establishing or enforcing a mandatory disclosure requirement for a real estate licensee, any party to a contract for the sale or listing of residential real property, or any authorized agent of such party. The bill provides that prohibited mandatory disclosures include mandatory notifications in contracts, contract amendments or addenda, advertising, other promotional materials, and subsequent deeds after the initial deed is recorded, related to the sale of residential real estate. This bill is identical to Senate Bill 354. *Patron: Delegate Marcus B. Simon.*

House Bill 574 – Recordation tax; value of interest conveyed. *Amends and reenacts §58.1-801 of the Code of Virginia.* Provides that for purposes of recordation taxes, the value of a property interest conveyed shall be the most recent property tax assessment for such property at the time the property is conveyed. *Patron: Delegate Joshua E. Thomas.*

House Bill 836 – Uniform Statutory Rule Against Perpetuities; trusts; certain nonvested property interests or powers of appointment over property or property interests. *Amends and reenacts §§55.1-124, 55.1-125, 55.1-127, and 55.1-128 of the Code of Virginia.* Extends from 90 years to 1,000 years the period for which a nonvested property interest held in trust may vest or terminate, or for which a power of appointment over property or property interests may be exercised. The bill clarifies that such extension applies only to such interests or powers that were created on or after July 1, 2024, and that such extension does not apply to real property held in trust or a power of appointment over real property granted under a trust. The bill also provides that the current law that allows the terms of a trust instrument to provide an exception to the Uniform Statutory Rule Against Perpetuities shall apply only to a nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, if such interest or power was created between July 1, 2000, and June 30, 2024, but shall not apply to such interests or powers created on or after July 1, 2024. This bill is identical to Senate Bill 470. *Patron: Delegate Rae Cousins.*

Senate Bill 9 – Department of real estate assessment; Orange County. *Amends and reenacts §58.1-3274 of the Code of Virginia*. Authorizes Orange County to establish a department of real estate assessment and to enter into an agreement with a contiguous county or city to establish a joint department of real estate assessment. Under current law, real estate assessments are made by the commissioner of the revenue, except in Accomack, Goochland, James City, and Powhatan Counties, and among those, only James City and Powhatan Counties may enter into an agreement to establish a joint department of real estate assessment. *Patron: Senator Bryce E. Reeves.*

Senate Bill 354 – Establishment by localities of certain real estate contract disclosures prohibited. *Amends the Code of Virginia by adding a section numbered 15.2-983.1*. Prohibits localities from establishing or enforcing a mandatory disclosure requirement for a real estate licensee, any party to a contract for the sale or listing of residential real property, or any authorized agent of such party. The bill provides that prohibited mandatory disclosures include mandatory notifications in contracts, contract amendments or addenda, advertising, other promotional materials, and subsequent deeds after the initial deed is recorded, related to the sale of residential real estate. This bill is identical to House Bill 467. *Patron: Senator Mamie E. Locke.*

Senate Bill 470 – Uniform Statutory Rule Against Perpetuities; trusts; certain nonvested property interests or powers of appointment over property or property interests. *Amends and reenacts §§55.1-124, 55.1-125, 55.1-127, and 55.1-128 of the Code of Virginia.* Extends from 90 years to 1,000 years the period for which a nonvested property interest held in trust may vest or terminate, or for which a power of appointment over property or property interests may be exercised. The bill clarifies that such extension applies only to such interests or powers that were created on or after July 1, 2024, and that such extension does not apply to real property held in trust or a power of appointment over real property granted under a trust. The bill also provides that the current law that allows the terms of a trust instrument to provide an exception to the Uniform Statutory Rule Against Perpetuities shall apply only to a nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, if such interest or power was created between July 1, 2000, and June 30, 2024, but shall not apply to such interests or powers created on or after July 1, 2024. This bill is identical to House Bill 836. *Patron: Senator Mark D. Obenshain.*

Senate Bill 589 – Rental conveyances; leases; assignments. *Amends the Code of Virginia by adding in Chapter 16 of Title 55.1 sections numbered 55.1-1606 through 55.1-1609 and repeals Article 2 (§§55.1-1406 through 55.1-1409) of Chapter 14 of Title 55.1 of the Code of Virginia.* Relocates certain provisions of Title 55.1 (Property and Conveyances) of the Code of Virginia related to assignments of rent from a chapter related to nonresidential tenancies to a chapter related to leases. The bill corrects a technical error from the 2019 recodification of Title 55 of the Code of Virginia. This bill is identical to House Bill 312. *Patron: Senator William M. Stanley, Jr.*

Senate Bill 598 – Property and conveyances; recordation of documents; name changes. *Amends and reenacts §55.1-601 of the Code of Virginia.* Provides that any name change made in relation to a person's marriage or divorce is entitled to be recorded in the clerk's office in which deeds are recorded of the county or city in which any land or interest in any land that is owned

by such person lies. Current law only entitles the name change of a woman made in relation to marriage or divorce to be so recorded. *Patron: Senator Adam P. Ebbin.*

STUDIES

House Bill 106 - **Shared solar programs; Dominion Energy Virginia; minimum bill; capacity.** *Amends and reenacts §56-594.3 of the Code of Virginia*. Amends existing shared solar program provisions applicable to Dominion Energy Virginia. The bill provides that a customer's net bill for participation in the shared solar program means the resulting amount a customer must pay the utility after the bill credit, defined in relevant law, is deducted from the customer's monthly gross utility bill. The bill divides the shared solar program into two parts, the first of which has an aggregate capacity of 200 megawatts. The bill provides that upon a determination that at least 90 percent of the megawatts of the aggregate capacity of part one of such program has been subscribed, as defined in the bill, and that project construction is substantially complete, the State Corporation Commission shall approve up to an additional 150 megawatts of capacity as part two of such program, 75 megawatts of which shall serve no more than 51 percent low-income customers, as defined in relevant law. The bill directs the Commission to initiate a proceeding to recalculate the minimum bill within 30 days of a final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall update its shared solar program consistent with the requirements of the bill by March 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by December 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024. This bill is identical to Senate Bill 253. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 108 - **Shared solar programs; American Electric Power; minimum bill; capacity.** *Amends the Code of Virginia by adding a section numbered 56-594.4*. Requires the State Corporation Commission to establish by regulation a shared solar program, as defined in the bill, through which customers of American Electric Power may purchase electric power through a subscription in a shared solar facility, as defined in the bill. The bill requires the Commission to establish a minimum bill, which shall include the costs of all utility infrastructure and services used to provide electric service and administrative costs of the shared solar program, taking into account certain considerations. The bill directs the Commission to initiate a proceeding to recalculate such minimum bill within 30 days of its final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall establish the shared solar program consistent with the requirements of the bill by January 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by July 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024. This bill is identical to Senate Bill 255. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 621 - Earned income tax credit. *Amends and reenacts §58.1-339.8 of the Code of Virginia.* Allows eligible low-income taxpayers to claim a refundable income tax credit equal to 20 percent of the federal earned income tax credit claimed that year by the taxpayer for the same taxable year. The bill also states that individuals who would have been entitled to the federal equivalent of this credit but for the fact that the individual, the individual's spouse, or one or more of the individual's children does not have a valid social security number are eligible to claim this credit. *Patron: Delegate Marcia S. "Cia" Price.*

House Bill 736 - Department of Law; compensation for veterans' benefits matters; work group; report. *Amends and reenacts §59.1-200 of the Code of Virginia and amends the Code of Virginia by adding in Title 59.1 a chapter numbered 57, consisting of sections numbered 59.1-603, 59.1-604, and 59.1-605.* Directs the Department of Law's Division of Consumer Counsel to convene a work group to examine and make recommendations regarding the practice of persons receiving compensation for preparing, presenting, prosecuting, advising, consulting, or assisting any individual regarding any veterans' benefits matter, as defined in the bill. *Patron: Delegate Briana D. Sewell.*

House Bill 827 - State Council of Higher Education for Virginia; survey on campus food insecurity; report. *Amends the Code of Virginia by adding a section numbered 23.1-409.2.* Requires the State Council of Higher Education for Virginia to (i) survey each public institution of higher education to determine how each such institution is addressing on-campus food insecurity, including specific methods, programs, sources of funding, expenditures, communications strategies, and staffing; (ii) compile and make available to each such institution a guidance document containing best practices for leveraging all available resources and opportunities, including public benefits programs and donation programs, to ensure that students do not face food insecurity on campus; and (iii) report its findings and any recommendations to the Chairs of the House Committee on Appropriations, the House Committee on Education, the Senate Committee on Education and Health, and the Senate Committee on Finance and Appropriations no later than November 1, 2024. *Patron: Delegate Rae Cousins.*

House Bill 893 - Standards for attorneys appointed to represent parents or guardians; child dependency cases; compensation; multidisciplinary law offices or programs; report. *Amends and reenacts §§16.1-266.1, 16.1-267, and 63.2-1505 of the Code of Virginia and amends the Code of Virginia by adding in Chapter 11 of Title 16.1 an article numbered 6.1, consisting of sections numbered 16.1-268.1 through 16.1-268.4.* Requires the Judicial Council of Virginia, in conjunction with the Virginia State Bar, beginning July 1, 2026, to adopt standards for the qualification and performance of attorneys appointed to represent a parent or guardian of a child when such child is the subject of a child dependency case, as defined in the bill. The bill also requires the Judicial Council of Virginia, beginning July 1, 2026, to maintain a list of attorneys admitted to practice law in Virginia who are qualified to be appointed to represent indigent parents involved in a child dependency case. Prior to July 1, 2026, counsel must be appointed from the list of attorneys qualified to serve as guardians ad litem. The bill provides that beginning January 1, 2025, court-appointed counsel for a parent, guardian, or other adult in a child dependency case will be compensated in an amount no greater than $330, or in a case for the termination of residual parental rights, $680. The bill authorizes the establishment of up to two multidisciplinary law offices or programs in localities, jurisdictions, or judicial districts that affirm they have met specified criteria for the purpose of representing parents in a child

dependency court proceeding or in a child protective services assessment or investigation prior to such proceeding. During any calendar year that such an office or program is in effect for at least six months, the office or program must submit a report on program outcomes, expenses, recommendations, and other pertinent information to the Office of the Children's Ombudsman and the Chairs of the House Committees for Courts of Justice and on Health and Human Services and Appropriations and the Senate Committees for Courts of Justice and on Education and Health and Finance and Appropriations by November 1. *Patron: Delegate Adele Y. McClure.*

House Bill 1083 - Virginia Longitudinal Data System and Virginia Workforce Data Trust; work group; report. *Amends and reenacts §§2.2-2011, 2.2-2036, 2.2-2041, 2.2-2238, 23.1-203, and 46.2-209 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 2.2-2238.2.* Directs the Secretary of Education to convene a work group to review the current capabilities and future needs of the Virginia Longitudinal Data System and the Virginia Workforce Data Trust and, based on the results of such review, develop a work plan for improving the Virginia Longitudinal Data System. *Patron: Delegate Carrie E. Coyner.*

House Bill 1186 - Department of Conservation and Recreation; two-year pilot program; all-terrain power wheelchairs in state parks. *An Act to direct the Department of Conservation and Recreation to create a two-year pilot program to provide all-terrain power wheelchairs to enhance state park accessibility for individuals with limited mobility.* Provides that the Department of Conservation and Recreation shall establish a two-year pilot program beginning October 1, 2024, and ending October 30, 2026, to enhance accessibility for individuals with limited mobility in Virginia's state parks by providing all-terrain power wheelchairs that may be used by such persons during their visits. The bill permits the Department to choose the locations for the pilot program and enter into a contract for the purchase of all-terrain power wheelchairs to be used in the pilot program. The bill allows the Department to adopt guidelines to administer the pilot program and requires the Department to make a report available to the public regarding the outcome of the pilot program on its website by November 1, 2026. *Patron: Delegate Kathy K.L. Tran.*

House Joint Resolution 10 - Study; joint subcommittee; creation of Virginia Gaming Commission; report. *Continuing the Joint Subcommittee to Study the Feasibility of Establishing the Virginia Gaming Commission to regulate and oversee all forms of gaming in the Commonwealth. Report.* Continues the Joint Subcommittee to Study the Feasibility of Establishing the Virginia Gaming Commission for two additional years, through November 30, 2025. *Patron: Delegate Paul E. Krizek.*

House Joint Resolution 30 - Study; State Corporation Commission; electric utilities; performance-based regulatory tools; competitive service providers; report. *Requesting the State Corporation Commission, in collaboration with the Department of Energy, to study performance-based regulatory tools for investor-owned electric utilities in the Commonwealth. Report.* Requests the State Corporation Commission, in consultation with the Department of Energy, to study performance-based regulatory tools for investor-owned electric utilities and the impact of competitive service providers in the Commonwealth. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

Senate Bill 253 - **Shared solar programs; Dominion Energy Virginia; minimum bill; capacity.** *Amends and reenacts §56-594.3 of the Code of Virginia.* Amends existing shared solar program provisions applicable to Dominion Energy Virginia. The bill provides that a customer's net bill for participation in the shared solar program means the resulting amount a customer must pay the utility after the bill credit, defined in relevant law, is deducted from the customer's monthly gross utility bill. The bill divides the shared solar program into two parts, the first of which has an aggregate capacity of 200 megawatts. The bill provides that upon a determination that at least 90 percent of the megawatts of the aggregate capacity of part one of such program has been subscribed, as defined in the bill, and that project construction is substantially complete, the State Corporation Commission shall approve up to an additional 150 megawatts of capacity as part two of such program, 75 megawatts of which shall serve no more than 51 percent low-income customers, as defined in relevant law. The bill directs the Commission to initiate a proceeding to recalculate the minimum bill within 30 days of a final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall update its shared solar program consistent with the requirements of the bill by March 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by December 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024. This bill is identical to House Bill 106. *Patron: Senator Scott A. Surovell.*

Senate Bill 255 - **Shared solar programs; American Electric Power; minimum bill; capacity.** *Amends the Code of Virginia by adding a section numbered 56-594.4.* Requires the State Corporation Commission to establish by regulation a shared solar program, as defined in the bill, through which customers of American Electric Power may purchase electric power through a subscription in a shared solar facility, as defined in the bill. The bill requires the Commission to establish a minimum bill, which shall include the costs of all utility infrastructure and services used to provide electric service and administrative costs of the shared solar program, taking into account certain considerations. The bill directs the Commission to initiate a proceeding to recalculate such minimum bill within 30 days of its final order in a proceeding establishing the value of a solar renewable energy certificate as required by relevant law. The bill specifies that the Commission shall establish the shared solar program consistent with the requirements of the bill by January 1, 2025, and shall require each utility to file any associated tariffs, agreements, or forms necessary for implementing the program by July 1, 2025. Additionally, the bill requires the Department of Energy to convene a stakeholder work group to determine the amounts and forms of certain project incentives and to submit a written report to the Chairs of the House Committee on Labor and Commerce and the Senate Committee on Commerce and Labor no later than November 30, 2024. This bill is identical to House Bill 108. *Patron: Senator Scott A. Surovell.*

Senate Bill 450 - **Regulation of towing fees; State Corporation Commission; report.** *An Act to direct the State Corporation Commission to examine the regulation of fees charged for the removal of vehicles and identify policy options to assume all or part of such regulation; report.* Directs the State Corporation Commission to examine the existing regulation of fees charged for the removal of vehicles and identify policy options for the Commission to assume all or part of

such regulation. The bill requires the Commission to report its findings to the General Assembly by November 30, 2024. *Patron: Senator David W. Marsden.*

Senate Bill 455 - Wildlife Corridor Grant Fund established; report. *Amends the Code of Virginia by adding in Article 8 of Chapter 5 of Title 29.1 a section numbered 29.1-580.* Establishes the Wildlife Corridor Grant Fund to provide grants for projects that conserve or enhance wildlife corridors prioritized by the Wildlife Corridor Action Plan and associated wildlife crossing infrastructure projects. The bill directs the Director of Wildlife Resources to administer the Fund and to consult with the Department of Conservation and Recreation, the Department of Forestry, the Department of Transportation, and the Department of Wildlife Resources on disbursing moneys from the Fund. The bill also requires the Director to submit a report to the General Assembly by November 1 of each odd-numbered year concerning funding of the Fund, the awarding of grants from the Fund, and the progress of projects funded by the Fund, including data on the use of project infrastructure by wildlife. *Patron: Senator David W. Marsden*.

Senate Bill 487 - Joint Commission on Technology and Science; analysis of the use of artificial intelligence by public bodies; report. *Amends and reenacts §2.2-2007 of the Code of Virginia and amends the Code of Virginia by adding in Chapter 55.3 of Title 2.2 a section numbered 2.2-5514.2.* Directs the Joint Commission on Technology and Science (JCOTS), in consultation with relevant stakeholders, to conduct an analysis of the use of artificial intelligence by public bodies in the Commonwealth and the creation of a Commission on Artificial Intelligence. JCOTS shall submit a report of its findings and recommendations to the Chairs of the House Committees on Appropriations and Communications, Technology and Innovation and the Senate Committees on Finance and Appropriations and General Laws and Technology no later than December 1, 2024. This bill incorporates Senate Bill 621. *Patron: Senator Lashrecse D. Aird.*

Senate Joint Resolution 17 - Study; JLARC; salaries and expenses of legislators; report. *Directing the Joint Legislative Audit and Review Commission to study the salaries, expense allowances, retirement benefits, and other emoluments received by members of the General Assembly. Report.* Directs the Joint Legislative Audit and Review Commission to study the salaries, expense allowances, retirement benefits, and other emoluments received by members of the General Assembly and to make recommendations for any adjustments to such salaries or expenses. As part of this study, JLARC will review the current salaries, expense allowances, retirement benefits, and other emoluments of the members of the General Assembly; examine the Commonwealth's history of legislative compensation; review the compensation, expenses, and benefits for legislative service in other states; assess various state methodologies in determining reasonable legislative compensation, including the tying of salaries to certain indexes or economic indicators; and make recommendations for any adjustments to such salaries, expenses, benefits, or other emoluments. *Patron: Senator Bryce E. Reeves.*

Senate Joint Resolution 25 - Study; Department of Environmental Quality; groundwater supply in the Commonwealth; report. *Requesting the Department of Environmental Quality to study the groundwater supply in the Commonwealth east of Interstate 95. Report.* Requests that the Department of Environmental Quality complete a one-year study of the groundwater supply in the Commonwealth with technical assistance provided by the State Water Control Board. The

Department shall complete its meetings by November 30, 2024, and submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations no later than the first day of the 2025 Regular Session of the General Assembly. *Patron: Senator Richard H. Stuart.*

TAXATION

House Bill 258 - Nonjudicial sale of tax delinquent real properties; unimproved properties within urban redevelopment or revitalization zone. *Amends and reenacts §58.1-3975 of the Code of Virginia.* Allows the nonjudicial sale of tax delinquent property when such property is (i) unimproved, (ii) one-half acre or less in size, and (iii) located within a designated urban redevelopment or revitalization zone. *Patron: Delegate Shelly A. Simonds.*

House Bill 558 - Constitutional amendment (voter referendum); real property tax exemption; surviving spouses of soldiers who died in the line of duty. *An Act to provide for the submission to the voters of a proposed amendment to Section 6-A of Article X of the Constitution of Virginia, relating to real property tax exemption; surviving spouses of soldiers who died in the line of duty.* Provides for a referendum at the November 5, 2024, election to approve or reject an amendment to the Constitution of Virginia that would expand the real property tax exemption that is currently available to the surviving spouses of soldiers killed in action to be available to the surviving spouses of soldiers who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense. This bill is identical to Senate Bill 4. *Patron: Delegate Phil M. Hernandez.*

House Bill 639 - Real property tax; notice of assessment changes. *Amends and reenacts §58.1-3330 of the Code of Virginia.* Provides that in certain localities, in the event that the total assessed value of real property would result in an increase of one percent or more in the total real property tax levied, the notice of assessment changes shall state the tax rate that would levy the same amount of real estate tax as the previous year when multiplied by the new total assessed value of real estate. This bill is identical to Senate Bill 677. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 960 - Historic rehabilitation tax credit; maximum amount of tax credit. *Amends and reenacts §58.1-339.2 of the Code of Virginia.* Increases from $5 million to $7.5 million, beginning in taxable year 2025, the maximum amount of the historic rehabilitation tax credit, including amounts carried over from prior taxable years, that may be claimed by a taxpayer in any taxable year. This bill is identical to Senate Bill 556. *Patron: Delegate Alfonso H. Lopez.*

House Bill 1015 - Agricultural best management practices tax credit; agricultural equipment purchase tax credit; sunset date. *Amends and reenacts §§58.1-337, 58.1-339.3, 58.1-436, and 58.1-439.5 of the Code of Virginia.* Extends from January 1, 2025, to January 1, 2030, the sunset date of the individual and corporate agricultural best management practices income tax credit and extends from January 1, 2026, to January 1, 2030, the sunset date of the individual and corporate income tax credit for the purchase of conservation tillage and precision agricultural application equipment. *Patron: Delegate Tony O. Wilt.*

House Bill 1203 - **Tax credit for participating landlords.** *Amends and reenacts §58.1-439.12:04 of the Code of Virginia.* Increases from $250,000 to $500,000 the maximum amount of tax credits that may be issued to participating landlords, as defined in relevant law, each fiscal year beginning with fiscal year 2025 and provides that, in the event that the amount of the qualified requests for tax credits for such participating landlords in the fiscal year exceeds $500,000, the Department of Housing and Community Development will prorate the tax credits among the qualified applicants. The bill also creates a pilot program that earmarks $100,000 for tax credits provided to a participating landlord renting a qualified housing unit in an eligible non-metropolitan census tract, as those terms are defined in the bill. *Patron: Delegate Rodney T. Willett.*

House Bill 1211 - **Tax assessment districts; petition by parcel owners.** *Amends and reenacts §15.2-2405 of the Code of Virginia.* Changes the threshold for petitioning a city or town for establishment of a tax assessment district from not less than three-fourths of the landowners affected to the owners of not less than three-fourths of the parcels affected. *Patron: Delegate C.E. Cliff Hayes, Jr.*

House Bill 1518 - **Research and development expenses tax credits.** *Amends and reenacts §§58.1-439.12:08 and 58.1-439.12:11 of the Code of Virginia.* Creates a step-rate reimbursement structure for the major research and development expenses tax credit in an amount equal to (i) 10 percent, up to the first $1 million, of the difference between (a) Virginia qualified research and development expenses paid or incurred by the taxpayer during the taxable year and (b) 50 percent of the average Virginia qualified research and development expenses paid or incurred by the taxpayer for the three taxable years immediately preceding the taxable year for which the credit is being determined and (ii) five percent of such difference in excess of $1 million. Beginning in taxable year 2023, the bill also (a) imposes an annual per taxpayer major research and development expenses tax credit cap of $300,000, except that such cap increases to $400,000 if the Virginia qualified research was conducted in conjunction with a public or private institution of higher education in the Commonwealth, (b) reduces from $24 million to $16 million the aggregate cap on the major research and development expenses tax credit granted for each fiscal year, and (c) increases from $7.77 million to $15.77 million the aggregate cap on the research and development expenses tax credit granted for each fiscal year beginning in taxable year 2023. *Patron: Delegate Jackie H. Glass.*

House Bill 1535 - **Food and beverage tax; meals tax; discount.** *Amends the Code of Virginia by adding in Article 7.1 of Chapter 38 of Title 58.1 a section numbered 58.1-3835.* Allows a county, city, or town to provide a commission to a business for collecting and remitting to the locality a meals tax or a food and beverage tax regardless of whether the business is delinquent on the collection and remittance of such tax. The rate of such commission shall be set by ordinance and shall not exceed 5 percent. *Patron: Delegate Michael J. Jones.*

Senate Bill 4 - **Constitutional amendment (voter referendum); real property tax exemption; surviving spouses of soldiers who died in the line of duty.** *An Act to provide for the submission to the voters of a proposed amendment to Section 6-A of Article X of the Constitution of Virginia, relating to real property tax exemption; surviving spouses of soldiers who died in the line of duty.* Provides for a referendum at the November 5, 2024, election to approve or reject an amendment to the Constitution of Virginia that would expand the real property tax exemption

that is currently available to the surviving spouses of soldiers killed in action to be available to the surviving spouses of soldiers who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense. This bill is identical to House Bill 558. *Patron: Senator Jeremy S. McPike.*

Senate Bill 240 – Property tax exemption; surviving spouses of armed forces members who died in the line of duty. *Amends and reenacts §§58.1-3219.9 and 58.1-3219.10 of the Code of Virginia and repeals §58.1-3228.2 of the Code of Virginia.* Expands the real property tax exemption that is currently available to the surviving spouses of soldiers killed in action to the surviving spouses of soldiers who died in the line of duty with a Line of Duty determination from the U.S. Department of Defense. This bill is enabling legislation for a constitutional amendment to be presented during the November 2024 general election. *Patron: Senator Jeremy S. McPike.*

Senate Bill 556 - Historic rehabilitation tax credit; maximum amount of tax credit. *Amends and reenacts §58.1-339.2 of the Code of Virginia.* Increases from $5 million to $7.5 million, beginning in taxable year 2025, the maximum amount of the historic rehabilitation tax credit, including amounts carried over from prior taxable years, that may be claimed by a taxpayer in any taxable year. This bill is identical to House Bill 960. *Patron: Senator Angelia Williams Graves.*

Senate Bill 677 - Real property tax; notice of assessment changes. *Amends and reenacts §58.1-3330 of the Code of Virginia.* Provides that in certain localities, in the event that the total assessed value of real property would result in an increase of one percent or more in the total real property tax levied, the notice of assessment changes shall state the tax rate that would levy the same amount of real estate tax as the previous year when multiplied by the new total assessed value of real estate. This bill is identical to House Bill 639. *Patron: Senator Tara A. Durant.*

TRUSTS AND ESTATES

House Bill 115 - Guardians and conservators; order of appointment and certificate of qualification; annual report. *Amends and reenacts §§64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia.* Requires a petitioner to file with a petition for the appointment of a guardian, a conservator, or both a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. The bill requires a guardian to file an initial annual report reflecting the first four months of guardianship since qualification within six months of the date of qualification and to file the second and each subsequent annual report for each succeeding 12-month period within four months from the last day of the last 12-month period covered by the previous annual report. The bill also specifies which documents the clerk shall forward to certain entities upon the qualification of a guardian or conservator. This bill is a recommendation of the Judicial Council of Virginia and is identical to Senate Bill 290. *Patron: Delegate Richard C. "Rip" Sullivan, Jr.*

House Bill 332 - Termination of trust; notice requirements. *Amends and reenacts §64.2-732 of the Code of Virginia.* Provides that a trustee seeking to terminate a trust consisting of trust property that has a total value of less than $100,000 may do so without a court order, provided

that the trustee sends notice, as specified in the bill, to any qualified beneficiaries or cotrustees. This bill is identical to Senate Bill 63. *Patron: Delegate Michael J. Jones.*

House Bill 336 - Certain powers of attorney; transfer on death deeds. *Amends and reenacts §64.2-1625 of the Code of Virginia.* Provides that an agent under a power of attorney shall not have the authority to create, change, or revoke a transfer on death deed unless specifically granted the power to create or change a beneficiary designation as otherwise provided by law. This bill is identical to Senate Bill 471. *Patron: Delegate Michael J. Jones.*

House Bill 648 – Contracts assigning rights to inheritance funds; legal rate of interest. *Amends and reenacts §6.2-303 of the Code of Virginia.* Provides that any contract entered into on or after July 1, 2024, pursuant to which a person receives a cash advance for assigning to a company or other entity a portion of such person's rights to receive inheritance funds from a will in a pending probate matter is considered a loan and any additional funds such person is obligated to pay under the terms of the contract shall be considered interest. The bill provides that such contract shall be subject to the legal rate of interest. *Patron: Delegate Carrie E. Coyner.*

House Bill 652 – Funeral arrangements; disputes between next of kin; proof of next of kin status. *Amends and reenacts §§54.1-2800 and 54.1-2825 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 54.1-2807.03.* Establishes a dispute resolution process for disagreements about what persons are responsible for a decedent's funeral and the disposition for such decedent's remains. The bill permits funeral service licensees to require a person claiming next of kin status to execute a document affirming that such person is the next of kin. *Patron: Delegate Carrie E. Coyner.*

House Bill 678 - Trustees; settlement of accounts; notice and statements to beneficiaries; requirements. *Amends and reenacts §64.2-800 of the Code of Virginia.* Provides that the beneficiary of a trust shall be deemed to have released a trustee and ratified all actions of a trustee for the administration of a trust if, when the trust terminates or the trustee ceases to serve, the trustee sends the beneficiary notice and the beneficiary does not object within 60 days after the trustee sent such notice. The bill also requires the trustee to provide to the beneficiary certain financial information related to the trust. This bill is identical to Senate Bill 566. *Patron: Delegate James A. "Jay" Leftwich.*

House Bill 779 – Permissible venue; personal injury and wrongful death actions; appointment of administrator on behalf of estate of decedent. *Amends and reenacts §§8.01-262 and 64.2-454 of the Code of Virginia.* Provides that in a personal injury or wrongful death action in which an administrator is appointed on behalf of the estate of a decedent, permissible venue shall lie only in a county or city in which venue would have been properly laid if the person for whom such appointment is made had survived. This bill is a recommendation of the Boyd-Graves Conference and is identical to Senate Bill 138. *Patron: Delegate Katrina Callsen.*

House Bill 786 - Guardianship and conservatorship; restoration of capacity or modification or termination of order; informal written communication. *Amends and reenacts §§64.2-2009 and 64.2-2012 of the Code of Virginia.* Allows a person subject to a guardianship or conservatorship who is not represented by counsel to initiate the process to be restored to

capacity or have such guardianship or conservatorship modified or terminated by sending informal written communication to the court, in lieu of the petition requirement specified under current law. *Patron: Delegate Patrick A. Hope.*

Senate Bill 63 - Termination of trust; notice requirements. *Amends and reenacts §64.2-732 of the Code of Virginia.* Provides that a trustee seeking to terminate a trust consisting of trust property that has a total value of less than $100,000 may do so without a court order, provided that the trustee sends notice, as specified in the bill, to any qualified beneficiaries or cotrustees. This bill is identical to House Bill 332. *Patron: Senator Ryan T. McDougle.*

Senate Bill 102 - Wills and trusts; tangible personal property; nonexoneration. *Amends and reenacts §§64.2-400 and 64.2-531 of the Code of Virginia.* Provides that if a trust instrument that was revocable, as defined in relevant law, immediately before the settlor's death refers to a written statement or list of items of tangible personal property and their intended recipients with reasonable certainty and is signed by the settlor, such written statement or list shall be given the effect of a specific bequest although it does not satisfy the requirements for a trust instrument. The bill also provides that real or personal property that is the subject of a specific devise or bequest in a trust instrument that was revocable immediately before the settlor's death shall be passed without the right of exoneration. Under current law, the provisions that govern separate writing identifying recipients of tangible personal property apply only to wills, and the provisions that govern the nonexoneration of a specific devise or bequest of real or personal property apply only to wills and transfer on death deeds. *Patron: Senator Glen H. Sturtevant, Jr.*

Senate Bill 138 – Permissible venue; personal injury and wrongful death actions; appointment of administrator on behalf of estate of decedent. *Amends and reenacts §§8.01-262 and 64.2-454 of the Code of Virginia.* Provides that in a personal injury or wrongful death action in which an administrator is appointed on behalf of the estate of a decedent, permissible venue shall lie only in a county or city in which venue would have been properly laid if the person for whom such appointment is made had survived. This bill is a recommendation of the Boyd-Graves Conference and is identical to House Bill 779. *Patron: Senator Jennifer D. Carroll Foy.*

Senate Bill 290 - Guardians and conservators; order of appointment and certificate of qualification; annual report. *Amends and reenacts §§64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia.* Requires a petitioner to file with a petition for the appointment of a guardian, a conservator, or both a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. The bill requires a guardian to file an initial annual report reflecting the first four months of guardianship since qualification within six months of the date of qualification and to file the second and each subsequent annual report for each succeeding 12-month period within four months from the last day of the last 12-month period covered by the previous annual report. The bill also specifies which documents the clerk shall forward to certain entities upon the qualification of a guardian or conservator. This bill is a recommendation of the Judicial Council of Virginia and is identical to House Bill 115. *Patron: Senator Danica A. Roem.*

Senate Bill 291 - **Department for Aging and Rehabilitative Services; training; powers and duties of guardian; annual reports by guardians; information required.** *Amends and reenacts §§51.5-150, 64.2-2019, and 64.2-2020 of the Code of Virginia and amends the Code of Virginia by adding a section numbered 51.5-150.1.* Directs the Department for Aging and Rehabilitative Services to develop and provide training for court-appointed guardians by July 1, 2025. The bill requires a court-appointed guardian and any skilled professional retained by such guardian to perform guardianship duties to complete the initial training developed by the Department within four months after the date of qualification of such guardian. Under the bill, guardians appointed prior to July 1, 2025, must complete such training by January 1, 2027. The bill further requires a guardian to include in his annual report to the local department of social services a statement as to whether such training has been completed. *Patron: Senator Danica A. Roem.*

Senate Bill 292 - **Guardianship and conservatorship; report of guardian ad litem.** *Amends and reenacts §64.2-2003 of the Code of Virginia.* Adds to the considerations regarding the suitability and propriety of a prospective guardian or conservator that a guardian ad litem is required to address in his report to the court following a petition for guardianship or conservatorship. The bill provides that the guardian ad litem shall consider the prospective guardian's or conservator's work as a professional guardian, including whether the person does so on a full-time basis, the prospective guardian's or conservator's expected capacity as a guardian, and whether the prospective guardian or conservator is named as a perpetrator in any substantiated adult protective services complaint involving the respondent following allegations of abuse or neglect. *Patron: Senator Danica A. Roem.*

Senate Bill 471 - **Certain powers of attorney; transfer on death deeds.** *Amends and reenacts §64.2-1625 of the Code of Virginia.* Provides that an agent under a power of attorney shall not have the authority to create, change, or revoke a transfer on death deed unless specifically granted the power to create or change a beneficiary designation as otherwise provided by law. This bill is identical to House Bill 336. *Patron: Senator Mark D. Obenshain.*

Senate Bill 566 - **Trustees; settlement of accounts; notice and statements to beneficiaries; requirements.** *Amends and reenacts §64.2-800 of the Code of Virginia.* Provides that the beneficiary of a trust shall be deemed to have released a trustee and ratified all actions of a trustee for the administration of a trust if, when the trust terminates or the trustee ceases to serve, the trustee sends the beneficiary notice and the beneficiary does not object within 60 days after the trustee sent such notice. The bill also requires the trustee to provide to the beneficiary certain financial information related to the trust. This bill is identical to House Bill 678. *Patron: Senator R. Creigh Deeds.*

WATER, SEWER AND STORMWATER

House Bill 71 - **Combined sewer overflow outfalls; compliance with regulations; Chesapeake Bay Watershed.** *Amends and reenacts §§3 and 4 of Chapter 826 and §§3 and 4 of Chapter 827 of the Acts of Assembly of 2017.* Extends from July 1, 2025, to July 1, 2026, the date by which certain combined sewer overflow (CSO) outfalls that discharge into the Chesapeake Bay Watershed must be in compliance with Virginia law, the federal Clean Water Act, and the Presumption Approach described in the EPA CSO Control Policy, unless a higher

level of control is necessary to comply with a total maximum daily load. This bill is identical to Senate Bill 372. *Patron: Delegate David L. Bulova.*

