Business Litigation in Virginia: The Year-in-Review: 2010 (and Early 2011)

Virginia CLE and the Civil Litigation Section of the Virginia Bar Association

Fourth Advanced Business Litigation Institute

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I. ATTORNEY CONDUCT, MISCONDUCT & SANCTIONS

A. Malpractice

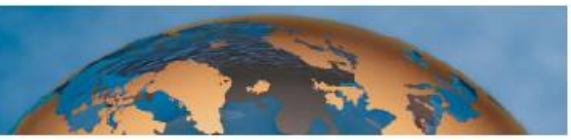
Wintergreen Partners, Inc. v. McGuireWoods, LLP, 280 Va. 374, 698 S.E.2d 913 (2010): The underlying case involved a skier who was injured when she collided with a snow groomer being operated by two of the client's employees. A corporate client filed a legal malpractice action against its appellate counsel after counsel failed to file trial transcripts from a personal injury action, resulting in the dismissal of an appeal. The circuit court granted summary judgment in favor of counsel in the legal malpractice action. The client appealed. The jury found the client liable but not the employees. The question was whether the client would have been successful in obtaining a reversal if the appeal had not been dismissed. The client did not object to the jury instructions or the verdict form so they became the law of the case. One of the instructions permitted the jury to find that the client, as the occupant of the premises, failed to exercise ordinary care in rendering the premises reasonably safe for the invitee skier's visit or failed to warn of unsafe conditions that were known to it and unknown to the skier. Violation of those duties supported an independent basis of liability against the client. Thus, even if the client's appeal had not been dismissed, the Supreme Court would not have been required to reverse the judgment in favor of the skier as a matter of law. The Supreme Court affirmed the circuit court's judgment.

B. Motions to Disqualify

Kronberg v. LaRouche, 2010 U.S. Dist. LEXIS 35097 (E.D. Va. Apr. 9, 2010): Defendants moved to disqualify plaintiff's counsel on the grounds that he had access to non-public, confidential information concerning LaRouche in connection with the criminal prosecutions against him, including classified information, that has never been disclosed to LaRouche or his criminal defense counsel. The court found there was no way for plaintiff's counsel to ensure that he would not remember any confidential information or that he would be able to differentiate at the time of trial, twenty years after learning the information, between information he obtained that was public and information that was classified. As a result, the court granted the motion to disqualify plaintiff's counsel.

Sunbeam Prods. v. Hamilton Beach Brands, Inc., 727 F. Supp. 2d 469 (E.D. Va. 2010): Defendant asserted that plaintiff's law firm employed a particular attorney, who while previously employed by defendant's law firm, represented defendant in litigation and patent applications regarding the product involved in the instant lawsuit. Specifically, the attorney drafted a complaint and performed investigation in infringement litigation involving this product; he also prepared a patentability opinion for defendant's applications regarding this product. However, the attorney was not performing any work for plaintiff in the instant lawsuit, and he had not performed any work for plaintiff during his tenure at the law firm. Rule 1.9 required disqualification if there was a substantial relationship between the present and prior representation. Rule 1.10 provided that a firm could not represent a client in any litigation if a member of the firm previously represented any adverse party in substantially related litigation. The court summarily found that disqualification was warranted because there was a substantial relationship between the prior and successive representation due to the attorney's involvement in patent prosecution work regarding defendant's accused product.

Wright v. Kincheloe, 81 Va. Cir. 277 (Fairfax County 2010): Plaintiffs, the wife and her brother-in-law, filed complaints against defendant attorney for fraud and legal malpractice. The attorney then filed motions to disqualify the counsel for the wife and her brother-in-law from representing both of them in their lawsuits against him because of a conflict of interest. When the wife retained the attorney to represent her during her separation and divorce, her brother-in-law wired money into the attorney's trust account, which was intended to be used for the wife's legal expenses. The wife and her brother-in-law retained the same legal



counsel to represent them in separate lawsuits against the attorney. They executed a waiver for any conflict of interest from their counsel representing each of them in their respective claims against the attorney. The court found that there was no concurrent conflict of interest. Based on the pleadings, it appeared that the wife's and her brother-in-law's interests aligned regardless of whether the brother-in-law was successful in his suit against the attorney. The attorney's motions to disqualify were denied.

C. Pro Hac Vice

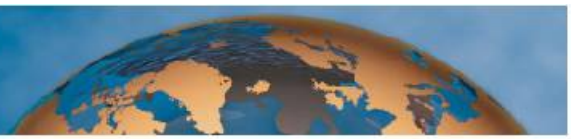
Belue v. Leventhal, 640 F.3d 567 (4th Cir. 2011): Appellant attorneys sought review of an order of the U.S. District Court for the District of South Carolina, which revoked their *pro hac vice* admissions in connection with a putative class action based on three motions the attorneys filed in response to a class certification motion, including a motion to exceed the page limitation in a responsive pleading, a motion to vacate a scheduling order, and a motion to recuse the district court judge. The court found that the attorneys' recusal motion formed the basis of the *pro hac vice* revocation order. In addition, on appeal, the court found that the recusal motion lacked merit because the district court's comments that formed the basis of the attorneys' recusal motion did not provide a basis for recusal. The court further found that the revocation of the attorneys' *pro hac vice* status did not satisfy the basic requirements of due process because there was insufficient notice of this matter, the district court essentially prevented the attorneys from speaking at the hearing, and the district court judge failed to conduct any individualized inquiry or analysis at the revocation hearing. Although normally vacating such an order required remand with directions for the provision of appropriate process, the court concluded that only vacation of the revocation order was appropriate since the underlying lawsuit had been resolved pending the appeal.

D. Sanctions

Ferris v. Kiritsis (Unpublished Order) (Va. May 14, 2010): Counsel filed three motions to reconsider. The first and second were invited by the judge and the third was filed after a new judge was assigned when a conflict was discovered. The Supreme Court reversed the circuit court, finding that filing a third motion to reconsider was not harassment and not sanctionable.

Johnson v. Woodard, 281 Va. 403, 707 S.E.2d 325 (2011): Appellant citizens submitted petitions, pursuant to Va. Code §§ 24.2-233 and 24.2-235, in the circuit court, to remove appellee supervisors from office. After entry of a nonsuit order, the court awarded the supervisors attorney's fees and costs under Va. Code § 24.2-238 and ordered each citizen to pay an amount of money as a sanction for frivolous pleadings. The citizens' petitions alleged that the supervisors engaged in conduct that amounted to a neglect of duty, misuse of office, or incompetence in the performance of duties. However, a special prosecutor moved to nonsuit the removal action. Two issues were dispositive of the appeal. First, whether the circuit court retained jurisdiction to consider a motion for sanctions beyond twenty-one days after entry of a nonsuit order which stated that the court was retaining jurisdiction and that the order was not a final order for purposes of Va. Sup. Ct. R. 1:1. Second, whether the citizens were parties to the removal action such that they could be subjected to sanctions pursuant to Va. Code § 8.01-271.1. On appeal, the court found that the circuit court had jurisdiction to consider the motion for sanctions, but erred in imposing sanctions against the citizens because they were not parties to the removal action. The judgment of the circuit court imposing sanctions against the citizens was reversed.

Minix v. Wells Fargo Bank, 81 Va. Cir. 130 (Fairfax County 2010): Plaintiff homeowners filed a complaint against defendant lenders, for wrongful eviction. The lenders demurred to the complaint. The homeowners took a voluntary nonsuit pursuant to Va. Code § 8.01-380. The lenders filed a motion for sanctions against the homeowners' attorney pursuant to Va. Code § 8.01-271.1. The homeowners filed a motion to withdraw their nonsuit and for leave to file an amended complaint. The homeowners alleged



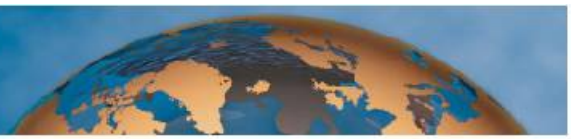
that certain loan servicers for the lenders deliberately acted to place loans in default. The lenders did not attach any referenced documents to their complaint. The lenders alleged that the complaint, as well as the others like it that were filed by the homeowners' attorney in previous cases, was filed with an improper purpose. The court found that the homeowners' motion to withdraw their nonsuit was an attempt to avoid the lenders' motion for sanctions. However, the homeowners could not use their motion as a procedural device to dodge the issue of whether their attorney's actions violated Va. Code § 8.01-271.1. In addition, the homeowners' attorney filed the lawsuit, which lacked a proper basis in law or in fact and was filed with the purpose of harassing the lenders and causing unnecessary delay and needless increase in the cost of litigation, and failed to attach any documents supporting the complaint. This caused the lenders to expend legal fees in an action that the homeowners did not have the intention of pursuing. These actions violated § 8.01-271.1. Accordingly, the imposition of the lenders' reasonable attorney's fees was an appropriate sanction.

VFI Assocs., LLC v. Lobo Mach. Corp., No. 1:08CV00014, 2010 U.S. Dist. LEXIS 120971 (W.D. Va. Nov. 15, 2010): The plaintiffs, investors in a wood products business, claim that their business manager and his wife (and related entities) enlisted an unscrupulous supplier, defendant Robin Yuan, and his companies Lobo Power Tools, Inc., and Lobo Machinery Corp., who sold equipment to the business at inflated prices and then paid kickbacks to the manager. The basis for these motions is that Yuan and his companies have lied in discovery, refused a court order to produce relevant documents, and destroyed evidence. The court found there was bad faith, that the plaintiff did not suffer significant prejudice, and that deterrence was not a factor because discovery was over. The motion for sanctions was granted and the defendants were precluded from offering any defense, evidence, or argument relating to the subject matter of the documents they refused to produce.