House Bill 220 - Water facilities; staffing; licensed operators. *Amends the Code of Virginia by adding a section numbered 32.1-172.1 and by adding in Article 4 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.19:3.5.* Requires sewage treatment works, classified waterworks, and classified water treatment facilities to employ a licensed operator. The bill establishes a protocol for responding to an unexpected vacancy of the licensed operator position. The bill also permits remote monitoring of the facility by the licensed operator upon a demonstration of sufficient technology for the remote operator to adequately monitor the waterworks or treatment facility and manage onsite operators. *Patron: Delegate Robert D. Orrock, Sr.*

House Bill 870 - Sewage sludge regulations; relief from administrative requirements; adverse and unusual weather events. *Amends and reenacts 62.1-44.19:3 of the Code of Virginia.* Requires the State Water Control Board, with the assistance of the Department of Conservation and Recreation and the Department of Health, to adopt regulations that include procedures for addressing administrative, staging, signage, and additional on-site and alternative storage site requirements when routine and on-site storage facility capacity and holding times are anticipated to be exceeded for the purpose of protecting against the release of sewage sludge into state waters and to account for increased intensity, frequency, and duration of storm events. The bill directs the Department of Environmental Quality to form a regulatory advisory panel consisting of certain stakeholders for the purpose of assisting the Board in developing the regulations as required by the bill. *Patron: Delegate David L. Bulova.*

House Bill 1431 – Alternative onsite sewage systems; approval of treatment units. *Amends the Code of Virginia by adding a section numbered 32.1-164.10.* Requires the Department of Health to approve treatment units for alternative onsite sewage systems if they meet certain NSF/ANSI standards or certain testing requirements. *Patron: Delegate M. Keith Hodges.*

Senate Bill 337 - Eastern Virginia Groundwater Management Area; continued residential withdrawals. *Amends the Code of Virginia by adding a section numbered 62.1-262.2.* Directs the State Water Control Board to waive the expiration of any ground water withdrawal permit for a well that serves exclusively residential users, is located in the Eastern Virginia Groundwater Management Area north of the Occoquan River, and is located within five miles of any commercial or industrial permitted ground water withdrawal. The bill provides that such waiver shall continue in force until the commercial or industrial permitted ground water withdrawals have been halted for five years. The Department of Environmental Quality shall then assess whether the termination of the commercial or industrial permitted ground water withdrawals has substantially mitigated the stress upon the aquifer and redetermine whether the permit for the residential well shall be renewed. *Patron: Senator Richard H. Stuart.*

Senate Bill 372 - Combined sewer overflow outfalls; compliance with regulations; Chesapeake Bay Watershed. *Amends and reenacts §§3 and 4 of Chapter 826 and §§3 and 4 of Chapter 827 of the Acts of Assembly of 2017.* Extends from July 1, 2025, to July 1, 2026, the date by which certain combined sewer overflow (CSO) outfalls that discharge into the Chesapeake Bay Watershed must be in compliance with Virginia law, the federal Clean Water Act, and the Presumption Approach described in the EPA CSO Control Policy, unless a higher

level of control is necessary to comply with a total maximum daily load. This bill is identical to House Bill 71. *Patron: Senator Adam P. Ebbin.*

Senate Bill 673 - Department of Environmental Quality; State Water Control Board; prioritization of water for human consumption and food production. *Amends the Code of Virginia by adding in Article 1 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.6:2.* Directs the Department of Environmental Quality and the State Water Control Board to prioritize the preservation of water for human consumption and food production in all permitting and regulatory processes related to groundwater and surface water resources. *Patron: Senator Richard H. Stuart.*

ZONING AND LOCAL ORDINANCE

House Bill 281 – Early childhood care and education; child day programs; use of office buildings; waiver of zoning requirements. *Amends the Code of Virginia by adding a section numbered 15.2-2292.2.* Permits any locality to by ordinance provide for the waiver of any requirements for zoning permits for the operation of a child day program in an office building, as defined by the bill, provided that such facility satisfies the requirements for state licensure as a child day program. This bill is identical to Senate Bill 13. *Patron: Delegate Atoosa R. Reaser.*

House Bill 619 - Military centered community zones; local designation. *Amends the Code of Virginia by adding in Chapter 38 of Title 58.1 an article numbered 12.1, consisting of a section numbered 58.1-3853.1.* Allows localities to establish, by ordinance, one or more military centered community zones, defined in the bill as a community that has a significant presence of military personnel living or working in the designated area and where such presence drives, or has the potential to drive, significant economic activity. The bill provides that a locality, or another political subdivision acting on behalf of the locality, may offer unique benefits to businesses looking to locate within a zone for the purpose of serving the needs of the military personnel, including reduction of certain fees and taxes. In addition, the bill provides that local governing bodies are authorized to enter into agreements for the payment of economic development incentive grants to such businesses. The bill also allows a governing body to provide for certain regulatory flexibility and incentives and provides that the establishment of a military centered community zone shall not preclude the area from also being designated as an enterprise zone or from receiving support under the Virginia Military Community Infrastructure Grant Program. This bill is identical to Senate Bill 343. *Patron: Delegate Marcia S. "Cia" Price.*

House Bill 650 - Zoning; residential and electrical generation projects; period of validity. *Amends and reenacts §§15.2-2209.1:2 and 15.2-2286 of the Code of Virginia.* Provides that the conditions of a special exception or special use permit may include a period of validity; however, in the case of a special exception or special use permit for residential and electrical generation projects, the period of validity shall be no fewer than three years. The bill provides that for so long as a special exception, special use permit, or conditional use permit remains valid, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy, or plan adopted subsequent to the date of approval of the special exception, special use permit, or conditional use permit shall adversely affect the right of the developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the special exception, special use permit, or conditional use permit unless the change or amendment

is required to comply with state law or there has been a mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare. *Patron: Delegate Carrie E. Coyner.*

House Bill 914 - Local historic districts; tax incentives. *Amends and reenacts §15.2-2306 of the Code of Virginia.* Allows a locality that establishes a local historic district to provide tax incentives for the conservation and renovation of historic structures in such district. The bill provides that such incentives may include tax rebates to the extent allowed by the Constitution of Virginia. *Patron: Delegate Irene Shin.*

House Bill 1415 – Civil penalty for demolition of historic structures. *Amends and reenacts §15.2-2306 of the Code of Virginia.* Authorizes any locality to adopt an ordinance establishing a civil penalty for the razing, demolition, or moving of a building or structure that is located in a historic district or that has been designated by a governing body as a historic structure or landmark in violation of an ordinance that no such building or structure shall be razed, demolished, or moved without the approval of a review board. The bill provides that such civil penalty shall not exceed the market value of the property as determined by the assessed value of the property at the time of razing, demolition, or moving of the building or structure. *Patron: Delegate Delores L. McQuinn.*

House Bill 1488 – Local government; standardization of public notice requirements for certain meetings, hearings, or intended actions. *Amends and reenacts §§15.2-107, 15.2-201, 15.2-202, 15.2-301, 15.2-503, 15.2-603, 15.2-716, 15.2-749, 15.2-903, 15.2-907.2, 15.2-909, 15.2-958.3, 15.2-958.6, 15.2-1201, 15.2-1301, 15.2-1427, 15.2-1702, 15.2-1703, 15.2-1719, 15.2-2006, 15.2-2101, 15.2-2105, 15.2-2108.7, 15.2-2108.21, 15.2-2114, 15.2-2204, 15.2-2270, 15.2-2271, 15.2-2272, 15.2-2316.2, 15.2-2321, 15.2-2400, 15.2-2401, 15.2-2409, 15.2-2506, 15.2-2507, 15.2-2606, 15.2-2610, 15.2-2652, 15.2-2653, 15.2-3236, 15.2-3242, 15.2-3400, 15.2-3401, 15.2-3504, 15.2-3600, 15.2-3805, 15.2-3913, 15.2-4311, 15.2-4313, 15.2-4405, 15.2-5136, 15.2-5156, 15.2-5403, 15.2-5431.25, 15.2-5704, 15.2-5806, 15.2-7502, 21-114, 21-117.1, 21-146, 21-229, 21-393, 21-420, 22.1-37, 30-140, 33.2-331, 33.2-723, 33.2-909, 33.2-2001, 33.2-2101, 33.2-2701, 58.1-3245.2, 58.1-3245.8, 58.1-3321, and 62.1-44.15:33 of the Code of Virginia.* Standardizes the frequency with which and length of time in which notices of certain meetings, hearings, and other intended actions of localities must be published. The notice provisions included in the bill are organized into three groups: (i) publication required at least seven days before the meeting, hearing, or intended action; (ii) publication required twice, with the first notice appearing no more than 28 days before and the second notice appearing no less than seven days before the meeting, hearing, or intended action; and (iii) publication required three times, with the first notice appearing no more than 35 days before and the third notice appearing no less than seven days before the meeting, hearing, or intended action. The bill also standardizes descriptive information in such notices related to (a) proposing, amending, or repealing ordinances; (b) local budget adoption; and (c) zoning ordinances and planning-related actions. This bill is identical to Senate Bill 413. *Patron: Delegate Rozia A. Henson, Jr.*

Senate Bill 13 – Early childhood care and education; child day programs; use of office buildings; waiver of zoning requirements. *Amends the Code of Virginia by adding a section numbered 15.2-2292.2.* Permits any locality to by ordinance provide for the waiver of any

requirements for zoning permits for the operation of a child day program in an office building, as defined by the bill, provided that such facility satisfies the requirements for state licensure as a child day program. This bill is identical to House Bill 281. *Patron: Senator Barbara A. Favola.*

Senate Bill 296 – Local planning commission; action on proposed plats, site plans, and development plans; residential use. *Amends and reenacts §§15.2-2259 and 15.2-2260 of the Code of Virginia.* Requires local planning commissions to use the same approval process for residential development projects as is currently required for commercial development projects. The bill is identical to House Bill 1356 which was left in Committee. *Patron: Senator Schuyler T. VanValkenburg.*

Senate Bill 343 – Military centered community zones; local designation. *Amends the Code of Virginia by adding in Chapter 38 of Title 58.1 an article numbered 12.1, consisting of a section numbered 58.1-3853.1.* Allows localities to establish, by ordinance, one or more military centered community zones, defined in the bill as a community that has a significant presence of military personnel living or working in the designated area and where such presence drives, or has the potential to drive, significant economic activity. The bill provides that a locality, or another political subdivision acting on behalf of the locality, may offer unique benefits to businesses looking to locate within a zone for the purpose of serving the needs of the military personnel, including reduction of certain fees and taxes. In addition, the bill provides that local governing bodies are authorized to enter into agreements for the payment of economic development incentive grants to such businesses. The bill also allows a governing body to provide for certain regulatory flexibility and incentives and provides that the establishment of a military centered community zone shall not preclude the area from also being designated as an enterprise zone or from receiving support under the Virginia Military Community Infrastructure Grant Program. This bill is identical to House Bill 619. *Patron: Senator Aaron R. Rouse.*

Senate Bill 413 – Local government; standardization of public notice requirements for certain meetings, hearings, or intended actions. *Amends and reenacts §§15.2-107, 15.2-201, 15.2-202, 15.2-301, 15.2-503, 15.2-603, 15.2-716, 15.2-749, 15.2-903, 15.2-907.2, 15.2-909, 15.2-958.3, 15.2-958.6, 15.2-1201, 15.2-1301, 15.2-1427, 15.2-1702, 15.2-1703, 15.2-1719, 15.2-2006, 15.2-2101, 15.2-2105, 15.2-2108.7, 15.2-2108.21, 15.2-2114, 15.2-2204, 15.2-2270, 15.2-2271, 15.2-2272, 15.2-2316.2, 15.2-2321, 15.2-2400, 15.2-2401, 15.2-2409, 15.2-2506, 15.2-2507, 15.2-2606, 15.2-2610, 15.2-2652, 15.2-2653, 15.2-3236, 15.2-3242, 15.2-3400, 15.2-3401, 15.2-3504, 15.2-3600, 15.2-3805, 15.2-3913, 15.2-4311, 15.2-4313, 15.2-4405, 15.2-5136, 15.2-5156, 15.2-5403, 15.2-5431.25, 15.2-5704, 15.2-5806, 15.2-7502, 21-114, 21-117.1, 21-146, 21-229, 21-393, 21-420, 22.1-37, 30-140, 33.2-331, 33.2-723, 33.2-909, 33.2-2001, 33.2-2101, 33.2-2701, 58.1-3245.2, 58.1-3245.8, 58.1-3321, and 62.1-44.15:33.* Standardizes the frequency with which and length of time in which notices of certain meetings, hearings, and other intended actions of localities must be published. The notice provisions included in the bill are organized into three groups: (i) publication required at least seven days before the meeting, hearing, or intended action; (ii) publication required twice, with the first notice appearing no more than 28 days before and the second notice appearing no less than seven days before the meeting, hearing, or intended action; and (iii) publication required three times, with the first notice appearing no more than 35 days before and the third notice appearing no less than seven days before the meeting, hearing, or intended action. The bill also standardizes descriptive

information in such notices related to (a) proposing, amending, or repealing ordinances; (b) local budget adoption; and (c) zoning ordinances and planning-related actions. This bill is identical to House Bill 1488. *Patron: Senator Christopher T. Head.*

Senate Bill 544 – Short-term rental property; special exceptions. *Amends and reenacts §15.2-983 of the Code of Virginia.* Prohibits a locality from barring the use of or requiring that a special exception, special use, or conditional use permit be obtained for the use of a residential dwelling as a short-term rental where the dwelling unit is also legally occupied by the property owner as his primary residence. *Patron: Senator Lamont Bagby.*

Senate Bill 701 – Vested rights; building permits. *Amends and reenacts §15.2-2307 of the Code of Virginia.* Provides that if a locality has issued a building permit, despite nonconformance with the zoning ordinance, and a property owner, relying in good faith on the issuance of the building permit, incurs extensive obligations or substantial expenses in diligent pursuit of a building project that is in conformance with the building permit and the Uniform Statewide Building Code, the locality shall not treat such building as an illegal use but rather as a legal nonconforming use. Current law requires that such project be completed and a certificate of occupancy issued in order to receive such protection. *Patron: Senator Timmy F. French.*

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REAL ESTATE CASE LAW UPDATE

for the

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A. FEDERAL COURT OF APPEALS

1. *SAS Associates 1, LLC v. City Council for the City of Chesapeake,* 91 F.4th 715 (Ct. App. 2024)

Facts: Plaintiff developers filed suit against the City Council for the City of Chesapeake alleging the City's denial of the Developers rezoning application violated their equal protection rights. Developers sought to rezone a ninety-acre assemblage of property from agricultural, general business, and single family residential to a mixed-use development containing multifamily units and commercial space. Developers filed two rezoning applications, one in 2016 and one in 2018, both of which were recommended by the Planning Commission as satisfying level of service requirements regarding infrastructure and as being consistent with the comprehensive plan. City Council denied both applications after public hearings that involved a number of objections by neighboring property owners. Developers then filed their complaint alleging equal protection violations, claiming that City Council had approved ten "similarly situated" developments and that the denial of the Developers' applications were based on discriminatory animus.

Lower Court Ruling: Chesapeake filed a motion to dismiss pursuant to Rule 12(b)(6) which was granted without leave to amend. The Developers appealed that ruling.

Holding: Affirmed.

Discussion: After expressing a general reluctance for federal courts to become involved in local legislative decisions, the Court identified the elements of a claim for an equal protection application – a plaintiff must plead sufficient facts "to demonstrate plausibly that they were treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus." The Court held that the Developers failed to allege facts to support either element.

With respect to discriminatory animus, a plaintiff has to allege some basis to support the claim, i.e. evidence of a pattern of historical discrimination, statements in the record reflecting a discriminatory animus, or facts to establish that a decision maker harbored ill will toward an applicant or a class of which she was a member. In this case, the Developers attempted to allege discriminatory intent based on statements by a council member regarding traffic congestion, drainage concerns, and school capacity. The Court found that those statements related to precisely the kind of concerns that local governments routinely consider and do not reflect any discriminatory animus.

The Developers also failed to identify a similarly situated property. Because discretionary zoning decisions are not generally governed by "a clear standard against which departures, even for a single plaintiff, can be readily assessed," a person complaining of a zoning violation must "show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." The Developers could not satisfy this burden with the ten allegedly similar developments. Of those developments, nine were constructed between 1960 and 2009, before recent demographic changes. The only development within the same time frame was located 1.3 miles away, on a different road and in a different part of

the City. In addition, none of the comparators included commercial components and none requested the same combination of zoning classifications.

B. FEDERAL CASES

1. *Carner v. Clements* 2023 WL 2764762 (W.D. Va. 2023)

Facts: Carner and her ex-husband obtained a loan secured by a deed of trust on their marital home. Plaintiff claimed she was unaware that her ex-husband fell behind on the payments. The deed of trust was to the benefit of MERS and in February 2014, MERS assigned the deed of trust to HSBC Bank USA on behalf of a securities trust. In April 2015, HSBC assigned it to Barclays Bank, PLC who then assigned it to Wilmington Savings Fund Society, FSB for a trust. In July 2016, the Vice-President of Carrington Mortgage Services, LLC as attorney-in-fact for Wilmington executed an appointment of substitute trustee appointing Clements as the substitute trustee.

Clements took steps to foreclose and on September 14, 2016, conducted a foreclosure sale of the property. The plaintiff filed variations of suits which ultimately was this case for alleged failure to provide proper notice, breach of contract pertaining to the appointment of substitute trustee, and failure to obtain the highest possible price at the sale. The defendants filed a motion to dismiss and attached a notice letter and a federal tax lien for the property to the motion. The district court converted the motion to dismiss to a motion for summary judgment and gave the parties time to complete discovery before a ruling was made.

The plaintiff failed to cooperate in any discovery plan and was non-responsive to the attempts to plan for discovery. The defendants filed a motion for clarification asking for the court to rule on the motion for summary judgment in their favor.

Holding: The district court granted the motion for clarification and awarded summary judgment to the defendants.

Discussion: The trustee produced notices of foreclosure properly addressed with proof of certified mail that was unclaimed and by regular mail. Plaintiff claimed she did not get notice. The court held that "the law does not require proof that the homeowner actually received the notice, only that notice be given, and the terms of mailing are laid out by statute and deemed sufficient compliance with the notice requirement." The court also found no breach of contract that arose out of the appointment of substitute trustee. Last, the court held that there was no breach due to the sale price as the price, in consideration of the price and the tax lien, was not "so grossly inadequate as to shock the conscience."

2. *Landfall Trust LLC v. Fidelity National Title Insurance Company,* 2023 WL 6406400 (E.D. Va. 2023)

Facts: In 2002 developers recorded a Declaration of Covenants, Conditions, and Restrictions for the Henry's Island subdivision in Lancaster County. The Declaration included a subdivision plat for a 10-lot subdivision and provided for a variety of easements for roads and utilities. The Declaration also included a Drainfield Easement Plat depicting

two different sets of drain fields, the "Primary Drainfield" and the "Reserve Drainfield" for use for the lots in the subdivision. The Declarant reserved the right to grant the surface use of those areas to the owners of lots 7 and 8.

In 2018, Landfall purchased Lots 9 and 10 and Fidelity issued a title insurance policy. The title policy insured title in lots 9 and 10, together with access easements for ingress and egress. The title policy made no reference to the drain fields.

In 2021, Landfall entered into a contract to sell Lots 9 and 10 to Crotty for 1.55M. Crotty sought a title insurance policy through Fidelity, which issued a binder identifying title as being vested in Landfall with respect to Lots 9 and 10 and in the HOA with respect to any drain field easement. Fidelity required that the HOA join in the deed to convey the drain field easement.

Crotty terminated the contract and Landfall requested Fidelity to provide coverage. Fidelity then issued Landfall a check in the amount of $90,000 to represent the diminution in value of the because of the lack of clear access easements.

In April of 2022, Landfall filed suit against Fidelity for breach of contract seeking $285,000 in damages, representing the remaining amount of coverage under the policy. Landfall moved for summary judgment on the ground that Fidelity refused to recognize Landfall's ownership of the drain field easements. The Court denied the motion for summary judgment because the "ownership" of the drainage easements was not sufficiently developed in the record to enable the court to grant summary judgment.

Subsequently, Fidelity filed motions for summary judgment, including on the following bases: (i) that issues concerning the drainage easements cannot be the subject of a breach of contract claim because the property description in Exhibit A to the insurance policy makes no reference to those interests, and (ii) that Fidelity has no liability pursuant to the cooperation clause in the insurance policy, which excuses the insurer from any loss or damage assumed by the insured in settling a claim without the insurer's consent.

Holding: The Court denied the motions for summary judgment on these bases because (i) the parties had not yet adequately briefed this issue of contract interpretation and "plans on ordering re-briefing" and (ii) the settlement with Crotty involved an issue as to which Fidelity had disclaimed coverage prior to settlement. The Court found that Virginia case law was clear that when an insurer denies liability under a policy before a settlement is reached, the insurance company cannot rely on the cooperation clause to deny coverage. It is worth noting that in this case the insured notified Fidelity on February 1, 2023 that it planned to conduct a mediation with Crotty before the end of that month, that Fidelity denied coverage by letter dated February 23, and the mediation was conducted and the settlement was reached on February 28.

3. *Thomas Jefferson Crossings Homeowners' Association, Inc. v. Etemadipour,* 2023 WL 6644583 (W.D. Va 2023)

Facts: The defendants purchased three lots in the subdivision. The lots were subject to covenants and restrictions contained in the bylaws of the association. One such covenant and restriction was a requirement that the architectural review board evaluate any construction on the lots before it commenced. However, it was undisputed that the architectural review board did not exist at the time the defendants were building their homes.

The plaintiff contended that there were deficiencies with the buildings constructed by the defendant. The plaintiff filed suit for breach of contract and the court was considering the defendant's motion for summary judgment.

Holding: The district court granted the defendant's motion for summary judgment on the issue of whether demolition was an appropriate remedy for any breach of contract and denied the remainder of the summary judgment motion finding material facts in dispute.

Discussion: The district court found disputed material facts on the issue of whether the defendants breach the contract. This was based on an analysis of the prevention doctrine that can be used offensively or defensively. Generally, in every contract there is an implied condition that one party will not prevent the other from performing. The defense asked the court to grant summary judgment by using the doctrine defensively by asserting that the association prevented them from performing under the contract due to its failure to form the review board.

The district court, having observed that there may have been an alternate review method provided, found there was a material fact in dispute about whether the association prevented the defendant from performing under the contract. Regardless, the district court granted summary judgment finding that tearing down the homes was not an appropriate remedy for the alleged breaches of contract. The court found that the demolition was "grossly out of proportion with the relief sought." In finding that real covenants must be strictly construed, the district court held that such a remedy for something like a slab construction v. a crawl space construction would be "oppressive or otherwise inequitable."

C. VIRGINIA SUPREME COURT CASES

1. *McKeithen, Trustee v. City of Richmond,* 893 S.E.2d 369 (Va. 2023)

Facts: This dispute arose from Richmond's processing of the sales proceeds from a real estate tax sale of real property located in the City. Prior to the sale, there were two prior liens: a deed of trust recorded in 2001 and a judgment lien from 2012 in favor of a trust in the amount of over $100,000. The city took appropriate steps to conduct and did conduct the sale. From the proceeds of the sale, the city paid the tax lien and expenses of sale and then paid the remainder to the court. The court held $14,000 in the event that the first lienholder deed of trust made a claim and $7,171.10 for the trust in the event that the trust appeared and timely made a claim.

About a year later, a representative for the trust filed with the court for payment of money from the account to satisfy its lien. The money was paid to the representative in the amount of $7,171.10. The dispute arose over the remainder of the money as no one from the deed of trust appeared or made a claim to the money. The city took the position that under § 58.1-3967, the remainder of the money should escheat to the city. The trust representative claimed the money as further payment for the $100,000+ owed to it.

Lower Court Ruling: The circuit court agreed with the city and held that § 58.1-3967 did not violate the Virginia or United States Constitution takings clause.

Holding: The Virginia Supreme Court reversed the circuit court and remanded the case.

Discussion: The Virginia Supreme Court, in discussion about creditor's bills, found that the judicial sale converts the lien "into a dollar-for-dollar" equitable claim on the sale proceeds." The court interestingly observed that the trust had a better argument from an equitable perspective, but the city had a better argument from a textual perspective. Nonetheless, the court found, narrowly, that the payment of proceeds of the sale where surplus was paid to the city was an unconstitutional taking. The court held that the city was fully compensated and had "no property interest whatsoever in the unclaimed surplus." In that fact scenario, the operation of § 58.1-3967 constituted an unconstitutional taking.

2. *Oreze Healthcare LLC v. Eastern Shore Community Services Board*, 886 S.E.2d 504 (Va. 2023)

Facts: Plaintiff Oreze operated an assisted living facility comprised of four buildings. In 2016, Oreze's license to operate the facility was suspended and Oreze entered into a lease with the Eastern Shore Community Services Board to provide interim care while Oreze tried to resolve its licensing issues. The lease was for a three-month term that would automatically renew every three months until ESCSB provided notice of termination. ESCSB agreed as part of the lease to maintain the four buildings in "tenantable condition" and to "suffer no waste or injury" to the buildings. ESCSB leased the property from May 1, 2017 until July 31, 2018 when it terminated the lease.

During the term, three of the four buildings were unoccupied. In late December 2017, the sprinkler systems in two of the unoccupied buildings froze and burst, causing water damage to the buildings. In February 2018 the third unoccupied building suffered water damage when a water filter froze and burst. ESCSB did not repair any of the damage.

Oreze then filed suit against ESCSB for breach of the lease to recover damages relating to the water damage in the buildings. While that suit was pending, Oreze sold the building to a third-party by general warranty deed, conveying to that third party the property along with "all rights, building, privileges and appurtenances thereunto belonging or in anywise appertaining."

ESCSB moved for summary judgment claiming that Oreze could no longer pursue the property damage claims because the deed conveyed those claims to the third party.

Circuit Court Ruling: The City of Portsmouth Circuit Court granted the motion for summary judgment, holding that Oreze failed to reserve its claims in the deed and that the deed conveyed all of Oreze's rights in connection with the property, including its rights to maintain the breach of contract action.

Holding: Reversed and remanded. The Supreme Court ruled that the deed did not extinguish or transfer Oreze's right to sue ESCSB for breach of the lease. Citing to Friedman on Leases, the Court noted that "the right to recover upon a broken covenant does not follow the land; rather it remains a chose in action." The Court further noted that the contractual right to recover for breach is a chose in action, which is considered intangible personal property and therefore does not run with the land. As a result, that chose of action did not transfer with the property by virtue of the deed.

D. VIRGINIA COURT OF APPEALS CASES

1. *Boxley v. Crouse*, 79 Va. App. 350 (Ct. App. 2023)

Facts: The Crouses sued Boxley to establish a prescriptive easement across Boxley's property and to order the removal of a gate across the right of way. The Crouses and Boxley own adjacent parcels in Highland County and the Crouses cross Boxley's property to access their property. Access to the Crouses parcel across the Boxley parcel began in 1976 and continued through 1989 when the Crouses purchased the property. In 1995, Boxley's predecessor in title erected a gate across the way and mailed the Crouses a key to the gate. There was no note accompanying the key, no discussion with Crouses about the key, and there was no evidence that the gate was ever locked. The Crouses continued to use the way until 2020 when Boxley installed a lock on the gate and did not provide the Crouses with a key.

Circuit Court Ruling: The Circuit entered judgment for the Crouses and ordered Boxley to remove the gate pursuant to Virginia Code § 33.2-110(A).

Holding: Affirmed. The primary issue on appeal related to whether the Crouses use was hostile. Boxley argued that the use was permissive because her predecessor in title gave the Crouses a key to the gate in 1995. The Court noted that, when a claimant establishes open, visible and continues use for the prescriptive period, the claimant is entitled to a presumption that the use arose adversely and under a claim for right. Once the presumption is established, the burden shifts to the servient estate owner to show that the use was permissive.

Significantly, the Court noted that the Supreme Court has held in Casey v. Lanigan, 208 Va. 587, 593 (1968) and again in Horn v. Webb, 882 S.E.2d 894 (2023), that the owner of the servient estate cannot rebut the presumption based only on circumstantial evidence. In other words, there must be some direct evidence – or "a positive showing that an agreement existed" to rebut the presumption. In this case, the Crouses presented evidence entitling them to the benefit of the presumption and Boxley produced only circumstantial evidence – the provision of a key to the gate – which was insufficient to rebut the presumption.

Virginia Code § 33.2-110(A) permits a servient estate holder to erect a gate across a way "at all points at which fences extend to such road on each side thereof." Boxley argued that this statute is merely permissive and should not be construed to prohibit a gate across a way where there are no adjacent fence lines. The Court rejected this argument, noting that the Supreme Court has interpreted this statute as "excluding any other gate across a right of way."

2. *Chacko v. Ford*, 2024 WL 558056 (unpublished opinion).

Facts: Chacko sued Ford, the president of the HOA in their neighborhood, for trespass and nuisance for entering his lot without permission. In 2020 the HOA noticed that Chacko had made unapproved improvements on his property, including construction of a pergola that could only be partially viewed from the street. The HOA sent a violation letter and Chacko responded by refusing to cooperate or engage in any approval process and advising Ford by email that he was not to "enter my property without my permission unless you want to face serious consequences."

The HOA then began the process of levying a restoration assessment under its Declaration – which would allow the HOA to restore the lot at Ford's cost. Before levying the assessment, the HOA was to provide notice and an opportunity for the owner to be heard at hearing.

Prior to levying the assessment, Ford entered Chacko's property so that he could photograph the improvements to assist in making a determination of what it would cost to restore the property, i.e. the amount of the restoration assessment. By entering the property, Ford could observe the entire pergola, including its foundation.

The HOA then sent another violation letter that informed Chacko of the initiation of the restoration assessment process. Ultimately the HOA filed a complaint for injunctive relief requiring the removal of the pergola and removal of all other unapproved alterations, which was awarded by the trial court.

While that case was pending, Chacko filed his complaint against Ford for trespass, nuisance, and intentional infliction of emotional distress. The intentional infliction of emotional distress claim was dismissed on demurrer.

Ford filed a plea in bar to the trespass and nuisance claims, asserting that he was acting on behalf of the HOA and his acts were authorized by the Declaration.

Lower Court Ruling: The trial court sustained the pleas in bar, finding that Ford had the right to enter the property for purposes related to restoration assessments, including determining whether an assessment is necessary and the amount thereof.

Holding: Affirmed. The issue on appeal was whether the Declaration authorized entry for this purpose. The Declaration only expressly authorized entry in three circumstances: to mow if the homeowner is not mowing, in emergencies, and *after* a restoration assessment has been levied and only for the purpose of restoring the lot. Ford argued that there was an implied right of entry for purposes of determining the extent of the violation and the amount of the assessment.

The Court – citing to Sainani v. Belmont Glen HOA, 297 Va. 714 (2019) – recognized that restrictive covenants "are not favored" and the burden is on the party seeking to enforce to establish "that the activity objected to is within their terms." Covenants are "construed strictly" and "substantial doubt or ambiguity is to be resolved in favor of the free use of property and against the restrictions."

The Court also recognized that restrictions are enforced where "the intention of the parties is clear and the restrictions are reasonable" and "if it is apparent from a reading of the whole instrument that the restrictions carry a certain meaning by definite and necessary implication."

Applying this case law, the Court determined that entry on the property for purposes of a restoration assessment was authorized by the Declaration.

3. *Cumberland v. Board of Supervisors of Middlesex County,* 2023 WL 666063 (unpublished opinion)

Facts: Middlesex County approved two applications of landowners to expand and improve their property in a CBPA-protected zone (Chesapeake Bay Preservation Act). The landowners sought approval for and were given approval for the work on their property finding that they had properly applied for and supplied the information required by the local zoning ordinance. That ordinance had specific setback requirements and exceptions could be provided if five requirements were met. One such requirement was reasonable and appropriate conditions be placed to prevent degradation of water quality. One step the landowners proposed to satisfy this requirement was the planting of 26 trees and 39 shrubs in the affected area. A neighbor objected to this plan and the exceptions because he alleged the trees and shrubs would interfere with his enjoyment of his property. He anticipated that one day the tree limbs would hang over onto his property.

The BZA approved the applications and the neighbor appealed to the circuit court. The board and the landowners filed a motion to dismiss based on the neighbor's lack of standing.

Lower Court Ruling: The circuit court granted the motion to dismiss finding the neighbor did not have standing.

Holding: The Court of Appeals affirmed.

Discussion: In order to have standing under § 15.1-2314 to file a writ of certiorari with the circuit court following a BZA decision, a party must be "aggrieved." A two-prong test is used to determine whether a party is aggrieved. First, a petitioner must plead sufficient facts to show he owns or occupies real property in close proximity. Here, this element was met. Second, a petitioner must allege facts "demonstrating a particularized harm to some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally." The court noted that the petitioner does not have to establish that the particularized harm has already occurred.

The court found that the crucial component in the analysis was the likelihood and immediacy of the alleged harm and a causal connection between the BZA decision and the harm. The

court held that the neighbor did not satisfy either. First, the neighbor did not and could not establish that the trees and shrubs had already been planted (they had not!). Second, the neighbor could not plead or establish a causal connection between the BZA decision and the alleged harm. Afterall, the landowners could plant the trees and shrubs whether or not the landowners received a variance. The court found that the alleged harm was too speculative. There was a dissenting opinion.

4. *Dorcon Group, LLC v. Westrick,* 2023 WL 4872484 (unpublished opinion)

Facts: The subdivision was created by deed that imposed restrictive covenants on lots with the exception of 4 particular lots. The deed provided that the four excepted lots could be used for "such non-residential purposes as approved by the Loudoun county Zoning and Subdivision ordinances . . . . The deed permitted that the restrictions could be "excepted, modified, or vacated in whole or in part at any time upon the affirmative vote of the owners of 23 lots on said subdivision." Dorcon purchased one of the excepted lots to open a bed and breakfast and to host special events. The other lot owners then voted to amend the deed to prohibit commercial activities on any lot and specifically to prevent bed and breakfasts under certain circumstances. Essentially, enough lot owners voted to prevent Dorcon from doing anything it planned to do on the lot it purchased.

Dorcon then filed suit seeking a declaratory judgment and injunctive relief finding that the 25 voting lot owners failed to comply with the Property Owners Association Act, the amendment violated the express language of the deed, the deed did not permit the lot owners to create a new restriction, the amendment impacted lot owners inequitably, and the lot owners in doing what they did engaged in a statutory business conspiracy.

Lower Court Ruling: The first and fifth count were dismissed on demurrer and plea in bar. After a bench trial, the circuit court dismissed the remaining counts finding that the term "modify" in the deed was unambiguous and permitted the lot owners to do what they did.

Holding: The Court of Appeals reversed.

Discussion: The Court of Appeals disagreed that the deed was ambiguous but found that the amendment was unenforceable because the term modify did not permit the landowners to add a new restrictive covenant. The court found that the term modify may permit the enlarging or reducing the scope of an existing restrictions, it did not permit the addition of a restriction. The court found that the amendment was not a simple modification but instead was a new restrictive covenant.

5. *Forbes, et al. v. Cantwell,* 78 Va. App. 454 (Ct. App. 2023)

Facts: Forbes owns lot 6 and Cantwell owns the adjoining lot 7 in the Stoneview Circle subdivision in Lexington. Forbes' predecessor in title previously owned both lots and conveyed Lot 7 subject to a reservation of "a 40 foot easement along the westerly boundary of Lot 7, for the purpose of providing ingress and egress over existing driveway, fencing, and landscape buffer for the benefit of Lot 6." The was a reference to a plat depicting the easement but no plat was attached to the deed.

Forbes file a declaratory judgment action seeking to interpret the terms of the easement and also asked for injunctive relief for Cantwell to remove fencing and gates within the easement area. The Court admitted parol evidence in the form of testimony of the predecessor in title to determine the size of the easement and to explain what was meant by the reference to "fencing, and landscape buffer for the benefit of Lot 6."

Lower Court Ruling: The trial court identified the exact location of the easement, found that the landscape and fencing components of the easement constituted negative easements which prohibited Cantwell from interfering with the landscape buffer or fencing, and that Cantwell had to remove his gate.

Holding: The Court of Appeals affirmed in part, reversed in part, and remanded. The Court determined that the trial court erred in admitting parol evidence as to the size of the easement because the plain language of the deed identified the easement as 40 feet wide. The Court determined that the trial court properly admitted parol evidence as to the scope of the fencing and landscape easement.

The trial court also erred in finding that the fencing and landscape easements constituted negative easements. The Court noted that negative easements "do not bestow upon the owner of the dominant tract the right to travel physically upon the servient tract . . . but only the legal right to object to the use of the servient tract by its owner inconsistent with the terms of the easement." Affirmative easements, in contrast, permit the dominant estate the use of the land as provided in the easement. In this case, the trial court erred in identifying the landscape and fencing rights as negative easements and further erred by failing to establish the scope of those rights. The Court remanded the case to establish the scope of the fencing and landscaping buffer.

Finally, the Court reviewed the law regarding the right to construct fencing and install gates in easement areas. Fences are prohibited within easements but a line fence, along the boundary of the easement, is permissible. Gates are permissible pursuant to Virginia Code § 33.2-110 at points where fences extend to the right of way on each side – but the gate must remain unlocked.

Based on the above, the Court affirmed the trial court's ruling requiring Cantwell to remove fencing that he installed within the easement area and ordered Cantwell to remove the gate he erected because it did not fall within the statute.

6. *Hartley, et al. v. Board of Supervisors of Brunswick County,* 80 Va. App. 1 (Ct. App. 2024)

Facts: Plaintiff filed suit seeking to reverse the decision of the Brunswick County Board of Supervisors rezoning a neighboring property from A-1 to B-1 to accommodate a Dollar General store.

Lower Court Ruling: The Circuit Court partially sustained a demurrer finding that Hartley's allegations on several grounds could not support a claim that the upzoning was arbitrary and capricious. The Circuit Court granted summary judgment for the County on the remaining claims that the upzoning was arbitrary and capricious because the decision failed

to align with the comprehensive plan and that the Board failed to consider the factors set forth in Code §§ 15.2-2283 and 2284.

Holding: Affirmed. The Court of Appeals in affirming the trial court's ruling reviewed the case law regarding the presumption of reasonableness that attaches to legislative action by a locality, identifying the following burden-shifting framework: where the plaintiff challenges the presumption of reasonableness with probative evidence of unreasonableness, the burden shifts to the locality to show sufficient evidence of reasonableness to make the question "fairly debatable." Under the fairly debatable standard, "the question is whether there is *any evidence in the record sufficiently probative* to make a fairly debatable issue of the boards decision." The Court also noted that legislative action taken "in violation of an existing ordinance or other binding source of law is by definition arbitrary and capricious and may not be sustained by a court."

With respect to alignment with the comprehensive plan, the Court noted that rezoning of parcel does not need to be in exact alignment with the comprehensive plan because that plan is general in nature. Moreover, alignment with the comprehensive plan is one of many factors a legislative body must consider in amending its zoning ordinance, i.e. it is not a determinative one. Accordingly, failure to align perfectly with the comprehensive plan does not render decision arbitrary and capricious as a matter of law. Rather, a reviewing court must apply the burden shifting framework noted above.

With respect to the weighing of the statutory factors, the Court determined that the failure to consider each of the statutory factors on the record does not render a legislative decision arbitrary and capricious as a matter of law. Rather the reviewing court is to evaluate whether the Board's decision was fairly debatable in the context of the required statutory factors.

The Court then addressed the issues under the fairly debatable standard and determined that, even assuming Hartley presented evidence of unreasonableness, the Board met its burden of putting forward some evidence of reasonableness in response, rendering the matter fairly debatable.

Finally, on review of the trial court's ruling on demurrer, the Court determined that the demurrer was properly sustained with respect to Hartley's claims that the rezoning was arbitrary and capricious as a matter of law for failure to follow certain VDOT Guidelines regarding the timing for traffic counts and failing to follow the County's own subdivision and zoning ordinances. Regarding VDOT, the Court clarified that an agency's guidelines – as opposed to their regulations – do not have the "force of law" and therefore failure to follow those guidelines does not render the ordinance arbitrary and capricious. The Court also determined that there were no provisions in the subdivision ordinance or the zoning ordinance prohibiting their actions.

7. *Ho v. Rahman,* 79 Va. App. 677 (Ct. App. 2024)

Facts: Rahman purchased property in 2005 where the plat showed a boundary line and fence on another lot. Ho purchased his property in 2010 and was aware of the fence. He made no entry onto the part of his property on the other side of the fence until 2021. In 2021,

he tore the fence down and removed trees. This was the first time an owner disturbed the fence since its construction. In September 2021, Rahman filed suit to quiet title in the land between the boundary line and the fence claiming she had acquired it by adverse possession. Ho filed a plea in bar claiming that he had not owned the land for the requisite 15 years so Rahman could not obtain title through adverse possession.

Lower Court Ruling: The circuit court granted the plea in bar and found that the 15-year possessory period requirement had not been met.

Holding: The court of appeals reversed.

Discussion: After a thorough analysis of the law on adverse possession in Virginia, the court found that "adverse possession primarily focuses on the possessor's occupation of the invaded interest and the nature of such occupation, rather than the rights of the owner whose interests have been invaded. The court held that it is clear that the statue of limitations starts to run when the possessory interest is "*sufficiently* and continuously invaded, thus allowing the owner to defend the interest." (Emphasis in original). As a result, it did not matter how long Ho had owned the property – it mattered how long Rahman had adversely possessed it. Since she started as early as 2005, the 15-year possessory period was met.

The court noted that this is in line with our usual understanding of tacking in adverse possession cases. Tacking is where the period for adverse possession can be added together through successive ownership of those in privity to get to 15 years of adverse possession. Ho also tried to claim *bona fide* purchaser status, but the court noted that *bona fide* purchaser status applies only to defects in the chain of title. An adverse possession claim is not a defect in the chain of title.

8. *Jackson v. Department of Conservation and Recreation,* 2023 WL 8721822 (unpublished opinion)

Facts: Jackson filed declaratory judgment action against DCR to establish an implied easement across property owned by the DCR. Jackson traced title to the two adjacent parcels to a common grantor and alleged that the severance of that property in 1912 gave rise to an easement by necessity benefitting his parcel that had been in use since that time and had been located in a recorded plat in 1924. Jackson acquired his property in 2001. The DCR acquired its property in 2006.

Jackson filed a separate action asserting a claim of adverse possession of the roadway.

The DCR filed a demurrer to both actions which were heard together on two grounds (i) no adverse possession claim lies against the Commonwealth and (ii) res judicata barred the actions because the DCR had previously prevailed in an ejectment action against Jackson.

Lower Court Ruling: The trial court sustained the demurrer, concluding that "the Commonwealth has the right so say you cannot make any claim of any sort, whether it's the easement or the adverse possession claim." The trial court declined to rule on the res judicata claim.

Holding: Reversed and remanded. The Court of Appeals determined that Jackson had alleged facts to support all of the elements of a claim for an easement by necessity: (i) that the dominant and servient estates derived from a common grantor, (ii) severance of title of those estates resulted in the need for access at the time of the severance (iii) the roadway was in existence at the time of the severance, and (iv) the easement is reasonably necessary to the enjoyment of his property.

The Court rejected the DCR's arguments. The DCR argued that there was no recorded easement at the time of the severance which the Court found to be irrelevant to a claim for an implied easement. The DCR also argued there were insufficient factual allegations as to necessity and as to whether the road was in existence at the time of severance. The Court of Appeals found that these were issues for the trier of fact. Finally, the Court of Appeals found no error in the trial court declining to rule on the issue of res judicata because that is an affirmative defense that can be raised by plea in bar but not demurrer.

9. *Jones v. South Bay Shore LLC,* 2024 WL 432574 (unpublished opinion)

Facts: Prior in time Lot 35A was given a visual easement over a portion of the adjacent lot 34A. The easement permitted the holder to prevent the owner of Lot 34A from placing structures in the area covered by the easement. In 2020, South Bay Shore bought the burdened lot and installed a pier into the creek. Jones filed suit claiming that the pier unreasonably interfered with their enjoyment of the easement.

Lower Court Ruling: The circuit court found that the language creating the easement was ambiguous and permitted parol evidence. It held that the Jones' had failed to prove that the pier interfered with the easement. It granted a motion to strike and ruled in South Bay Shore's favor permitting the pier to remain.

Holding: Concluding that the easement "unambiguously establishes metes and bounds of the easement" and that the trial court did not err in concluding the Jones' failed to prove the pier unreasonably interfered with the easement, the court of appeals affirmed.

Discussion: The court did a good analysis of the history of the law on these topics stating that restrictions on the free use of land "are not favored and must be strictly construed." If the deed language is unambiguous, then the easement should be interpreted based on the language of the deed. The court analyzed the deed language and concluded that it intended only to prevent structures on land. It considered the fact that the deed did not reference any water-based structures or wharfs. The court held that the "default rule, therefore, is that the appellee's purchase of land adjacent to Little Neck Creek included the right to build a pier out to navigable water." The appellee owned subaqueous bottomland that rests above the mean low-water mark and had riparian rights not affected by the easement. The deed had no language that rebutted the default grant of the riparian rights and there was nothing indicating that any structures were prevented except on land.

10. *Kooiman v. Ornoff,* 2024 WL 330506 (unpublished opinion)

Facts: The parties own adjoining lots in Isle of Wight that are encumbered by 8 deed restrictions. Among them is that it may be used only for residential purposes, shall be

constructed only of frame or masonry materials and no exterior side can be cinder block, asbestos shingle, or a combination asphalt siding material, and that no trailer, basement, tent, shack, garage, barn, or boathouse can be used as a residence.

The neighbors sued each other for violations of the restrictions. The Ornoffs alleged that the Kooimans violated by renting the basement out for short-term rentals as an AirBNB and on VRBO. The Ornoffs sought injunctive relief to prevent the Kooimans from using the basement as a residence. The Kooimans allege that the Ornoffs violated by using cinder blocks in construction that are visible.

Lower Court Ruling: The circuit court granted the Ornoffs injunctive relief finding that the Kooimans could not rent or allow people to stay in their basement. Before the order was entered, Ornoff wrote to the court and indicated that the Kooimans were planning to live in their basement and rent out the main house as a work-around the court's orders. The judge wrote an order for the court that barred the Kooimans from using the basement as a separate residence while renting out the house. The circuit court denied injunctive relief to the Kooimans finding the barely visible cinder blocks were not a violation.

Holding: The court of appeals affirmed.

Discussion: In consideration of a prior ruling of the Virginia Supreme Court in *Scott v. Walker*, 645 S.E.2d 278 (2007), the court of appeals held that the case was not decisive as the Virginia Supreme Court did not hold that short-term rentals are always a permitted residential purpose. The term "residential purposes" was ambiguous and did not prohibit such use. However, here, there was an additional restriction that expressly stated the basement could not be used as a residence. The court found that reading the restrictions together, it was clear the concern was not duration of stay or status of residents. Its purpose was to prevent two separate living spaces from being utilized on one property. The trial court also did not err when it ordered that the Kooimans could not reside in the basement while renting out the main house. The court of appeals found that it did not matter who resided there as no one was permitted by the restrictions to reside in the basement.

11. *Board of Supervisors for County of Louisa v. Vallerie Holdings of Virginia, LLC,* 80 Va. App. 335 (Ct. App. 2024)

Facts: VHOV purchased the property from the prior owner in 2015. The prior owner had begun construction on the property but did not finish due to financial restraints. The property was for commercial use on the first floor and had a 400 square foot living space on the second floor. When VHOV purchased the property, the staircase that was in place to go from the first floor to the second floor had been removed in construction and the outside door to the second floor had been moved in its location.

In 2016, without obtaining a permit, VHOV constructed stairs outside from the first floor to the second floor in the same place as the prior stairs. It connected the stairs to a "bridge" that encroached a 5-foot setback requirement. VHOV contacted the County to alert it that it needed to repair the stairs which evolved into a rebuild and that they would immediately

apply for a permit. The county reviewed the plan and noted that the 5-foot setback line had been encroached and a variance was needed.

For more than 3 years, VHOV tried to get a variance. In the last attempt, members of the BZA disagreed on the variance. One thought that VHOV caused its own problems and had other alternatives to the encroachment. Another thought that the problems had not been created by VHOV but were due to location and prior work. While recognizing that granting the variance would "alleviate the hardship of lacking access," the BZA denied the variance "hanging its hat" on the belief that VHOV had "other options" for accessing the second floor.

Lower Court Ruling: The circuit court reversed the BZA and granted the variance.

Holding: The court of appeals affirmed.

Discussion: First, the court had to decide as a case of first impression how to reconcile two presumptions that arise when the BZA and the circuit court disagree. First is a presumption of correctness afforded to a BZA decision to deny a variance. Second is a presumption that the circuit court's factual findings are correct. The court of appeals reconciled the presumptions by finding that "so long as the circuit court applies the presumption as required by Code § 15.1-2314, the presumption in favor of the BZA's decision does not directly apply to review by this Court. Therefore, we apply the ordinary presumption on appeal from a circuit court, and the circuit court's findings 'shall not be set aside unless it appears from the evidence that [they are] plainly wrong or without evidence to support [them].'"

After a historical analysis of the amendments to the statutes, the court of appeals found that it was clear that the legislature "intended to expand the availability of variances." As a result, it need only be shown that the zoning ordinance "unreasonably restrict the utilization of the property, or cause hardship due to a physical condition relating to the property or improvements thereon." The court cautioned the use of prior cases under prior statutes.

Considering the quantity and reality of the evidence presented by the property owner, the court of appeals found that the circuit court did not err in granting the variance. It would require a lot of construction at a high cost. Further, the court of appeals held that the property owner did not create its own hardship so that could not be a basis to deny the variance. "Merely purchasing property that will require a variance is not enough to qualify as a self-inflicted hardship."

12. *Morris v. Parker,* 2024 WL 236553 (unpublished opinion)

Facts: The Morrises sought an implied easement over a right of way abutting their property. In 1998, the Morrises bought property in Chesapeake, which was shown on the plat as being bordered by a right of way named "Flurry Road" aka "Fluridy Road" on the east side. The Morrises never used Flurry Road to access their property, choosing instead to access their property through public roads adjacent to the southern and western borders of their property. The Parkers own property on the other side of "Flurry Road" and access their property along a gravel road, which the Morrises claim is Flurry Road.

In 2017, the Morrises subdivided their property creating a parcel bordering on the gravel road used by the Parkers and sought to install a driveway connecting to that gravel road. The Parkers objected and the Morrises filed a declaratory judgment action seeking to establish access to their newly subdivided parcel.

At trial, the Morrises presented expert testimony from a title examiner establishing that the parcels were once owned by a common grantor and that the deeds in the chains of title to both properties consistently describe the properties with reference to a 1909 plat that shows both the Morris Property and the Parker property abutting Flurry Road. The title examiner also testified that Flurry Road as platted in the 1909 plat was not located on either the Parkers' or the Morrises' property but between them. The expert did not testify as to actual the physical location of Flurry Road as platted, noting that she did not know whether that road was "developed or not, whether its gravel or dirt" and "there is no way to really tell exactly where it is."

Lower Court Ruling: The circuit court ruled that the Morrisses failed to establish an easement by necessity finding that, although the evidence demonstrated that there was a common grantor, there was no evidence that either the use of the road was in existence at the time of the severance of the unity of title or that the use had been reasonably necessary for the enjoyment of the dominant tract.

Holding: Affirmed. On appeal, the Morrises argued that they were not required to establish the elements of an easement by necessity because they were entitled to an implied easement under *Lindsay v. James*, 188 Va. 646 (1949, which provides that
"[w]hen land is subdivided into lots, streets, and alleys, and lots are sold and conveyed by reference to the plat . . . , the conveyances carry with them the right to the use of such streets and alleys as may be necessary to the enjoyment and value of said lots.

The Court of Appeals determined that because the Morrises failed to establish the physical location of Flurry Road, i.e. their claimed easement, they could not prevail on any theory. The Morrises sued to establish an easement over the gravel road used by the Parkers claiming that it was the road depicted in the 1909 plat as "Flurry Road." The Morrises failed to present any testimony that that was the case. Meanwhile, the Parkers claimed that the gravel road was located entirely on their property and therefore could not be "Flurry Road."

Under the right result, wrong reason principle, the Court of Appeals affirmed the trial court's ruling that the Morrises failed to establish an implied easement.

13. *Norfolk District Associates, LLC v. City of Norfolk,* 2024 WL 780724 (unpublished opinion)

Facts: In 2013, Norfolk District Associates and the City of Norfolk and NHRA entered a lease for the space known as Waterside and owned by NHRA. In the lease, NDA claimed that it had the right to turn Waterside into a casino if Virginia law changed and permitted casinos. The lease provided that the use did not currently include the operation of a casino. It also provided that if the law changed in the Commonwealth of Virginia that permitted

developing and operating a casino, then the parties would enter an amendment. The terms of the amendment were not defined.

In December 2018, the City of Norfolk began working with the Pamunkey Tribe both in the city and through the Virginia legislature so that the laws could be changed, and the Tribe could open a casino in Norfolk. The law changed to permit casinos in Virginia in 2020.

NDA filed suit claiming a breach of the lease as well as many other claims like tortious interference with contract and conspiracy. All three of the defendants filed demurrers to the complaint.

Lower Court Ruling: The circuit court sustained the demurrers.

Holding: The court of appeals affirmed.

Discussion: The court of appeals found that all the claims turned on the premise that the City and NHRA breached enforceable contract provisions owed under the lease to NDA. First, the court of appeals found that applicable lease section to be unenforceable. "Agreements to agree in the future are too vague and indefinite to be enforced." All NDA had was an agreement to agree in the future. Further, the terms of any future deal were undefined. As a result, any potential obligation to permit NDA to lease Waterside for a casino was an unenforceable contract.

Second, the court of appeals found that a casino was not a permitted use under the lease. The lease specifically defined what the permitted uses were, and a casino was not listed. Further, it was not a breach of the lease for the city to permit the Tribe to develop and run a casino because that would be a different operation than the one NDA ran at Waterside.

14. *Sainani v. Belmont Glen Homeowners Association,* 2024 WL 157551 (unpublished opinion)

Facts: Belmont Glen originally sued Sainani in the Loudoun County General District Court seeking to collect $885.64 in fines for violating the HOA's seasonal outdoor holiday lighting guidelines. The Sainanis appealed the GDC's judgment in the HOA's favor to the Circuit Court and filed a counterclaim seeking an injunction to prevent enforcement of the seasonal guidelines as well as damages for breach of the underlying Declaration and violation of the Property Owners' Association Act.

The circuit court found in favor of the HOA, determining that the seasonal guidelines were reasonable and enforceable and entered judgment in favor of the HOA for $884.17, plus $39,148.25 in attorney's fees.

The Sainanis appealed to the Supreme Court, which held that the seasonal guidelines exceeded the scope of the HOA's authority and were not reasonably related to any restrictive covenant. *Sainani v. Belmont Glen Homeowners Ass'n*, 297 Va. 714 (2019). The Supreme Court reversed the circuit court's judgment and remanded the case.

Lower Court Ruling: On remand, the circuit court entered judgment for Sainani for $200 on its breach of contract claim, ordered the HOA to release any liens against the Sainanis, and to vacate any notices of violation. The trial court refused to award the Sainanis a permanent injunction against the HOA.

Pursuant to Va. Code § 55.1-1828, the Sainanis sought recovery of just over $285,000 in attorney's fees and costs and the circuit court awarded $106,699 in fees and $19,521,98 in costs. In reducing the amount of fees awarded to the Sainanis, the trial court rejected any award of post-appeal fees, determining that they were not the prevailing party due to the refusal to award an injunction. Both parties appealed.

Holding: The Court of Appeals found that the trial court erred in determining that the Sainanis were not the prevailing party post appeal. The Court recognized that the prevailing party is "the party in whose favor . . . judgment is entered, and in determining this question the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action." The Court relied on federal case law – the United States Supreme Court decision in *Hensley v. Eckerhart*, 461 U.S. 425 (1983) for the proposition that when a party brings multiple claims that involve a common core of facts or related legal theories, "the statutorily-authorized attorney fee should not be reduced simply because the party prevailed on some claims and not others." A person is a prevailing party when they succeed "on any significant issue in litigation which achieves some of the benefit [he] sought in bringing the suit." Further, even when a party fails to prevail on every issue they raised in the litigation, the fee award should not be reduced." That said, the Court also recognized that if a plaintiff achieves "only partial or limited success" awarding a fee based on all of the hours expended in the case may be excessive.

Although an award of fees is in the discretion of the trial court, the circuit court should "provide a concise but clear explanation of its reasons for the fee award" and if the basis of the adjustment is due to "the exceptional or limited nature of the relief obtained by the plaintiff, the court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained."

The Court remanded the matter to the trial court "to provide a concise but clear explanation of its reasons for the fee award" taking into consideration the ruling in *Hensley*, *461 U.S. at 435."* The Court also remanded to consider evidence of certain appellate fees that it denied, which related to an initial appeal that was dismissed by the Supreme Court because the underlying ruling was not a final order. The Court emphasized that a court cannot award a fee that is "so low that it fails to reimburse the prevailing party for the costs necessary to effectively litigate the claim that – after all – it prevailed on."

The Court also rejected the HOA's appeal claiming that the trial court erred in granting judgment to the Sainanis on their breach of contract claim.

15. *Salunkhe v. Christopher Customs, LLC,* 78 Va. App. 312 (Ct. App. 2023)

Facts: Owners of lot 29 in the Brentwood Subdivision brought claims against owners of two other lots (Lots 28 and 30) seeking to establish, among other things, that public

easements existed for a 24' access easement and for a 35' turnaround easement based on notations on the recorded subdivision plat. Lots 28 and 29 both include 12-foot adjacent pipestems providing access to a subdivision road. The pipestems total 24 feet in width and are partially paved. By agreement among the predecessors in title, the parties agreed to permit each other to use the paved portion of the pipestems to access the public road.

The Owners of Lot 29 believed based on the notes on the subdivision plat that they had the right to make improvements and therefore pave the entire 24 pipestem area, as well as the 35 foot pipestem area.

The Owners of Lot 29 filed a complaint seeking a declaration of the existence of public easements, as well as seeking some ancillary relief.

Lower Court Ruling: On cross-motions for partial summary judgment, the trial court ruled in favor of the defendants finding that the notations on the subdivision plat failed to create a public easement pursuant to Code § 15.2-2265 because the plat did not "indicate that the claimed easements [were] for public usage." The circuit court further held that § 15.2-2265 "does not operate to create public easements; it merely effectuates the transfers of easements which are identified on the plat as being created for public use." Plaintiffs non-suited their remaining claims and appealed the ruling.

Holding: Affirmed. Code § 15.2-2265 provide for two different types of transfers to a locality when an approved subdivision plat is recorded: (i) the transfer of areas set apart for "streets, alleys or other public use" and (ii) "any easement indicated on the plat to create a public right of passage over land."

The Court ruled that in this case, which concerned the second type of transfer, that merely noting "Ingress-Egress Esm't" on a subdivision plat does not create a public easement under the statute. The Court based its ruling on the plain language of the statute – which requires some indication of an intent "to create a public right of passage" which is absent in the subdivision plat at issue. In addition, Virginia case law provides that a dedication to the public is not complete until an easement is "accepted by the competent public authority." Although the Couty approved the plat, nothing on the plat signaled to the locality that it was being offered a public easement.

Based on the above, the Court ruled that a public easement can only be transferred pursuant § 15.2-2265 where there is an explicit notation on the plat reflecting that it is for a public purpose.

16. *Veldhuis as Trustee v. Abboushi,* 77 Va. App. 599 (Ct. App. 2023)

Facts: When the appellees purchased their property, they had a discussion with the appellant's prior owner about the boundary line. The prior owner was mistaken about the boundary line, but the appellees accepted it and used the disputed portion of land, exclusively, for more than 15 years. This use included all maintenance, a privacy screen, and all costs associated with maintaining the disputed portion of land. The prior owner went to the appellees and asked them to agree for him to install a pipe so that rain can flow away from his property. The appellees gave permission, and the pipe was installed. The appellees

filed suit to obtain ownership of the disputed portion of land through adverse possession. The appellant counterclaimed for trespass.

The appellant inherited the property from her father, the prior owner, and at trial and on appeal took the position that the appellees use was not exclusive because of the pipe. She claimed that her father and she also used the disputed portion of land with the pipe and as a result, the appellees could not obtain ownership of the disputed land by adverse possession as the use was not exclusive.

Lower Court Ruling: The trial court ruled in favor of the appellees and ordered them to have ownership of the disputed land by adverse possession.

Holding: The court of appeals affirmed.

Discussion: The only issue raised by the appellant on appeal was the trial court's finding that the use by the appellees was exclusive. Use is exclusive when it is not in common with others. The court of appeals found that the appellant's position "misunderstands the ethos of an adverse possession claim." As is clear from the history of cases on adverse possession in Virginia, the possession must be "under a claim of right and adverse to the right of the true owner." A claim of right is "a possessor's intention to appropriate and use the land as his own to the exclusion of all others."

The court of appeals examined and decided that the fact that the prior owner sought permission from the appellees to install the pipe and that the appellees gave the permission illustrated the claim of right. The court stated that the "operable question here is whether [prior owner] used the land *as the rightful* owner; as his use *as a licensee or invitee* would not affect the Abboushis' exclusive possession." Here, there was an abundance of evidence that established the appellees ownership by adverse possession and permissive installation and use of a pipe for water did not change that.

17. *Watan Holdings, LLC v. Blankenship,* 2023 WL 7359891 (unpublished opinion)

Facts: Watan purchased commercial property from the Blankenships. At some point after the closing, Watan learned that parts of the property conveyed to it by the Blankenships was not owned by them. Watan learned this through a zoning application and process when the city told it that it did not own all the property. Watan learned that two other entities owned portions of what it purchased from the Blankenships.

Watan filed suit for breach of general warranty alleging both an actual eviction and constructive eviction. The Blankenships filed a demurrer alleging that Watan had not properly stated a claim for either type of eviction.

Lower Court Ruling: The trial court sustained the demurrers and dismissed the complaint.

Holding: The court of appeals affirmed.

Discussion: Ultimately, Watan failed to state a claim for breach of warranty because it failed to plead that a third party had asserted paramount title to the property, or that there was an ouster, or that Watan was forced to pay money to acquire superior title to the property. It undisputed that neither of the third-party owners asserted ownership over any of the property. It was undisputed that Watan, once it learned of the true ownership, voluntarily did not enter the property due to fear of a trespass claim. The court was not even aware of whether the third parties knew of the title issues.

"In an action for breach of a covenant of warranty, a claimant must plead that an actual or constructive eviction has occurred." An actual eviction requires an ouster or dispossession. "A constructive eviction occurs when 'the premises are in the actual possession of a third party' under 'an adverse assertion of paramount title' at the time of the conveyance." It can also occur when there is no change of possession, but a party is compelled to purchase the property to receive proper title. None of these were plead in the complaint.

The court of appeals held that Watan's treatment of the property after it learned of the title issues was voluntary. "Merely because Watan treated the title defect as an eviction does not make it so . . . ."

18. *Willems v. Batcheller,* 78 Va. App. 199 (Ct. App. 2023)

Facts: Plaintiffs sued for trespass and nuisance due to encroachment of Defendants' bamboo into Plaintiffs' property. In 2002, Defendants bought their property and installed a split rail fence in 2003. In 2005, Defendants planted bamboo in the corner of their lot for privacy and screening. The bamboo was planted next to the split rail fence and near a shed on what is now Plaintiffs' property.

In 2015, Plaintiffs bought their property, which adjoins Defendants' property. At that time, Plaintiffs repaired the roof of a utility shed adjacent to the fence. The eave of the reconstructed roof of the shed overhangs the fence.

In 2020, Plaintiffs filed suit alleging that (i) Defendants fence encroached on Plaintiffs' property and (ii) the bamboo created a nuisance and encroached on Plaintiffs' property. Plaintiffs sought to enjoin both encroachments. Defendants asserted various defenses, including the defense of "adverse possession" to the fence encroachment and laches and statute of limitations.

Lower Court Ruling: The court held that (i) the spread of bamboo into Plaintiffs' property was both a nuisance and a trespass and (ii) the statute of limitations did not apply because the relief sought was only equitable and laches did not bar the continuing trespasses and nuisances. The Court also held that the split rail fence installed by Defendants in 2003 – which fence encroached onto Plaintiffs' property in several areas, established the boundary line between the properties by virtue of adverse possession.

On motion for reconsideration, Plaintiffs argued that their shed roof eave, which hung over parts of the split rail fence, interrupted the exclusivity or continuity of the fence installed by Defendants to defeat their adverse possession claim. The court rejected that argument,

finding that Plaintiffs would have had to take action to interfere with how Defendants used the land to disrupt the adverse possession claim. Because of the location and height of the shed eave, it did not disturb or restricted Defendants' normal use of the disputed ground.

Holding: Affirmed in part, reversed in part, and remanded. The Court reversed and remanded with respect to the trial court's ruling on adverse possession with respect to the fence on the ground that the defendants sought no affirmative relief in their pleadings. Defendants merely alleged "adverse possession" as a defense and nothing more. Although the Court determined that adverse possession can be couched as a defense and need not be alleged as a counterclaim to obtain relief, the pleading must include an affirmative request for relief to enable the trial court to grant any relief. Because no relief was requested, the trial court lacked jurisdiction to declare a new boundary line.

The Court ruled that the trial court did not err in concluding that the bamboo constituted both a nuisance and a trespass, and further rejected Defendants' claim that, under *Fancher v. Fagella*, 274 Va. 549 (2007), only self-help is available as a remedy for encroaching trees and plants. In *Fancher*, the Supreme Court adopted the "Hawaii" rule, which provides that encroaching trees and plants are not nuisances unless they cause actual harm or pose an imminent danger of harm to adjoining property. If actual harm is caused, then the owner can be held liable for the damage and can be required to cut back the encroachments. In the absence of any actual harm or imminent danger of harm, the adjoining landowner has the right to engage in self-help to cut away encroaching vegetation at the property line – regardless of whether the encroaching vegetation constitutes a nuisance.

In this case, the Plaintiffs testified that the bamboo damaged the shingles on their shed, so the encroachment caused actual harm, justifying the trial court's finding of a nuisance and its order for Defendants to abate that nuisance.

Finally, the Court held that the trial court did not err in denying Defendants' defense of statute of limitations and laches. With respect to statute of limitations, which is five years for damage to property, Virginia Code § 8.01-230 provides that rights of action are deemed to accrue – and the applicable limitations period begins to run – when the injury is sustained . . . *except when the relief sought is solely equitable*. Here, because Plaintiffs sought only equitable relief, the statute of limitations was inapplicable. Laches also did not apply because Defendants established no prejudice from the delay.

E. VIRGINIA CIRCUIT COURT CASES

1. *Carniol v. Nayak,* (County of Fairfax 2023)

Facts: The Carniols and the Nayaks owned neighboring lots in a subdivision in Vienna, Virginia. Six mature white pine trees were located entirely on the Carniols lot and ran along the boundary line between the properties. The trees provided a sight barrier between the parties' houses and also mitigated noise coming from Route 7.

While the Carniols were on vacation, the Nayaks hired contractors to trim the branches on the pine trees. Rather than just trimming branches as they crossed the property line, which is

permitted under *Fancher v. Fagella*, the Nayaks trimmed branches around the entire circumference of the trees. According to the Court the trees were "lollipopped" – meaning that the trees now looked like giant lollipops with only the trunk extending upward with branches only at the very top. According to the Court, "the distorted appearance of the trees was hideous" and the "trees looked stupid."

The Carniols filed suit for trespass and the Nayaks counterclaimed for trespass and nuisance.

Holding: The Court ruled the Nayaks trespassed when trimming the branches and that the trespass was not justified under the Restatement (Second) of Torts § 201, which allows entry on a neighboring property to abate a nuisance if the owner fails to do so after demand. Here, the Nayaks never made demand. The Court noted that *Fancher* allows an adjoining landowner to cut vegetation at the property line "whether or not the encroaching vegetation constitutes a nuisance or is otherwise causing harm." The only right the Nayaks had was to trim vegetation at the property line and by crossing the boundary line, the Nayaks trespassed.

The Court then turned to assessing damages for the trespass, finding that the correct measure of damages for nonmerchantable trees is the "diminution in the market value of the property" – not the stumpage value or the replacement value.

The Carniols testified that the trees had an aesthetic value as a sight and sound barrier. The Court also found that in this instance the stumpage value – estimated at $45,800 – was too high an award to justify particularly when the trees were never going to be timbered and therefore where not merchantable.

The Court then reviewed several circuit court cases that have attempted to determine the proper measure of damage for injury to aesthetic or ornamental trees. Those courts have concluded that Virginia does not allow replacement costs as measure of damage, but that the replacement costs could be incorporated into the testimony of a real estate appraiser with respect to the diminution in value.

The Carniols' real estate appraiser determined that the diminution in value of the property was $25,000 and awarded those damages, as well as some additional damages for damage to a pool fence and some other pool related items.

With respect to the Nayaks counterclaim for trespass and nuisance, the court found in favor of the Nayaks on their trespass claim – that the Carniols trespassed on their property repeatedly over the years to cut down tree branches – and awarded $1.00 in damages. The Court also found in their favor on their nuisance claim – that the encroaching branches and damages to their deck and other property constituted a nuisance – and awarded another $1.00 in damages.

2. *Patterson v. Garder,* (City of Norfolk 2023)

Facts: The parties owned property in a condominium in Ocean View. The dispute arose because one owner desired to build a fence. Patterson asked the court to find that the fence would constitute a private nuisance and asked for an injunction preventing the Gardners from

building the fence. Patterson claimed that the fence would cause the loss of her view and diminish her access to the dock. Patterson claimed the fence would greatly lower the value of her property. The Gardner's filed a demurrer to the complaint.

Holding: The court sustained the demurrer and dismissed the count.

Discussion: The court provide a very thorough analysis of old English law on nuisance. In this analysis, the court noted that the law if nuisance does not protect a landowner's view. Further, the discomfort and annoyance caused by the alleged nuisance must be significant and of a kind that would be suffered by a normal person in the community. On the issue of blocking her view, the court found that the fence would not be a private nuisance due to any impact on the view. Fences and walls are common and serve the same purpose whether built in England or Virginia! On the access to the dock, the plaintiff plead that the City of Norfolk owned a paper street that gave her access to the dock. She did not plead that she took any steps to have the city abandon or convey the paper street to anyone. As the condominium did not own the paper street that provided access to the dock, it could not grant an easement over it. As a result, Patterson had no claim against Gardner pertaining to access to the dock.

Recent Developments in Virginia Trusts & Estates Law 2023 – 2024

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I. CASES (VIRGINIA COURT OF APPEALS)

A. No-Contest Clause. *Hunter v. Hunter*, 77 Va. App. 468 (2023)

Charles and Theresa Hunter had two children, Chip and Eleanor, and separate revocable trusts. In the last few years of Mr. and Mrs. Hunter's lives, Eleanor and Mrs. Hunter served as co-trustees of both trusts. Mr. Hunter predeceased Mrs. Hunter, and the assets of his trust were payable to Mrs. Hunter. Upon Mrs. Hunter's subsequent death, Eleanor became the sole trustee of both trusts. Chip, Eleanor, and a trust for the benefit of Eleanor's daughter, Sharon, were the beneficiaries of Mrs. Hunter's trust, with Chip being entitled to the smallest share. Both trusts contained no-contest provisions.