E.I. du Pont de Nemours & Co. v. Kolon Indus., 2011 U.S. Dist. LEXIS 45888 (E.D. Va. Apr. 27, 2011): After filing this suit for the use of confidential information and trade secrets, DuPont issued a records hold order. DuPont routinely deleted inactive email accounts from its servers after an employee left the company. Kolon filed its motion based on DuPont's deletion of emails and other documents after employees left or changed their employment at DuPont. The court concluded that on the date argued by Kolon as triggering the duty to preserve evidence, DuPont had no reason to believe that the data deleted would be relevant or potentially relevant to the litigation. Further, the court found that DuPont's duty to preserve relevant information did not extend to the four former DuPont employees because they could not reasonably have been seen as "key players." The court ruled that DuPont acted reasonably and in good faith and as such, the motion for sanctions was denied.

E.I. du Pont de Nemours & Co. v. Kolon Indus., 2011 U.S. Dist. LEXIS 79406 (E.D. Va. July 21, 2011): In a lengthy opinion, the Court sanctioned defendant Kolon for deleting emails and files relevant to DuPont's trade secrets claims. The court found that "the actions taken by the key employees discussed herein were intentional, in bad faith and quite serious," but it refused to grant default judgment as requested by DuPont and instead will instruct the jury that Kolon destroyed relevant information after learning of the suit and that such information would have been helpful to DuPont and harmful to Kolon. The court did cite Kolon's efforts in issuing litigation holds and subsequent efforts to preserve files (including preserving backup tapes and capturing images of custodian hard drives) in its decision against a default judgment. However, it found the litigation hold process lacking – the first hold was sent only to a handful of employees, with no evidence that the hold was forwarded on to others in the company. The second issued a week later was distributed broadly, yet done so in English to mostly non-English speaking employees, and with "insufficient instruction given to employees about the importance of preserving relevant files and email items."

Wilson Adm'r v. Bon Secours-Richmond Health System, et al., No. CL 09-461 (Richmond 2011): The court denied a plaintiff's motion to sanction defense counsel on the ground that an order submitted to



counsel for endorsement was altered. The court denied sanctions against the submitting attorney on the basis that the parties never reached final agreement on the altered provision before it was sent to the court, which mitigated any finding of animus.

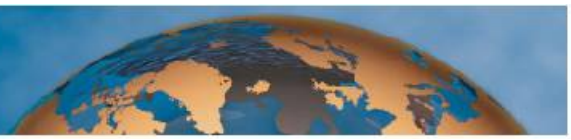
Shipe v. Hunter, 280 Va. 480 (2010): The action involved an attorney not licensed in Virginia (though licensed in DC) who signed a Complaint in the name of and as authorized by his Virginia co-counsel. The defendant later moved for summary judgment and the trial court granted the motion, holding that the Complaint was a nullity because it was not signed by a Virginia attorney. On appeal, the Supreme Court agreed. The fact that the Virginia attorney authorized the D.C. attorney to sign his (the Virginia attorney's) name to the pleading carried no weight with the Court. Likewise, the Court was rejected the argument that many pleadings today have electronic signatures, stating that "Rule 1:5 clearly implies that a member or associate of a law firm signing a pleading must do so in handwriting, by providing that those signatures to (1) briefs and (2) petitions for rehearing (and only those papers) may be printed or typed and 'need not be in handwriting."

Pinpoint IT Servs., LLC v. Atlas IT Exp. Corp., 2011 U.S. Dist. LEXIS 82742 (E.D. Va. July 28, 2011): The court held that a Virginia lawyer who was not a party to a contract case could not move for Rule 11 sanctions based on allegations that the defendant company made misrepresentations in its court filings that it had contacted the lawyer, who failed to follow through on an agreement to represent the company. The court held that the non-party lawyer did not have standing to seek sanctions under Rule 11.

SunTrust Mortg., Inc. v. AIG United Guar. Corp., 2011 U.S. Dist. LEXIS 33118 (E.D. Va. Mar. 29, 2011): In a dispute over defendant insurer's obligation to provide coverage on loans by plaintiff mortgage company that had gone into default, the insurer learned that the language of an email, quoted in the company's amended complaint, about an understanding between the company and the insurer did not match the language of the same email in the insurer's possession. The company's employee, who was found eventually to have altered other emails, explained that she sometimes added parts of earlier emails to later emails in order to have relevant portions of earlier emails available for reference in a single document. The court observed that the employee's explanation did not account for the actual alterations and deletions that she made. After a lengthy review of activities of management and in-house counsel for plaintiff, the court concluded that sanctions were warranted for their "willful blindness." However, "shortcomings" of outside counsel did not constitute willful abuse of the judicial process: "Though privy to the fact that [the employee] had altered two similar emails, [outside counsel] did not have nearly the same depth of knowledge that [plaintiff]'s management and in-house counsel had about the nature and context of the alterations" and they had been told that the employee's explanation for the alterations had been plausible. So far as outside counsel was concerned, the altered email thus found its way into the amended complaint, according to the court, by neglect and error rather than willful conduct or willful blindness. The court rejected the insurer's request for sanctions beyond requiring the company to pay the insurer's costs and attorney fees in seeking sanctions. According to the court, "[t]he record shows that some of the documents on which the employee relied for her story were fraudulent, but it does not show that her story itself is a false one that cannot be independently proved by untainted means."

II. ATTORNEYS' FEES AND COSTS

Mayse v. Mathyas, 2010 U.S. Dist. LEXIS 103393 (W.D. Va. Sept. 28, 2010): The matter came before the court on plaintiff's Motion for the Award of Costs Other than Attorney Fees. Following a jury trial, plaintiff prevailed on her claims against defendant and was awarded both compensatory and punitive damages. Plaintiff filed the motion seeking an award of costs in the amount of $10,029.42 pursuant to Fed. R. Civ. P. 54(d)(1). After reviewing the submissions of the parties, the court found that plaintiff was not entitled to recover several of the requested fees, such as document review fees charged by a third party, fees for



the creation of trial exhibits, a testifying expert's full witness fees, and private process server fees. Accordingly, the court reduced the requested taxation of costs, and awarded plaintiff $1,062.25.

Newport News Shipbuilding v. Holiday, 591 F.3d 219 (4th Cir. 2009): Petitioner employer sought review of a second Department of Labor's Benefits Review Board order holding the employer had not provided substantial evidence to rebut a presumption of compensability under the Longshore and Harbor Workers' Compensation Act once petitioner longshoreman made a prima facie case of workplace related aggravation-injury. The longshoreman cross-petitioned for a reduction in counsel's hourly rate. The employer's appeal to the Board sought only review of the Board's prior ruling that the presumption of compensability was not rebutted. Compensability was affirmed. While the Board could look to previous fee awards, the court held that arbitrarily adjusting a ten-year-old hourly rate was not necessarily appropriate. Remand was proper on the appropriate rate, and on whether it should be based on Georgia (the employee's state) or Washington, D.C. (the attorney's state and court location).

Pellegrin v. Nat'l Union Fire Ins., 605 F.3d 238 (4th Cir. 2010): Plaintiff's attorneys secured an $18 million settlement in an indemnity suit involving a man severely disabled in an automobile accident caused by a drunk colleague. The district court reduced the attorneys' fees from 33 percent as outlined in the contingency fee agreement to only 3 percent of the settlement. The circuit court ruled that the district court abused its discretion and that the lower court ignored several important factors, including the importance of contingency fees in providing underrepresented clients access to the justice system. The circuit court vacated the award and instructed the district court to apply a more rigorous analysis to its fee awards and recognize "the important role played by contingency fees."

Porter v. Elk Remodeling, Inc., 2010 U.S. Dist. LEXIS 89037 (E.D. Va. Aug. 27, 2010): This motion for attorneys' fees and expenses arose out of an ERISA retaliation claim and a Virginia Human Rights Act claim. The parties consented to judgment as to liability in favor of the plaintiff. A bench trial was held to determine damages and subsequently, plaintiff moved for fees and expenses. The court ruled that an award of attorneys' fees was appropriate and the court relied on the Laffey Matrix to determine a reasonable hourly fee for the award.

United Mktg. Solutions v. Fowler, 2011 U.S. Dist. LEXIS 21720 (E.D. Va. Mar. 2, 2011): The court held that the award of fees on a motion to compel in a franchise termination case was appropriate, but the court said the magistrate judge needed to revisit the proper rate. The court said that billing rates probably had changed in the previous year and therefore, the magistrate judge erred in using fees that were not in the relevant time period to calculate the appropriate fee award.

W.A.K., II v. Wachovia Bank, N.A., 2010 U.S. Dist. LEXIS 79074 (E.D. Va. Aug. 5, 2010): In a dispute over the fiduciary duties of a trustee, the court found that the trustee did not violate any of its fiduciary duties. The trustee then sought attorneys' fees and costs incurred in its defense. The court found that the Virginia Code provides that in cases involving trust administration, the court may award costs and expenses, including reasonable attorneys' fees, to any party from another party or from the trust at issue. On this basis, the court held that an award of costs and fees to the trustee bank was warranted, including substantial uncontested expert witness fees.

Westmoreland Coal Co. v. Cox, 602 F.3d 276 (4th Cir. 2010): Petitioner, a former coal mine employer, argued that an administrative law judge's decision under the Black Lung Benefits Act improperly calculated the award of attorneys' fees. The court found that the ALJ erred by determining a reasonable hourly rate "in the absence of satisfactory specific evidence of the prevailing market rates." The ALJ need not have limited her consideration to fees in black lung cases. The court held that the ALJ erred in excusing counsel from his well-established burden to provide evidence of an applicable prevailing rate as a starting point for the fee analysis. Therefore, the court vacated the fee award and remanded the matter.

United States v. 1.604 Acres of Land, 2011 U.S. Dist. LEXIS 80153 (E.D. Va. July 21, 2011). Plaintiffs prevailed in an underlying eminent domain proceeding and sought reimbursement for its expert's travel time to depositions. The court held that because E.D. Va. R. 30(E) did not specifically address payment of expenses for experts' travel time, it could exercise its discretion under both Fed. R. Civ. P. 26(b)(4)(E) and Rule 30(E) to award defendant costs for its property valuation experts' travel time at one-half of the experts' regular hourly rate.

Fox v. Vice, 131 S. Ct. 2205 (U.S. 2011): The challenger alleged that the incumbent resorted to dirty tricks in the election. At the end of discovery, the federal claims were dismissed. The district court granted the incumbent's motion for attorney's fees on the ground that the challenger's federal claims were frivolous. The appellate court upheld the decision that the incumbent was entitled to fees for all time thus far spent on the case, even though state-law claims remained unadjudicated. The Supreme Court determined that in a suit involving both frivolous and non-frivolous claims, a defendant could recover the reasonable attorney's fees he expended solely because of the frivolous allegations, but a defendant could not receive compensation for any fees that he would have paid in the absence of the frivolous claims. Remand was warranted because the district court used a different and incorrect standard in awarding fees, the analysis suggested that the incumbent's attorneys would have done much the same work even if the challenger had not brought frivolous claims, and the district court's decision to award full attorney's fees failed to take proper account of the overlap between the frivolous and non-frivolous claims.

Auto. Fin. Corp. v. EEE Auto Sales, Inc., 2011 U.S. Dist. LEXIS 86049 (E.D. Va. Aug. 3, 2011): Applying the standard *Johnson/Kimbrell* factors, the court reduced attorneys' fees and costs award of $217,414.91 to plaintiff lender was reasonable because the contractual attorneys' fees provision relied upon by the lender--which allowed 15% of a judgment--was unenforceable as a matter of law, and no portion of the amount requested in connection with the bankruptcy proceedings could be awarded because the record did not contain any evidence of the nature of that work, the degree of success achieved by the lender, or the skill required to perform the services rendered. The court thus rejected the argument that the plaintiff was entitled to a set contractual amount of fees, regardless of the substantive reasonableness of such a fee award.

III. PROCEDURE, DISCOVERY, AND JURISDICTION

A. Amended Pleadings

Burnette v. Fahey, 2011 U.S. Dist. LEXIS 20588 (E.D. Va. Mar. 1, 2011): Plaintiffs requested the court alter or amend its order of dismissal to be "without prejudice" in order to provide plaintiffs an opportunity to amend their complaint to comply with the pleading standards articulated by the court in its dismissal. The court denied the motion to alter or amend, holding that a copy of the proposed amended pleading, and not simply the proposed amendment, must be attached to the motion.

Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485 (2010): Petitioner passenger on a cruise ship brought a personal injury action against an agent for respondent owner of the cruise ship line, and the passenger subsequently amended the complaint to name the owner as the proper defendant. The owner contended that the amendment did not relate back to the date of the original complaint, and thus the claim against the owner was barred by the statute of limitations, because the passenger's printed ticket expressly advised the passenger that the owner was the proper party to sue, and the passenger unduly delayed joining the owner. The U.S. Supreme Court unanimously held, however, that neither the passenger's knowledge nor her delay precluded relation-back of the amendment, since the proper inquiry was whether the owner knew or should have known that the owner would have been named as the defendant but for an error. That the passenger knew of the owner's existence did not preclude a mistake concerning the

identity of the owner as the party to sue, and Rule 15(c) expressly asked what the owner knew or should have known, not what the passenger knew or should have known at the time the original complaint was filed. Further, Rule 15(c) did not mandate diligence on the part of the passenger as a requirement for relation back, and undue delay was not a discretionary basis to deny relation back since relation back was mandatory if the requirements of Rule 15(c) were met. Judgment denying relation back was reversed.

Bates v. Merritt, Law No. 64554 (Loudoun County Cir. Ct. 2011): Although the circuit court gave the plaintiff leave to amend its complaint after the court sustained one defendant's demurrer, the plaintiff did not file its amended complaint within the time specified by the court. Based on the untimely nature of the filing, and given no demonstrable extenuating circumstances, the court dismissed the case against the defendant.

B. Attorney-Client Privilege

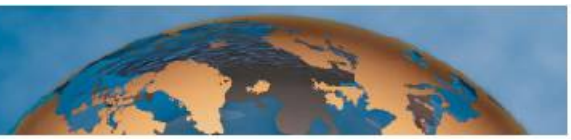
Mohawk Industries Inc. v. Carpenter, 130 S. Ct. 599 (2009): Petitioner employer attempted to bring a collateral order appeal after a district court ordered it to disclose certain confidential materials on the ground that the employer had waived the attorney-client privilege. The U.S. Court of Appeals for the Eleventh Circuit dismissed the appeal for want of jurisdiction. Certiorari was granted to resolve a conflict concerning the availability of collateral appeals in the attorney-client privilege context. Respondent's former shift supervisor filed suit alleging that the employer had terminated him in violation of 42 U.S.C. § 1985(2) and various Georgia laws. According to the complaint, his termination came after he informed a member of the employer's human resources department in an e-mail that the company was employing undocumented immigrants. At the time, unbeknownst to the supervisor, the employer stood accused in a pending class-action lawsuit of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers. The supervisor refused to recant his statement and was fired. The supervisor filed a motion to compel the employer to produce information concerning his meeting with retained counsel and the employer's termination decision. The employer maintained that the requested information was protected by the attorney-client privilege. Collateral order appeals were not necessary to ensure effective review of orders adverse to the attorney-client privilege, 28 U.S.C. § 1292(b) appeals, mandamus, and appeals from contempt citations facilitated immediate review of some of the more consequential attorney-client privilege rulings. The Court affirmed the judgment of the Court of Appeals, finding a lack of jurisdiction.

C. Case Consolidation

In re Chinese Drywall Cases, 80 Va. Cir. 69 (Norfolk 2010): Defendants objected to consolidation of Chinese drywall cases because plaintiffs included personal injury claims with their claims for property damage. The court ruled that, based on plaintiffs' proffers regarding the limited extend of the personal injury claims, those claims need not be severed and tried separately. The court was persuaded that the interest of the parties and the court would be best served by conducting the trials on a consolidated basis of groups of similarly situated plaintiffs against common defendants.

D. Class Actions

Cappuccitti v. DirecTV, Inc., 623 F.3d 1118 (11th Cir. 2010): Defendant satellite television provider appealed an order of the United States District Court for the Northern District of Georgia denying its motion to compel arbitration under the Federal Arbitration Act in a putative class action brought by plaintiff subscriber under Fed. R. Civ. P. 23 to invalidate an early cancellation fee imposed by the provider. The court determined that the Class Action Fairness Act of 2005 clearly afforded the district court jurisdiction

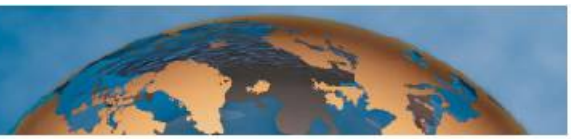


to hear the class action under 28 U.S.C.S. § 1332(d)(2)(A) because there was no requirement than any individual subscriber's claim had to exceed $75,000. The putative class exceeded 100 persons, the amount in the aggregate exceeded $5 million, and there was sufficient diversity in that the provider was a California corporation and the subscribers were Georgia residents. On review, under 9 U.S.C.S. § 16 of the FAA, the court vacated the order denying the motion to compel arbitration.

Ferrell v. Express Check Advance of South Carolina, LLC, 591 F.3d 698 (4th Cir. 2010): Appellee consumer filed a class action in state court against appellant limited liability company and alleged that its payday loans violated South Carolina law. The LLC removed the action to federal court under the Class Action Fairness Act of 2005, 28 U.S.C. § 1453(b), and alleged minimal diversity. The United States District Court for the District of South Carolina granted the consumer's motion to remand. The LLC appealed. The issue presented focused on the single question of statutory interpretation of whether 28 U.S.C. § 1332(d)(10), which, in the context of the Class Action Fairness Act of 2005 (CAFA), changed the traditional rule for determining the citizenship of unincorporated associations, applied to LLCs. The appellate court held that, for purposes of determining subject matter jurisdiction under the CAFA, an LLC was an "unincorporated association" as that term was used in 28 U.S.C. § 1332(d)(10) and therefore was a citizen of the state under whose laws it was organized and the state where it had its principal place of business. Because the LLC had its principal place of business in South Carolina, it was a citizen of South Carolina for purposes of diversity jurisdiction under CAFA. 28 U.S.C. § 1332(d)(10). Accordingly, it had not carried its burden of demonstrating that minimal diversity as defined in 28 U.S.C. § 1332(d)(2)(A) existed. The district court's order remanding the case to state court was affirmed.

Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011): Plaintiffs, citizens of a town, sued defendant, a manufacturer, for contamination of the municipal water supply, seeking damages as to various tort claims and injunctive relief to obtain medical monitoring. Although all of the various tort claims involved distinct elements of proof, the claims all required that a plaintiff establish that defendant's conduct produced some injury to plaintiffs or to plaintiffs' property. However, as the district court found, the accumulation of the contaminant in plaintiffs' blood, and the alleged risk of developing certain diseases in the future, did not constitute an injury for purposes of proving the common law claims. The increased risk of disease did not satisfy the "injury" requirement for negligence and gross negligence nor the actual impairment required for battery. Plaintiffs did not show that the contaminants in the water damaged or interfered with the possession and use of their properties. To obtain medical monitoring relief, plaintiffs still had to prove the elements of an underlying tort. The court lacked appellate jurisdiction over the denial of class certification of the individual medical monitoring claims because after the claims were voluntarily dismissed in order for plaintiffs to appeal, there was no longer a self-interested party advocating for class treatment as necessary to satisfy Article III standing requirements.