In an earlier action, Chip, employing the "alternative-pleading model," sought a determination that Eleanor was not entitled to withhold from him certain information regarding a significant decline in the value of Mrs. Hunter's trust in the final years of his parents' lives, provided that his seeking such determination would not violate the no-contest clause in Mrs. Hunter's trust. *Hunter v. Hunter* (*Hunter I*), 298 Va. 414 (2020). His request was determined not to violate the no-contest clause and was granted.

In this action (*Hunter II*), Chip again employed the alternative-pleading model, seeking a determination that his substantive claims would not violate the no-contest clause before actually making those claims. His substantive claims were, in effect, that Eleanor procured certain gifts from their parents through undue influence and fraud. Eleanor counterclaimed, alleging the transactions at issue were not gifts but rather discretionary distributions she made as trustee, and that Chip, in seeking to set those transactions aside, violated the no-contest clause. The trial court ruled that Chip's claims did not violate the no-contest clause but certified its order for interlocutory appeal. On appeal, Eleanor argued that the trial court improperly granted Chip a declaratory judgment on the no-contest clause issue.

The Court of Appeals did not find any of Eleanor's six assignments of error persuasive.

Perhaps most notably, Eleanor claimed there was no justiciable controversy to warrant a declaratory judgment, because Chip did not prove Eleanor had threatened his claims would violate the no-contest clause. The Court of Appeals disagreed, finding that Eleanor's previous attempts to use the no-contest clause to disinherit Chip gave him "good reason to think this time would be no different."

Eleanor also asserted that for Chip to obtain a declaratory judgment providing that his claims, if true, would not violate the no-contest clause, he had to present evidence in support of those claims. The Court of Appeals again disagreed with Eleanor, finding that the complaint and trust were sufficient evidence to provide a basis for the trial court's determination.

So, Chip's declaratory judgment (that his claims would not violate the no-contest clause) stands. But the Court of Appeals cautioned that Chip "proceeds at his peril if. . . he makes additional arguments or claims beyond those contained in the complaint that violate the no-contest provision."

B. Commissioner of Accounts. *Minor v. Heishman*, Record No. 0980224 (Va. Ct. App. 10/10/2023)

On her petition to the Fairfax Circuit Court, Kishna was appointed the guardian and conservator of her incapacitated grandfather, Eric Wilder. The order appointing Kishna gave her power over Mr. Wilder's assets and any accounts he owned jointly with his wife. Kishna posted bond with Liberty Mutual as her surety.

Kishna filed her inventory, amended inventory, and first account, all of which were approved by the office of the Commissioner of Accounts. [1] Mr. Wilder died during the second accounting period, and Kishna filed a second and final account shortly after his death. Before the second account was approved, Eric, one of Mr. Wilder's children, wrote to the Commissioner raising concerns about Kishna's management of the assets. Cynthia, another of the Wilder children, joined in Eric's complaints, and they subsequently requested the Commissioner hold a hearing under Va. Code § 64.2-1209 and the production of certain bank records.

The hearing occurred in 3 parts, having been continued twice. In the earliest of the hearings, Kishna confirmed the existence of an undisclosed bank account. She had opened two accounts, one being reported to the commissioner and the other being, according to Kishna, a "guardian account" reported only to the "state." After that hearing, Kishna, by counsel, argued that the proceeding was a "nullity" because Eric and Cynthia were not "interested persons" with standing or the right to request a hearing under Va. Code § 64.2-1209. In another of the hearings, the Commissioner made statements to the effect that the Commissioner herself was an "interested person," she "had standing in the case," and she was not "neutral."

Between the hearings, the Commissioner subpoenaed and obtained statements for both accounts. The funds in the undisclosed account were Mr. Wilder's, and among the expenditures were the following: $25,437.92 in furniture at Restoration Hardware, $2,018.20 on a Carnival cruise, and $2,489 on a Peloton bike. Also, $166,813.57 in "transf to Kishna" transactions appear on the statements. The explanations for these transactions offered by Kishna's counsel after the hearings was that the "funds went to address perceived inequities or improprieties within the family" and "to prepare an in-law suite for [Mr. Wilder] in [Kishna's] house." No evidence to support the propriety of these transactions was provided.

The circuit court issued a show cause summons, following a the Commissioner's summons to Kishna to file a proper account, Kishna's failure to do so, and the Commissioner's filing of a report of noncompliance. Kishna's counsel argued that the proceeding was a nullity and the Commissioner was not an impartial adjudicator. The circuit court entered an order directing the Commissioner to hold a hearing to determine whether Kishna should be removed and in what amount, if any, her bond should be forfeit. On the same date, the Commissioner filed a petition for Kishna's removal and the forfeiture of her bond.

The Commissioner held the hearing ordered by the circuit court to determine the extent, if any, of the bond forfeiture. The Commissioner's report, filed with the

[1] Commissioner Heishman took over the supervision of this matter from her predecessor after the second account was filed.

circuit court, recommended a bond forfeiture. Kishna and Liberty Mutual filed exceptions. The report was confirmed, and no appeal was noted.

Following a later hearing on the Commissioner's petition, the circuit court issued a letter opinion determining the Commissioner was correct in holding a hearing and acted within the scope of her powers. Kishna and Liberty Mutual appealed.

1. Confirmed Report as Final Order

On appeal, the Commissioner argued that the circuit court's order confirming her report was a final, appealable order from which Kishna and Liberty Mutual did not note their appeal, and their subsequent appeals should have been procedurally barred.

The Court of Appeals disagreed that the circuit court's confirmation of the Commissioner's report was a final order for purposes of appeal. According to the Court of Appeals, the language of Va. Code § 64.2-1213 does not alter the traditional analysis of whether an order is a final, appealable order, and under the traditional analysis, the order was not a final one. The order did not "dispose[] of the entire matter" because issues remained to be decided and the Commissioner's petition to remove Kishna and forfeit her bond was still pending.

2. "Interested Persons" under 64.2-1209

Kishna and Liberty Mutual again argued that the whole proceeding was a "nullity" because it started with Eric and Cynthia's improper request for a hearing under Va. Code § 64.2-1209. The Court of Appeals did not agree. Instead, the Court of Appeals agreed with the circuit court that Va. Code § 64.2-1209 is not the only way a commissioner can hold a hearing, and the Commissioner's activities were proper under her other authority.

3. The Commissioner's Impartiality

Kishna and Liberty Mutual argued that the Commissioner was not an impartial arbiter based on the statements she made during the hearing, and she was impermissibly acting as judge and prosecutor.

The Court of Appeals did not agree. The court said the Commissioner's statements during the investigatory hearings were taken out of context. Also, the Commissioner acted appropriately pursuant to her statutory duties and did not act as a prosecutor. She made, as required by the statutory scheme, findings of fact and recommendations to the circuit court in her report, and she otherwise acted consistently with her other statutory obligations, which can require her to initiate proceedings against a fiduciary.

4. The Joint Accounts

Kishna and Liberty Mutual assigned error to the Commissioner's not having considered certain evidence. The Court of Appeals declined to find error, since the appellants failed to offer that evidence before the Commissioner and did not proffer what evidence they would have offered.

One of the arguments relating to evidence was about the Wilders' intentions regarding their joint accounts. As to those accounts, the appellants also argued that Kishna should not be held responsible for the funds originating from them because the funds should have been viewed as Mrs. Wilder's. The Court of Appeals noted that the order appointing Kishna gave her power over the joint accounts, and she therefore had a duty to account for and not misappropriate any funds from them.

C. Will Interpretation. *Stack v. Larsen*, Record No. 1301223 (Va. Ct. App. 09/26/2023)

In his will, Erik Larsen left his residence and the 101 acres on which it lies to his two adult children, Pamela and Kirk, subject to the right of his wife, Sandra, "to reside in [the] home. . . for as long as she is physically and mentally able to do so." Mr. Larsen's will also gave Sandra the right to "receive the monthly rental payments" from a cell-tower lease on the property, "as provided for in the [lease a]greement. . . for as long as she resides in [the] home."

Previously, in *Larsen v. Stack*, 298 Va. 683 (2020), the Virginia Supreme Court determined that Sandra did not have a life estate in the property. Rather, the children's rights in the property were concurrent with Sandra's, as long as the children did not "interfere with [Sandra's] ability to live on the property by herself."

Following the 2020 Supreme Court's decision, this litigation arose over (a) the children's demands that the cell tower rent be paid to them for distribution to Sandra, rather than to Sandra directly, and (b) the parties' relative rights to and responsibility for the residence.

As to the cell-tower rental payments, the circuit court, interpreting the will, determined they were properly being made directly to Sandra. The circuit court's order went as far as to say that "the lease payments regarding the cell phone tower payable by Beacon Towers (or its successor) shall be made directly to Sandra," even though Beacon Towers was not a party to the proceeding. On appeal, the children sought to vacate that provision of the order, assigning error to the circuit court's interpretation of the will and raising for the first time the failure to join Beacon Towers as a necessary party. The Court of Appeals declined to vacate the provision, finding no error in the circuit court's interpretation of the will and, based on precedent and Va. Code § 8.01-678, determining that the children could not set aside a judgment where they failed to join a necessary party, waited until the appeal to raise that objection, and received a fair trial on the merits.

As to the residence, the parties' disagreements were over (i) Pamela's plans to occupy the second floor of the residence and divide the house into two apartments; (ii) the children's demands that Sandra pay rent; and (iii) the children's demands that they be allowed to inspect the property at any time.

The circuit court declined to divide the residence into two apartments as the children had proposed on the grounds that doing so would materially interfere with Sandra's rights under the will, as interpreted in *Larsen v. Stack*. For the division to occur, Sandra would have had to vacate her bedroom on the second floor, her occupancy would have been restricted to the first floor (of which she would not

have exclusive use), her privacy would have been limited, and major renovations to the house would have been required. On appeal, the children argued that the circuit court should have followed *White v. White*, 183 Va. 239 (1944) and divided the residence. The Court of Appeals found no abuse of discretion in the circuit court's decision not to divide the residence and distinguished *White*.

The children's argument for rent was that in giving Sandra exclusive use of the residence, the circuit court effectively ousted them, and they, as something akin to tenants in common with Sandra, should be entitled to rent from her. The Court of Appeals disagreed, saying the circuit court did not alter the children's rights—their rights were always subject to Sandra's. Having never been entitled to exclude Sandra from the second floor of the house, the children were not ousted.

The circuit court gave the children the right to "periodically inspect the residence for waste as long as they give at least 24 hours' notice to Sandra. . . [at] an agreeable time for all parties for such inspection," with Sandra being prohibited from unreasonably withholding her consent. On appeal, the children argued that as fee-simple owners, they should be allowed to enter and inspect the property at any time. The Court of Appeals again found no abuse of discretion, noting it was reasonable for the chancellor to have determined 24 hours' notice alone would not have been sufficient to protect Sandra's privacy.

D. Fees and Costs. *Bradshaw v. Owens* (unpublished), Record No. 1782222 (Va. Ct. App. 02/27/2024)

Keith Bradshaw was the beneficiary of a testamentary trust. Keith's brother, Steven Bradshaw, was named as the trustee. Keith was incarcerated and serving a life sentence, which made the trust difficult to administer by its terms. Steven asked that the circuit court allow him to resign and either replace him or terminate the trust and distribute the funds to an inmate account for Keith.

The circuit court appointed a guardian ad litem for Keith. The GAL agreed to Steven's resignation and the termination of the trust. Keith appeared by phone at the hearing and represented himself, since the GAL did not appear. The judge granted the relief requested and asked Steven's counsel to prepare an order. The order, which was signed after the hearing, granted the relief discussed at the hearing *and* awarded reasonable attorney's fees and costs to Steven's counsel and $1250 to the GAL (the amount on her invoice), all to be paid from the trust assets.

Upon receiving a copy of the order, Keith sent letters to the GAL and the judge expressing discontent with the fee awards and appealed the circuit court's order.

The Court of Appeals addressed, sua sponte, whether Keith's assignment of error was preserved, given that it was not made contemporaneously with the order. The court determined it was: since Keith did not see the final order or know of the fee awards until after the order was entered, he did not have the opportunity to object contemporaneously.

As to the propriety of the fee awards, Keith argued that they should not have been included in the order since they were not included in the judge's oral pronouncements at the hearing. The Court of Appeals disagreed, pointing out that

the basis for Keith's argument was in criminal sentencing cases, and the logic does not extend to this case. Keith also argued that various provisions of the will under which the trust was established prevented the fees from being paid from his trust or directed payment from another source. The court said the provison directing payment of the decedent's debts, taxes, and expenses from his residuary estate applied to the decedent's debts, taxes, and expenses, not Keith's. Also, the ostensible spendthrift provision did not preclude a court from awarding fees and costs from the trust principal. Finally, the will contains provisions indicating the testator did not envision the trust being completely insulated from its costs, and Virginia law contemplates trust assets being used for trust expenses.

Judge Causey dissented. She would have found error in several of the circuit court's determinations, including the fee awards.

Because Keith did not oppose Steven's resignation or the termination of the trust and circuit court was willing to enter an agreed order without a hearing, "there was no need for aid and direction." Consequently, the fees of Steven's counsel did not aid the fiduciary in the performance of his duties and benefit the estate, as is required for fees to be awarded in an aid and direction suit.

The fee award was also in error for the following reasons:

- The circuit court did not expressly find that that the attorney's fees were trust expenses.
- The attorney did not make a prima facia case for the fees.
- The award was not included in the ruling from the bench.
- Keith should have been given notice of and an opportunity to be heard on the matter of the attorney's fees before he was "deprived of a property interest."

According to the dissent, "if attorney fees must be granted, they must be granted from the residuary estate" [i.e., "as an expense of the administration of the [decedent's] estate,"] rather than from the trust.

The dissent also takes issue with the award of the GAL's fee. Because Keith was not named as a defendant in the action, Va. Code § 8.01-9 could not provide a basis for the appointment of a GAL for him. Therefore, the appointment of a GAL under Va. Code § 8.01-9 was error. Since the appointment was in error (and he neither requested nor received counsel), Keith should not have been made to bear the GAL's fees.

Even if the GAL was properly appointed, her service did not constitute "substantial service in representing [Keith's] interest" meriting compensation.

An additional error was allowing Keith to waive his right to counsel (the GAL) and represent himself during the hearing without ensuring he was making a voluntary, knowing, and intelligent waiver was also error, given the circuit court's determination that Keith required a GAL.

Finally, the dissent made a case that "all civil defendants should be entitled to the right to counsel, regardless of disability."

E. Ademption by Extinction. *Atkins v. Williams* (unpublished), Record No. 0751223 (Va. Ct. App. 08/01/2023)

Betty Atkins's husband and brother-in-law owned a piece of land. Mrs. Atkins inherited her husband's share of this land upon his death. She and her brother-in-law partitioned the land, and Mrs. Atkins's received approximately 142 acres.

Mrs. Atkins gave 1 acre to Timothy, one of her 4 children. Later, she gave the remaining approximately 141 acres to Curtis, another of her children. But, soon after making the gift to Curtis, she sought to void it. She and Curtis settled the dispute over the gift, with Curtis retaining approximately 58 acres and conveying approximately 83 acres to Timothy.

Timothy died intestate, and Mrs. Atkins, as Timothy's sole heir at law, inherited back his 84 acres.

Mrs. Atkins died testate 2 months after Timothy. Her will contained the following devise of the land:

> "[t]o my sons, Timothy Lee Atkins and Curtis Glen Atkins, as joint tenants with the right of survivorship as existed at common law, so that upon the death of one of the parties, the entire fee simple interest in said real estate shall immediately become vested in the survivor, any and all interest which I may receive from my said husband in the farm at Maybrook, Giles County, Virginia, which farm is currently jointly owned by my husband and my brother-in-law. . . ."

Curtis sought a determination from the circuit court that the devise under the will entitled him to the 84 acres Mrs. Atkins inherited from Timothy. The circuit court determined the devise in the will was adeemed by extinction. The court reasoned that the various inter vivos conveyances "completely change[d] the nature of the property and negated [Mrs. Atkins's] intent," and Mrs. Atkins's reacquisition of the 84 acres from Timothy did not revive the devise. The ademption of the devise caused the land to pass under the residuary clause to Joseph, another of Mrs. Atkins's children. Curtis appealed.[2]

Curtis argued that Va. Code § 64.2-413 precluded the application of the common law ademption by extinction doctrine. According to him, Mrs. Atkins's reacquisition of the 84 acres gave her the "power to dispose of" the property, reviving the devise. The Court of Appeals, having looked to North Carolina's similar statute and the cases interpreting it, said Curtis's reading of the statute was too broad, and Va. Code § 64.2-413 "merely establishes that the only effect of a subsequent conveyance is an ademption." So, according to the Court of Appeals, Va. Code § 64.2-413 only applies in this case to establish that Mrs. Atkins's inter vivos conveyances of the land do not revoke her entire will, and who inherits the property depends on whether the devise was adeemed.

According to the Court of Appeals, the interest devised in the will, i.e., the "interest which I may receive from my husband in the farm at Maybrook, Giles County[,]" was extinguished by Mrs. Atkins's inter vivos conveyance of the 141 acres to Curtis. The

[2] Discussion of the evidentiary assignment of error is omitted here.

84 acres she inherited from Timothy was not the same interest because it was inherited from Timothy, not Mr. Atkins. So, the devise was adeemed.

Va. Code § 64.2-416 provides that failed devises become part of the residue, unless the testator expressed a contrary intention in the will. Curtis argued that the will indicated such a contrary intention in providing that Timothy and Curtis should receive the land as joint tenants with the right of survivorship. The Court of Appeals did not find that language sufficient to establish Mrs. Atkins's contrary intention with the requisite level of certainty, since the language was written before the inter vivos conveyances, the inter vivos conveyances occurred separately and without survivorship, and nothing indicates Mrs. Atkins anticipated reacquiring an interest in the land.

Judge Chaney dissented from the majority opinion.

According to the dissent, the reference in the will to the land as the "interest which [Mrs. Atkins] may receive from [her] husband" was merely descriptive of the land and attributable to the circumstances of its ownership when the will was made. The majority's formalistic focus on those words erroneously led it to conclude that the inter vivos conveyances caused the land Mrs. Atkins inherited from Timothy to be materially different from that she inherited from her husband. In fact, the land Mrs. Atkins inherited from Timothy was the same land that she inherited from her husband, and the land itself did not change.

Additionally, the dissent took issue with the majority's reliance on the manner of Mrs. Atkins's inter vivos conveyances, since those did not modify, and therefore should not bear on the interpretation of, her will. Mrs. Atkins could have changed the devise at issue when she executed a codicil to change her executors after her husband's death, but she did not.

In the view of the dissent, since the land Mrs. Atkins held was that received from her husband, Va. Code § 64.2-413 would require the land to be distributed to Curtis.

Also, according to the dissent, the majority read Va. Code § 64.2-413 so narrowly as to limit its applicability to cases where the devised property was only partially disposed of during the testator's life, adding a restriction not imposed in the statute.

F. Validity of Will. *Shorter v. Cherry* (unpublished), Record No. [1904224](#) (Va. Ct. App. 11/21/2023)

JoAnne Cherry's 2002 will named her 3 children as beneficiaries. She purportedly executed another will naming Wayne Shorter, with whom she lived for more than 10 years before her death, as the beneficiary when she signed her advance medical directive at a UPS store in 2021.

The circumstances of the purported execution of the 2021 will were as follows: Ms. Cherry, her sister Sherry Johnson, and Wayne went to a UPS store. They brought with them Ms. Cherry's advance medical directive and, according to some witnesses, the 2021 will and its self-proving affidavit. The notary, a UPS store employee,

reviewed the documents and had Ms. Cherry initial and sign them. He then had Sherry and another employee sign as witnesses. He notarized the documents and returned them to Ms. Cherry or Wayne.

After Ms. Cherry's death, the children sought to probate the 2002 will, and Wayne sought to probate the 2021 will.

At trial, Sherry testified that Ms. Cherry asked her only to witness an advance medical directive and that she was never presented with the will. She was certain the signature adjacent to her name on the self-proving affidavit was not hers, based on the writing style and the misspelling of her name. The children's handwriting expert, after studying examples of Ms. Cherry's and Sherry's handwriting, testified that Ms. Cherry's initials and signatures on the will and self-proving affidavit were not genuine, nor was Johnson's signature on the affidavit. The UPS store employees could not recall the signing of these particular documents, but, based on their usual procedures for witnessing and notarizing such documents, they confirmed all of the signatures on the advance medical directive, will, and affidavit. Though, the notary admitted he improperly notarized the advance medical directive, which contained a blank signature block, and did not place the signers under oath (which was his usual practice).

The circuit court found the 2021 will to be invalid and admitted the 2002 will to probate. Wayne appealed.[3]

Wayne argued that the testimony of the notary and the UPS-store-employee witness established that the will was properly executed, and he had therefore met his burden to establish the 2021 as valid. He further argued that the evidence for invalidating the 2021 will was not clear and convincing.

The Court of Appeals disagreed with Wayne and found no error in the circuit court's ruling. According to the Court of Appeals, there was clear and convincing evidence for the circuit court to have found Ms. Cherry's and Sherry's signatures to have been forged. The expert's testimony was uncontroverted, Sherry denied that she was asked to witness a will and that her signature was on the affidavit, and the trial court was entitled to give little weight to and consider discredited the testimony of the UPS store employees.

II. LEGISLATION

All legislation went into effect on July 1, 2024, except as otherwise noted.

A. Procedure for Termination of Small Trusts (§ 64.2-732)

Senate Bill 63 (2024 Acts, ch. 336) and House Bill 332 (2024 Acts, ch. 224), recommended by the Virginia Bankers Association, amend Va. Code § 64.2-732 to clarify certain aspects of the procedure for terminating a trust with a value under $100,000. Specifically:

- the trust can be terminated without court approval;

[3] Discussion of the evidentiary assignments of error (relating to the admissibility of certain testimony) is omitted here.

- the required notice is as defined in Va. Code § 64.2-707;
- Va. Code § 64.2-779 can be used in conjunction with § 64.2-732; and
- expenses incurred by the trustee in the termination "shall" be paid from the trust estate.

B. Deemed Release of Trustee (§ 64.2-800)

House Bill 678 (2024 Acts, ch. 446) and Senate Bill 566 (2024 Acts, ch. 600), recommended by the Virginia Bankers Association, amend § 64.2-800 to provide that upon the termination of a trust or the trustee's ceasing to serve, a beneficiary who fails to make a timely objection after being provided with certain information will be deemed to have released and ratified all conduct of the trustee.

To obtain such a release, the trustee must send the beneficiary the following:

- a report (under 64.2-775(C)) for the preceding 2 years;
- the amounts of any remaining payments to be made or reserves retained;
- notice of the termination, the time for objection, and the trustee's being unaware of any undisclosed information that could give rise to a claim by the beneficiary; and
- if the trust is terminating, a description of any property not yet received and a proposed distribution.

The beneficiary has 60 days from the trustee's sending of the information to notify the trustee in writing of any objection. The effect of the beneficiary's failure to object (or the resolution of any objections) and the trustee's distribution is "as if a court had entered a final order approving the trustee's. . . account." Also, "a beneficiary *or other party* who received the notice and statements, and either consented, or did not object [is] prohibited from bringing a claim against the trustee." (emphasis added). Query who an "other party" might be and the scope of the preclusive effect. A trustee who is not released under this procedure is not precluded from obtaining a release by other means.

This procedure is not available for transactions under Va. Code §§ 64.2-779.1 et seq. (Virginia Trust Decanting Act).

C. List of Tangible Personal Property in Trust (§ 64.2-400)

Senate Bill 102 (2024 Acts, ch. 576), recommended by the Legislative Committee of the Virginia Bar Association's Wills, Trusts & Estates Section as part of its ongoing project to the laws applicable to wills and trusts more consistent, amends Va. Code § 64.2-400 to apply to revocable trusts.

These amendments allow the settlor of a revocable trust to dispose of specific items tangible personal property by memorandum in the same was as testators can under current law.

D. Nonexoneration (§ 64.2-531)

Also in Senate Bill 102 (2024 Acts, ch. 576) are changes to Va. Code § 64.2-531.

These changes extend the nonexoneration default rule currently applicable to wills and transfer on death deeds to revocable trusts. Consequently, real property

specifically devised in a revocable trust will pass subject to any existing mortgage or other lien, unless the trust expresses a contrary intent or the lien was granted by an agent, conservator, guardian, or committee acting for an incapacitated settlor.

E. Powers of Attorney (§ 64.2-1625)

House Bill 336 (2024 Acts, ch. 283) Senate Bill 471 (2024 Acts, ch. 123), recommended by the Legislative Committee of the Virginia Bar Association's Wills, Trusts & Estates Section, amend Va. Code §§ 64.2-1625 to clarify that creating, changing, or revoking a transfer on death deed is, in general, a creation or change of a beneficiary designation rather than an ordinary conveyance of property. So, an agent must have the "hot" powers to create or change a beneficiary designation to create, change, or revoke a transfer on death deed.

F. Rule Against Perpetuities (§§ 55.1-127 et seq.)

House Bill 836 (2024 Acts, ch. 52) and Senate Bill 470 (2024 Acts, ch. 52), recommended by the Legislative Committee of the Virginia Bar Association's Wills, Trusts & Estates Section, amend the Virginia Statutory Rule Against Perpetuities (Va. Code §§ 55.1-127 et seq.) to resolve uncertainty in whether the Delaware Tax Trap could be triggered as to a Virginia perpetual trust.

Triggering the "Delaware Tax Trap" of Internal Revenue Code § 2041(a)(3) (and § 2514(d)) causes the inclusion of property subject to a limited power of appointment in the powerholder's estate as though the power were a general power. To trigger the Delaware Tax Trap, the limited power of appointment must be exercised in further trust to extend the time for vesting "for a period ascertainable without regard to the date of the creation of the first power." IRC § 2041(a)(3).

Virginia has allowed perpetual trusts since July 1, 2000, by permitting settlors to opt out of the rule against perpetuities for trusts of personal property. Va. Code § 55.1-127(A)(8). Whether the Delaware Tax Trap can be triggered in a perpetual trust (i.e., whether a perpetual or indefinite perpetuities period can be restarted and extended by the exercise of a power of appointment in further trust), and the tax consequences of an attempt to trigger the trap, are open questions.

HB 836/SB 470 eliminate the uncertainty regarding the Delaware Tax Trap by eliminating perpetual trusts in Virginia. As of July 1, 2024, settlors will no longer be able to opt out of the rule against perpetuities under Virginia law. The maximum time for vesting under the Virginia Statutory Rule Against Perpetuities as to personal property held in trust will become 1,000 years (increased for 90 years).

G. Advance Directives

1. Revocation on Divorce (§ 54.1-2985)

House Bill 436 (2024 Acts, ch. 81) amends Va. Code § 54.1-2985 to revoke the authority of an agent under an advance directive upon the filing of either (i) an action for the divorce or annulment of the marriage between the declarant and the agent or (ii) a petition for custody or visitation of a child born of the declarant and agent.

This provision is similar to the revocation-on-divorce provision of the Virginia Power of Attorney Act (§ 64.2-1608), though (a) an action for separate maintenance does not trigger revocation for an advance directive, and (b) as to petitions for custody or visitation, § 54.1-2985 seems to require that the child be "born of" the principal and agent while § 64.2-1608 requires only "a child in common."

2. Registry Renamed (§§ 54.1-2994 and 54.1-2995)

House Bill 188 (2024 Acts, ch. 274) and Senate Bill 154 (2024 Acts, ch. 231) amend Va. Code §§ 54.1-2994 and 54.1-2995 to allow submission to the state's registry for advance directives of other documents that "support advance healthcare planning, including Durable Do Not Resuscitate Orders and portable medical order forms." The acts also change the name of the registry to the "Advance Health Care Planning Registry." (It was previously the "Advance Health Care Directive Registry.")

H. Funeral Arrangements (§§ 54.1-2708.01 and 54.1-2708.03)

House Bill 652 (2024 Acts, ch. 200) amends Va. Code § 54.1-2708.01 to add protections for funeral service establishments handling funeral arrangements or the disposition of remains over which the next of kin disagree.

- These new procedures ostensibly require one of the next of kin to notify the funeral service establishment of the dispute within 48 hours, and, upon receiving such notice, the establishment is required to cease making arrangements until the next of kin agree or a court rules on a petition filed by a next of kin.
- Also, if there is a disagreement over the identity of the persons entitled to make the arrangements, the establishment is not liable for refusing to dispose of the remains or complete arrangements for the final disposition without a court order or agreement among the disputing next of kin. The establishment may take measures to preserve the body while the dispute is pending, and the person ultimately empowered to make the arrangements is responsible for the costs of those measures.

The act also adds § 54.1-2708.03, which allows funeral service licensees to require a person claiming next-of-kin status to execute a document affirming such status. The section also allows funeral service licensees to rely on a decedent's will naming a person as "to serve as next of kin for making funeral and burial arrangements," regardless of whether the will has been probated, "as part of affirming such person is next of kin under this section."

I. Assignments of Inheritance Rights (§ 6.2-303)

House Bill 648 (2024 Acts, ch. 728) amends Va. Code § 6.2-303 to provide that a cash advance for an assignment of an inheritance right under a will is to be treated as a loan, and any amount the inheritor is contractually obligated to pay in excess of the amount advanced is to be treated as interest and subject to the usury limit of 12% per year.

J. Notaries

1. Fees (§ 47.1-19)

House Bill 986 (2024 Acts, ch. 310) amends Va. Code § 47.1-19 to increase the fees notaries can charge for acknowledgments, oaths, affidavits, and certifying copies from $5 to $10.

2. KBA (§§ 47.1-2, 47.1-16, 47.1-20.1)

House Bill 1372 (2024 Acts, ch. 832) amends Va. Code §§ 47.1-2, 47.1-16, and 47.1-20.1 to allow notaries to use knowledge-based authentication as satisfactory evidence of identity and provide criteria for such authentications.

K. Guardianships & Conservatorships

1. Report of GAL (§ 64.2-2003)

Senate Bill 292 (2024 Acts, ch. 588) amends Va. Code § 64.2-2003 to require a guardian ad litem to address in his or her report the following additional areas of concern regarding a prospective guardian or conservator: whether the person works full-time as a professional guardian, the person's expected capacity as a guardian, and whether the person is named as a perpetrator in any substantiated adult protective services complaint involving the respondent following allegations of abuse.

2. Order (§§ 64.2-2002, 64.2-2011, and 64.2-2020)

Senate Bill 290 (2024 Acts, ch. 156) and House Bill 115 (2024 Acts, ch. 17) amend Va. Code §§ 64.2-2002, 64.2-2011, and 64.2-2020.

A form cover sheet, on a form to be published by the Office of the Executive Secretary of the Supreme Court of Virginia, will be required with any a petition for the appointment of a guardian or conservator.

The changes also clarify the filing deadlines for annual reports of guardians and the time periods to be covered by each report. The first report is to reflect the first four months of guardianship and must be filed within six months of qualification. Subsequent reports, covering each succeeding 12-month period, are due "within four months from the last day of the last 12-month period covered by the previous annual report."

The clerk will be required to send additional documents to certain agencies upon the qualification of a guardian or conservator.

3. Restoration and Modification (§§ 64.2-2009, 64.2-2012)

House Bill 786 (2024 Acts, ch. 820) amends Va. Code §§ 64.2-2009 and 64.2-2012 to allow the ward of a guardianship or conservatorship who is not represented by counsel to initiate the process of having his or her capacity restored or the guardianship or conservatorship modified or terminated by informal written communication to the court rather than by petition. Upon receipt of such an informal communication, the court may set a hearing, not set a hearing, or order other appropriate relief. The court must communicate

its decision to the ward and any guardian, conservator, and guardian ad litem then serving. That communication may also be an informal writing.

4. Training for Guardians (§§ 51.5-150, 64.2-2019, 64.2-2020)

Senate Bill 291 (2024 Acts, ch. 587) amends Va. Code §§ 51.5-150, 64.2-2019, and 64.2-2020 to require the Department for Aging and Rehabilitative Services to provide training for court-appointed guardians by July 1, 2025. Guardians appointed on or after July 1, 2025, will be required to complete the training within 120 days of qualification. Guardians appointed before that date will be required to complete the training by January 1, 2027. The training will also be required for any skilled professionals a guardian retains to perform guardianship duties. The guardian's annual report will require a statement about whether the required training has been completed.

L. PR for Personal Injury or Wrongful Death (§§ 64.2-454, 8.01-262)

House Bill 779 (2024 Acts, ch. 50) and Senate Bill 138 (2024 Acts, ch. 340), recommended by the Boyd-Graves Conference, amend Va. Code §§ 64.2-454 and 8.01-262 to remove the venue-related condition on where a personal representative may be appointed in connection with a personal injury or wrongful death action in § 64.2-454. As a result of the change, the appointment can be made by "by the clerk of a circuit court," rather than only the clerk in which jurisdiction and venue would have been properly laid for the action had the decedent survived. The act moves the venue-related provision to § 8.01-262, so that in actions where an administrator is appointed under § 64.2-454, permissible venue lies only where venue would have been properly laid had the decedent survived.

M. Electronic Signatures on Court Papers (§ 8.01-271.1)

House Bill 171 (2024 Acts, ch. 20), also recommended by the Boyd-Graves Conference, amends Va. Code § 8.01-271.1 to provide that the required signature of an attorney on "every pleading, motion, or other paper" may be "an electronic signature as defined in § 59.1-480 or a digital image of a signature."

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 64.2-732 of the Code of Virginia, relating to modification or termination*
3 *of uneconomic trust; notice.*

4 [S 63]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-732 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-732. Modification or termination of uneconomic trust.**
9 A. After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having
10 a total value less than $100,000 may terminate the trust *without court approval* if the trustee concludes
11 that the value of the trust property is insufficient to justify the cost of administration. *Notice required by*
12 *this section shall be sent in accordance with § 64.2-707.*
13 B. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if
14 it determines that the value of the trust property is insufficient to justify the cost of administration.
15 C. Upon termination of a trust under this section, the trustee shall distribute the trust property in a
16 manner consistent with the purposes of the trust *and may simultaneously utilize the provisions of*
17 *§ 64.2-779*.
18 D. This section does not apply to an easement for conservation or preservation.
19 *E. Expenses incurred by the trustee incident to the termination of a trust pursuant to this section*
20 *shall be paid by the trust estate.*

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 64.2-800 of the Code of Virginia, relating to trusts; release or*
3 *ratification of trustee by beneficiary.*

4 [H 678]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-800 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-800. Beneficiary's consent, release, or ratification.**
9 *A.* A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the
10 conduct constituting the breach, released the trustee from liability for the breach, or ratified the
11 transaction constituting the breach, unless:
12 1. The consent, release, or ratification of the beneficiary was induced by improper conduct of the
13 trustee; or
14 2. At the time of the consent, release, or ratification, the beneficiary did not know of the
15 beneficiary's rights or of the material facts relating to the breach.
16 *B. A beneficiary shall be deemed to have released a trustee and ratified all actions of a trustee for*
17 *the administration of the trust if, when the trust terminates or the trustee ceases to serve:*
18 *1. The trustee sends the beneficiary the following:*
19 *a. A report as described in subsection C of § 64.2-775, for the immediately preceding two years;*
20 *b. The amount of any taxes, expenses, or fees, including trustee fees and any reserves, remaining to*
21 *be paid;*
22 *c. Notice that (i) the trust is terminating or that the trustee is ceasing to serve; (ii) if the beneficiary*
23 *does not object in writing to the trustee within 60 days after the trustee sent the notice and information,*
24 *the beneficiary shall be deemed to have released the trustee and ratified all actions of the trustee; and*
25 *(iii) the trustee is unaware of any undisclosed information that could give rise to a claim by the*
26 *beneficiary; and*
27 *d. If the trust is terminating, a description of any trust property or interests reasonably anticipated*
28 *but not yet received and a proposal for distribution; and*
29 *2. The beneficiary does not notify the trustee of the beneficiary's objection in writing within 60 days*
30 *after the trustee sent the notice and information pursuant to subdivision 1.*
31 *C. The provisions of subsection B shall not apply to a transaction pursuant to Article 8.1*
32 *(§ 64.2-779.1 et seq.) of Chapter 7.*
33 *D. In the event the trustee is not released and his actions ratified pursuant to the process provided*
34 *by subsection B, the trustee shall not be precluded from obtaining a release of liability by another*
35 *permitted method.*
36 *E. When a trustee complies with the provisions of subsection B, has received no objection or has*
37 *resolved any objection, and distributes the assets of a terminating trust to a beneficiary or to a*
38 *successor trustee, such action shall have the same legal and preclusive effect as if a court had entered a*
39 *final order approving the trustee's final account or approving the trustee's interim accounts. A*
40 *beneficiary or other party who received the notice and statements and either consented or did not object*
41 *shall be prohibited from bringing a claim against the trustee.*

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 64.2-400 and 64.2-531 of the Code of Virginia, relating to wills and trusts; tangible personal property; nonexoneration.