Smith v. Bayer Corp., 2011 U.S. LEXIS 4559 (S.D. W.Va. June 16, 2011): Petitioner consumers sued respondent pharmaceutical company in West Virginia state court regarding a drug. After denying Fed. R. Civ. P. 23 certification in a similar suit, a federal district court enjoined the West Virginia court from hearing a certification motion under the relitigation exception to the Anti-Injunction Act. Although the Anti-Injunction Act generally prohibited federal courts from enjoining state court proceedings, the circuit court affirmed the injunction under the relitigation exception to this statute, finding that ordinary rules of issue preclusion barred the consumer from seeking certification of his proposed class, which was identical to the class that the federal district court had declined to certify. In reversing this decision, the Court noted that the relitigation exception to the Act should be narrowly construed, and an injunction should issue only if preclusion was clearly established. Applying these principles, the Court found that the federal district court's rejection of Rule 23 certification in the related federal court suit did not preclude a later adjudication in state court of the consumer's class certification motion. Specifically, the issue decided by the federal court was not the same issue as the one presented in the state tribunal because federal and



state certification rules were not identical. In addition, the consumer was not a party to the federal suit, and he was not bound to the federal court ruling since the Rule 23 certification motion had been denied.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 2011 U.S. LEXIS 3367 (April 27, 2011): The United States Supreme Court has come down against the growing trend of lower courts finding class action waiver provisions in arbitration agreements unconscionable and unenforceable. The plaintiffs sued AT&T Mobility in a class action lawsuit for alleged false advertising and fraud in the sale of telephones. AT&T Mobility asked the trial court to enforce a waiver provision in the customer agreement that precluded both class litigation and class arbitration and to refer the matter to arbitration on an individual basis. The trial court refused, finding the waiver to be unconscionable and invalid under California law. The Ninth Circuit agreed, relying on a line of prior decisions invalidating class waiver provisions, particularly where the waiver also barred class arbitration. The Supreme Court disagreed. In a 5-4 decision, the Court reversed and held that the arbitration agreement containing the class action waiver provision must be enforced under the Federal Arbitration Act (FAA) "according to its terms." The Court premised its decision on its long-standing view that Congress designed the FAA to promote arbitration and that the Act embodies a national policy favoring arbitration, which has as its principal purpose ensuring that Courts enforce arbitration agreements according to their terms. The Court found that the Ninth Circuit's unconscionability analysis conflicted with the terms and purpose of the FAA and, therefore, was preempted by the FAA.

Janus Capital Group, Inc. v. First Derivative Traders, 131 S. Ct. 2296 (U.S. 2011): Respondent investors alleged petitioners, a mutual fund advisor and its parent fund creator, as a control person under 15 U.S.C.S. § 78t(a), violated 17 C.F.R. § 240.10b-5(b) and 15 U.S.C.S. § 78j(b) in connection with impressions created by prospectuses on measures to curb market timing in the fund. A district court dismissed for failure to state a claim. The U.S. Court of Appeals for the Fourth Circuit reversed. Certiorari was granted. The Supreme Court held that, to be liable, the advisor had to have "made" the material misstatements. The "maker" of a statement for purposes of § 240.10b-5(b)'s private right of action was the entity with authority over the content of the statement and whether and how to communicate it. Without such authority, it was not "necessary or inevitable" that any falsehood would be in the statement. The advisor and the fund were legally separate entities, and the fund's board was more independent than 15 U.S.C.S. § 80a-10 required. There was no allegation that the advisor filed the prospectuses and falsely attributed them to the fund. Nor did the prospectuses indicate that they came from the advisor rather than the fund--a legally independent entity with its own board of trustees. Being involved in preparing the prospectuses, subject to the ultimate control of the fund, did not mean the advisor "made" any statements in the prospectuses. Although the advisor may have assisted the fund with crafting what the fund said in the prospectuses, the advisor itself did not "make" those statements for purposes of § 240.10b-5(b). Absent liability by the advisor, the creator was not liable as a control person.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (U.S. 2011): Respondent employees brought a class action suit against petitioner employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-1 et seq., alleging sex discrimination in pay and promotions. A district court granted the employees' motion for class certification. The United States Court of Appeals for the Ninth Circuit substantially affirmed. The Supreme Court granted certiorari and held that the employees' class could not be certified because the action did not satisfy the commonality requirement of Fed. R. Civ. P. 23(a)(2). The employees failed to offer significant proof that the employer operated under a general policy of discrimination. An expert who testified that the employer had a strong corporate culture that made it vulnerable to gender bias did not determine how often stereotypes played a meaningful role in employment decisions. The employees' statistical and anecdotal evidence did not show that a common mode of exercising managerial discretion pervaded the entire company. In addition, the employees' backpay claims were improperly certified under Rule 23(b)(2), which did not allow certification of monetary relief claims that were not incidental to injunctive or declaratory relief.

E. Crime-Fraud Exception to Attorney-Client Privilege

United State ex rel. Frascella v. Oracle Corp., 2011 U.S. Dist. LEXIS 43322 (E.D. Va. Apr. 21, 2011): The suit arose under the False Claim Act, with an allegation that Oracle misrepresented certain pricing practices during contract negotiations with the government, offered commercial customers discounts it did not offer to the government, and then engaged a law firm to help further its scheme. The court held that the crime-fraud exception to attorney-client privilege applied to some of defendants' communications with counsel. As such, neither the communications reflected in logged documents nor any other communications on the relevant subject matter were protected by attorney-client privilege.

F. Default

Colleton Preparatory Acad., Inc. v. Hoover Universal, 616 F.3d 413 (4th Cir. 2010): Plaintiff college sued alleging, *inter alia*, defendant company and served its registered agent, but the agent failed to notify defendant. A default judgment was entered. In denying the motion to vacate the entry of default, the district court applied the Payne factors. Four of the six factors weighed significantly in defendant's favor. As for the fifth factor, a review of the record did not sustain the district court's view that undue prejudice would have been visited upon plaintiff if the default was set aside less than three months after a timely answer to the complaint would have been filed and the case made ready for discovery. By attributing the actions of the registered agent to defendant, the district court found that defendant was "personally responsible" for the default. The court did not address the sixth factor because it was satisfied that the district court abused its discretion when, in light of overwhelming evidence supporting good cause to vacate the default under Fed. R. Civ. P. 55(c), the district court denied the motion.

Mayberry v. Cedarfield Corp., 2011 U.S. Dist. LEXIS 21755 (E.D. Va. Mar. 3, 2011): A company vice president mistakenly presumed outside counsel would defend an overtime-pay claim. As a result, defendant failed to respond to plaintiff's complaint. The court held that the default should be set aside because the defendant asserts a meritorious defense and because the defendant acted with reasonable promptness upon learning that default had been entered. The court further noted that the defendant need not prove its case to set aside default, but it was enough that defendant's proffered evidence, if taken as true, could establish the defendant's defense. The motion to set aside entry of default was granted.

G. Depositions

E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 268 F.R.D. 45 (E.D. Va. 2010): Kolon refused to provide several of its managing agents for depositions. Kolon contended that because none of the employees were managing agents at the time of the deposition request, none of them could be deposed. Kolon further contended that many of the persons never were managing agents and that if any depositions were to be ordered, they should be held in Korea. The court rejected Kolon's contention that the removal of the persons as managing agents negates their status as managing agents as a matter of law. The court found ample evidence to demonstrate that an exception was warranted in this case, at least for the limited purpose of requiring them to appear at depositions. Further, the court found the timing of Kolon's reassignment or termination highly suspect and that it allowed for a strong inference that Kolon was conveniently shielding employees from DuPont's access. Plaintiff's motion to compel depositions of managing agents is denied as to three of the deponents and granted as to five, with deposition to be held in Richmond.

In re: Outsidewall Tire Litig., 267 F.R.D. 466 (E.D. Va. 2010): Plaintiffs designed and made mining tires. Plaintiffs alleged that the tire designs were trademarked, copyrighted, and constitute trade secrets, and that the former employee, conspired with the foreign defendants to steal the designs. Plaintiffs filed

notices of depositions against two managing agents of the foreign defendants pursuant to Fed. R. Civ. P. 30(a)(1) and (b)(6). Defendants filed objections to a magistrate's discovery ruling that required two managing agents to travel to and be deposed in Virginia. The district court found that the magistrate judge correctly recognized the governing presumption that a foreign corporation's Rule 30(a)(1) and 30(b)(6) managing agent deponents should be deposed at the corporation's principal place of business. Less clear, however, was whether the existing record warranted overcoming the presumption. One of the proposed deponents, had been to Virginia precisely once, while the other had never set foot inside the Commonwealth. The possible effect of Dubai law and the likelihood of deposition disputes requiring judicial intervention--could well suffice, if further explicated, to overcome the presumption. International travel was expensive and time consuming. These factors were appropriately considered and weighed in the presumption calculus. The magistrate judge's ruling was vacated.

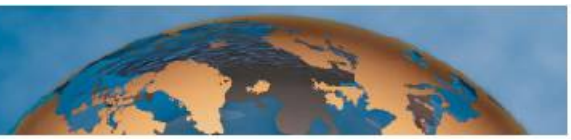
H. Discovery Costs

Francisco v. Verizon South, Inc., 272 F.R.D. 436 (E.D. Va. 2011): The prevailing party on a motion for summary judgment was entitled to recover deposition costs of eight deponents, court reporter attendance fees, costs for expedited deposition transcripts, and copying costs because they were reasonably necessary at the time of their taking. The prevailing party was not entitled to recover private process server fees or vendor processing, storage, and production fees for electronically stored information because it failed to meet its burden of supporting its request for reimbursement of those costs.

I. Electronic Discovery

In re Subpoenas, 692 F. Supp. 2d 602 (W.D. Va. 2010): The United States was investigating manufacturer for a number of potential federal violations arising out of the manufacturer's impermissible off-label marketing of a particular drug. The manufacturer refused to comply with two subpoenas it claimed were unduly burdensome. Those subpoenas sought all e-mails sent or received by thirteen individuals from 1996 through 2008. The government offered to limit those subpoenas to the e-mails of only three people relating to the particular drug and to off-label marketing of other FDA approved drugs. Enforcing the subpoenas as so limited, the court rejected the manufacturer's argument that it was prohibitively expensive to restore the yearly, snapshot e-mails of the three individuals, despite the fact that the requested records were necessarily retained for other litigation. The court determined that the subpoenas were sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance would not be unreasonably burdensome. The manufacturer failed to meet the burden of proving that the subpoenas, as limited, were unreasonable.

Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enforcement Agency, 2011 U.S. Dist. LEXIS 87471 (S.D.N.Y. June 17, 2011): On June 17, 2011, Judge Scheindlin withdrew her February ruling ordering the production of metadata by the US Government as "an integral part of an electronic record." In February 2011, of this year, Judge Shira Scheindlin of the Southern District of New York—famous for authoring several landmark decisions in the area of e-discovery, including the seminal Zubulake and Pension Committee decisions—issued a 26 page opinion ordering the United States Government to produce various categories of metadata in response to requests received under the Freedom of Information Act. Judge Scheindlin held that "it is well accepted, if not indisputable, that metadata is generally considered to be an integral part of an electronic record." Therefore, as a matter of first impression in the FOIA context, the court found that "metadata maintained by the agency as part of an electronic record is presumptively producible under FOIA, unless the agency demonstrates that such metadata is not 'readily reproducible.'" She also explained that, even if metadata has not been specifically requested, the "production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading" of the electronic information and,



therefore, is unacceptable. Judge Scheindlin did observe, however, that in some cases involving small document volumes where an electronic review platform is not likely to be used, the production of individual static images, without the accompanying metadata, still may be deemed reasonable. Following Judge Scheindlin's retraction of her February ruling, the question of whether the government is obligated to produce metadata in response to FOIA requests remains open (or, more precisely, has been re-opened). The exact scope of the obligation to produce metadata in civil proceedings, however, likely will continue to be resolved on a case-by-case basis, and also may vary from jurisdiction to jurisdiction.

Pennington v. Midland Credit Mgmt., 2010 U.S. Dist. LEXIS 80534 (E.D. Va. Aug. 9, 2010): Pennington was a victim of identity theft, which caused several errors in her credit reports. As a result, Pennington sued to recover under the FDCPA and the FCRA. During discovery, Midland requested disclosure of agreements reflecting settlements Pennington had reach with other credit reporting agencies. Pennington refused to produce the agreements, so Midland moved to compel disclosure. The court held that Midland failed to demonstrate that its request for the settlement agreements was reasonably calculated to lead to the discovery of admissible evidence. Therefore, the motion to compel was denied.

J. Final Judgment

E.I. du Pont de Nemours & Co. v. Kolon Indus., 2010 U.S. Dist. LEXIS 8981 (E.D. Va. Feb. 3, 2010): Kolon moved for entry of final judgment on its counterclaim and filed notice of appeal, which, although premature, indicated its intention to litigate the issue on appeal. DuPont opposed the motion, arguing that this severing under Rule 54(b) was an "exceptional remedy" and would result here in piecemeal appeals. The court elected to enter final judgment for the counterclaim because Kolon's counterclaims were completely distinct from DuPont's claims and because "considerations of judicial administration favor[ed]" Kolon's motion for entry of final judgment.

K. Inadvertent Disclosure

King Pharms., Inc. v. Purdue Pharm. L.P., 2010 U.S. Dist. LEXIS 54407 (W.D. Va. 2010): King had received through discovery four pages of documents that Purdue sought to "claw back" as privileged and inadvertently produced. King asserted the document was not privileged and was not inadvertently produced. The pages were submitted to the court for *in camera* review. The court found the pages to be privileged as attorney-client communication and attorney work-product, with Perdue having exercised dilligence. As such, the court allowed Purdue to claw back the four pages, among millions of documents, because Purdue did not waive attorney-client privilege by inadvertent disclosure.

L. Injunctions

MicroAire Surgical Instruments, LLC v. Arthrex, Inc., 726 F. Supp. 2d 604 (W.D. Va. 2010): The court considered a plaintiff patent holder's motion for preliminary injunction and the defendant alleged infringer's opposition to the motion. The patent at issue related to a surgical instrument for probing body cavities and manipulating tissue contained therein under continuous observation. The court found that plaintiff had not established that it was likely to succeed on the merits and the plaintiff had failed to establish that it was likely to suffer irreparable harm in the absence of preliminary relief. As a result, plaintiff's motion for preliminary injunction was denied.

Splitfish AG v. Bannco Corp., 727 F. Supp. 2d 461 (E.D. Va. 2010): Plaintiffs requested that defendants be enjoined from selling or offering for sale a video game controller device that allegedly contained copyrighted computer programming code plaintiffs claimed they owned. The court found that plaintiffs met their burden to show a clear likelihood of success on the issue of whether one of the plaintiffs owned the

driver and firmware code and therefore had standing to sue for copyright infringement. This was because Chinese Copyright Law defined works created in the course of employment broadly to include any "work created by a citizen in the fulfillment of tasks assigned to him by a legal entity or other organization." Next, the court found that plaintiffs made a clear showing that they were likely to be harmed irreparably absent preliminary injunctive relief. This was because allowing defendants to continue to distribute products containing plaintiffs' copyrighted work would deprive the copyright holder of intangible exclusive rights to control the means and methods by which its work would be seen by the public. Plaintiffs' motion for preliminary injunctive relief was granted.

M. Motions to Strike

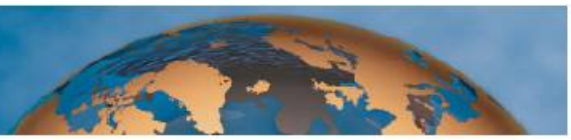
Murillo-Rodriguez v. Commonwealth, 279 Va. 64, 688 S.E.2d 199 (2010): The Supreme Court held that in order to preserve a challenge to the sufficiency of the evidence for appeal, the defendant must move to strike not only at the close of the plaintiff's or prosecution's evidence, but also at the close of all of the evidence. The Court reasoned that "by not reasserting a sufficiency challenge after he has introduced his own evidence, the defendant has deprived the trial court of the opportunity to consider and rule on the sufficiency of the evidence as a matter of law under the proper standard." While *Murillo-Rodriguez* is a criminal case, it appears to apply to civil cases as well.

United Leasing Corp. v. Lehner Family Bus. Trust, 279 Va. 510, 689 S.E.2d 670 (2010): In a contract claim, at the close of plaintiff's case, the defendant moved to strike, arguing that the plaintiff had failed to establish a valid assignment and also failed to establish damages. This motion was overruled. At the close of evidence, the defendant stated, "Renew my motion to strike," but failed to explain the basis for the renewed motion to strike. The court did not rule on this motion. After closing argument, and after the jury began deliberating, the defendant argued that the court should strike the plaintiff's claim because the plaintiff failed to establish damages. The defendant did not address the validity of the assignment. On appeal, the plaintiff claimed that the defendant waived the assignment issue because it failed to cite it in the motion to strike made after the close of all evidence. The Supreme Court held that the defendant failed to renew its motion to strike on the assignment issue because the argument on the renewed motion to strike only concerned damages. A renewed motion to strike is a completely new motion and because the defendant did not include the assignment issue in the motion to strike made at the conclusion of all evidence, it waived that issue.

N. Personal Jurisdiction

Chesapeake Bank v. Cullen, 2010 U.S. Dist. LEXIS 100827 (E.D. Va. Sept. 21, 2010): The case arose when the bank alleged defendants defrauded the bank out of hundreds of thousands of dollars. Defendants filed a motion to dismiss for lack of personal jurisdiction. The court held that personal jurisdiction existed because defendants transacted business in Virginia and in doing so, purposefully availed themselves of the forum. The motion to dismiss was denied.

Commercial Metals Co. v. Compania Espanola de Laminacion S.L., 749 F. Supp. 2d 438 (E.D. Va. 2010): The case was a contract dispute arising from the importation of steel on a vessel that traveled from Spain to Virginia. Defendant argued that the district court did not have personal jurisdiction over the company. Defendant's motion to dismiss for lack of personal jurisdiction was denied because the in-state actions of the representative—stemming from his conduct as Corporate Supply Director of the confederation and General Director of the sister company—should be imputed to defendant in order to confer specific personal jurisdiction.



eServices, LLC v. Energy Purchasing, Inc., 2011 U.S. Dist. LEXIS 27254 (E.D. Va. March 15, 2011): This suit arose from a series of alleged contracts, in which defendant EPI allegedly agreed to sell natural gas from wells located in Kentucky to the plaintiff. Defendant Michael Buchart is a citizen and resident of Kentucky, and the president and sole director of EPI. Buchart argued that his contacts with Virginia were insufficient to give rise to personal jurisdiction in the state and any contacts that EPI had with Virginia cannot be imputed to him personally since such contacts arose solely from his role as president of EPI. On balance, the court was not convinced that the company had made a prima facie showing that the business owner purposefully availed himself of the laws of Virginia. Even when the allegations were construed in the light most favorable to the company, the court held that it was clear that the owner had no relevant contact with Virginia other than the communications made to the company's Virginia office and the choice of law and performance provisions in the master gas contract. As such, personal jurisdiction did not exist. The motions to dismiss were granted.