[S 102]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-400 and 64.2-531 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-400. Separate writing identifying recipients of tangible personal property; liability for distribution; action to recover property.

A. *For the purposes of this section, "revocable," "settlor," "trustee," and "trust instrument" mean the same as those terms are defined in § 64.2-701.*

B. If a will *or a trust instrument that was revocable immediately before the settlor's death* refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator *or settlor* although it does not satisfy the requirements for a will *or trust instrument*. Bequests of a general or residuary nature, whether referring only to personal property or to the entire estate, are not specific bequests for the purpose of this section.

~~B.~~ *C.* The written statement or list may be (i) referred to as one that is in existence at the time of the testator's *or settlor's* death, (ii) prepared before or after the execution of the will *or trust instrument*, (iii) altered by the testator *or settlor* at any time, and (iv) a writing that has no significance apart from its effect on the dispositions made by the will *or trust instrument*. When distribution is made pursuant to such a written statement or list *referred to in a will*, a copy thereof shall be furnished to the commissioner of accounts along with the legatee's receipt.

~~C.~~ *D.* A personal representative *or trustee* shall not be liable for any distribution of tangible personal property to the apparent ~~legatee~~ *recipient* under the ~~testator's~~ will *or trust instrument* made without actual knowledge of the existence of a written statement or list, nor shall he have any duty to recover property so distributed. However, a person named to receive certain tangible personal property in a written statement or list that is effective under this section may recover that property, or its value if the property cannot be recovered, from an apparent ~~legatee~~ *recipient* to whom it has been distributed in an action brought for that purpose within one year after the probate of the testator's will *if such written statement or list was referred to in a testator's will or within one year of the settlor's death if such written statement or list was referred to in a trust instrument*.

~~D.~~ *E.* This section shall not apply to a writing admitted to probate as a will and, except as provided herein, shall not otherwise affect the law of incorporation by reference.

§ 64.2-531. Nonexoneration; payment of lien if granted by agent.

A. *For the purposes of this section, "revocable," "settlor," "trustee," and "trust instrument" mean the same as those terms are defined in § 64.2-701.*

B. Unless a contrary intent is clearly set out in the will*, the trust instrument,* or ~~in~~ a transfer on death deed, (i) real or personal property that is the subject of a specific devise or bequest in the will *or the trust instrument that was revocable immediately before the settlor's death* or (ii) real property subject to a transfer on death deed passes, subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator *or settlor*, without the right of exoneration. A general directive in the will *or trust instrument* to pay debts shall not be evidence of a contrary intent that the mortgage, pledge, security interest, or other lien be exonerated prior to passing to the legatee.

~~B.~~ *C.* The personal representative may give written notice to the creditor holding any debt to which subsection ~~A~~ *B* applies that there is no right of exoneration for such debt pursuant to this section. Such notice shall include a copy of this section. Any such notice shall be sent by certified mail (i) to the address the creditor last provided to the debtor as the address to which notices to the creditor are to be sent; (ii) if the personal representative cannot reasonably determine the address to which notices to the creditor are to be sent, to the address the creditor last provided to the debtor as the address at which payments to the creditor are to be made; or (iii) if the personal representative cannot reasonably determine either the address to which notices to the creditor are to be sent or at which payments to the creditor are to be made, to (a) the address of the creditor's registered agent on file with the Virginia State Corporation Commission or (b) if there is no such registered agent on file, to the creditor's last known address. The creditor holding such debt may file a claim for such debt with the commissioner of

ENROLLED

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 64.2-732 of the Code of Virginia, relating to modification or termination*
3 *of uneconomic trust; notice.*

4 [S 63]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-732 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-732. Modification or termination of uneconomic trust.**
9 A. After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having
10 a total value less than $100,000 may terminate the trust *without court approval* if the trustee concludes
11 that the value of the trust property is insufficient to justify the cost of administration. *Notice required by*
12 *this section shall be sent in accordance with § 64.2-707.*
13 B. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if
14 it determines that the value of the trust property is insufficient to justify the cost of administration.
15 C. Upon termination of a trust under this section, the trustee shall distribute the trust property in a
16 manner consistent with the purposes of the trust *and may simultaneously utilize the provisions of*
17 *§ 64.2-779*.
18 D. This section does not apply to an easement for conservation or preservation.
19 *E. Expenses incurred by the trustee incident to the termination of a trust pursuant to this section*
20 *shall be paid by the trust estate.*

ENROLLED

SB63ER

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 64.2-800 of the Code of Virginia, relating to trusts; release or*
3 *ratification of trustee by beneficiary.*

4 [H 678]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-800 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-800. Beneficiary's consent, release, or ratification.**
9 *A.* A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the
10 conduct constituting the breach, released the trustee from liability for the breach, or ratified the
11 transaction constituting the breach, unless:
12 1. The consent, release, or ratification of the beneficiary was induced by improper conduct of the
13 trustee; or
14 2. At the time of the consent, release, or ratification, the beneficiary did not know of the
15 beneficiary's rights or of the material facts relating to the breach.
16 *B. A beneficiary shall be deemed to have released a trustee and ratified all actions of a trustee for*
17 *the administration of the trust if, when the trust terminates or the trustee ceases to serve:*
18 *1. The trustee sends the beneficiary the following:*
19 *a. A report as described in subsection C of § 64.2-775, for the immediately preceding two years;*
20 *b. The amount of any taxes, expenses, or fees, including trustee fees and any reserves, remaining to*
21 *be paid;*
22 *c. Notice that (i) the trust is terminating or that the trustee is ceasing to serve; (ii) if the beneficiary*
23 *does not object in writing to the trustee within 60 days after the trustee sent the notice and information,*
24 *the beneficiary shall be deemed to have released the trustee and ratified all actions of the trustee; and*
25 *(iii) the trustee is unaware of any undisclosed information that could give rise to a claim by the*
26 *beneficiary; and*
27 *d. If the trust is terminating, a description of any trust property or interests reasonably anticipated*
28 *but not yet received and a proposal for distribution; and*
29 *2. The beneficiary does not notify the trustee of the beneficiary's objection in writing within 60 days*
30 *after the trustee sent the notice and information pursuant to subdivision 1.*
31 *C. The provisions of subsection B shall not apply to a transaction pursuant to Article 8.1*
32 *(§ 64.2-779.1 et seq.) of Chapter 7.*
33 *D. In the event the trustee is not released and his actions ratified pursuant to the process provided*
34 *by subsection B, the trustee shall not be precluded from obtaining a release of liability by another*
35 *permitted method.*
36 *E. When a trustee complies with the provisions of subsection B, has received no objection or has*
37 *resolved any objection, and distributes the assets of a terminating trust to a beneficiary or to a*
38 *successor trustee, such action shall have the same legal and preclusive effect as if a court had entered a*
39 *final order approving the trustee's final account or approving the trustee's interim accounts. A*
40 *beneficiary or other party who received the notice and statements and either consented or did not object*
41 *shall be prohibited from bringing a claim against the trustee.*

ENROLLED

HB678ER

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact §§ 64.2-400 and 64.2-531 of the Code of Virginia, relating to wills and trusts; tangible personal property; nonexoneration.

[S 102]

Approved

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-400 and 64.2-531 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-400. Separate writing identifying recipients of tangible personal property; liability for distribution; action to recover property.

A. *For the purposes of this section, "revocable," "settlor," "trustee," and "trust instrument" mean the same as those terms are defined in § 64.2-701.*

B. If a will *or a trust instrument that was revocable immediately before the settlor's death* refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator *or settlor* although it does not satisfy the requirements for a will *or trust instrument*. Bequests of a general or residuary nature, whether referring only to personal property or to the entire estate, are not specific bequests for the purpose of this section.

~~B.~~ *C.* The written statement or list may be (i) referred to as one that is in existence at the time of the testator's *or settlor's* death, (ii) prepared before or after the execution of the will *or trust instrument*, (iii) altered by the testator *or settlor* at any time, and (iv) a writing that has no significance apart from its effect on the dispositions made by the will *or trust instrument*. When distribution is made pursuant to such a written statement or list *referred to in a will*, a copy thereof shall be furnished to the commissioner of accounts along with the legatee's receipt.

~~C.~~ *D.* A personal representative *or trustee* shall not be liable for any distribution of tangible personal property to the apparent ~~legatee~~ *recipient* under the ~~testator's~~ will *or trust instrument* made without actual knowledge of the existence of a written statement or list, nor shall he have any duty to recover property so distributed. However, a person named to receive certain tangible personal property in a written statement or list that is effective under this section may recover that property, or its value if the property cannot be recovered, from an apparent ~~legatee~~ *recipient* to whom it has been distributed in an action brought for that purpose within one year after the probate of the testator's will *if such written statement or list was referred to in a testator's will or within one year of the settlor's death if such written statement or list was referred to in a trust instrument*.

~~D.~~ *E.* This section shall not apply to a writing admitted to probate as a will and, except as provided herein, shall not otherwise affect the law of incorporation by reference.

§ 64.2-531. Nonexoneration; payment of lien if granted by agent.

A. *For the purposes of this section, "revocable," "settlor," "trustee," and "trust instrument" mean the same as those terms are defined in § 64.2-701.*

B. Unless a contrary intent is clearly set out in the will*, the trust instrument,* or ~~in~~ a transfer on death deed, (i) real or personal property that is the subject of a specific devise or bequest in the will *or the trust instrument that was revocable immediately before the settlor's death* or (ii) real property subject to a transfer on death deed passes, subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator *or settlor*, without the right of exoneration. A general directive in the will *or trust instrument* to pay debts shall not be evidence of a contrary intent that the mortgage, pledge, security interest, or other lien be exonerated prior to passing to the legatee.

~~B.~~ *C.* The personal representative may give written notice to the creditor holding any debt to which subsection ~~A~~ *B* applies that there is no right of exoneration for such debt pursuant to this section. Such notice shall include a copy of this section. Any such notice shall be sent by certified mail (i) to the address the creditor last provided to the debtor as the address to which notices to the creditor are to be sent; (ii) if the personal representative cannot reasonably determine the address to which notices to the creditor are to be sent, to the address the creditor last provided to the debtor as the address at which payments to the creditor are to be made; or (iii) if the personal representative cannot reasonably determine either the address to which notices to the creditor are to be sent or at which payments to the creditor are to be made, to (a) the address of the creditor's registered agent on file with the Virginia State Corporation Commission or (b) if there is no such registered agent on file, to the creditor's last known address. The creditor holding such debt may file a claim for such debt with the commissioner of

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57 accounts pursuant to § 64.2-552 on or before the later of one year after the qualification of the personal
58 representative of the decedent's estate or six months after the personal representative gives such written
59 notice to the creditor. Once the personal representative has given notice to the creditor as provided in
60 this section, unless the creditor files a timely claim against the estate as set forth in this subsection, the
61 liability of a personal representative or his surety for such debt shall not exceed the assets of the
62 decedent remaining in the possession of the personal representative and available for application to the
63 debt pursuant to § 64.2-528 at the time the creditor presents a demand for payment of such debt to the
64 personal representative. Nothing in this section shall affect either the liability of the estate for such debt
65 to the extent of the decedent's assets remaining at the time a claim is filed or the liability of the
66 beneficiaries that receive the decedent's assets to the extent of such receipt.
67 In the event that any such claim is timely filed with the commissioner of accounts, the personal
68 representative shall give the specific beneficiary receiving such real or personal property written notice,
69 within 90 days after such claim is filed, to obtain from the creditor the release of the estate from such
70 claim. The notice to a beneficiary may be made to the personal representative of a deceased beneficiary
71 whose estate is a beneficiary, an attorney-in-fact for a beneficiary, a guardian or conservator of an
72 incapacitated beneficiary, a committee of a convict or insane beneficiary, or the duly qualified guardian
73 of a minor or, if none exists, a custodial parent of a minor. If the estate has not been released from such
74 claim after the later of 180 days from such notice or one year from qualification, the personal
75 representative may ~~(a)~~ *(1)* sell the real or personal property that is the subject of a specific devise or
76 bequest and that is also subject to the claim, ~~(b)~~ *(2)* apply the proceeds of sale to the satisfaction of the
77 claim, and ~~(c)~~ *(3)* distribute any excess proceeds from such sale of the specific beneficiary of such
78 property. If the proceeds of such sale are insufficient to satisfy the debt in full, the deficiency shall
79 remain a debt of the estate to be satisfied from the other assets of the estate in accordance with
80 applicable law. If such real property is subject to a transfer on death deed and is also subject to the
81 claim, the personal representative may proceed as provided in § 64.2-634 to enforce the liability for such
82 claim against such property.
83 ~~C.~~ *D.* Subsection ~~A~~ *B* shall not apply to any mortgage, pledge, security interest, or other lien existing
84 at the date of death of the testator *or settlor* against any specifically devised or bequeathed real or
85 personal property, or any real property subject to a transfer on death deed, that was granted by an agent
86 acting within the authority of a durable power of attorney for the testator *or settlor* while the testator *or*
87 *settlor* was incapacitated. For the purposes of this section, (i) no adjudication of the testator's *or settlor's*
88 incapacity is necessary, (ii) the acts of an agent within the authority of a durable power of attorney are
89 rebuttably presumed to be for an incapacitated testator *or settlor*, and (iii) an incapacitated testator *or*
90 *settlor* is one who is impaired by reason of mental illness, intellectual disability, physical illness or
91 disability, chronic use of drugs, chronic intoxication, or other cause creating a lack of sufficient
92 understanding or capacity to make or communicate responsible decisions. This subsection shall not apply
93 (a) if the mortgage, pledge, security interest, or other lien granted by the agent on the specific property
94 is thereafter ratified by the testator *or settlor* while he is not incapacitated or (b) if the durable power of
95 attorney was limited to one or more specific purposes and was not general in nature.
96 ~~D.~~ *E.* Subsection ~~A~~ *B* shall not apply to any mortgage, pledge, security interest, or other lien existing
97 at the date of the death of the testator *or settlor* against any specific devise or bequest of any real or
98 personal property, or any real property subject to a transfer on death deed, that was granted by a
99 conservator, guardian, or committee of the testator *or settlor*. This subsection shall not apply if, after the
100 mortgage, pledge, security interest, or other lien granted by the conservator, guardian, or committee,
101 there is an adjudication that the testator's *or settlor's* disability has ceased and the testator *or settlor*
102 survives that adjudication by at least one year.
103 ~~E.~~ *F.* Nothing in this section shall affect the priority of a secured debt with respect to the collateral
104 securing such debt.

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 64.2-1625 of the Code of Virginia, relating to certain powers of*
3 *attorney; transfer on death deeds.*

4 [H 336]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-1625 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-1625. Real property.**
9 *A.* Unless the power of attorney otherwise provides, language in a power of attorney granting general
10 authority with respect to real property authorizes the agent to:
11 1. Demand, buy, lease, receive, accept as a gift or as security for an extension of credit, or otherwise
12 acquire or reject an interest in real property or a right incident to real property;
13 2. Sell; exchange; convey with or without covenants, representations, or warranties; quitclaim;
14 release; surrender; retain title for security; encumber; partition; consent to partitioning; subject to an
15 easement or covenant; subdivide; apply for zoning or other governmental permits; plat or consent to
16 platting; develop; grant an option concerning; lease; sublease; contribute to an entity in exchange for an
17 interest in that entity; or otherwise grant or dispose of an interest in real property or a right incident to
18 real property;
19 3. Pledge or mortgage an interest in real property or right incident to real property as security to
20 borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt
21 guaranteed by the principal;
22 4. Release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional
23 sale contract, encumbrance, lien, or other claim to real property that exists or is asserted;
24 5. Manage or conserve an interest in real property or a right incident to real property owned or
25 claimed to be owned by the principal, including:
26 a. Insuring against liability or casualty or other loss;
27 b. Obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;
28 c. Paying, assessing, compromising, or contesting taxes or assessments or applying for and receiving
29 refunds in connection with them; and
30 d. Purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real
31 property;
32 6. Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real
33 property in or incident to which the principal has, or claims to have, an interest or right;
34 7. Participate in a reorganization with respect to real property or an entity that owns an interest in or
35 right incident to real property and receive, hold, and act with respect to stocks and bonds or other
36 property received in a plan of reorganization, including:
37 a. Selling or otherwise disposing of them;
38 b. Exercising or selling an option, right of conversion, or similar right with respect to them; and
39 c. Exercising any voting rights in person or by proxy;
40 8. Change the form of title of an interest in or right incident to real property; and
41 9. Dedicate to public use, with or without consideration, easements or other real property in which
42 the principal has, or claims to have, an interest.
43 *B. An agent under a power of attorney acting under the authority of this section shall not have the*
44 *authority to create, change, or revoke a transfer on death deed on behalf of the owner of property*
45 *unless such agent is granted the power to create or change a beneficiary designation as required by*
46 *subdivision A 4 of § 64.2-1622. This subsection shall not be construed to prohibit such agent from*
47 *exercising any authority under subsection A, even if the effect of exercising of such authority may be to*
48 *revoke a transfer on death deed.*

VIRGINIA ACTS OF ASSEMBLY -- 2024 SESSION

CHAPTER 52

An Act to amend and reenact §§ 55.1-124, 55.1-125, 55.1-127, and 55.1-128 of the Code of Virginia, relating to Uniform Statutory Rule Against Perpetuities; trusts; certain nonvested property interests or powers of appointment over property or property interests.

[H 836]

Approved March 8, 2024

Be it enacted by the General Assembly of Virginia:

1. That §§ 55.1-124, 55.1-125, 55.1-127, and 55.1-128 of the Code of Virginia are amended and reenacted as follows:

§ 55.1-124. Uniform Statutory Rule Against Perpetuities.

A. A nonvested property interest is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

2. The interest either vests or terminates within 90 years after its creation.

B. A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or

2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

C. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

D. In determining whether a nonvested property interest or a power of appointment is valid under subdivision A 1, B 1, or C 1, the possibility that a child will be born to an individual after the individual's death is disregarded.

E. If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (a) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (b) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

F. For any nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, if such interest or power is created on or after July 1, 2024, §§ 55.1-124 through 55.1-129 shall apply to such interest or power by substituting "1,000 years" in each instance in which the term "90 years" appears in §§ 55.1-124 through 55.1-129. This subsection shall not extend to a nonvested property interest in, or a power of appointment over, real property held in trust or a power of appointment over real property granted under a trust. For the purposes of this subsection, real property does not include an interest in a corporation, limited liability company, partnership, business trust, or other entity, even if such entity owns an interest in real property.

§ 55.1-125. When nonvested property interest or power of appointment created.

A. Except as provided in ~~subsections B and C~~ *this section* and in *subsection B of* § 55.1-128, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

B. For the purposes of §§ 55.1-124 through 55.1-129, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in subsection B or C ~~in~~ *of* § 55.1-124, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

C. For the purposes of §§ 55.1-124 through 55.1-129, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original

contribution was created.

D. For the purposes of §§ 55.1-124 through 55.1-129, except as provided in subsection B of § 55.1-128, if a nongeneral or testamentary power of appointment is exercised to create another nongeneral or testamentary power of appointment, every nonvested property interest or power of appointment created through the exercise of such other nongeneral or testamentary power is considered to have been created at the time of the creation of the first nongeneral or testamentary power of appointment.

§ 55.1-127. Exclusions from statutory rule against perpetuities.

A. Section 55.1-124 does not apply to:

1. A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement; (ii) a separation or divorce settlement; (iii) a spouse's election; (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties; (v) a contract to make or not to revoke a will or trust; (vi) a contract to exercise or not to exercise a power of appointment; (vii) a transfer in satisfaction of a duty of support; or (viii) a reciprocal transfer;

2. A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

3. A power to appoint a fiduciary;

4. A discretionary power of trustee to distribute principal before termination of a trust to a beneficiary having an indefensibly vested interest in the income and principal;

5. A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

6. A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

7. A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of the Commonwealth; or

8. A nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, if the trust instrument, by its terms, provides that § 55.1-124 shall not apply*, provided that such interest or power was created between July 1, 2000, and June 30, 2024. If a nonvested interest in or power of appointment over personal property held in trust, or a power of appointment over personal property granted under a trust, was created on or after July 1, 2024, the provisions of the first sentence of this subdivision shall not apply, and any terms in the trust instrument providing that § 55.1-124 does not apply shall not be operative and shall not prevent the application of § 55.1-124 to such interest or power.*

B. The exception to the Uniform Statutory Rule Against Perpetuities under *the first sentence of* subdivision A 8 shall not extend to real property held in trust. For purposes of this subsection, real property does not include an interest in a corporation, limited liability company, partnership, business trust, or other entity, even if such entity owns an interest in real property.

§ 55.1-128. Prospective application.

A. Sections 55.1-124 through 55.1-129 apply to a nonvested property interest or a power of appointment that is created on or after July 1, 2000.

B. For purposes of ~~this section~~ *subsection A, the first sentence of subsection F of § 55.1-124, and subdivision A 8 of § 55.1-127,* a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

CHAPTER 81

An Act to amend and reenact § 54.1-2985 of the Code of Virginia, relating to revocation of advance directive; divorce or annulment; custody or visitation.

[H 436]

Approved March 14, 2024

Be it enacted by the General Assembly of Virginia:

1. That § 54.1-2985 of the Code of Virginia is amended and reenacted as follows:

§ 54.1-2985. Revocation of an advance directive.

A. ~~An~~ *Except as provided by subsection A1, an* advance directive may be revoked at any time by the declarant who is capable of understanding the nature and consequences of his actions (i) by a signed, dated writing; (ii) by physical cancellation or destruction of the advance directive by the declarant or another in his presence and at his direction; or (iii) by oral expression of intent to revoke. A declarant may make a partial revocation of his advance directive, in which case any remaining and nonconflicting provisions of the advance directive shall remain in effect. In the event of the revocation of the designation of an agent, subsequent decisions about health care shall be made consistent with the provisions of this article. Any such revocation shall be effective when communicated to the attending physician. No civil or criminal liability shall be imposed upon any person for a failure to act upon a revocation unless that person has actual knowledge of such revocation.

A1. The filing of either (i) an action for the divorce or annulment of the marriage of the declarant and agent or (ii) a petition for custody or visitation of a child or children born to the declarant and agent shall revoke the authority of the agent. In the event of such revocation upon such filing, subsequent decisions about health care shall be made consistent with the provisions of this article.

B. If an advance directive has been submitted to the Advance Health Care Directive Registry pursuant to Article 9 (§ 54.1-2994 et seq.) of this chapter, any revocation of such directive shall also be notarized before being submitted to the Department of Health for removal from the registry. However, failure to notify the Department of Health of the revocation of a document filed with the registry shall not affect the validity of the revocation, as long as it meets the requirements of ~~subsection~~ *subsection* A *or A1*.

2. That the provisions of this act shall apply to advance directives executed on or after July 1, 2024.

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 54.1-2994 and 54.1-2995 of the Code of Virginia, relating to Advance*
3 *Health Care Planning Registry; amendment of regulations.*

4 [H 188]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That §§ 54.1-2994 and 54.1-2995 of the Code of Virginia are amended and reenacted as follows:**
8 **§ 54.1-2994. Advance Health Care Planning Registry established.**
9 The Department of Health shall make available a secure online central registry for advance health
10 care ~~directives~~ *planning*.
11 **§ 54.1-2995. Filing of documents with the registry; regulations; fees.**
12 A. A person may submit any of the following documents and the revocations of these documents to
13 the Department of Health for filing in the Advance Health Care ~~Directive~~ *Planning* Registry established
14 pursuant to this article:
15 1. A health care power of attorney.
16 2. An advance directive created pursuant to Article 8 (§ 54.1-2981 et seq.) or a subsequent act of the
17 General Assembly.
18 3. A declaration of an anatomical gift made pursuant to the Revised Uniform Anatomical Gift Act
19 (§ 32.1-291.1 et seq.).
20 *4. Any other document that supports advance health care planning, including Durable Do Not*
21 *Resuscitate Order or portable medical order forms.*
22 B. The document may be submitted for filing only by the person who executed the document or his
23 legal representative or designee and shall be accompanied by any fee required by the Department of
24 Health.
25 C. All data and information contained in the registry shall remain confidential and shall be exempt
26 from the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).
27 D. The Board of Health shall promulgate regulations to carry out the provisions of this article, which
28 shall include, but not be limited to (i) a determination of who may access the registry, including
29 physicians, other licensed health care providers, the declarant, and his legal representative or designee;
30 (ii) a means of annually reminding registry users of which documents they have registered; and (iii) fees
31 for filing a document with the registry. Such fees shall not exceed the direct costs associated with
32 development and maintenance of the registry and with the education of the public about the availability
33 of the registry, and shall be exempt from statewide indirect costs charged and collected by the
34 Department of Accounts. No fee shall be charged for the filing of a document revoking any document
35 previously filed with the registry.
36 **2. That the Department of Health shall amend the Advance Health Care Planning Registry**
37 **regulations to include advance health care planning documentation in the list of documents that**
38 **may be submitted to the registry pursuant to § 54.1-2995 of the Code of Virginia, as amended by**
39 **this act.**
40 **3. That the Department of Health shall amend the Advance Health Care Planning Registry**
41 **regulations to allow licensed health care providers licensed in the Commonwealth access to the**
42 **registry for the purpose of collecting advance health care planning information on patients with**
43 **whom who they have a treatment relationship.**

CHAPTER 200

An Act to amend and reenact § 54.1-2807.01 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 54.1-2807.03, relating to funeral arrangements; disputes between next of kin; proof of next of kin status.

[H 652]

Approved March 28, 2024

Be it enacted by the General Assembly of Virginia:

1. That § 54.1-2807.01 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 54.1-2807.03 as follows:

§ 54.1-2807.01. When next of kin disagree.

A. In the absence of a designation under § 54.1-2825, when there is a disagreement among a decedent's next of kin concerning the arrangements for his funeral or the disposition of his remains, any of the next of kin may petition the circuit court where the decedent resided at the time of his death to determine which of the next of kin shall have the authority to make arrangements for the decedent's funeral or the disposition of his remains. The court may require notice to and the convening of such of the next of kin as it deems proper.

B. In determining the matter before it, the court shall consider the expressed wishes, if any, of the decedent, the legal and factual relationship between or among the disputing next of kin and between each of the disputing next of kin and the decedent, and any other factor the court considers relevant to determine who should be authorized to make the arrangements for the decedent's funeral or the disposition of his remains.

C. When there is a disagreement among a decedent's next of kin concerning the arrangements for his funeral or the disposition of his remains, at least one of the next of kin shall, within 48 hours of the funeral service establishment receiving the decedent's remains, notify such funeral service establishment of the dispute, at which time the funeral service establishment shall immediately stop making arrangements for the decedent's funeral or for the disposition of the decedent's remains until such time as an agreement is reached by the disputing next of kin or a court of appropriate jurisdiction has ruled on any petition filed by such disputing next of kin.

D. If there is a dispute regarding the identity of any persons who have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of such decedent's remains, a funeral service establishment shall not be liable for refusing to dispose of the decedent's remains or complete the arrangements for the final disposition of such remains until the funeral service establishment receives a court order or written agreement signed by the disputing next of kin that establishes the final disposition of the decedent's remains. If the funeral service establishment retains the decedent's remains for final disposition while any such dispute is pending, the funeral service establishment may embalm or refrigerate and shelter the decedent's body for preservation purposes until the dispute is resolved. Any person or persons adjudged or agreed to have the right to make arrangements and otherwise be responsible for the decedent's funeral and the disposition of the decedent's remains shall be responsible for any costs incurred by the funeral service establishment pursuant to this subsection.

§ 54.1-2807.03. Proof of next of kin status.

A. A funeral service licensee may require that a person claiming next of kin status, in accordance with the definition of next of kin in § 54.1-2800, execute a document affirming that such person is the next of kin. Upon execution of this form, the funeral service licensee is exempt from any liability for allowing such person to proceed with funeral planning for the decedent.

B. A funeral service licensee may, as a part of affirming that such person is next of kin under this section, rely on the decedent's will that names such person as the individual the decedent wishes to serve as next of kin for making funeral and burial arrangements, regardless of whether the will has been probated.

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 6.2-303 of the Code of Virginia, relating to contracts assigning rights to*
3 *inheritance funds; legal rate of interest.*

4 [H 648]
5 Approved

ENROLLED

HB648ER

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 6.2-303 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 6.2-303. Contracts for more than legal rate of interest.**
9 A. Except as otherwise permitted by law, no contract shall be made for the payment of interest on a
10 loan at a rate that exceeds 12 percent per year.
11 B. Laws that permit payment of interest at a rate that exceeds 12 percent per year are set out,
12 without limitation, in:
13 1. Article 4 (§ 6.2-309 et seq.) of this chapter;
14 2. Chapter 15 (§ 6.2-1500 et seq.), relating to powers of consumer finance companies;
15 3. Chapter 18 (§ 6.2-1800 et seq.), relating to short-term loans;
16 4. Chapter 22 (§ 6.2-2200 et seq.), relating to interest chargeable by motor vehicle title lenders;
17 5. § 36-55.31, relating to loans by the Virginia Housing Development Authority;
18 6. § 38.2-1806, relating to interest chargeable by insurance agents;
19 7. Chapter 47 (§ 38.2-4700 et seq.) of Title 38.2, relating to interest chargeable by premium finance
20 companies;
21 8. § 54.1-4008, relating to interest chargeable by pawnbrokers; and
22 9. § 58.1-3018, relating to interest and origination fees payable under third-party tax payment
23 agreements.
24 C. In the case of any loan upon which a person is not permitted to plead usury, interest and other
25 charges may be imposed and collected as agreed by the parties.
26 D. Any provision of this chapter that provides that a loan or extension of credit may be enforced as
27 agreed in the contract of indebtedness, shall not be construed to preclude the charging or collecting of
28 other loan fees and charges permitted by law, in addition to the stated interest rate. Such other loan fees
29 and charges need not be included in the rate of interest stated in the contract of indebtedness.
30 E. The provisions of subsection A shall apply to any person who seeks to evade its application by
31 any device, subterfuge, or pretense whatsoever, including:
32 1. The loan, forbearance, use, or sale of (i) credit, as guarantor, surety, endorser, comaker, or
33 otherwise; (ii) money; (iii) goods; or (iv) things in action;
34 2. The use of collateral or related sales or purchases of goods or services, or agreements to sell or
35 purchase, whether real or pretended; receiving or charging compensation for goods or services, whether
36 or not sold, delivered, or provided; and
37 3. The real or pretended negotiation, arrangement, or procurement of a loan through any use or
38 activity of a third person, whether real or fictitious.
39 F. Any contract made in violation of this section is void and no person shall have the right to
40 collect, receive, or retain any principal, interest, fees, or other charges in connection with the contract.
41 *G. Any contract entered into on or after July 1, 2024, pursuant to which a person receives a cash*
42 *advance for assigning to a company or other entity a portion of such person's rights to receive*
43 *inheritance funds from a will that has been, or is anticipated to be, offered for probate in a circuit*
44 *court of the Commonwealth shall be considered a loan. Any funds such person is obligated to pay under*
45 *the terms of such contract in addition to the total of the cash advance shall be considered interest. Such*
46 *contract shall be subject to the provisions of subsection A.*

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 47.1-19 of the Code of Virginia, relating to notaries; fees.*

3 [H 986]
4 Approved

5 **Be it enacted by the General Assembly of Virginia:**
6 **1. That § 47.1-19 of the Code of Virginia is amended and reenacted as follows:**
7 **§ 47.1-19. Fees.**
8 A. A notary may, for taking and certifying the acknowledgment of any writing, or administering and
9 certifying an oath, or certifying affidavits and depositions of witnesses, or certifying that a copy of a
10 document is a true copy thereof, charge a fee up to ~~$5~~ *$10*.
11 B. A notary may, for taking and certifying the acknowledgement of any electronic document, or
12 administering and certifying an oath or affirmation, or certifying electronic affidavits and depositions of
13 witnesses, or certifying that a copy of an electronic document is a true copy thereof, charge a fee not to
14 exceed $25.
15 C. Any person appointed as a member of an electoral board or a general registrar shall be prohibited
16 from collecting any fee as a notary during the time of such appointment. Any person appointed as a
17 deputy registrar or officer of election shall be prohibited from collecting any fee as a notary for services
18 relating to the administration of elections or the election laws.
19 D. It shall be unlawful for any notary to charge more than the fee established herein for any notarial
20 act; however, a notary may recover, with the agreement of the person to be charged, any actual and
21 reasonable expense of traveling to a place where a notarial act is to be performed if it is not the usual
22 place in which the notary performs his office.

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact §§ 47.1-2, 47.1-16, and 47.1-20.1 of the Code of Virginia, relating to*
3 *notaries; definitions; knowledge-based authentication assessment.*

4 [H 1372]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That §§ 47.1-2, 47.1-16, and 47.1-20.1 of the Code of Virginia are amended and reenacted as**
8 **follows:**
9 **§ 47.1-2. Definitions.**
10 As used in this title, unless the context demands a different meaning:
11 "Acknowledgment" means a notarial act in which an individual at a single time and place (i) appears
12 in person before the notary and presents a document; (ii) is personally known to the notary or identified
13 by the notary through satisfactory evidence of identity; and (iii) indicates to the notary that the signature
14 on the document was voluntarily affixed by the individual for the purposes stated within the document
15 and, if applicable, that the individual had due authority to sign in a particular representative capacity.
16 "Affirmation" means a notarial act, or part thereof, that is legally equivalent to an oath and in which
17 an individual at a single time and place (i) appears in person before the notary and presents a document;
18 (ii) is personally known to the notary or identified by the notary through satisfactory evidence of
19 identity; and (iii) makes a vow of truthfulness or fidelity on penalty of perjury.
20 "Commissioned notary public" means that the applicant has completed and submitted the registration
21 forms along with the appropriate fee to the Secretary of the Commonwealth and the Secretary of the
22 Commonwealth has determined that the applicant meets the qualifications to be a notary public and
23 issues a notary commission and forwards same to the clerk of the circuit court, pursuant to this chapter.
24 "Copy certification" means a notarial act in which a notary (i) is presented with a document that is
25 not a public record; (ii) copies or supervises the copying of the document using a photographic or
26 electronic copying process; (iii) compares the document to the copy; and (iv) determines that the copy is
27 accurate and complete.
28 "Credential analysis" means a process or service that independently affirms the veracity of a
29 government-issued identity credential by reviewing public or proprietary data sources and meets the
30 standards of the Secretary of the Commonwealth.
31 "Credible witness" means an honest, reliable, and impartial person who personally knows an
32 individual appearing before a notary and takes an oath or affirmation from the notary to confirm that
33 individual's identity.
34 "Document" means information that is inscribed on a tangible medium or that is stored in an
35 electronic or other medium and is retrievable in perceivable form, including a record as defined in the
36 Uniform Electronic Transactions Act (§ 59.1-479 et seq.).
37 "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical,
38 electromagnetic, or similar capabilities.
39 "Electronic document" means information that is created, generated, sent, communicated, received, or
40 stored by electronic means.
41 "Electronic notarial act" or "electronic notarization" means an official act by a notary under § 47.1-12
42 or as otherwise authorized by law that involves electronic documents.
43 "Electronic notarial certificate" means the portion of a notarized electronic document that is
44 completed by the notary public, bears the notary public's signature, title, commission expiration date, and
45 other required information concerning the date and place of the electronic notarization, and states the
46 facts attested to or certified by the notary public in a particular notarization. The "electronic notarial
47 certificate" shall indicate whether the notarization was done in person or by remote online notarization.
48 "Electronic notary public" or "electronic notary" means a notary public who has been commissioned
49 by the Secretary of the Commonwealth with the capability of performing electronic notarial acts under
50 § 47.1-7.
51 "Electronic notary seal" or "electronic seal" means information within a notarized electronic
52 document that confirms the notary's name, jurisdiction, and commission expiration date and generally
53 corresponds to data in notary seals used on paper documents.
54 "Electronic signature" means an electronic sound, symbol, or process attached to or logically
55 associated with an electronic document and executed or adopted by a person with the intent to sign the
56 document.