Galustian v. Peter, 750 F. Supp. 2d 670 (E.D. Va. 2010): Although a defendant owned a home in Virginia, it was not contested that he currently spends approximately 330 days per year in Iraq. While he was technically a Virginia resident, given his brief sojourn in the state, traveling to this forum from Iraq, and back to Iraq from this forum, for pre-trial matters and trial would obviously be expensive, time-consuming, and difficult, and would force defendant away from his work for appreciable periods of time. Moreover, the court held that trial of this matter in Iraq would be the easiest, most expeditious, and most inexpensive manner of resolving this dispute. The motions to dismiss for lack of personal jurisdiction were granted.

Gonzalez v. Stout, 81 Va. Cir. 376 (Fairfax County 2010): Plaintiff homeowner filed an action against defendants, a mother and her daughters, alleging that they misappropriated and converted assets from his bank account in excess of $1,000,000. A default judgment was entered against the daughters and they filed a demurrer asserting that the default judgment was void. The homeowner had filed an action against a mother and her daughters, alleging that they had misappropriated and converted assets from the homeowner's bank account in excess of $1,000,000. A default judgment had been entered against the daughters and the daughters filed a demurrer asserting that the default judgment was void for lack of personal jurisdiction. The only issue before the circuit court was whether an allegation of a civil conspiracy was enough to establish *in personam* jurisdiction. The circuit court vacated the default judgment and sustained the demurrer with leave to amend. The daughters' only meaningful links were their alleged knowledge of a theft and the receipt of funds from the crime and that was insufficient for *in personam* jurisdiction. There was no allegation that the daughters came to Virginia to conspire with their mother and no allegation that letters were sent or telephone calls made from the daughters to the mother in Virginia. The facts did not establish sufficient minimum contacts to show that the daughters purposefully availed themselves of the laws and protections of Virginia.

O. Pleading Standards

Adiscov, LLC v. Autonomy Corp., 762 F. Supp. 2d 826 (E.D. Va. 2011): A patent owner's conclusory allegations in its complaint neither gave the alleged infringers notice of the substance of the suit against them, nor raised the right to relief above the speculative level. The allegations that defendants manufactured, used and sold infringing "products and services" did not identify any particular products or services that were infringing. The category "legal discovery software and services" did not describe either a category or specific products and services with the specificity required by Fed. R. Civ. P. 8. The court granted defendants' motions to dismiss.

Automated Transactions, LLC v. First Niagara Fin. Group, Inc., 2010 U.S. Dist. LEXIS 141275 (W.D. N.Y. Aug. 31, 2010): The court found that the pleading standard articulated by the United States Supreme Court in *Twombly* and *Iqbal* could not be reconciled with the standard exemplified by the Appendix of Forms to the Federal Rules of Civil Procedure. Thus, the sufficiency of the company's direct infringement

allegations was governed by Appendix Form 18, not by the requirements of *Twombly* and *Iqbal*. The company's allegations of direct infringement were at least as detailed as those of Form 18, and its identification of "ATMs" as the infringing products was comparable to Form 18's reference to "electric motors". The magistrate judge recommended that the motion to dismiss should be denied.

J. McIntyre Mach., Ltd. V. Nicastro, 2011 U.S. LEXIS 4800 (D.N.J. April 1, 2011): Petitioner British manufacturer moved to dismiss respondent consumer's products-liability suit, arguing lack of personal jurisdiction. Under the "stream-of-commerce" doctrine, the Supreme Court of New Jersey held that the Due Process Clause was not violated by the New Jersey court's exercise of jurisdiction. The manufacturer directed marketing and sales efforts in the U.S., but the question was whether the New Jersey state court had the authority to exercise jurisdiction; thus, it was the manufacturer's purposeful contacts with New Jersey, not with the U.S., that alone were relevant. A distributor sold the products, the manufacturer's officials attended trade shows in several States but not in New Jersey, and up to four machines ended up in New Jersey. The manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. It did not have a single contact with New Jersey short of the product in question ending up in New Jersey. The Court held that the Supreme Court of New Jersey's holding was error.

Lopez v. Asmar's Mediterranean Food, Inc., 2011 U.S. Dist. LEXIS 2265 (E.D. Va. 2011): The employer allegedly failed to pay the employee required additional "half time" (*i.e.*, half her normal hourly salary) for overtime work. Plaintiff employee filed a motion to strike the affirmative defenses raised in defendant employer's answer to her claim for failure to pay overtime in violation of the Fair Labor Standards Act. The court found, *inter alia*, that neither *Twombly* nor *Iqbal*'s analyses even touched Fed. R. Civ. P. 8(b)(1)(A); both began and ended with interpretation of Rule 8(a)(2)'s required showing that the pleader was entitled to relief. *Twombly* and *Iqbal* did not introduce the requirement of showing entitlement to relief under Rule 8(a)(2), they interpreted it. They did so by interpreting language that was not present in Rule 8(b)(1)(A). The court would not import that language, nor *Twombly* and *Iqbal*'s interpretations of it, to a different rule that lacked such language. In any event, there was no serious risk of ambush from a lack of factual detail supporting the employer's affirmative defenses. The employee could more fully explore such factual detail through such tools as contention interrogatories, under Fed. R. Civ. P. 33. Therefore, the employer's affirmative defenses withstood dismissal.

Odyssey Imaging, LLC v. Cardiology Assocs. of Johnston, LLC, 752 F. Supp. 2d 721 (W.D. Va. 2010): Cardiology Associates of Johnston, North Carolina cardiologists, arranged for Odyssey Imaging to provide imaging services at their practice near Raleigh. Odyssey sued in state court for breach of contract, but the defendant removed the case to federal court and filed two counterclaims and several affirmative defenses. The court did not hold affirmative defenses to the stricter "plausibility" standard of *Twombly* and *Iqbal*. Instead, the court looked to whether the affirmative defenses were "contextually comprehensible." The court held that all but two of the affirmative defenses were contextually comprehensible, so the motion to dismiss affirmative defenses was granted in part.

P. Proposed Statement of Facts

Shapiro v. Younkin, 279 Va. 256, 688 S.E.2d 157 (2010): On appeal in a landlord-tenant dispute, pursuant to Rule 5:11, the pro se litigant submitted to the trial court a proposed statement of facts to be used on appeal in place of a transcript. The trial court refused to certify this statement. The Supreme Court of Virginia reversed and remanded for a new trial, holding that the trial court should have either: (1) signed the proposed statement of facts, certifying the manner in which the record was incomplete, or (2) ordered a new trial. The court held that a circuit court is not authorized to dismiss a case based solely on a litigant's failure to obtain the services of a court reporter.

Q. Removal and Remand

Barbour v. Int'l Union, 640 F.3d 599 (4th Cir. 2011): Former employees of the Chrysler Corporation filed suit against UAW for negligent misrepresentation and negligence in retirement planning consultations. The UAW removed the retirees' state-court action to federal court. The retirees moved to remand the case back to state court alleging the notice of removal was untimely filed. The district court said the notice of removal was timely filed. While other circuits have questioned the *McKinney* rule for counting the 30-day period to remove a suit from state to federal court, the Fourth Circuit continues to adhere to the rule. The *McKinney* rule requires that a notice of removal be filed within the first-served defendant's 30-day window, but gives later-served defendants 30 days from the date they were served to join the notice of removal. The court held that this rule best reflect Congress's intent.

Hatcher v. Lowe's Home Ctrs., Inc., 718 F. Supp. 2d 684 (E.D. Va. 2010): Plaintiff filed motions for leave to amend and to remand his action alleging negligence on the part of defendant retailer based on a trip-and-fall. The retailer filed a timely notice of removal, which removed the case to federal court on the basis of diversity of citizenship. Plaintiff moved to file an amended complaint reducing the amount of damages sought from $ 3,000,000 to $ 74,500, and seeking a consequent remand to state court. As a preliminary matter, the court first determined whether the retailer correctly removed the case from state court. It was undisputed that the existing record at the time of commencement and the time of removal triggered federal subject matter jurisdiction pursuant to 28 U.S.C.S. § 1332(a). Plaintiff was a Virginia resident, and the retailer was a citizen of North Carolina. The amount in controversy, as plainly stated in the complaint and notice of removal, exceeded $ 75,000. Importantly, plaintiff never objected to removal based on his original complaint. Instead, the parties sought to lower the amount in controversy by amending the complaint after federal jurisdiction was perfected. Because removal to the court was valid, the sole issue remaining was whether the parties' post-removal agreement to reduce the amount in controversy to $74,500 ousted the court of federal diversity jurisdiction. Denying remand, the court stated that it was clearly established that a post-removal event--such as amending a complaint in order to reduce the amount in controversy below the jurisdictional limit--did not deprive a federal court of diversity jurisdiction.

Lee v. Citimortgage, Inc., 739 F. Supp. 2d 940 (E.D. Va. 2010): This case arose from a dispute regarding an unfulfilled obligation in the Deed of Trust and the resulting foreclosure sale. The plaintiff filed a motion to remand the case to state court. The court held that even though the value of the object of the litigation was the value associated with having (or complying with) the right of borrower to have a face-to-face meeting with the lender prior to the commencement of foreclosure, under any approach and analysis, the pecuniary value and costs to both parties were simply too speculative and immeasurable to satisfy the amount in controversy requirement. The lender made mere allegations in its notice of removal and failed to provide competent proof of diversity jurisdiction. The motion to remand was granted.

R. Service of Pleadings

Robinson v. Wix Filtration, LLC, 599 F.3d 403 (4th Cir. 2010): A lawyer's computer troubles kept him from receiving electronic notice through a federal court's CM/ECF system that his opponent had filed a motion for summary judgment. Plaintiff argues that the trial court erred in denying his motion pursuant to Rule 59. The circuit court affirmed the district court decision, imposing on the lawyer a duty to inform the court and opposing counsel of his computer troubles, rather than deliberately remaining in the dark.