"Identity proofing" means a process or service that independently verifies an individual's identity in accordance with § 2.2-436.

"Knowledge-based authentication assessment" means an identity assessment formulated from public or private data sources for which the principal has not provided a prior answer that meets the following requirements:

1. The principal shall answer a quiz composed of at least five questions related to the principal's personal history or identity;

2. At least five possible answer choices shall be available for each question;

3. The principal shall pass the quiz if he achieves a score of 80 percent or higher;

4. The principal shall have two minutes to answer the questions on the quiz;

5. If the principal fails to achieve a score of at least 80 percent, the principal may attempt up to two additional quizzes within 48 hours following the first failed quiz; and

6. No more than 60 percent of the questions from the initial quiz can be reused on additional quizzes.

"Notarial act" or "notarization" means any official act performed by a notary under § 47.1-12 or 47.1-13 or as otherwise authorized by law.

"Notarial certificate" or "certificate" means the part of, or attachment to, a notarized document that is completed by the notary public, bears the notary public's signature, title, commission expiration date, notary registration number, and other required information concerning the date and place of the notarization and states the facts attested to or certified by the notary public in a particular notarization.

"Notary public" or "notary" means any person commissioned to perform official acts under the title, and includes an electronic notary except where expressly provided otherwise.

"Oath" shall include "affirmation."

"Official misconduct" means any violation of this title by a notary, whether committed knowingly, willfully, recklessly or negligently.

"Personal knowledge of identity" or "personally knows" means familiarity with an individual resulting from interactions with that individual over a period of time sufficient to dispel any reasonable uncertainty that the individual has the identity claimed.

"Principal" means (i) a person whose signature is notarized or (ii) a person, other than a credible witness, taking an oath or affirmation from the notary.

"Record of notarial acts" means a device for creating and preserving a chronological record of notarizations performed by a notary.

"Remote online notarization" means an electronic notarization under this chapter where the signer is not in the physical presence of the notary.

"Satisfactory evidence of identity" means identification of an individual based on (i) examination of one or more of the following unexpired documents bearing a photographic image of the individual's face and signature: a United States Passport Book, a United States Passport Card, a certificate of United States citizenship, a certificate of naturalization, a foreign passport, an alien registration card with photograph, a state issued driver's license or a state issued identification card or a United States military card or (ii) the oath or affirmation of one credible witness unaffected by the document or transaction who is personally known to the notary and who personally knows the individual or of two credible witnesses unaffected by the document or transaction who each personally knows the individual and shows to the notary documentary identification as described in clause (i). In the case of an individual who resides in an assisted living facility, as defined in § 63.2-100, or a nursing home, licensed by the State Department of Health pursuant to Article 1 (§ 32.1-123 et seq.) of Chapter 5 of Title 32.1 or exempt from licensure pursuant to § 32.1-124, an expired United States Passport Book, expired United States Passport Card, expired foreign passport, or expired state issued driver's license or state issued identification card may also be used for identification of such individual, provided that the expiration of such document occurred within five years of the date of use for identification purposes pursuant to this title. In the case of an electronic notarization, "satisfactory evidence of identity" may be based on video and audio conference technology, in accordance with the standards for electronic video and audio communications set out in subdivisions B 1, 2, and 3 of § 19.2-3.1, that permits the notary to communicate with and identify the principal at the time of the notarial act, provided that such identification is confirmed by (a) personal knowledge~~,~~ *or* (b) an oath or affirmation of a credible witness *who personally knows the principal and is either personally known to the notary*~~,~~ or ~~(c)~~ *is identified by* at least two of the following: (1) credential analysis of an unexpired government-issued identification bearing a photograph of the principal's face and signature~~,~~*;* (2) identity proofing by an antecedent in-person identity proofing process in accordance with the specifications of the Federal Bridge Certification Authority, *including any supplements thereto or revisions thereof;* (3) another identity proofing method authorized in guidance documents, regulations, or standards adopted pursuant to § 2.2-436~~, or~~*;* (4) a valid digital certificate accessed by biometric data or by use of an interoperable

Personal Identity Verification card that is designed, issued, and managed in accordance with the specifications published by the National Institute of Standards and Technology in Federal Information Processing Standards Publication 201-1, "Personal Identity Verification (PIV) of Federal Employees and Contractors," and supplements thereto or revisions thereof, including the specifications published by the Federal Chief Information Officers Council in "Personal Identity Verification Interoperability for Non-Federal Issuers~~.~~"*; or (5) a knowledge-based authentication assessment.*

"Seal" means a device for affixing on a paper document an image containing the notary's name and other information related to the notary's commission.

"Secretary" means the Secretary of the Commonwealth.

"State" includes any state, territory, or possession of the United States.

"Verification of fact" means a notarial act in which a notary reviews public or vital records to (i) ascertain or confirm facts regarding a person's identity, identifying attributes, or authorization to access a building, database, document, network, or physical site or (ii) validate an identity credential on which satisfactory evidence of identity may be based.

§ 47.1-16. Notarizations to show date of act, official signature and seal, etc.

A. Every notarization shall include the date upon which the notarial act was performed and the county or city and state in which it was performed. Every electronic notarial certificate *completed by an electronic notary public commissioned in the Commonwealth* shall include the county or city within the Commonwealth where the electronic notary public was physically located at the time of the notarial act. The electronic notarial certificate shall indicate whether the notarization was done in person or by remote online notarization.

B. A notarial act shall be evidenced by a notarial certificate or electronic notarial certificate signed by a notary in a manner that attributes such signature to the notary public identified on the commission.

C. Upon every writing that is the subject of a notarial act, the notary shall, after his certificate, state the date of the expiration of his commission in substantially the following form:

"My commission expires the ____ day of ________, ____ "

Near the notary's official signature on the notarial certificate of a paper document, the notary shall affix a sharp, legible, permanent, and photographically reproducible image of the official seal, or, to an electronic document, the notary shall attach an official electronic seal.

D. The notary shall attach the official electronic signature and electronic seal to the electronic notarial certificate of an electronic document in a manner that is capable of independent verification and renders any subsequent changes or modifications to the electronic document evident.

E. An electronic notary's electronic signature and electronic seal shall conform to the standards for electronic notarization developed in accordance with § 47.1-6.1.

§ 47.1-20.1. Validation of certain acts.

A. Oaths of office administered by a notary public on or before July 1, 1982, are hereby deemed to be valid and actions of any public officer taking such oaths are hereby deemed valid.

B. No notarial act performed by a notary public shall be invalidated solely because of the failure of such notary public to perform a duty or meet a requirement specified in this title. However, the validity of a notarial act shall not prohibit an aggrieved person from seeking to invalidate the record or transaction that is the subject of such notarial act or from seeking other remedies authorized by the laws of the Commonwealth or laws of the United States. Nothing in this subsection shall be construed to validate a purported notarial act performed by an individual who is not authorized to perform such notarial acts.

2. That the provisions of subsection B of § 47.1-20.1 of the Code of Virginia, as amended by this act, shall apply retroactively to any notarial act that was performed before July 1, 2024.

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act to amend and reenact § 64.2-2003 of the Code of Virginia, relating to guardianship and conservatorship; report of guardian ad litem.

[S 292]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 64.2-2003 of the Code of Virginia is amended and reenacted as follows:

§ 64.2-2003. Appointment of guardian ad litem.

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) notifying the court as soon as practicable if the respondent requests counsel regardless of whether the guardian ad litem recommends counsel; (v) investigating the petition and evidence, requesting additional evaluation if necessary, considering whether a less restrictive alternative to guardianship or conservatorship is available, including the use of an advance directive, supported decision-making agreement, or durable power of attorney, and filing a report pursuant to subsection C; (vi) making a good faith effort to consult directly with the respondent's primary health care provider, if any, unless the evaluation report required by § 64.2-2005 is prepared in whole or in part by such provider; and (vii) personally appearing at all court proceedings and conferences. If the respondent is between 17 and a half and 21 years of age and has an Individualized Education Plan (IEP) and transition plan, the guardian ad litem shall review such IEP and transition plan and include the results of his review in the report required by clause (v).

C. In the report required by clause (v) of subsection B, the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed based on evaluations and reviews conducted pursuant to subsection B; (iii) the extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the person selected as guardian or conservator after consideration of *(a)* the person's geographic location, *(b) the person's* familial or other relationship with the respondent, *(c) the person's* ability to carry out the powers and duties of the office, *(d) the person's* commitment to promoting the respondent's welfare, *(e)* any potential conflicts of interests, *(f) whether the person works as a professional guardian on a full-time basis, (g) the person's expected capacity as a guardian, (h) the* wishes of the respondent, ~~and~~ *(i) the* recommendations of relatives, *and (j) whether the person is named as a perpetrator in any substantiated adult protective services complaint involving the respondent following allegations of abuse or neglect*; (v) a recommendation as to the amount of surety on the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent. The report shall also contain an explanation by the guardian ad litem as to any (a) decision not to recommend the appointment of counsel for the respondent, (b) determination that a less restrictive alternative to guardianship or conservatorship is not advisable, and (c) determination that appointment of a limited guardian or conservator is not appropriate. If the guardian ad litem was unable to consult directly with the respondent's primary health care provider, such information shall also be included in such report.

D. Any individual or entity with information, records, or reports relevant to a guardianship or conservatorship proceeding, including any (i) health care provider, local school division, or local department of social services; (ii) criminal justice agency as that term is defined in § 9.1-101, unless the disclosure of such information, records, or reports would impede an ongoing criminal investigation or proceeding; and (iii) financial institution as that term is defined in § 6.2-100, investment advisor as that term is defined in § 13.1-501, or other financial service provider shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section to the extent allowed under the Gramm-Leach-Bliley Act (15 U.S.C. § 6801 et seq.) and 12 U.S.C. § 3403. The request from the guardian ad litem shall be accompanied by a copy of the court order (a) appointing the guardian ad litem for the respondent and (b) that allows the release of the respondent's nonpublic personal information to the guardian ad litem. All such information, records, and reports shall be provided to the

57 guardian ad litem at no charge. Disclosures, records, and reports can be provided in electronic form to
58 the guardian ad litem and may be accompanied by a statement of expenses or an invoice, which shall be
59 filed with the report of the guardian ad litem to be considered by the court when awarding costs among
60 the parties pursuant to § 64.2-2008. Absent gross negligence or willful misconduct, the person or entity
61 making disclosures, and their staff, shall be immune from civil or criminal liability for providing
62 information or records to a court-appointed guardian ad litem pursuant to this section.

VIRGINIA ACTS OF ASSEMBLY -- 2024 SESSION

CHAPTER 156

An Act to amend and reenact §§ 64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia, relating to guardians and conservators; order of appointment and certificate of qualification; annual report.

[S 290]

Approved March 26, 2024

Be it enacted by the General Assembly of Virginia:
1. That §§ 64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2002. Who may file petition; contents.

A. Any person, including a community services board and any other local or state governmental agency, may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;

2. The basis for the court's jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;

3. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including stepchildren. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;

4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;

5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, and any guardian, committee, or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney, advance directive, or order appointing the guardian, committee, or conservator, if available;

5a. The name, location, and post office address of the respondent's primary health care provider, if any;

6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;

8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

9. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent and that person's relationship to the respondent;

10. The native language of the respondent and any necessary alternative mode of communication;

11. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts, contained in a separate confidential addendum, pursuant to § 64.2-2000.1;

12. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

13. A request for appointment of a guardian ad litem.

C. The petitioner shall complete and file with the petition for appointment of a guardian, a conservator, or both, a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. Such cover sheet shall contain such information as the Executive Secretary deems necessary.

§ 64.2-2011. Qualification of guardian or conservator; clerk to record order and issue certificate; reliance on certificate.

A. A guardian or conservator appointed in the court order shall qualify before the clerk upon the following:

1. Subscribing to an oath promising to faithfully perform the duties of the office in accordance with

all provisions of this chapter;

2. Posting of bond, but no surety shall be required on the bond of the guardian, and the conservator's bond may be with or without surety, as ordered by the court; and

3. Acceptance in writing by the guardian or conservator of any educational materials provided by the court.

B. Upon qualification, the clerk shall issue to the guardian or conservator a certificate with a copy of the order *of appointment* appended thereto. The clerk shall record the order in the same manner as a power of attorney would be recorded and shall, in addition to the requirements of § 64.2-2014, provide a copy of the order to the commissioner of accounts. It shall be the duty of a conservator having the power to sell real estate to record the order in the office of the clerk of any jurisdiction where the respondent owns real property. If the order appoints a guardian, the clerk shall promptly forward a copy of the order *of appointment and a copy of the certificate of qualification* to the local department of social services in the jurisdiction where the respondent then resides and *a copy of the order of appointment* to the Department of Medical Assistance Services.

C. A conservator shall have all powers granted pursuant to § 64.2-2021 as are necessary and proper for the performance of his duties in accordance with this chapter, subject to the limitations that are prescribed in the order. The powers granted to a guardian shall only be those powers enumerated in the court order.

D. Any individual or entity conducting business in good faith with a guardian or conservator who presents a currently effective certificate of qualification may presume that the guardian or conservator is properly authorized to act as to any matter or transaction, except to the extent of any limitations upon the fiduciary's powers contained in the court's order of appointment.

1. A person that refuses in violation of this subsection to accept a certificate of qualification is subject to (i) a court order mandating acceptance of the certificate of qualification and (ii) liability for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the certificate of qualification or mandates acceptance of the certificate of qualification.

2. A person shall either accept or reject a certificate of qualification no later than seven business days after presentation of such certificate of qualification for acceptance. A person is not required to accept a certificate of qualification for a transaction if:

a. Engaging in the transaction with the guardian or conservator would be inconsistent with state or federal law;

b. The person has actual knowledge of the termination of the authority of the guardian or conservator or of the certificate of qualification before exercise of the power;

c. The person in good faith believes that the certificate of qualification is not valid or that the guardian or conservator does not have the authority to perform the act requested; or

d. The person believes in good faith that the transaction may involve, facilitate, result in, or contribute to financial exploitation.

§ 64.2-2020. Annual reports by guardians.

A. ~~A~~ *Within six months from the date of qualification, a* guardian *appointed pursuant to § 64.2-2009* shall file an *initial* annual report ~~in compliance with the filing deadlines in § 64.2-1305~~ *reflecting the first four months of guardianship since qualification* with the local department of social services for the jurisdiction where the incapacitated person then resides. *After such initial annual report has been filed, the second and subsequent annual reports for each succeeding 12-month period shall be due within four months from the last day of the 12-month period covered by the previous annual report.* The annual report shall be on a form prepared by the Office of the Executive Secretary of the Supreme Court and shall be accompanied by a filing fee of $5. To the extent practicable, the annual report shall be formatted in a manner to encourage standardized and detailed responses from guardians. The local department shall retain the fee in the jurisdiction where the fee is collected for use in the provision of services to adults in need of protection. Within 60 days of receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 64.2-1305.

B. The annual report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person, including any change in diagnosis or assessment of any such condition of such incapacitated person by any medical provider since the last report;

2. A description of the incapacitated person's living arrangements during the reported period, including a specific assessment of the adequacy of such living arrangement;

3. The medical, educational, vocational, social, recreational, and any other professional services and activities provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care. The information required by this subdivision shall include (i) the specific

names of the medical providers that have treated the incapacitated person and a description of the frequency or number of times the incapacitated person was seen by such providers; (ii) the date and location of and reason for any hospitalization of such incapacitated person; and (iii) a description of the educational, vocational, social, and recreational activities in which such incapacitated person participated;

4. A statement of whether the guardian agrees with the current treatment or habilitation plan;

5. A statement of whether the incapacitated person has been an alleged victim in a report of abuse, neglect, or exploitation made pursuant to Article 2 (§ 63.2-1603 et seq.) of Chapter 16 of Title 63.2, to the extent known, and whether there are any other indications of abuse, neglect, or exploitation of such incapacitated person;

6. A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;

7. The name of any persons whose access to communicate, visit, or interact with the incapacitated person has been restricted and the reasons for such restriction;

8. A self-assessment by the guardian as to whether he feels he is able to continue to carry out the powers and duties imposed upon him by § 64.2-2019 and as specified in the court's order of appointment pursuant to § 64.2-2009;

9. Unless the incapacitated person resides with the guardian, a statement of the frequency and nature of any (i) in-person visits from the guardian with the incapacitated person over the course of the previous year and (ii) visits over the course of the previous year from a designee who is directly supervised or contracted by the guardian, including the name of the designee performing such visit. If any visit described in this section is made virtually, the guardian shall include such information in the annual report;

10. If no visit is made within a 120-day period, the guardian shall describe any challenges or limitations in completing such visit;

11. A general description of the activities taken on by the guardian for the benefit of the incapacitated person during the past year;

12. Any other information deemed necessary by the Office of the Executive Secretary of the Supreme Court of Virginia or the Department for Aging and Rehabilitative Services to understand the condition, treatment, and well-being of the incapacitated person;

13. Any other information useful in the opinion of the guardian; and

14. The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify by signing under oath that the information contained in the annual report is true and correct to the best of his knowledge. If a guardian makes a false entry or statement in the annual report, he shall be subject to a civil penalty of not more than $500. Such penalty shall be collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall be deposited into the general fund.

C. If the local department of social services files notice that the annual report has not been timely filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons or rule to show cause why the guardian has failed to file such annual report.

2. That nothing in this act shall be construed to preclude the clerk of a circuit court from establishing and maintaining his own case management system or other independent technology system provided by a private vendor or the locality. Any data from such clerk's independent system may be provided directly from such clerk to designated state agencies or through an interface with the technology systems operated by the Office of the Executive Secretary of the Supreme Court of Virginia.

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 64.2-2009 and 64.2-2012 of the Code of Virginia, relating to*
3 *guardianship and conservatorship; restoration or modification or termination of order; informal*
4 *written communication.*

5 [H 786]
6 Approved

7 **Be it enacted by the General Assembly of Virginia:**
8 **1. That §§ 64.2-2009 and 64.2-2012 of the Code of Virginia are amended and reenacted as follows:**
9 **§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.**
10 A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the
11 person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the
12 incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify
13 whether the appointment of a guardian or conservator is limited to a specified length of time, as the
14 court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in
15 connection with the finding of incapacity, including but not limited to mental competency for purposes
16 of Article II, § 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed
17 appropriate following consideration of the factors specified in § 64.2-2007; (vi) set the bond of the
18 guardian and the bond and surety, if any, of the conservator; and (vii) where a petition is brought prior
19 to the incapacitated person's eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the
20 order shall take effect immediately upon entry or on the incapacitated person's eighteenth birthday.
21 A1. Beginning July 1, 2023, the court shall set a schedule in the order of appointment for periodic
22 review hearings, to be held no later than one year after the initial appointment and no later than every
23 three years thereafter, unless the court orders that such hearings are to be waived because they are
24 unnecessary or impracticable or that such hearings shall be held on such other schedule as the court
25 shall determine. Any such determination to waive the hearing or use a schedule differing from that
26 prescribed in this subsection shall be supported in the order and address the reason for such
27 determination, including (i) the likelihood that the respondent's condition will improve or the respondent
28 will regain capacity, (ii) whether concerns or questions were raised about the suitability of the person
29 appointed as a guardian or conservator at the time of the initial appointment, and (iii) whether the
30 appointment of a guardian or conservator or the appointment of the specifically appointed guardian or
31 conservator was contested by the respondent or another party.
32 The court shall not waive the initial periodic review hearing scheduled pursuant to this subsection
33 where the petitioner for guardianship or conservatorship is a hospital, convalescent home, or certified
34 nursing facility licensed by the Department of Health pursuant to § 32.1-123; an assisted living facility,
35 as defined in § 63.2-100, or any other similar institution; or a health care provider other than a family
36 member. If the petitioner is a hospital, convalescent home, or certified nursing facility licensed by the
37 Department of Health pursuant to § 32.1-123 or an assisted living facility as defined in § 63.2-100,
38 nothing in this chapter shall require such petitioner to attend any periodic review hearing.
39 Any person may file a petition, which may be on a form developed by the Office of the Executive
40 Secretary of the Supreme Court of Virginia, to hold a periodic review hearing prior to the scheduled
41 date set forth in the order of appointment. The court shall hold an earlier hearing upon good cause
42 shown. At such a hearing, the court shall review the schedule set forth in the order of appointment and
43 determine whether future periodic review hearings are necessary or may be waived.
44 A2. If the court has ordered a hearing pursuant to subsection A1, the court shall appoint a guardian
45 ad litem, who shall conduct an investigation in accordance with the stated purpose of the hearing and
46 file a report. The incapacitated person has a right to be represented by counsel, and the provisions of
47 § 64.2-2006 shall apply, mutatis mutandis. The guardian ad litem shall provide notice of the hearing to
48 the incapacitated person and to all individuals entitled to notice as identified in the court order of
49 appointment. Fees and costs shall be paid in accordance with the provisions of §§ 64.2-2003 and
50 64.2-2008. The court shall enter an order reflecting any findings made during the review hearing and
51 any modification to the guardianship or conservatorship.
52 B. The court may appoint a limited guardian for an incapacitated person who is capable of
53 addressing some of the essential requirements for his care for the limited purpose of medical decision
54 making, decisions about place of residency, or other specific decisions regarding his personal affairs.
55 The court may appoint a limited conservator for an incapacitated person who is capable of managing
56 some of his property and financial affairs for limited purposes that are specified in the order.

57 C. Unless the guardian has a professional relationship with the incapacitated person or is employed
58 by or affiliated with a facility where the person resides, the court's order may authorize the guardian to
59 consent to the admission of the person to a facility pursuant to § 37.2-805.1, upon finding by clear and
60 convincing evidence that (i) the person has severe and persistent mental illness that significantly impairs
61 the person's capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed
62 psychiatrist; (ii) such condition is unlikely to improve in the foreseeable future; and (iii) the guardian
63 has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive
64 setting suitable for the person's condition.
65 D. A guardian need not be appointed for a person who has appointed an agent under an advance
66 directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of
67 Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the
68 principal or there is a need for decision making outside the purview of the advance directive. A
69 guardian need not be appointed for a person where a health care decision is made pursuant to, and
70 within the scope of, the Health Care Decisions Act (§ 54.1-2981 et seq.).
71 A conservator need not be appointed for a person (i) who has appointed an agent under a durable
72 power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act
73 (§ 64.2-1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need
74 for decision making outside the purview of the durable power of attorney or (ii) whose only or major
75 source of income is from the Social Security Administration or other government program and who has
76 a representative payee.
77 E. All orders appointing a guardian shall include the following statements in conspicuous bold print
78 in at least 14-point type:
79 1. Pursuant to § 64.2-2009 of the Code of Virginia, (name of guardian), is hereby appointed as
80 guardian of (name of respondent) with all duties and powers granted to a guardian pursuant to
81 § 64.2-2019 of the Code of Virginia, including but not limited to: (enter a statement of the rights
82 removed and retained, if any, at the time of appointment; whether the appointment of a guardian is a
83 full guardianship, public guardianship pursuant to § 64.2-2010 of the Code of Virginia, limited
84 guardianship pursuant to § 64.2-2009 of the Code of Virginia, or temporary guardianship; and the
85 duration of the appointment).
86 2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to
87 the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the
88 expressed desires and personal values of the incapacitated person to the extent known, and shall not
89 restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with
90 whom the incapacitated person has an established relationship, unless such restriction is reasonable to
91 prevent physical, mental, or emotional harm to or financial exploitation of such incapacitated person and
92 after consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be
93 imposed pursuant to § 64.2-2019.1.
94 3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian
95 with the local department of social services for the jurisdiction where the incapacitated person resides.
96 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for
97 restoration of the incapacitated person to capacity; modification of the type of appointment or areas of
98 protection, management, or assistance granted; or termination of the guardianship. *In lieu of such a*
99 *petition, if the person subject to the guardianship is not represented by counsel, such person may*
100 *initiate the process by sending informal written communications to the court. All orders appointing a*
101 *guardian, conservator, or both shall include the current mailing address, email address, and physical*
102 *address of the court issuing the order and to which such informal written communication shall be*
103 *directed.*
104 **§ 64.2-2012. Petition for restoration, modification, or termination; effects.**
105 A. Upon petition by the incapacitated person, the guardian or conservator, or any other person or
106 upon motion of the court, the court may (i) declare the incapacitated person restored to capacity; (ii)
107 modify the type of appointment or the areas of protection, management, or assistance previously granted
108 or require a new bond; (iii) terminate the guardianship or conservatorship; (iv) order removal of the
109 guardian or conservator as provided in § 64.2-1410; or (v) order other appropriate relief. The fee for
110 filing the petition shall be as provided in subdivision A 42 of § 17.1-275.
111 *A1. Instead of the filing of a petition or upon motion provided by subsection A, if the person subject*
112 *to the guardianship or conservatorship is not represented by counsel, such person may initiate the*
113 *process to be restored to capacity or have guardianship or conservatorship modified or terminated by*
114 *informal written communication to the court.*
115 *Upon receipt of such informal written communication, the court shall review the communication to*
116 *determine whether there is good cause to take action and may (i) set the matter for hearing pursuant to*
117 *the provisions of this section, (ii) take no action if there is not good cause for such a hearing, or (iii)*

118 *order other appropriate relief. The court shall communicate its decision to the incapacitated person and*
119 *any guardian, conservator, and guardian ad litem then serving. The court's response may be made by*
120 *the same mode of informal written communication as used to make the request to the court.*
121 *No filing fee shall be assessed for the receipt of such informal communication.*
122 B. In the case of a petition for modification to expand the scope of a guardianship or
123 conservatorship, the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing
124 and a copy of the petition shall be personally served on the incapacitated person and mailed to other
125 persons entitled to notice pursuant to § 64.2-2004. The court shall appoint a guardian ad litem for the
126 incapacitated person and may appoint one or more licensed physicians or psychologists or licensed
127 professionals skilled in the assessment and treatment of the physical or mental conditions of the
128 incapacitated person, as alleged in the petition, to conduct an evaluation. Upon the filing of any other
129 such petition or upon the motion of the court, and after reasonable notice to the incapacitated person,
130 any guardian or conservator, any attorney of record, any person entitled to notice of the filing of an
131 original petition as provided in § 64.2-2004, and any other person or entity as the court may require, the
132 court shall hold a hearing. *Upon the filing of any petition or submission of informal written*
133 *communications pursuant to subsection A1, the incapacitated person has a right to be represented by*
134 *counsel, and the provisions of § 64.2-2006 shall apply, mutatis mutandis.*
135 C. An order appointing a guardian or conservator may be revoked, modified, or terminated upon a
136 finding that it is in the best interests of the incapacitated person and that:
137 1. The incapacitated person is no longer in need of the assistance or protection of a guardian or
138 conservator;
139 2. The extent of protection, management, or assistance previously granted is either excessive or
140 insufficient considering the current need of the incapacitated person;
141 3. The incapacitated person's understanding or capacity to manage his estate and financial affairs or
142 to provide for his health, care, or safety has so changed as to warrant such action; or
143 4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is
144 insufficient.
145 D. The court shall declare the person restored to capacity and discharge the guardian or conservator
146 if, on the basis of evidence offered at the hearing, the court finds by a preponderance of the evidence
147 that the incapacitated person has substantially regained his ability to (i) care for his person in the case of
148 a guardianship or (ii) manage and handle his estate in the case of a conservatorship.
149 In the case of a petition for modification of a guardianship or conservatorship, the court shall order
150 (a) limiting or reducing the powers of the guardian or conservator if the court finds by a preponderance
151 of the evidence that it is in the best interests of the incapacitated person to do so, or (b) increasing or
152 expanding the powers of the guardian or conservator if the court finds by clear and convincing evidence
153 that it is in the best interests of the incapacitated person to do so.
154 The court may order a new bond or other appropriate relief upon finding by a preponderance of the
155 evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or
156 of the estate.
157 E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of
158 the guardian or conservator or upon the termination of the guardianship or conservatorship.
159 A guardianship or conservatorship shall terminate upon the death of the incapacitated person or, if
160 ordered by the court, following a hearing on the petition of any interested person.
161 F. The court may allow reasonable compensation from the estate of the incapacitated person to any
162 guardian ad litem, attorney, or evaluator appointed pursuant to this section. Any compensation allowed
163 shall be taxed as costs of the proceeding.

ENROLLED

HB786ER

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 51.5-150, 64.2-2019, and 64.2-2020 of the Code of Virginia and to*
3 *amend the Code of Virginia by adding a section numbered 51.5-150.1, relating to Department for*
4 *Aging and Rehabilitative Services; training; powers and duties of guardian; annual reports by*
5 *guardians; information required.*

6 [S 291]
7 Approved

8 **Be it enacted by the General Assembly of Virginia:**
9 **1. That §§ 51.5-150, 64.2-2019, and 64.2-2020 of the Code of Virginia are amended and reenacted**
10 **and that the Code of Virginia is amended by adding a section numbered 51.5-150.1 as follows:**
11 **§ 51.5-150. Powers and duties of the Department with respect to public guardian and**
12 **conservator program.**
13 A. The Department shall fund from appropriations received for such purpose a statewide system of
14 local or regional public guardian and conservator programs.
15 B. The Department shall*, with respect to the public guardian and conservator programs*:
16 1. Make and enter into all contracts necessary or incidental to the performance of its duties and in
17 furtherance of the purposes as specified in this article in conformance with the Public Procurement Act
18 (§ 2.2-4300 et seq.);
19 2. Contract with local or regional public or private entities to provide services as guardians and
20 conservators operating as local or regional Virginia public guardian and conservator programs in those
21 cases in which a court, pursuant to §§ 64.2-2010 and 64.2-2015, determines that a person is eligible to
22 have a public guardian or conservator appointed;
23 3. Adopt reasonable regulations in accordance with the Administrative Process Act (§ 2.2-4000 et
24 seq.) as appropriate to implement, administer, and manage the state and local or regional programs
25 authorized by this article, including, but not limited to, the adoption of:
26 a. Minimum training and experience requirements for volunteers and professional staff of the local
27 and regional programs;
28 b. An ideal range of staff-to-client ratios for the programs, and adoption of procedures to be followed
29 whenever a local or regional program falls below or exceeds the ideal range of staff-to-client ratios,
30 which shall include, but not be limited to, procedures to ensure that services shall continue to be
31 available to those in need and that appropriate notice is given to the courts; sheriffs, where appropriate;
32 and the Department;
33 c. Procedures governing disqualification of any program falling below or exceeding the ideal range of
34 staff-to-client ratios, which shall include a process for evaluating any program that has exceeded the
35 ratio to assess the effects falling below or exceeding the ideal range of ratios has, had, or is having upon
36 the program and upon the incapacitated persons served by the program.
37 The regulations shall require that evaluations occur no less frequently than every six months and
38 shall continue until the staff-to-client ratio returns to within the ideal range; and
39 d. Person-centered practice procedures that shall:
40 (1) Focus on the preferences and needs of the individual receiving public guardianship services; and
41 (2) Empower and support the individual receiving public guardianship services, to the extent feasible,
42 in defining the direction for his life and promoting self-determination and community involvement.
43 4. Establish procedures and administrative guidelines to ensure the separation of local or regional
44 Virginia public guardian and conservator programs from any other guardian or conservator program
45 operated by the entity with whom the Department contracts, specifically addressing the need for
46 separation in programs that may be fee-generating;
47 5. Establish recordkeeping and accounting procedures to ensure that each local or regional program
48 (i) maintains confidential, accurate, and up-to-date records of the personal and property matters over
49 which it has control for each incapacitated person for whom it is appointed guardian or conservator and
50 (ii) files with the Department an account of all public and private funds received;
51 6. Establish criteria for the conduct of and filing with the Department and as otherwise required by
52 law: values history surveys, annual decisional accounting and assessment reports, the care plan designed
53 for the incapacitated person, and such other information as the Department may by regulation require;
54 7. Establish criteria to be used by the local and regional programs in setting priorities with regard to
55 services to be provided;
56 8. Take such other actions as are necessary to ensure coordinated services and a reasonable review of

57 all local and regional programs;
58 9. Maintain statistical data on the operation of the programs and report such data to the General
59 Assembly on or before January 1 of each even-numbered year as provided in the procedures of the
60 Division of Legislative Automated Systems for the processing of legislative documents regarding the
61 status of the Virginia Public Guardian and Conservator Program and the identified operational needs of
62 the program. Such report shall be posted on the Department's website. In addition, the Department shall
63 enter into a contract with an appropriate research entity with expertise in gerontology, disabilities, and
64 public administration to conduct an evaluation of local public guardian and conservator programs from
65 funds specifically appropriated and allocated for this purpose, and the evaluator shall provide a report
66 with recommendations to the Department and to the Public Guardian and Conservator Advisory Board
67 established pursuant to § 51.5-149.1. Trends identified in the report, including the need for public
68 guardians, conservators, and other types of surrogate decision-making services, shall be presented to the
69 General Assembly. The Department shall request such a report from an appropriate research entity every
70 four years, provided the General Assembly appropriates funds for that purpose;
71 10. Decennially review the ideal range of staff-to-client ratios for local and regional public guardian
72 and conservator programs in the Commonwealth and make recommendations as to whether the ratio
73 should be revised to ensure that public guardians are able to meet their obligations to incapacitated
74 persons pursuant to this article and report its findings and conclusions to the Governor and the General
75 Assembly by December 1 of each year in which such review is performed; and
76 11. Recommend appropriate legislative or executive actions.
77 C. Nothing in this article shall prohibit the Department from contracting pursuant to subdivision B 2
78 with an entity that may also provide privately funded surrogate decision-making services, including
79 guardian and conservator services funded with fees generated by the estates of incapacitated persons,
80 provided such private programs are administered by the contracting entity entirely separately from the
81 local or regional Virginia public guardian and conservator programs, in conformity with regulations
82 established by the Department in that respect.
83 D. In accordance with the Public Procurement Act (§ 2.2-4300 et seq.) and recommendations of the
84 Public Guardian and Conservator Advisory Board, the Department may contract with a not-for-profit
85 private entity that does not provide services to incapacitated persons as guardian or conservator to
86 administer the *public guardian and conservator* program, and, if it does, the term "Department" when
87 used in this article shall refer to the contract administrator.
88 ***§ 51.5-150.1. Powers and duties of the Department with respect to guardian training.***
89 *The Department shall develop and provide training for guardians pursuant to § 64.2-2019 that shall*
90 *include training on the responsibilities and duties of guardians, how to complete annual guardianship*
91 *reports, how to involve and encourage participation of incapacitated adults in decisions made by such*
92 *guardians, medical advocacy, and decision-making on behalf of other persons.*
93 **§ 64.2-2019. Duties and powers of guardian.**
94 A. A guardian stands in a fiduciary relationship to the incapacitated person for whom he was
95 appointed guardian and may be held personally liable for a breach of any fiduciary duty to the
96 incapacitated person. A guardian shall not be liable for the acts of the incapacitated person unless the
97 guardian is personally negligent. A guardian shall not be required to expend personal funds on behalf of
98 the incapacitated person.
99 B. A guardian's duties and authority shall not extend to decisions addressed in a valid advance
100 directive or durable power of attorney previously executed by the incapacitated person. A guardian may
101 seek court authorization to revoke, suspend, or otherwise modify a durable power of attorney, as
102 provided by the Uniform Power of Attorney Act (§ 64.2-1600 et seq.). Notwithstanding the provisions of
103 the Health Care Decisions Act (§ 54.1-2981 et seq.) and in accordance with the procedures of
104 § 64.2-2012, a guardian may seek court authorization to modify the designation of an agent under an
105 advance directive, but the modification shall not in any way affect the incapacitated person's directives
106 concerning the provision or refusal of specific medical treatments or procedures.
107 C. A guardian shall maintain sufficient contact with the incapacitated person to know of his
108 capabilities, limitations, needs, and opportunities and as needed to comply with the duties imposed upon
109 him pursuant to the order of appointment and this section and any other provision of law. The guardian
110 shall visit the incapacitated person as often as necessary and at least three times per year, with at least
111 one visit occurring every 120 days. Except as otherwise provided in subsection C1, of the three required
112 visits, at least two visits shall be conducted by the guardian. The guardian shall conduct at least one of
113 such visits in person; the second such visit may be conducted by the guardian via virtual conference or
114 video call between the guardian and incapacitated person, provided that the technological means by
115 which such conference or call can take place are readily available.
116 The remaining visit may be conducted (i) by the guardian; (ii) by a person other than the guardian,
117 including (a) a family member or friend monitored by the guardian or (b) a skilled professional retained