Smith v. EVB, 2010 U.S. Dist. LEXIS 65534 (E.D. Va. 2010): Plaintiff hand-delivered to the defense law firm's office his response to defendant's motion to dismiss. The certificate of service, however, stated the response was filed three days later. EVB's reply was filed three days late, based on the later date reflected on the certificate of service. The court held that EVB acted in a good faith and its relatively short

three-day late filing had not prejudiced the plaintiff, so the court ruled that EVB's late filing was the result of excusable neglect.

S. Rule 59

In re: Outsidewall Tire Litig., 748 F. Supp. 2d 543 (E.D. Va. 2010): The court considered defendants' Rule 59 motion for a new trial following a $26 million jury verdict in favor of plaintiff's claims of copyright infringement, unfair competition, and deceptive trade practices, conversion, and civil conspiracy. Defendants attacked the jury verdict based on the fact that the jury was allowed to provide a figure for total damages, but the court did not require the jury to specify damages for each claim on which plaintiffs succeeded. The court held that the attack on the jury verdict based on the form of the verdict did not warrant vacating the jury verdict and ordering a new trial.

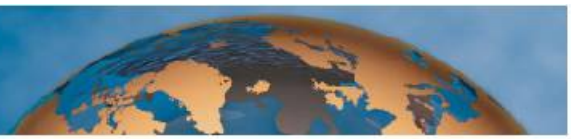
T. Rule 68

Hawkins v. Johnston Memorial Hospital, Inc., 267 F.R.D. 483 (W.D. Va. 2010): Plaintiff claimed he was a patient at defendant hospital, recovering from knee replacement surgery, and he became seriously infected from an unsanitary shower in his patient room, and had to have the surgery repeated. The hospital served an offer of judgment on plaintiff pursuant to Rule 68. The day after service of the offer of judgment, counsel for plaintiff provided pharmacy records to defense counsel that identified, for the first time, that plaintiff had been receiving numerous narcotic pain medications from at least four other physicians. Defendant hospital contended that it has the right to withdraw an offer of judgment under Rule 68 based on "exceptional factual situations," and in particular, where the offer is procured by fraud. The court found it clearly established that defendant relied on plaintiff's material misrepresentation about his medical history in making the offer of judgment. Therefore, the court granted defendant's motion for leave to withdraw the offer of judgment.

Simmons v. United Mortgage & Loan Inv., LLC, 634 F.3d 754 (4th Cir. 2011): Plaintiff employees filed a class action against defendant employers for violations of the Fair Labor Standards Act and the North Carolina Wage and Hour Act. The question was whether the district court erred in holding that a letter from defense counsel to plaintiffs' counsel offering full relief rendered plaintiffs' FLSA claims moot, thus requiring their dismissal for lack of subject matter jurisdiction. The court answered in the affirmative. The letter did not constitute a Rule 68 offer of judgment. Moreover, the failure of defendants to make their attempted offer for full relief in the form of an offer of judgment prevented the mooting of plaintiffs' FLSA claims. Because the settlement offer did not propose the entry of judgment, it was ambiguous as to the amounts of actual and liquidated damages to be recovered, and it required confidentiality, the offer prevented the mooting of the FLSA claims, and it was error to dismiss them for lack of subject matter jurisdiction. The court vacated the district court's order dismissing plaintiffs' FLSA claims and corresponding judgment and the order denying plaintiffs' motion for certification of their FLSA claims and their amended version of such motion, and remanded for further proceedings. The court vacated the order denying plaintiffs leave to amend and remanded for further proceedings.

U. Statute of Limitations

Dunston v. Huang, 709 F. Supp. 2d 414 (E.D. Va. 2010): Plaintiff patient sued defendant doctor alleging medical malpractice. The case presented a question concerning the application of Virginia's six-month statute of limitations tolling provision for nonsuited actions. The issue was whether the two time-barred claims were saved by the six-month tolling provision where those claims were not pled in the original medical malpractice action. Defendants moved to dismiss. The patient voluntarily nonsuited her state court case. Defendants, citing the Virginia two-year statute of limitations for personal injury claims, filed a



motion to dismiss the federal complaint with respect to the newly-pled claims of failure to perform an alternative procedure and lack of informed consent. Although the patient's two additional claims were filed after the original limitations period expired, application of the transaction or occurrence test compelled the conclusion that those claims were nonetheless saved by the nonsuit statute of limitations tolling provision. All of the patient's current claims related to a common transaction or occurrence, and therefore constituted a single cause of action. Because her additional claims were included within the nonsuited cause of action, as defined by the nonsuit statute, they were also properly considered as part of the nonsuited action that could be recommenced within six months of the nonsuit, as understood by the nonsuit statute of limitations tolling provision. Both her additional claims and nonsuited claims constituted a single cause of action under the statute and as such came within the action saved by the nonsuit statute of limitations tolling provision.

Kelley v. Pirsch & Associates PLLC, Record No. 100446 (Unpublished Order) (Va. May 13, 2011): In a legal malpractice case, the plaintiff argued that the defendant law firm failed to file an estate tax return in time, which resulted in the assessment of penalties and interest. Plaintiff maintained that the statute of limitations did not begin to run until the estate sustained damages in the form of penalties and interest. The Supreme Court held that was not the case and instead, held that the legal injury occurred when the law firm failed to file the return, a holding that put the suit outside the three-year statute of limitations for oral contracts.

RCI Contractors & Eng'rs, Inc. v. Joe Rainero Tile Co., 677 F. Supp. 2d 914 (W.D. Va. 2010): Plaintiff, a subcontractor in the construction of three jails, sued defendants, a tiling company and the distributor of a certain grout, which the subcontractor and the tiling company had agreed to use, alleging breach of contract, breach of implied and express warranties for the grout, fraud, and false advertising. The distributor moved to dismiss the breach of contract claim and for summary judgment as to the remaining claims. The court denied the distributor's motion for summary judgment dismissing the breach of implied warranty claim as time-barred. The court found that under Va. Code § 8.01-229(E)(1), the limitations period was tolled while the first suit was pending. Although the first suit did not expressly use the words "implied warranty," the substance of its claim was a breach of an implied warranty. Further, § 8.01-229(E)(1) was not restricted to suits filed after a dismissal, and such a restriction was not warranted due to the remedial nature of the tolling provision.

Torkie-Tork v. Wyeth, 739 F. Supp. 2d 887 (E.D. Va. 2010): Plaintiff was diagnosed on with cancer that was hormone receptor positive, meaning it was caused by hormones like those in a drug made by defendant pharmaceutical company. Plaintiff sued defendant for negligence, defective design, failure to warn, breach of express warranty, and fraud. Defendant argued that all claims were time-barred because they accrued beyond Virginia's two-year limitations period for personal injury suits. Virginia did not adhere to a discovery rule for claims other than fraud, so plaintiff's personal injury claims accrued on the date of diagnosis and would have been time-barred in the absence of a cross-jurisdictional tolling rule applicable to federal class actions. The discovery rule applied to fraud claims, but there were genuine issues of fact as to when the alleged fraud was discovered or should have been discovered. Nonetheless, the statute of limitations was tolled for all claims as a result of the previously filed class action suit of which plaintiff was a putative class member. The prior class action suit operated to toll the application of the statute of limitations for a ten-month period, and the tolling brought all of plaintiff's claims within the two-year filing window. According to the Supreme Court of Virginia, the sweeping language of the statute allowed tolling of prior suits arising in both state and federal courts. The court denied defendant's motion for summary judgment on the statute of limitations issue in all respects.

V. Subject-Matter Jurisdiction

JTH Tax, Inc. v. Frashier, 624 F.3d 635 (4th Cir. 2010): Appellant franchisor sought judicial review of an order by the district court, dismissing its complaint against appellee franchisee for lack of subject matter jurisdiction. The franchisor argued that the district court erred in holding that its complaint failed to meet the $75,000 amount in controversy requirement for diversity jurisdiction. The complaint, which was not amended, alleged $80,000 in damages, a sum sufficient to exceed the amount necessary for diversity jurisdiction. Its later downward adjustment made in the franchisor's motion for summary judgment was not a subsequent reduction of the amount claimed sufficient to oust the district court's jurisdiction. Jurisdiction turned not on the sum contained in the summary judgment motion, but on the good faith of the allegation in the complaint of an adequate jurisdictional amount. There was no finding or argument that the franchisor made a bad faith claim in its complaint. Accordingly, the complaint appeared sufficient to allege an adequate jurisdictional amount. Even if the franchisor's reassessment of its damages showed to a legal certainty that it could recover only the $60,456.25 requested in its summary judgment motion, the district court should have considered the amount of money damages and the injunctive relief sought when determining jurisdiction. The injunction, whether valued for the benefit it conferred on the franchisor or the detriment it imposed on the franchisee, arguably yielded a figure that exceeded the necessary jurisdictional amount. The judgment of the district court was reversed.

Lexcorp v. Western World Ins. Co., 2010 U.S. Dist. LEXIS 117001 (W.D. Va. Oct. 1, 2010): This suit concerned insurance coverage for an accident involving the plaintiff, a patient transport provider. Plaintiff filed a declaratory judgment action in state court. The defendant filed a competing declaratory judgment action in federal court. The competing action was remanded to state court because complete diversity did not exist.

Lott v. Scottsdale Ins. Co., 2011 U.S. Dist. LEXIS 53143 (E.D. Va. May 9, 2011): Plaintiff filed a declaratory judgment action against a commercial general liability carrier that refused to defend a pool company in a $10 million wrongful death suit filed by the parents of a child who drowned. The complaint in this removed state wrongful death case showed a lack of diversity of citizenship among the parties. The question was whether, after removal, it was permissible to realign the parties to produce the required diversity and whether the requested realignment was appropriate under the principles governing party realignment. The court answered yes to both questions because under Fourth Circuit precedent, the test for determining proper alignment is a two-step test, that first determines the primary issue in controversy and then aligns the parties with respect to the primary issue. The primary issue was whether Scottsdale had a duty to defend and indemnify. As such, the pool's interests are clearly more aligned with the plaintiffs with respect to this issue and, therefore, realignment was proper.