ENROLLED

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 64.2-732 of the Code of Virginia, relating to modification or termination*
3 *of uneconomic trust; notice.*

4 [S 63]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-732 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-732. Modification or termination of uneconomic trust.**
9 A. After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having
10 a total value less than $100,000 may terminate the trust *without court approval* if the trustee concludes
11 that the value of the trust property is insufficient to justify the cost of administration. *Notice required by*
12 *this section shall be sent in accordance with § 64.2-707.*
13 B. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if
14 it determines that the value of the trust property is insufficient to justify the cost of administration.
15 C. Upon termination of a trust under this section, the trustee shall distribute the trust property in a
16 manner consistent with the purposes of the trust *and may simultaneously utilize the provisions of*
17 *§ 64.2-779*.
18 D. This section does not apply to an easement for conservation or preservation.
19 *E. Expenses incurred by the trustee incident to the termination of a trust pursuant to this section*
20 *shall be paid by the trust estate.*

ENROLLED

SB63ER

1 **VIRGINIA ACTS OF ASSEMBLY — CHAPTER**

2 *An Act to amend and reenact § 64.2-800 of the Code of Virginia, relating to trusts; release or*
3 *ratification of trustee by beneficiary.*

4 [H 678]
5 Approved

6 **Be it enacted by the General Assembly of Virginia:**
7 **1. That § 64.2-800 of the Code of Virginia is amended and reenacted as follows:**
8 **§ 64.2-800. Beneficiary's consent, release, or ratification.**
9 *A.* A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the
10 conduct constituting the breach, released the trustee from liability for the breach, or ratified the
11 transaction constituting the breach, unless:
12 1. The consent, release, or ratification of the beneficiary was induced by improper conduct of the
13 trustee; or
14 2. At the time of the consent, release, or ratification, the beneficiary did not know of the
15 beneficiary's rights or of the material facts relating to the breach.
16 *B. A beneficiary shall be deemed to have released a trustee and ratified all actions of a trustee for*
17 *the administration of the trust if, when the trust terminates or the trustee ceases to serve:*
18 *1. The trustee sends the beneficiary the following:*
19 *a. A report as described in subsection C of § 64.2-775, for the immediately preceding two years;*
20 *b. The amount of any taxes, expenses, or fees, including trustee fees and any reserves, remaining to*
21 *be paid;*
22 *c. Notice that (i) the trust is terminating or that the trustee is ceasing to serve; (ii) if the beneficiary*
23 *does not object in writing to the trustee within 60 days after the trustee sent the notice and information,*
24 *the beneficiary shall be deemed to have released the trustee and ratified all actions of the trustee; and*
25 *(iii) the trustee is unaware of any undisclosed information that could give rise to a claim by the*
26 *beneficiary; and*
27 *d. If the trust is terminating, a description of any trust property or interests reasonably anticipated*
28 *but not yet received and a proposal for distribution; and*
29 *2. The beneficiary does not notify the trustee of the beneficiary's objection in writing within 60 days*
30 *after the trustee sent the notice and information pursuant to subdivision 1.*
31 *C. The provisions of subsection B shall not apply to a transaction pursuant to Article 8.1*
32 *(§ 64.2-779.1 et seq.) of Chapter 7.*
33 *D. In the event the trustee is not released and his actions ratified pursuant to the process provided*
34 *by subsection B, the trustee shall not be precluded from obtaining a release of liability by another*
35 *permitted method.*
36 *E. When a trustee complies with the provisions of subsection B, has received no objection or has*
37 *resolved any objection, and distributes the assets of a terminating trust to a beneficiary or to a*
38 *successor trustee, such action shall have the same legal and preclusive effect as if a court had entered a*
39 *final order approving the trustee's final account or approving the trustee's interim accounts. A*
40 *beneficiary or other party who received the notice and statements and either consented or did not object*
41 *shall be prohibited from bringing a claim against the trustee.*

VIRGINIA ACTS OF ASSEMBLY -- 2024 SESSION

CHAPTER 156

An Act to amend and reenact §§ 64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia, relating to guardians and conservators; order of appointment and certificate of qualification; annual report.

[S 290]

Approved March 26, 2024

Be it enacted by the General Assembly of Virginia:
1. That §§ 64.2-2002, 64.2-2011, and 64.2-2020 of the Code of Virginia are amended and reenacted as follows:

§ 64.2-2002. Who may file petition; contents.

A. Any person, including a community services board and any other local or state governmental agency, may file a petition for the appointment of a guardian, a conservator, or both.

B. A petition for the appointment of a guardian, a conservator, or both, shall state the petitioner's name, place of residence, post office address, and relationship, if any, to the respondent and, to the extent known as of the date of filing, shall include the following:

1. The respondent's name, date of birth, place of residence or location, post office address, and the sealed filing of the social security number;

2. The basis for the court's jurisdiction under the provisions of Article 2 (§ 64.2-2105 et seq.) of Chapter 21;

3. The names and post office addresses of the respondent's spouse, adult children, parents, and adult siblings or, if no such relatives are known to the petitioner, at least three other known relatives of the respondent, including stepchildren. If a total of three such persons cannot be identified and located, the petitioner shall certify that fact in the petition, and the court shall set forth such finding in the final order;

4. The name, place of residence or location, and post office address of the individual or facility, if any, that is responsible for or has assumed responsibility for the respondent's care or custody;

5. The name, place of residence or location, and post office address of any agent designated under a durable power of attorney or an advance directive of which the respondent is the principal, and any guardian, committee, or conservator currently acting, whether in this state or elsewhere, and the petitioner shall attach a copy of any such durable power of attorney, advance directive, or order appointing the guardian, committee, or conservator, if available;

5a. The name, location, and post office address of the respondent's primary health care provider, if any;

6. The type of guardianship or conservatorship requested and a brief description of the nature and extent of the respondent's alleged incapacity;

7. When the petition requests appointment of a guardian, a brief description of the services currently being provided for the respondent's health, care, safety, or rehabilitation and, where appropriate, a recommendation as to living arrangements and treatment plan;

8. If the appointment of a limited guardian is requested, the specific areas of protection and assistance to be included in the order of appointment and, if the appointment of a limited conservator is requested, the specific areas of management and assistance to be included in the order of appointment;

9. The name and post office address of any proposed guardian or conservator or any guardian or conservator nominated by the respondent and that person's relationship to the respondent;

10. The native language of the respondent and any necessary alternative mode of communication;

11. A statement of the financial resources of the respondent that shall, to the extent known, list the approximate value of the respondent's property and the respondent's anticipated annual gross income, other receipts, and debts, contained in a separate confidential addendum, pursuant to § 64.2-2000.1;

12. A statement of whether the petitioner believes that the respondent's attendance at the hearing would be detrimental to the respondent's health, care, or safety; and

13. A request for appointment of a guardian ad litem.

C. The petitioner shall complete and file with the petition for appointment of a guardian, a conservator, or both, a cover sheet on a form prepared by the Office of the Executive Secretary of the Supreme Court of Virginia. Such cover sheet shall contain such information as the Executive Secretary deems necessary.

§ 64.2-2011. Qualification of guardian or conservator; clerk to record order and issue certificate; reliance on certificate.

A. A guardian or conservator appointed in the court order shall qualify before the clerk upon the following:

1. Subscribing to an oath promising to faithfully perform the duties of the office in accordance with

118 *order other appropriate relief. The court shall communicate its decision to the incapacitated person and*
119 *any guardian, conservator, and guardian ad litem then serving. The court's response may be made by*
120 *the same mode of informal written communication as used to make the request to the court.*
121 *No filing fee shall be assessed for the receipt of such informal communication.*
122 B. In the case of a petition for modification to expand the scope of a guardianship or
123 conservatorship, the incapacitated person shall be entitled to a jury, upon request. Notice of the hearing
124 and a copy of the petition shall be personally served on the incapacitated person and mailed to other
125 persons entitled to notice pursuant to § 64.2-2004. The court shall appoint a guardian ad litem for the
126 incapacitated person and may appoint one or more licensed physicians or psychologists or licensed
127 professionals skilled in the assessment and treatment of the physical or mental conditions of the
128 incapacitated person, as alleged in the petition, to conduct an evaluation. Upon the filing of any other
129 such petition or upon the motion of the court, and after reasonable notice to the incapacitated person,
130 any guardian or conservator, any attorney of record, any person entitled to notice of the filing of an
131 original petition as provided in § 64.2-2004, and any other person or entity as the court may require, the
132 court shall hold a hearing. *Upon the filing of any petition or submission of informal written*
133 *communications pursuant to subsection A1, the incapacitated person has a right to be represented by*
134 *counsel, and the provisions of § 64.2-2006 shall apply, mutatis mutandis.*
135 C. An order appointing a guardian or conservator may be revoked, modified, or terminated upon a
136 finding that it is in the best interests of the incapacitated person and that:
137 1. The incapacitated person is no longer in need of the assistance or protection of a guardian or
138 conservator;
139 2. The extent of protection, management, or assistance previously granted is either excessive or
140 insufficient considering the current need of the incapacitated person;
141 3. The incapacitated person's understanding or capacity to manage his estate and financial affairs or
142 to provide for his health, care, or safety has so changed as to warrant such action; or
143 4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is
144 insufficient.
145 D. The court shall declare the person restored to capacity and discharge the guardian or conservator
146 if, on the basis of evidence offered at the hearing, the court finds by a preponderance of the evidence
147 that the incapacitated person has substantially regained his ability to (i) care for his person in the case of
148 a guardianship or (ii) manage and handle his estate in the case of a conservatorship.
149 In the case of a petition for modification of a guardianship or conservatorship, the court shall order
150 (a) limiting or reducing the powers of the guardian or conservator if the court finds by a preponderance
151 of the evidence that it is in the best interests of the incapacitated person to do so, or (b) increasing or
152 expanding the powers of the guardian or conservator if the court finds by clear and convincing evidence
153 that it is in the best interests of the incapacitated person to do so.
154 The court may order a new bond or other appropriate relief upon finding by a preponderance of the
155 evidence that the guardian or conservator is not acting in the best interests of the incapacitated person or
156 of the estate.
157 E. The powers of a guardian or conservator shall terminate upon the death, resignation, or removal of
158 the guardian or conservator or upon the termination of the guardianship or conservatorship.
159 A guardianship or conservatorship shall terminate upon the death of the incapacitated person or, if
160 ordered by the court, following a hearing on the petition of any interested person.
161 F. The court may allow reasonable compensation from the estate of the incapacitated person to any
162 guardian ad litem, attorney, or evaluator appointed pursuant to this section. Any compensation allowed
163 shall be taxed as costs of the proceeding.

CHAPTER 50

An Act to amend and reenact §§ 8.01-262 and 64.2-454 of the Code of Virginia, relating to permissible venue; personal injury and wrongful death actions; appointment of administrator on behalf of estate of decedent.

[H 779]

Approved March 8, 2024

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-262 and 64.2-454 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-262. Category B or permissible venue.

In any actions to which this chapter applies except those actions enumerated in Category A where preferred venue is specified, one or more of the following counties or cities shall be permissible forums, such forums being sometimes referred to as "Category B" in this title:

1. Wherein the defendant resides or has his principal place of employment or, if the defendant is not an individual, wherein its principal office or principal place of business is located;

2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the law; or, in case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

3. Provided there exists any practical nexus to the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action, wherein the defendant regularly conducts substantial business activity, or in the case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

4. Wherein the cause of action, or any part thereof, arose;

5. In actions to recover or partition personal property, whether tangible or intangible, the county or city:

a. Wherein such property is physically located; or

b. Wherein the evidence of such property is located;

c. And if subdivisions a and b do not apply, wherein the plaintiff resides.

6. In actions against a fiduciary as defined in § 8.01-2 appointed under court authority, the county or city wherein such fiduciary qualified;

7. In actions for improper message transmission or misdelivery wherein the message was transmitted or delivered or wherein the message was accepted for delivery or was misdelivered;

8. In actions arising based on delivery of goods, wherein the goods were received;

9. If there is no other forum available in subdivisions 1 through 8 of this category, then the county or city where the defendant has property or debts owing to him subject to seizure by any civil process; or

10. Wherein any of the plaintiffs reside if (i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provisions of § 8.01-261 or this section.

Notwithstanding the provisions of this section, in actions in which an administrator has been appointed pursuant to § 64.2-454, permissible venue shall only lie in a county or city in which venue would have been properly laid if the person for whom such appointment is made had survived.

§ 64.2-454. Appointment of administrator for prosecution of action for personal injury or wrongful death against or on behalf of estate of deceased resident or nonresident.

An administrator may be appointed in any case in which it is represented that either a civil action for personal injury or death by wrongful act, or both, arising within the Commonwealth is contemplated against or on behalf of the estate or the beneficiaries of the estate of a resident or nonresident of the Commonwealth who has died within or outside the Commonwealth if at least 60 days have elapsed since the decedent's death and an executor or administrator of the estate has not been appointed under § 64.2-500 or 64.2-502, solely for the purpose of prosecution or defense of any such actions, by the clerk of ~~the~~ *a* circuit court ~~in the county or city in which jurisdiction and venue would have been properly laid for such actions if the person for whom the appointment is sought had survived~~. An administrator appointed pursuant to this section may prosecute actions for both personal injury and death by wrongful act.

If a fiduciary has been appointed in a foreign jurisdiction, the fiduciary may qualify as administrator. The appointment of a fiduciary in a foreign jurisdiction shall not preclude a resident or nonresident from qualifying as an administrator for the purposes of maintaining a wrongful death action pursuant to § 8.01-50 or a personal injury action in the Commonwealth.

A resident and nonresident may be appointed as coadministrators.

CHAPTER 20

An Act to amend and reenact § 8.01-271.1 of the Code of Virginia, relating to signing of pleadings, motions, and other papers; electronic signatures.

[H 171]

Approved March 8, 2024

Be it enacted by the General Assembly of Virginia:
1. That § 8.01-271.1 of the Code of Virginia is amended and reenacted as follows:
§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions.

A. Except as otherwise provided in §§ 16.1-260 and 63.2-1901, every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Virginia State Bar in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion, or other paper and state his address. The signature of a person other than counsel of record who is an active member in good standing of the Virginia State Bar or a pro se litigant is not a valid signature. A minor who is not represented by an attorney shall sign his pleading, motion, or other paper by his next friend. Either or both parents of such minor may sign on behalf of such minor as his next friend. However, a parent may not sign on behalf of a minor if such signature is otherwise prohibited by subdivision 6 of § 64.2-716. *The signature required by this section may be an electronic signature as defined in § 59.1-480 or a digital image of a signature.* If a pleading, motion, or other paper is not signed in compliance with this paragraph, it is defective. Such a defect renders the pleading, motion, or other paper voidable.

B. The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

C. An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

D. If a pleading, motion, or other paper is signed or made in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including reasonable attorney fees.

E. Failure to raise the issue of a signature defect in a pleading, motion, or other paper before the trial court's jurisdiction expires pursuant to Rule 1:1 (a) and Rule 1:1B waives any challenge to that pleading, motion, or other paper based on such a defect.

F. Signature defects in appellate filings, including the notice of appeal, shall be raised in the appellate court where the appeal is taken. Failure to timely raise the issue of a defective signature in an appellate pleading, motion, or other paper while the case is pending before the appellate court waives any challenge to that pleading, motion, or other paper based on such a defect.

G. If a signature defect is not timely and properly cured after it is brought to the attention of the pleader or movant, the pleading, motion, or other paper is invalid and shall be stricken. A signature defect shall be cured within 21 days after it is brought to the attention of the pleader or movant. If a signature defect is timely and properly cured, the pleading, motion, or other paper shall be valid and relate back to the date it was originally served or filed.

118 by the guardian to perform guardianship duties on behalf of the guardian and who is experienced in the
119 care of individuals, including older adults or adults with disabilities; or (iii) via virtual conference or
120 video call between either the guardian or such family member or friend monitored by the guardian or
121 skilled professional and the incapacitated person, provided that the technological means by which such
122 conference or call can take place are readily available. If a person other than the guardian conducts any
123 such visit, he shall provide a written report to the guardian regarding any visit conducted by such
124 person.
125 A telephone call shall meet the requirements of this subsection only if such technological means are
126 not readily available.
127 C1. If for reasons outside the guardian's control the guardian cannot make an in-person visit to an
128 incapacitated person, then such visit may be conducted in person by an individual designated by the
129 guardian pursuant to subsection C. If either the guardian or such individual designated by the guardian
130 is unable to conduct an in-person visit, then such visit may be conducted virtually through electronic
131 means such as a virtual conference or video call, or, if such technological means are not readily
132 available, by telephone.
133 C2. In the event of a state of emergency or public health crisis in which a facility in which the
134 incapacitated person resides is not allowing in-person visitation, visitation requirements required pursuant
135 to subsection C may be met via a virtual conference or video call between the guardian and
136 incapacitated person, to the extent feasible for the facility to provide the technological means by which
137 such conference or call can take place. A telephone call shall meet the requirements of this subsection
138 only if such technological means are not readily available.
139 D. A guardian shall be required to seek prior court authorization to change the incapacitated person's
140 residence to another state, to terminate or consent to a termination of the person's parental rights, or to
141 initiate a change in the person's marital status.
142 E. A guardian shall, to the extent feasible, encourage the incapacitated person to participate in
143 decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A
144 guardian, in making decisions, shall consider the expressed desires and personal values of the
145 incapacitated person to the extent known and shall otherwise act in the incapacitated person's best
146 interest and exercise reasonable care, diligence, and prudence. A guardian shall not restrict an
147 incapacitated person's ability to communicate with, visit, or interact with other persons with whom the
148 incapacitated person has an established relationship, unless such restriction is reasonable to prevent
149 physical, mental, or emotional harm to or financial exploitation of such incapacitated person and after
150 consideration of the expressed wishes of the incapacitated person. Such restrictions shall only be
151 imposed pursuant to § 64.2-2019.1.
152 *E1. A guardian and any skilled professional retained by such guardian to perform guardianship*
153 *duties on behalf of the guardian pursuant to clause (ii) (b) of subsection C shall complete the training*
154 *developed by the Department for Aging and Rehabilitative Services pursuant to § 51.5-150.1 within 120*
155 *days after the date of the qualification of such guardian, unless such training was completed within the*
156 *past 36 months in conjunction with another guardianship appointment made pursuant to § 64.2-2009.*
157 *No guardian or skilled professional retained by such guardian shall be required to complete such*
158 *training more frequently than once every 36 months.*
159 F. A guardian shall have authority to make arrangements for the funeral and disposition of remains,
160 including cremation, interment, entombment, memorialization, inurnment, or scattering of the cremains,
161 or some combination thereof, if the guardian is not aware of any person that has been otherwise
162 designated to make such arrangements as set forth in § 54.1-2825. A guardian shall have authority to
163 make arrangements for the funeral and disposition of remains after the death of an incapacitated person
164 if, after the guardian has made a good faith effort to locate the next of kin of the incapacitated person to
165 determine if the next of kin wishes to make such arrangements, the next of kin does not wish to make
166 the arrangements or the next of kin cannot be located. Good faith effort shall include contacting the next
167 of kin identified in the petition for appointment of a guardian. The funeral service licensee, funeral
168 service establishment, registered crematory, cemetery, cemetery operator, or guardian shall be immune
169 from civil liability for any act, decision, or omission resulting from acceptance of any dead body for
170 burial, cremation, or other disposition when the provisions of this section are met, unless such acts,
171 decisions, or omissions resulted from bad faith or malicious intent.
172 **§ 64.2-2020. Annual reports by guardians.**
173 A. A guardian shall file an annual report in compliance with the filing deadlines in § 64.2-1305 with
174 the local department of social services for the jurisdiction where the incapacitated person then resides.
175 The annual report shall be on a form prepared by the Office of the Executive Secretary of the Supreme
176 Court and shall be accompanied by a filing fee of $5. To the extent practicable, the annual report shall
177 be formatted in a manner to encourage standardized and detailed responses from guardians. The local
178 department shall retain the fee in the jurisdiction where the fee is collected for use in the provision of

services to adults in need of protection. Within 60 days of receipt of the annual report, the local department shall file a copy of the annual report with the clerk of the circuit court that appointed the guardian, to be placed with the court papers pertaining to the guardianship case. Twice each year the local department shall file with the clerk of the circuit court a list of all guardians who are more than 90 days delinquent in filing an annual report as required by this section. If the guardian is also a conservator, a settlement of accounts shall also be filed with the commissioner of accounts as provided in § 64.2-1305.

B. The annual report to the local department of social services shall include:

1. A description of the current mental, physical, and social condition of the incapacitated person, including any change in diagnosis or assessment of any such condition of such incapacitated person by any medical provider since the last report;

2. A description of the incapacitated person's living arrangements during the reported period, including a specific assessment of the adequacy of such living arrangement;

3. The medical, educational, vocational, social, recreational, and any other professional services and activities provided to the incapacitated person and the guardian's opinion as to the adequacy of the incapacitated person's care. The information required by this subdivision shall include (i) the specific names of the medical providers that have treated the incapacitated person and a description of the frequency or number of times the incapacitated person was seen by such providers; (ii) the date and location of and reason for any hospitalization of such incapacitated person; and (iii) a description of the educational, vocational, social, and recreational activities in which such incapacitated person participated;

4. A statement of whether the guardian agrees with the current treatment or habilitation plan;

5. A statement of whether the incapacitated person has been an alleged victim in a report of abuse, neglect, or exploitation made pursuant to Article 2 (§ 63.2-1603 et seq.) of Chapter 16 of Title 63.2, to the extent known, and whether there are any other indications of abuse, neglect, or exploitation of such incapacitated person;

6. A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship;

7. The name of any persons whose access to communicate, visit, or interact with the incapacitated person has been restricted and the reasons for such restriction;

8. A self-assessment by the guardian as to whether he feels he is able to continue to carry out the powers and duties imposed upon him by § 64.2-2019 and as specified in the court's order of appointment pursuant to § 64.2-2009;

9. *A statement as to whether the guardian and any skilled professional retained by such guardian to perform guardianship duties on behalf of the guardian have completed the training required by subsection E1 of § 64.2-2019;*

10. Unless the incapacitated person resides with the guardian, a statement of the frequency and nature of any (i) in-person visits from the guardian with the incapacitated person over the course of the previous year and (ii) visits over the course of the previous year from a designee who is directly supervised or contracted by the guardian, including the name of the designee performing such visit. If any visit described in this section is made virtually, the guardian shall include such information in the annual report;

~~10.~~ *11.* If no visit is made within a 120-day period, the guardian shall describe any challenges or limitations in completing such visit;

~~11.~~ *12.* A general description of the activities taken on by the guardian for the benefit of the incapacitated person during the past year;

~~12.~~ *13.* Any other information deemed necessary by the Office of the Executive Secretary of the Supreme Court of Virginia or the Department for Aging and Rehabilitative Services to understand the condition, treatment, and well-being of the incapacitated person;

~~13.~~ *14.* Any other information useful in the opinion of the guardian; and

~~14.~~ *15.* The compensation requested and the reasonable and necessary expenses incurred by the guardian.

The guardian shall certify by signing under oath that the information contained in the annual report is true and correct to the best of his knowledge. If a guardian makes a false entry or statement in the annual report, he shall be subject to a civil penalty of not more than $500. Such penalty shall be collected by the attorney for the Commonwealth or the county or city attorney, and the proceeds shall be deposited into the general fund.

C. If the local department of social services files notice that the annual report has not been timely filed in accordance with subsection A with the clerk of the circuit court, the court may issue a summons or rule to show cause why the guardian has failed to file such annual report.

2. That the Department for Aging and Rehabilitative Services shall develop and implement the training specified by § 51.5-150.1 of the Code of Virginia, as created by this act, by July 1, 2025.

240 **3. That guardians appointed pursuant to § 64.2-2009 of the Code of Virginia prior to July 1, 2025,**
241 **and any skilled professional retained by such guardian to perform guardianship duties on behalf**
242 **of such guardian, shall complete the training required by § 64.2-2019 of the Code of Virginia, as**
243 **amended by this act, by January 1, 2027.**
244 **4. That the Office of the Executive Secretary of the Supreme Court of Virginia shall prepare the**
245 **annual report form specified by § 64.2-2020 of the Code of Virginia, as amended by this act, by**
246 **July 1, 2025.**
247 **5. That the Department for Aging and Rehabilitative Services shall consult with the Virginia State**
248 **Bar, the Supreme Court of Virginia, and the Office of the Executive Secretary of the Supreme**
249 **Court of Virginia to ensure that the training program developed pursuant to § 51.5-150.1, as**
250 **created by this act, is in compliance with the rules and regulations regarding the Mandatory**
251 **Continuing Legal Education (MCLE) program and is eligible for attorneys taking such course to**
252 **receive MCLE credits.**

CHAPTER 50

An Act to amend and reenact §§ 8.01-262 and 64.2-454 of the Code of Virginia, relating to permissible venue; personal injury and wrongful death actions; appointment of administrator on behalf of estate of decedent.

[H 779]

Approved March 8, 2024

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-262 and 64.2-454 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-262. Category B or permissible venue.

In any actions to which this chapter applies except those actions enumerated in Category A where preferred venue is specified, one or more of the following counties or cities shall be permissible forums, such forums being sometimes referred to as "Category B" in this title:

1. Wherein the defendant resides or has his principal place of employment or, if the defendant is not an individual, wherein its principal office or principal place of business is located;

2. Wherein the defendant has a registered office, has appointed an agent to receive process, or such agent has been appointed by operation of the law; or, in case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

3. Provided there exists any practical nexus to the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action, wherein the defendant regularly conducts substantial business activity, or in the case of withdrawal from the Commonwealth by such defendant, wherein venue herein was proper at the time of such withdrawal;

4. Wherein the cause of action, or any part thereof, arose;

5. In actions to recover or partition personal property, whether tangible or intangible, the county or city:

a. Wherein such property is physically located; or

b. Wherein the evidence of such property is located;

c. And if subdivisions a and b do not apply, wherein the plaintiff resides.

6. In actions against a fiduciary as defined in § 8.01-2 appointed under court authority, the county or city wherein such fiduciary qualified;

7. In actions for improper message transmission or misdelivery wherein the message was transmitted or delivered or wherein the message was accepted for delivery or was misdelivered;

8. In actions arising based on delivery of goods, wherein the goods were received;

9. If there is no other forum available in subdivisions 1 through 8 of this category, then the county or city where the defendant has property or debts owing to him subject to seizure by any civil process; or

10. Wherein any of the plaintiffs reside if (i) all of the defendants are unknown or are nonresidents of the Commonwealth or if (ii) there is no other forum available under any other provisions of § 8.01-261 or this section.

Notwithstanding the provisions of this section, in actions in which an administrator has been appointed pursuant to § 64.2-454, permissible venue shall only lie in a county or city in which venue would have been properly laid if the person for whom such appointment is made had survived.

§ 64.2-454. Appointment of administrator for prosecution of action for personal injury or wrongful death against or on behalf of estate of deceased resident or nonresident.

An administrator may be appointed in any case in which it is represented that either a civil action for personal injury or death by wrongful act, or both, arising within the Commonwealth is contemplated against or on behalf of the estate or the beneficiaries of the estate of a resident or nonresident of the Commonwealth who has died within or outside the Commonwealth if at least 60 days have elapsed since the decedent's death and an executor or administrator of the estate has not been appointed under § 64.2-500 or 64.2-502, solely for the purpose of prosecution or defense of any such actions, by the clerk of ~~the~~ *a* circuit court ~~in the county or city in which jurisdiction and venue would have been properly laid for such actions if the person for whom the appointment is sought had survived~~. An administrator appointed pursuant to this section may prosecute actions for both personal injury and death by wrongful act.

If a fiduciary has been appointed in a foreign jurisdiction, the fiduciary may qualify as administrator. The appointment of a fiduciary in a foreign jurisdiction shall not preclude a resident or nonresident from qualifying as an administrator for the purposes of maintaining a wrongful death action pursuant to § 8.01-50 or a personal injury action in the Commonwealth.

A resident and nonresident may be appointed as coadministrators.

VIRGINIA ACTS OF ASSEMBLY -- 2024 SESSION

CHAPTER 20

An Act to amend and reenact § 8.01-271.1 of the Code of Virginia, relating to signing of pleadings, motions, and other papers; electronic signatures.

[H 171]

Approved March 8, 2024

Be it enacted by the General Assembly of Virginia:
1. That § 8.01-271.1 of the Code of Virginia is amended and reenacted as follows:
§ 8.01-271.1. Signing of pleadings, motions, and other papers; oral motions; sanctions.

A. Except as otherwise provided in §§ 16.1-260 and 63.2-1901, every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Virginia State Bar in his individual name, and the attorney's address shall be stated on the first pleading filed by that attorney in the action. A party who is not represented by an attorney, including a person confined in a state or local correctional facility proceeding pro se, shall sign his pleading, motion, or other paper and state his address. The signature of a person other than counsel of record who is an active member in good standing of the Virginia State Bar or a pro se litigant is not a valid signature. A minor who is not represented by an attorney shall sign his pleading, motion, or other paper by his next friend. Either or both parents of such minor may sign on behalf of such minor as his next friend. However, a parent may not sign on behalf of a minor if such signature is otherwise prohibited by subdivision 6 of § 64.2-716. *The signature required by this section may be an electronic signature as defined in § 59.1-480 or a digital image of a signature.* If a pleading, motion, or other paper is not signed in compliance with this paragraph, it is defective. Such a defect renders the pleading, motion, or other paper voidable.

B. The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

C. An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that (i) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (ii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

D. If a pleading, motion, or other paper is signed or made in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including reasonable attorney fees.

E. Failure to raise the issue of a signature defect in a pleading, motion, or other paper before the trial court's jurisdiction expires pursuant to Rule 1:1 (a) and Rule 1:1B waives any challenge to that pleading, motion, or other paper based on such a defect.

F. Signature defects in appellate filings, including the notice of appeal, shall be raised in the appellate court where the appeal is taken. Failure to timely raise the issue of a defective signature in an appellate pleading, motion, or other paper while the case is pending before the appellate court waives any challenge to that pleading, motion, or other paper based on such a defect.

G. If a signature defect is not timely and properly cured after it is brought to the attention of the pleader or movant, the pleading, motion, or other paper is invalid and shall be stricken. A signature defect shall be cured within 21 days after it is brought to the attention of the pleader or movant. If a signature defect is timely and properly cured, the pleading, motion, or other paper shall be valid and relate back to the date it was originally served or filed.

Recent Updates In Civil Procedure — 2024 Edition

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Part I – Changes in the Rules

I. RULES OF THE VIRGINIA SUPREME COURT

In 2024, the Virginia Supreme Court amended Rule 1A:8 (effective March 4, 2024), added Rule 3:26 (effective August 4, 2024), and then made extensive changes to Rules 1:1B, 1:4, 1:5, 1:24, 1:25, 4:7A, 5:1B, 5:26, 5:29, 5A:1, 5A:10, 5A:12, 5A:13, 5A:19, 5A:20, 5A:21, 5A:22, 5A:25, and Part Five A, Appendix, Form 10 (effective August 20, 2024.)

They are recommended reading, especially the new Rule 3:26 which (finally) gives Virginia a standard for injunctive relief.

II. FEDERAL RULES OF CIVIL PROCEDURE.

On December 1, 20243, amendments to Federal Rules of Civil Procedure 12 will take effect.

III. FEDERAL RULES OF EVIDENCE.

On December 1, 2024, amendments to Federal Rules of Evidence 613, 801, 804, 1006, and new rule 107 will take effect.

Part II: State and Federal Cases in Virginia

I. CONTRACT INTERPRETATION

Case: *BAE Sys. Ordnance Sys. v. Fluor Fed. Sols., LLC*, 2024 U.S. Dist. LEXIS 17020 (W.D.Va. 2024)

Holdings:

i. Virginia code § 11–4.1:1 effectively prohibits any provision in a subcontract or material contract that diminishes the parties right to recover demonstrated additional costs incurred on a construction project.

ii. The language of "except as otherwise provided in this subcontract" necessarily implies that there are exceptions to the general provision, here a limitation on damages, which govern the specific issue. A conflict therefore does not render the contract and ambiguous, because the language of exception brings the two provisions into harmony.

Analysis: Fluor was a subcontractor to BAE under a contract with the United States Army to build a new facility in North Carolina to replace the Radford Arsenal. Fluor actually took over from another subcontractor, and began work originally under a "undefinitized contract action" ("UCA") which allowed them to begin work while the final contract was being negotiated. That final contract superseded and replaced the UCA and contained the various limitation on damages clauses, which were at issue in this case.

As you might imagine, there were cost over runs and delays, and the project was ultimately finished almost 3 years late. BAE sued to recover the delay damages it had to pay to the Army, and Fluor counterclaimed to recover the additional costs it claimed to have incurred under the contract change provision in the subcontract.

Finding the contract unambiguous, Judge Ballou applied the language in the Changes Clause as an exception to the three limitations on damages, which purported to limit damages to $30 million regardless of their source or amount. Separately, and alternatively, he found that even were the limitation of damages provisions to govern, they would run afoul of Virginia code § 11–4.1:1 and he would have struck them down. On either ground, he granted summary judgment to Fluor finding that the limitation on damages causes did not govern in this matter.

Takeaway: When drafting any limitations provisions, whether on damages or otherwise, be very careful of the phrase "except as otherwise provided in the subcontract", as it could accidentally eviscerate whatever limitation you have put in place.

II. EVIDENCE

a. <u>Dead Man's Statute</u>

Case: *Bon Secours-Depaul Med. Ctr., Inc. v. Rogakos-Russell*, 2023 Va. App. LEXIS 738 (2023)

Holding:

i. Testimony is subject to the corroboration requirement of the Dead Man's Statute only if it is offered by an adverse or interested party. The decedent is neither adverse to the action nor interested in the outcome thereof, and as such his statements do not require corroboration if offered by a witness who is neither adverse nor interested.

ii. Corroborating evidence is such evidence as tends to confirm and strengthen the testimony of the witness sought to be corroborated—that is, such as tends to show the

truth, or the probability of its truth. It is not necessary that the corroborative evidence should of itself be sufficient to support a verdict.

Analysis: On Fr. Rogakos's birthday on October 26, 2018, he traveled to DePaul Medical Center in Norfolk, accompanied by his wife, Eleni Rogakos. Dr. Nabil Tadros, Fr. Rogakos's primary care physician, had ordered an outpatient abdominal ultrasound to evaluate Fr. Rogakos's abdominal symptoms. When Fr. Rogakos and Regan arrived at the exam room, Regan "instructed him to remove [his] clothing from the waist up" and "put on the gown open in the back." Fr. Rogakos responded, "okay," and Regan stepped out of the room to let him change. A few minutes later, Regan knocked on the exam room door, cracked it open, and asked Fr. Rogakos if he was ready, to which he responded, "no." Then, within a couple of seconds, Regan "heard what sounded like a fall" and found Fr. Rogakos moaning and grunting on the floor in front of the ultrasound stretcher.

Fr. Rogakos was "found to have large right periorbital hematoma as well as extracranial hemorrhage, with subdural and intracerebral elements." Fr. Rogakos was admitted into the intensive care unit and was interviewed by Dr. Tadros. In a written medical report, Dr. Tadros observed that Fr. Rogakos "was awake and verbal" and had stated that the ultrasound stretcher "was unlocked and when he leaned over to change his clothes, it moved and he lost his balance, fell, etc." Shortly after the interview, Fr. Rogakos's mental condition began deteriorating, and he died on November 5, 2018.

Before he died, Fr. Rogakos told five individuals how and why his fall occurred: (1) Dr. Tadros, (2) a priest, George Bessinas ("Fr. Bessinas"), (3) Ms. Rogakos, (4) his daughter, Vasilia Rogakos-Russell, and (5) his other daughter, Georgia Rogakos Johnson.

The Hospital asserts that the final judgment in this case cannot be sustained under the first sentence of Virginia's Dead Man's Statute because Fr. Rogakos's statements regarding his account of the fall were not corroborated. The Court of Appeals found this argument “flawed at the outset” because it is only the testimony of an “adverse or interested party” which requires corroboration, not the statements of the Decedent himself. While three of the witnesses in this case (his wife and two daughters) were under this requirement, Dr. Tadros and Fr. Bessinas were not. Moreover, their testimony could serve as corroboration of the testimony of the interested witnesses.

Takeaway: Left unclear is whether a writing of the Decedent would be similarly governed, though if there were no question as to its authenticity one would assume it would.

b. <u>Adverse Witnesses</u>

Case: *J&R Enters. v. Ware Creek Real Est. Corp.*, 80 Va. App. 603 (2024)

Holding:

- **i.** When a party has called an adverse witness, their testimony is usually binding on the calling party only if it is uncontradicted and is not inherently improbable.
- **ii.** A court reviews adverse witness testimony differently from the way it weighs the sufficiency of ordinary evidence. The adverse party witness rule requires a reviewing court to examine the testimony of a party called as a witness by the opposing party and to sift what is uncontradicted from what is contradicted (or inherently incredible).

Analysis: Plaintiff was attempting to pierce (and reverse-pierce) the corporate veil. It called as its only witness the principal of the Defendant who was alleged to have made fraudulent

transfers, acted as an alter ego, etc. It examined him on a number of company documents which purported to show several badges of fraud.

The witnesses testimony largely related to whether expenses paid for were incurred for valid business purposes. These expenses included charges for numerous restaurants, amusement park and movie theater tickets, medical procedures and supplements, jewelry, taxes on a boat and real estate property owned by Ware, and grocery and retail purchases.

As J&R's counsel questioned Ware about these expenses, he struggled to recall most details about the purchases, though he often maintained that they were indeed legitimate business expenses. He insisted that—although the companies had not earned profits since 2017 and 2018 respectively, had no other employees, nor performed work for any customers at the time—any and all expenses were business related and not personal.

Although the trial court found this testimony inherently incredible, it nonetheless held that the plaintiff was bound by it and granted a motion to strike. For the reasons discussed, the Court of Appeals reversed.

Takeaway: The Court of Appeals ruling still does contain some danger in calling an adverse party as your witness – if you don't have evidence to contradict a statement they make, you could get stuck with it.

c. **Parol evidence**

Case: *Joplin v. Harris*, 2024 Va. App. LEXIS 220 (2024)

Holding: Virginia courts allow parol evidence to prove the existence and content of a lost or destroyed document, but the greater the value of the lost document, the more conclusive must be the proof of its existence and contents.

Analysis: A defendant sought to enforce a $25,000 release of all claims based on an illegible document bearing the plaintiff's signature and a document from its own files which was "similar in format" to the illegible document. The trial court agreed, finding that the unexecuted release was sufficient to prove the content of the illegible document. The Court of Appeals reversed.

The Court of Appeals held that although an unexecuted or otherwise blank document can serve as parole evidence to prove the contents of a illegible, lost, or destroyed document, "the greater the value of the [lost document] the more conclusive should be the proof of its existence and contents." However, it found that the testimony that it was "similar in format" was not enough to prove that the contents of the two documents were otherwise identical. It also noted all of the surrounding evidence that the plaintiff did not intend to settle all of his claims with all of the defendants, and indeed that his counsel had discussed the lack of such agreement with counsel for the defendant.

Takeaway: Introducing evidence of a "form" can serve as parol evidence as to the content of the lost/destroyed document, but only if the other evidence is solid that they were identical in all relevant aspects.

III. JURY INSTRUCTIONS

Case: *Emergency Physicians of Tidewater, PLC v. Hanger*, 899 S.E.2d 413 (2024).

Holding:

i. When a trial court refuses to give an instruction proffered by a party that is a correct statement of law and which is supported by adequate evidence in the record, this

action, without more, is sufficient to preserve for appeal the issue of whether the trial court erred in refusing the instruction.

Analysis: On March 28, 2017, Kurt arrived home at approximately 2:45 p.m. and discovered Hanger sitting on the kitchen floor, leaning against the wall, bleeding from a wound over her right eye. Hanger's eyes were open, but she "just wasn't responsive." There was a blood stain on the corner of a nearby water cooler and two blood stains on the floor. Kurt asserted that he did not see anything that could have caused Hanger to fall and that she had never fainted, passed out, or had a seizure, nor had she ever tripped or fallen in his presence. Based on a CT scan, Hanger's treating physician, Dr. Dana Adkins, opined that Hanger suffered a traumatic brain injury ("TBI") when she fell.

Hanger had been previously diagnosed with hyponatremia, and Plaintiff alleged that the failure to properly treat it was the cause of her fall. Defendant contested this, introducing evidence not suffer a hyponatremic seizure on the day of her fall, identifying various possibilities that could have caused Hanger's fall other than hyponatremia, including a trip and fall, stress induced fainting, low blood pressure, cardiac arrythmia, a mild stroke, a heart attack, or a pulmonary embolus.

Defendant requested that the Court give a modification of the “multiple causation instruction”, as follows:

> If you believe from the evidence that the injury to Patricia Hanger might have resulted from either of two causes, for one of which Dr. Raines might have been responsible and for the other of which Dr. Raines was not responsible, and if you are unable to determine which of the two causes occasioned the injury complained of, then the plaintiff cannot recover

The circuit court refused the instruction, finding that the instructions on proximate cause and multiple causation sufficiently identified the issues for the jury. The Court of Appeals didn't address the issue, finding that the Defendant had waived the argument by failing to state the basis for its requested instruction on the record.

The Virginia Supreme Court reversed. First, in a welcome break for the usual rules on "waiver", the Court ruled it was sufficient to proffer the instruction provided it was supported by adequate evidence in the record. Second, it held that it was error for the circuit court to refuse the instruction because it was "a correct statement of law [and] applicable to the facts presented during trial."

Takeaway: This ruling was issued after the rulings in ____ and Bon Secours, below, and seems to run contrary to the various Court of Appeals holdings on this same issue.

Case: *Rodrigue v. Butts-Franklin*, 79 Va. App. 645 (2024)

Holding:

i. The trial court did not abuse its discretion in granting the defendant's request for a duty-to-mitigate instruction.

ii. The duty-to-mitigate is a defense that goes to damages, not causation; if causation, more properly characterized as contributory negligence.

Analysis: Plaintiff suffered a severe infection following carpal tunnel syndrome. After several corrective surgeries, she eventually lost some use of the wrist and hand. She sued defendant for failure to diagnose and treat the infection.

Defendant argued that plaintiff had failed to mitigate her damages, based on its evidence that she soaked her hand post-surgery in contravention of doctor's orders. However, the

defendant did not put forth any evidence of when this “soaking” occurred, and plaintiff denied it occurred until after the sutures had been removed.

Approving of the trial court’s refusal to give the mitigation instruction, the Court of Appeals examined the difference between the duty to mitigate and contributory negligence:

If the plaintiff's injury occurs because the plaintiff failed to exercise reasonable care contemporaneously or concurrently with the negligent act of the defendant, it constitutes contributory negligence that bars the plaintiff's recovery. In the medical malpractice context, this requirement means that the patient's negligent act must be contemporaneous with the main fact asserted as the negligent act of the physician.

By contrast, and unlike contributory negligence, the plaintiff's duty to mitigate damages arises only after the defendant's tortious conduct. Our Supreme Court has described the patient's duty to mitigate damages as arising "after receiving negligent medical care," or "'following his physician's negligent treatment.'"

Another difference is in the rules for pleading the affirmative defenses of contributory negligence and failure to mitigate damages. Contributory negligence will not constitute a defense unless pleaded or shown by the plaintiff's evidence. By contrast, even though the plaintiff's failure to mitigate damages is "an affirmative defense," the defendant need not plead that defense in the answer.

*** Though discussed more fully above with respect to its holdings on the Dead Man’s Statute,** *Bon Secours-Depaul Med. Ctr., Inc. v. Rogakos-Russell*, 2023 Va. App. LEXIS 738 (2023) also contains a discussion regarding whether a requested instruction should be given

where other instructions "fully and fairly cover the principles of law governing the case." This appears far more susceptible to the Virginia Supreme Court's holding in *Hanger.*

IV. ABSOLUTE IMMUNITY

Case: *Gibson v. Goldston*, 85 F.4th 218 (4th Cir. 2023)

Holding:

iii. Judges have judicial immunity only for judicial acts, not for actions taken when they step outside their role (in this case, acting as an executive officer in conducting a search)

Analysis: The facts of this case are absolutely fascinating, especially if you are a litigant who has struggled to get a judge to ever take "a view" of a property or scene. Taken (with edits) from the opinion, and with emphasis added:

About a year after the approval of a property distribution settlement, Gibson's ex-wife returned to Judge Goldston's chambers with a Petition for Contempt, complaining that Gibson had failed to turn over some of the promised items and had damaged others before returning them.

On March 4, 2020, the parties gathered before Judge Goldston in her West Virginia courtroom for a hearing on the petition. Gibson's ex-wife was represented by counsel; Gibson appeared *pro se*. The ex-wife was asked to testify about her grievances. In the middle of her testimony, Judge Goldston interrupted to ask Gibson for his address, which he gave her. She then recessed the hearing and ordered the parties to meet her at Gibson's home. She did not

explain the sudden change of venue and gave Gibson no opportunity to object before leaving the courtroom.

Judge Goldston, the bailiff, Gibson, his ex-wife, and her attorney all piled into their cars for the ten-minute drive over. Upon arriving first, Gibson started an audio recording on his phone and his girlfriend started a video recording on hers while they waited outside for the others. Judge Goldston and the bailiff arrived last.

As they made their way up the lawn, Gibson asked for Judge Goldston's attention and made an oral motion to disqualify her on the ground that she had become a witness in the case. Standing in Gibson's front yard, Judge Goldston denied the motion as untimely. Gibson quickly protested that Judge Goldston "[wouldn't] get in [his] house without a search warrant." She responded laconically, "Oh yeah I will."

The above exchange was caught on video, but Judge Goldston soon realized that she was being recorded. She ordered Gibson to stop the recordings on the ground that parties may not record family court proceedings. She told everyone to turn off their phones, warning, "I'll take you to jail if you don't turn them off." When Gibson failed to comply, she ordered him to turn his phone over to the bailiff and again threatened him with arrest. Before the recording stops, Judge Goldston can be heard saying, "I am the judge trying to effect equitable distribution. We're having a hearing. Now you let me in that house or he [the bailiff] is going to arrest you for being in direct contempt of court."

During the brouhaha over the recordings, the bailiff had radioed the local sheriff's department to ask for backup law enforcement. But Judge Goldston did not wait for the sheriff's department to arrive. Instead, she, the bailiff, the ex-wife, and the ex-wife's attorney all entered Gibson's home to look for the contested items.

Unbeknownst to Judge Goldston, her bailiff recorded the first part of the search. The video painted a striking picture. Judge Goldston, her list of unproduced assets in hand, directed proceedings. When the ex-wife identified some photos hanging on the wall as being on the list, Judge Goldston told her to "take 'em." When the ex-wife opened a closet to reveal some yearbooks, Judge Goldston said, "Get 'em." And when the ex-wife said that their old DVD collection was downstairs, Judge Goldston accompanied her down and told her to "go in there and pick the ones you want." The ex-wife sifted through the DVDs as Judge Goldston sat in a rocking chair, shoes off, supervising and giving orders.

Though this was not the first time she had conducted one of these home visits, it was the first time she was subject to discipline. Judge Gibson was ultimately disciplined for serious misconduct and fined $1,000 (and that's it).

The Fourth Circuit then discusses the law of judicial immunity, reminding us that "it serves as a complete bar to suit" even when the actions taken are "alleged to have been done maliciously or corruptly." However, it allowed this case to go forward finding that Judge Gibson had been acting in other than a judicial capacity when she directed the search.

Takeaway: During the pendency of the appeal, and with impeachment proceedings pending, Judge Golston resigned from the bench.

V. SUMMARY JUDGMENT

Case: *Harrell v. Deluca*, 97 F.4th 180 (4th Cir. 2024)

Holding: A contrary record consisting solely of self-serving affidavits by the party resisting summary judgment can be sufficient to defeat summary judgment.

Analysis: Other than the fact that real estate in Arlington is very expensive (in this case, $4,425,139 for a 6-bedroom house that needed some renovation), this case is a fairly run-of-the-mill "homeowner sues contractor for breach of contract and tries to insert fraud and VCPA claims to increase likelihood case will settle closer to out-of-pocket damages" matter. The case didn't settle, and the trial court entered judgment on the breach of contract claims but denied the balance.

There is a discussion about was is sufficient to constitute "materiality" in fraud in the inducement claims, but the Fourth Circuit's holding is in line with existing Virginia precedent.

VI. RIGHT TO TRIAL BY JURY

Case: *Israelitt v. Enter. Servs. LLC*, 78 F.4th 647 (4th Cir. 2023)

Holding:

- **i.** A plaintiff seeking only relief under the anti-retaliation provision of the ADA only is not entitled to a jury trial.
- **ii.** An "arthritic big toe" is not a disability under the ADA.

Analysis: The Fourth Circuit goes down the rabbit hole to determine that where only an ADA retaliation claim is asserted, only equitable remedies are available:

We start with *§ 12203(c)*. It gives the ADA's remedies for retaliatory conduct. But it doesn't actually list remedies. Instead, for retaliation in the employment context, it refers readers to remedies "available under" *42 U.S.C. § 12117*. *See § 12203(c).* Section 12117 is the remedies provision for *42 U.S.C. § 12112* , which prohibits substantive ADA discrimination in employment. But while *§ 12117* mentions remedies, it doesn't actually provide them; it instead points to the remedies "set forth" in *42 U.S.C. § 2000e-5*. *See § 12117(a)*. *Section 2000e-5* is the

remedies provision for Title VII discrimination claims. *Section 2000e-5* does, at last, list remedies, but only equitable ones. *See § 2000e-5(g)(1)*. So, at the end of this statutory chain, ADA retaliation plaintiffs are entitled to equitable remedies.

That's a lot to swallow. Walk through it again, step by step, with the statutory language:

1. *Section 12203(a)*—the ADA's antiretaliation section—provides: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." *§ 12203(a)*. But *§ 12203* does not give remedies, instead: "The remedies and procedures available under *section 12117 . . .* of this title shall be available . . . ." *§12203(c)*.

2. *Section 12117* doesn't give us remedies either; it's a passthrough, which provides: "The powers, remedies, and procedures set forth in *section[ ] . . . 2000e-5* . . . of this title shall be the powers, remedies, and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment." *§ 12117(a)*.

3. *Section 2000e-5* finally gives real answers: "[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate." *§ 2000e-5(g)(1)*.

Again, the statutory chain bottoms out in the equitable remedies listed in *§ 2000e-5*.

Takeaway: Given the Court's discussion of the lack of such right when equitable relief is sought, this holding presumably has a far wider reach.

VII. ATTORNEY FEES

Case: *Lamb v. Liberty Univ., Inc.*, 2024 U.S. Dist. LEXIS 55961 (W.D.Va. 2024)

Holding: Absent exceptional circumstances, $400/hour is the highest hourly rate the Court will approve in fee-shifting cases.

Analysis: The underlying dispute concerns an evidence spoliation issue. But of relevance to this presentation, the Court also engaged in an analysis of reasonable hourly rates in the Western District.

Liberty University sought to recover its fees at an hourly blended rate of ~$650/hour, with hourly rates ranging from $160 for support staff, $300 for paralegals, $500-$600 for associates, and close to $1,000 for senior partners. The Court declined to award rates of this amount, based largely on the failure of Liberty to put forth any evidence of what "law firms in the Western District of Virginia" charge. Instead, the Court approved reduced rates as follows:

Name	Position	2022 Rate	2023 Rate	<u>Revised Rate</u>	Requested Hours	<u>Revised Hours</u>	<u>Lodestar</u>
Oostdyk	Partner	$ 860	$ 988	$400	263.7	263.7	$105,480
McCray	Partner	$ 836		$400	5.9	5.9	$2,360
Thompson	Partner	$ 732		$400	6.3	6.3	$2,520
Siegmund	Associate	$ 552	$ 664	$250	57.4	57.4	$14,350
Church	Associate	$ 424	$ 508	$250	79.8	75.8	$18,950
Shahadat	Associate	$ 420		$250	26	26	$6,500
Betts	Paralegal	$ 276		$150	35.4	35.4	$5,310
Cyr	Paralegal	$ 300		$150	1	1	$150
Stevens	Support Staff	$ 160		$150	3.8	3.8	$570
Field	Support Staff	$ 160		$150	2.1	2.1	$315
TOTALS						**477**	**$156,505.00 [* 12]**

Takeaway: If you are going to ask for a higher hourly rate in Roanoke, at least call someone from Gentry Locke Woods Rogers and see if they will share their hourly rates with you.

VIII. CAUSES OF ACTION

a. <u>Relief Sought must equal relief plead</u>

Case: *Willems v. Batcheller*, 78 Va. App. 199 (2023)

Holding: A foundational rule of pleading in Virginia is that only the relief a party requests may be granted. The basis of every right of recovery under Virginia's system of jurisprudence is a pleading setting forth facts warranting the granting of the relief sought – it is a fundamental requirement that only relief affirmatively requested in a pleading may be granted by a circuit court.

Analysis: While the case contains some interesting discussion regarding what can constitute a nuisance when it comes to plantings between neighbors, the biggest takeaway is that to get relief under a cause of action, you have to plead that cause of action in a complaint, crossclaim, or counterclaim – simply identifying it as an affirmative defense or similar won't do it.

Here, in defending against a nuisance claim, the defendants raised adverse possession as an affirmative defense. Essentially, they argued that they owned the land they were supposedly encroaching on. The trial court agreed, and actually granted them title to that land, redrawing the boundary line between the parties.

The Court of Appeals reversed, finding that the trial court did not have the authority to redraw the boundary line, essentially because no one had requested he do so in a pleading.

Takeaway: I assume the defendants immediately turned around and brought a claim for adverse possession directly, as presumably their fence stayed up the whole time.

b. Injunctive Relief

Case: *Leggett v. Sanctuary at False Cape Condo. Ass'n, Inc.*, 900 S.E.2d 155 (2024)

Holding: Va. Code Ann. § 8.01-189 does not preclude a circuit court from granting injunctive relief while a declaratory judgment action is pending. Rather, it precludes injunctive relief if the only basis for the injunction is the mere fact that a declaratory judgment action is pending.

Analysis: A relatively short opinion, the Supreme Court clarified that while Va. Code § 8.01-189 does not allow a court to award injunctive relief when the only basis for relief sought is declaratory judgment, that does not mean that injunctive relief (where appropriate) can be awarded in cases in which a party is *also* seeking injunctive relief as one of its remedies.

c. <u>Conversion</u>

Case: *McCants v. CD & PB Enterprises, LLC*, 897 S.E.2d 209 (2024)

Holding:

i. There is no requirement under the basic conversion cause of action to show intentionality, willfulness, venality, or any other mental state of the defendant. When such conversion is proved, the plaintiff is entitled to recover, irrespective of good or bad faith, care or negligence, knowledge or ignorance.

ii. Instead, the "wrongfulness" element is that the defendant has no legitimate claim to the property or recognized legal justification or excuse for taking possession and control of it. This element focuses on an objective evaluation of the factual and legal legitimacy of the defendant's conduct.

Analysis: This case concerned a 1970 Ford Mustang Mach 1 which the plaintiff had delivered to the defendant for repairs. Following a great deal of back-and-forth and eventual breakdown of the relationship, the principal of the form initiated the abandoned vehicle process through DMV, eventually taking title in how own name. He then sold the car to an employee, and this case followed.

The relevance of this case is that while civil litigators tend to view conversion as the civil alter ego of larceny (i.e. theft), it is not. Unlike larceny, which requires some *mens rea* and a

permanent intent to deprive, the Supreme Court holds that the taking of property to which you don't have a claim can be conversion even if such action is taken innocently or negligently.

d. Virginia Wage Payment Act

Case: *Naidu-Mccown v. Emergency Coverage Corp.*, 2024 U.S. Dist. LEXIS 51608 (E.D.Va. 2024)

Holding: The Virginia Wage Payment Act provides a private cause of action against an employer for failure to pay "all hours worked."

Analysis: Plaintiffs are ER doctors who are technically employed by TeamHealth (some of them through their own corporate entity), but who are placed in hospitals throughout Virginia, in this case all owned by HCA Healthcare. Plaintiffs brought claims against TeamHEalth for misclassifying them as independent contractors when in fact they meet nearly element of an "employee" under state law:

- As ER physicians, Plaintiffs were required to diagnose, treat, and admit patients in HCA's ER facilities using the facilities' equipment and assisted by staff of the facilities or TeamHealth.
- Plaintiffs had no role in determining the prices of the medical services they rendered.
- TeamHealth provided Plaintiffs with medical malpractice insurance.
- TeamHealth and HCA required Plaintiffs "to complete all client required medical documentation and/or medical charting within a specified timeframe following treatment, or else face a reduction or offset to their pay from [TeamHealth]."
- TeamHealth required medical charting for each patient seen by Plaintiffs.

- Plaintiffs regularly completed medical charting after the end of their ER shifts and on their days off because of their ER duties involving patient services.
- Plaintiffs would also work beyond their scheduled shift to treat patients.
- Although Defendant was aware of these practices, Plaintiffs were not paid for the time they worked beyond their scheduled shifts to complete medical documentation and charting or to treat patients.

Takeaway: Virginia state law has gotten much more employee-friendly in the last 5 years, and anyone taking a look at an employment case should review whether a Virginia cause of action against a Virginia defendant is worthwhile, especially if you want to avoid federal court.

e. **Loans vs. gifts**

Case: *Shannon v. Smalls,* 2024 Va. App. LEXIS 205 (2024)

Holding:

i. The law does not presume a gift and where a donee claims title to personal property by virtue of a gift inter vivos, the burden of proof rests upon him to show every fact and circumstance necessary to constitute a valid gift by clear and convincing evidence.

ii. To establish the existence of a gift, the donee must prove by clear and convincing evidence: (1) the intention on the part of the donor to make the gift; (2) delivery or transfer of the gift; and (3) acceptance of the gift by the donee.

Analysis: This case, which concerns a series of small loans made by the plaintiff to the defendant over a series of years, ultimately addresses which way the “default” goes when money or property is given from one person to another. The trial court appears to have thought the

presumption was in favor of “gift”, as he required the plaintiff to prove by clear and convincing evidence that all of the payments were loans. Interestingly, he found them to be gifts even though they had been reduced to a series of promissory notes and there were a number of writings in the record in which the defendant characterized them as loans.

The Court of Appeals holds otherwise, effectively holding that a transfer of money or property from one person to another is assumed to be a loan which has to be paid back unless the recipient can prove otherwise (by clear and convincing evidence).

IX. FINALITY OF JUDGMENT

a. Rule 1:1

Case: *Monroe v. Monroe,* 302 Va. 387 (2023)

Holding: Neither the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the twenty-one day time period of *Va. Sup. Ct. R. 1:1*. The running of the twenty-one day time period prescribed by *Rule 1:1* may be interrupted only by the entry, within the twenty-one day time period, of an order modifying, vacating, or suspending the final judgment order. Such an order is necessary if a circuit court needs sufficient time to address a post-trial motion after the entry of the final order.

Analysis: Although a domestic relations case (which your presenter normally avoids like the plague), this opinion actually concerns an unsuccessful derivative lawsuit (interesting) and an award of attorney fees taken away from the prevailing party because it was entered more than 21 days after the final order.

Husband and wife were the 49%/51% owners of a company. About a week after husband filed for divorce, he caused the company to institute a direct action against his wife for conversion and breach of fiduciary duty. Reading between the lines, the parties had likely run a lot of family expenses through the company, and husband was looking to gain an advantage in the divorce proceeding.

The following year, husband sought to convert the action to a shareholder-derivative action. The motion was granted, and husband was made a party to the case, albeit as a representative of the company. Following a 2-day trial, the circuit court ruled in wife's favor, finding that husband did not bring the case to benefit the corporation. Thereafter, he entered an order on May 12, 2021 which permitted the filing of post-judgment motions, but specifically included the phrase "this matter is final." The wife quickly filed a motion for attorney fees, which the Court ultimately granted in an order dated August 31, 2021.

As you would expect from the "Holding" above, the Supreme Court vacated this order, finding that it had come more than 21 days after the final order was entered and without the trial court having done anything to toll its entry, reserve jurisdiction, or anything similar.

Takeaway: Don't agree to the entry of an order containing the word "final" if you plan to file any subsequent motions.

X. DISCOVERY and MOTIONS PRACTICE

a. <u>Discovery objections</u>

Case: *Patterson v. Gardner*, 2023 Va. Cir. LEXIS 267 (Norfolk Cir. Ct. 2023)

Holding:

i. Virginia Rules do not permit "General Objections".

ii. If documents or information are being withheld pursuant to an objection, the response should so indicate.

Analysis: This case is included largely because it addresses a pet peeve of the presenter – the use of a number of general objections in answering discovery and/or the assertion of objections of questionable validity. This then requires the sending of a meet and confer email along the lines of "while I don't agree that objections __ and __ are valid, if nothing has been withheld based on them we can move on."

Interestingly, Judge Martin also includes some discussion of whether objections are deemed waived if not timely made. While he eventually holds "not necessarily," you can tell he wouldn't mind a rule that says they are.

b. Timing of Filing

Case: *Plantan v. Smith,* U.S. Dist. LEXIS 53113 (E.D.Va. 2024)

Holding: The filing of a brief less than 7 hours late is permitted under the excusable neglect standard.

Analysis: While the opinion starts out discussing a somewhat tortured discovery and briefing history, a little over 5 pages is ultimately devoted to the Defendant's Motion to Strike the Plaintiff's Opposition to its Motion for Summary Judgement because it was filed at 11:56 PM instead of before 5 P.M. (and on a Friday, no less).

Counsel for the defendant argued that it was prejudiced by the delay. Apparently, when a brief is received at this law firm, the associates are expected to begin work immediately, even if it is 5:01 PM on a Friday. The Court subtly calls this out, noting that the resulting delay is the

result of defendant's filing of the Motion to Strike, and it is this motion which will "impact the resources of the Court."

You read that correctly – the clients in this case were charged thousands (perhaps tens of thousands?) of dollars and the Court forced to write a 7-page opinion which boils down to essentially "no harm, no foul".

Takeaway: No real takeaway, only a desire to point out pettiness wherever it can be found, and hope most members of the audience would have just let it go.

Case: *Sidar v. Doe*, 80 Va. App. 579 (2024)

Holding: An application for attorney fees under Rule 1:1A must be filed within 30 days after entry of the final appellate judgment, regardless of when the file is transmitted back to the circuit court clerk's office.

Analysis: The deeply frustrating part of this case for those who practice law is that Doe tried to file her application timely, but it was mistakenly refused by the Clerk because the file had not yet been returned from the Court of Appeals. Here is the entirety of the Court of Appeals ruling on this:

> This Court recognizes that the circuit court clerk's error in not allowing Doe to file her application for fees on October 7, 2022 created a substantial hardship for Doe. The unfortunate circumstances, however, do not entitle her to relief in this Court. "Our province is not to make law, but to administer it, and we must, therefore, decide this case according to the settled law as it is written, and not permit a hard case to make bad law.").

The Court of Appeals provides no guidance for what you are supposed to do when a constitutional officer refuses to take an action. The only answers apparent to this presenter are (i) file a motion for mandamus, somehow get the circuit court's attention to it, get it scheduled in less than 30 days, and insist the Court enter the order directing the Clerk to accept the filing, all before the 30 days runs, or (ii) threaten or bribe the Clerk somehow. While the second option is (mostly) a joke, it probably has a better chance of getting results.

Takeaway: To achieve a similar level of outrage, go back and read *Brandon v. Cox*, 284 Va. 251 (2012). There, the Supreme Court dinged a litigant for failing to get a hearing on its Motion for Reconsideration even though the Court's own rule provides that only the judge may notice or set such a hearing.

XI. MISCELLANEOUS

Case: *Haysbert v. Bloomin' Brands, Inc.*, 2023 U.S. Dist. LEXIS 148808 (E.D.Va. 2023)

Holding: The actual legal holdings in this case aren't earth-shattering; this case is included entirely for the (i) interesting facts and (ii) warning against serving as local counsel in the EDVa if you aren't serious about it.

Analysis: The underlying case is a restaurant slip-and-fall. The interesting part of the opinion is everything that lead counsel did to eventually get his pro hac vice pulled:

- Unprofessional Conduct:
    - Slamming papers and making outbursts on two (2) occasions in front of the jury.
    - Issuing a subpoena to his own expert, Dr. Haider, who is located more than one hundred (100) miles from the courthouse, even when Mr. Haysbert knew the

subpoena was unenforceable. Mr. Haysbert indicated to the court that he still issued a subpoena to Dr. Haider because, as a non-attorney, she was not familiar with the legal process, and he thought it might encourage and put pressure on her to come to trial.

- Badgering witnesses through repetitive and combative questioning techniques.
- Misstating *Federal Rule of Evidence 407* ("*Rule 407*") to the court to support admission of a contested work order exhibit, and also implying that the court itself was violating the Federal Rules of Evidence, if the exhibit was not admitted.
- Attempting to quickly publish an exhibit (i.e., a work order) to the jury, which had outstanding objections to it and on which the court previously reserved its ruling, and claiming the exhibit was being used for impeachment purposes, even though the seemingly real purpose was to prove negligence, culpable conduct, or a defect, in violation of *Rule 407*.
- Purposely misleading the jury (e.g., implying that witness statements were inconsistent when they were not, including by misrepresenting Christopher Robinson's and Alicia Eleftherion's ("Ms. Eleftherion") testimony; suggesting that the restaurant had a camera that could have captured Plaintiff's fall when the camera was only positioned to capture the front entrance/host stand area; and repeating that a work order was "authentic" in front of the jury, even though its admissibility was still under advisement).
- Making conflicting representations and misrepresentations to the court (e.g., telling the court that he reached out to his service processing company at approximately 6:00 A.M. when emails confirmed that such contact was not made

until 9:00 A.M. on August 11, 2023, ECF No. 297 at 1; and stating that he was a term law clerk to a district court judge when he served as a judicial intern).

- Speaking over the court, opposing counsel, and witnesses on multiple occasions, even after being warned and reprimanded for this conduct.
- Accusing the court of attempting to "catch" him in something when the court was simply and constantly trying to enforce the federal and local rules of the court to ensure a fair trial.

- Violations of Rules and Rulings:
    - Intentionally eliciting hearsay testimony and testimony regarding risk management/insurance on multiple occasions, even after the court explained that this was a violation of rules and case law.
    - Failing to understand and/or follow the Federal Rules of Evidence and related court rulings/instructions (e.g., attempting to admit a brain animation into evidence when no foundation had been laid and outstanding objections had not been ruled upon by the court; and declaring two (2) witnesses, Norman "Chip" Chase and Nick Siefert, as adverse in front of the jury before the witness began to testify, and after the court had instructed that this pronouncement by counsel during Ms. Eleftherion's testimony was improper and not pursuant to the Federal Rules of Evidence and the law).
    - Failing to issue subpoenas to multiple witnesses at least two (2) weeks in advance of trial, in violation of Local Civil Rule 45(E).
    - Failing to properly and timely redact Dr. Filler's PowerPoint exhibit [*9] and provide it to the court and counsel in advance of trial, even though Mr. Haysbert

had been ordered by the court to do so at the Supplemental Final Pretrial Conference on August 1, 2023.

- Swiftly publishing Dr. Filler's PowerPoint exhibit to the jury, knowing it had prejudicial headers and outstanding objections not yet addressed by the court and not in compliance with the court's redaction order.
- Failing to lay proper foundations and improperly impeaching witnesses on multiple occasions, despite court rulings and explanations to the contrary. The court repeatedly had to instruct on the process for using deposition testimony to impeach or refresh the recollection of witnesses, and the difference between the two processes, which also delayed the trial proceedings.

- Negative Impact on Judicial Economy:
  - Failing to come prepared as required with paper copies of necessary documents, including at the Supplemental Final Pretrial Conference on August 1, 2023,
  - Filing last-minute motions and other filings, including witness subpoenas and a motion to have Dr. Haider testify remotely by Zoom, see ECF Nos. 274, 275 (filed at 10:01 P.M. the Sunday before trial).
  - Scheduling a delivery for August 8, 2023, the morning the trial was to start, to Defendants at their counsel's Fairfax, Virginia office, which delivery contained Plaintiff's updated final trial exhibit binder. Mr. Haysbert represented otherwise to the court, despite the Federal Express receipt and tracking record to the contrary, see ECF No. 313-2 (Court Exhibits 1 and 2 from August 8, 2023), thereby causing delay to the proceedings to sort out the matter, as well as to defense counsel who were delayed in their review of Plaintiff's updated exhibits.

- Making improper and/or frivolous objections on multiple occasions, including his claim that a question was compound when it simply was not.
- Repeating questions that had already been asked and answered on multiple occasions. The repetitions were so numerous that defense counsel and the court stopped raising the objection, just to keep the trial moving forward, as trial had only been scheduled to last for three (3) to four (4) days.

Takeaway: Local counsel doesn't escape unnoticed. The Court notes that [local counsel] did not examine a single witness, rarely was able to answer questions posed by the court regarding the case, and allowed numerous rules violations to occur before the court, apparently without counsel to Mr. Haysbert.