Riley v. Dozier Internet Law, PC, 371 Fed. Appx. 399 (4th Cir. 2010): Dozier, a Virginia resident and founder of Dozier Internet Law, PC, sued Riley in state court for defamation and trademark infringement. Riley, a Michigan resident, filed suit in federal court seeking a declaratory judgment that he was not liable to defendant for defamation or trademark infringement. On appeal, the majority said that Riley's federal suit was "mere procedural fencing" in a attempt to get into federal court after having failed to get Dozier's suit removed to federal court. The court affirmed the district court, dismissing the action for lack of jurisdiction.

Dipaolo v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 73000 (E.D. Va. June 28, 2011): The plaintiff invoked the federal court's jurisdiction on the basis of a forum selection clause in the insurance contract between the parties. However, the court reiterated the settled principle that parties cannot bestow federal courts with subject matter jurisdiction by consent.

Va. Code § 8.01-195.4. Jurisdiction of claims under this article; right to jury trial; service on Commonwealth or locality. "The general district courts shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim against the Commonwealth or any transportation district cognizable under this article when the amount of the claim does not exceed $4,500, exclusive of interest and any attorneys' fees. Jurisdiction shall be concurrent with the circuit courts when the amount of the claim exceeds $4,500 but does not exceed $25,000, exclusive of interest and such attorneys' fees. Jurisdiction of claims when the amount exceeds $25,000 shall be limited to the circuit courts of the Commonwealth. The parties to any such action in the circuit courts shall be entitled to a trial by jury.

W. Summary Judgment

Ortiz v. Jordan, 131 S. Ct. 884 (2011): There was a conflict among the circuits as to whether a party could appeal a denial of summary judgment after a district court conducted a full trial on the merits. The officials sought no immediate appeal from the denial of their motion for summary judgment. Nor did they avail themselves of Fed. R. Civ. P. 50(b). Questions going to the sufficiency of the evidence were not preserved for appellate review by a summary judgment motion alone; rather, challenges of that order must have been renewed post trial under Rule 50. The Supreme Court found that the qualified immunity defenses asserted by the officials did not present neat abstract issues of law. To the extent that the officials urged that the inmate had not proved her case, they were obliged to raise that sufficiency-of-the-evidence issue by post verdict motion for judgment as a matter of law under Rule 50(b). They did not, so the court of appeals had no warrant to upset the jury's decision on the officials' liability. A party could not appeal a denial of summary judgment after a district court conducted a full trial on the merits.

X. Venue

Albemarle Corp. v. Astrazeneca UK Ltd, 628 F.3d 643 (4th Cir. 2010): Plaintiff, a Virginia corporation, sued defendant, a United Kingdom corporation, in state court for breach of contract. Based on a forum selection clause in the subject contract, defendant moved to dismiss the action for improper venue. The U.S. District Court for the District of South Carolina granted the motion and dismissed the complaint. Plaintiff appealed. Plaintiff argued primarily that the district court erred in enforcing the forum selection clause under English law rather than under American federal common law. The contract provided for English law to apply, and although the forum clause would have been permissive under federal law, it was mandatory under English law. The court held that application was not contrary to public policy because federal law preempted the South Carolina forum statute and moreover, the statute did not manifest a strong public policy of South Carolina. The court affirmed the judgment of the district court.

Find Where Holdings, Inc. v. Sys. Env't Optimization, LLC, 626 F.3d 752 (4th Cir. 2010): Plaintiff global positioning systems (GPS) seller sued defendants, including a reseller and a subsidiary, alleging breach of contract. The GPS seller and the reseller entered into a contract wherein the reseller agreed to act as the GPS seller's exclusive reseller in several countries in the Middle East. The GPS seller alleged that the reseller failed to pay for units ordered by the subsidiary. The GPS seller filed suit in a Virginia state court. The subsidiary removed the case to federal court on the basis of diversity of citizenship jurisdiction. The appellate court determined that the district court did not err when it remanded the action to state court based on the forum selection clause because (1) the clause provided that jurisdiction and venue "shall lie exclusively in the courts of the State of Virginia," (2) as federal courts are not courts "of" the state of Virginia, the contract language referred to sovereignty rather than geography and limited jurisdiction over the parties' dispute to state court, and (3) the additional language "or be transferred to" did not necessarily imply that the parties intended that there be concurrent federal and state court jurisdiction within Virginia.

Fox Group, Inc. v. Cree, Inc., 749 F. Supp. 2d 410 (E.D. Va. 2010): Plaintiff Fox Group filed this patent infringement action against Cree and Dow Corning. Two months prior, Dow Corning filed a declaratory judgment action in the Southern District of New York. The action could have been brought in the Southern District. Plaintiff alleged patent holder could have brought its counterclaims against the alleged infringer in the Southern District. There was no basis for the district court to depart from the first-filed rule. The motion to transfer venue to the Southern District of New York was granted.

Thomas v. Accounts Receivable Mgmt., Inc., 2010 U.S. Dist. LEXIS 112922 (E.D. Va. 2010): Thomas filed the case complaining of violations of the Fair Credit Reporting Act. The Defendants move to transfer venue. The court held that the District of Maryland was the best venue for this action, taking into account witness convenience, party convenience, and the interests of justice. As such, the motion to transfer was granted the case transferred to the District of Maryland.

Torres v. SOH Distrib. Co., Inc., 2010 U.S. Dist. LEXIS 47448 (E.D. Va. May 13, 2010): A snack-food distributor sought to avoid his distributorship agreement's forum selection clause by arguing it was an unconscionable contract of adhesion. The court held that a mere lack of actual bargaining will not render a forum selection clause unenforceable. Absent evidence of a bad-faith motive, disparity in bargaining power does not render a forum selection clause fundamentally unfair. The court granted the motion to transfer venue pursuant to the forum selection clause.

Wye Oak Tech. Inc. v. Republic of Iraq, 2010 U.S. Dist. LEXIS 64527 (E.D. Va. June 29, 2010): Wye Oak sued the Republic of Iraq for contract fees stemming from the provision of security and equipment services to the Iraqi Ministry of Defense at the time plaintiff's sole shareholder was assassinated in Iraq. Iraq challenged venue in Alexandria, filing a motion to transfer the case to the U.S. District Court for the District of Columbia. The court found no connection between the district in Virginia and the actions giving rise to the claim. Plaintiff's bare allegations of two meetings that occurred at the Pentagon did not cure the complaint's failure to identify a substantial part of events or omissions giving rise to Wye Oak's claim that occurred in the Eastern District of Virginia. The case was transferred to the D.C. District Court.

Y. Work Product Privilege

CIVIX-DDI LLC v. Metro. Reg'l Info. Sys., Inc., 2011 U.S. Dist. LEXIS 27973 (E.D. Va. Mar. 8, 2011): This case involved a patent suit and whether lawyers can protect their expert reports under a new amendment to federal discovery rules. An amendment to Fed. R. Civ. P. 26(b)(4) extends work-product protection to drafts of expert reports and disclosures and to attorney-expert communications, both of which used to be subject to discovery.

E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 269 F.R.D. 600 (E.D. Va. 2010): DuPont filed suit alleging that Kolon Industries stole its secret processes and technologies for manufacturing Kevlar. Kolon said that the issuance of a press release by DuPont was a partial waiver of the work product protection. The court stated that DuPont had not established that the press releases were based solely on public information. The court held that it was appropriate to conclude that, by making the statement at issue in the press release, DuPont waived work product protection respecting the factual basis for the statement in the press release.

Sanford v. Virginia, No. 3:08cv835, 2009 U.S. Dist. LEXIS 83979 (E.D. Va. Sept. 14, 2009): Decedent was physically and mentally disabled and died while at the medical college following surgery. The administrator alleged, *inter alia*, that various police officers contributed to the decedent's demise by the manner in which they subdued him while he was under medication. Additionally, several medical care providers allegedly mishandled the decedent's medical care, which also allegedly contributed to his death. Plaintiff, an administrator of a decedent's estate, moved for additional consideration, claimed

substantial need, and requested disclosure of ten documents identified by defendants, a medical college, medical care providers, and police officers and a police department, as protected by the fact work product privilege. The court concluded that the administrator demonstrated that he needed the information, and made efforts to obtain the information other ways, but that no adequate substitute for the documents existed. The administrator's motion was granted.

Yorktowne Shopping Ctr., LLC v. Nat'l Sur. Corp., 2011 U.S. Dist. LEXIS 52032 (E.D. Va. May 16, 2011): In litigation over insurance coverage for a shopping center fire, the court held that document prepared by an insurance adjuster to assist in pursuing claims against the defendant was protected by the attorney work product privilege. After *in camera* review, the court held that each such document was prepared under the direction of an attorney in order to maximize insurance coverage, which was clearly done in anticipation of litigation.

IV. BUSINESS TORTS/CONTRACT

A. Antitrust

E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435 (4th Cir. 2011): Plaintiff chemical manufacturer brought a trade secrets suit against defendant competitor, which counterclaimed for monopolization and attempted monopolization in violation of § 2 of the Sherman Act. The primary thrust of the competitor's counterclaim was that the manufacturer illegally used multi-year supply agreements with high-volume para-aramid fiber customers. Those agreements required the customers to purchase 80 to 100% of their para-aramid requirements from the manufacturer. The competitor claimed those agreements removed substantial commercial opportunities from competition and limited other para-aramid fiber producers' ability to compete. The appellate court found that, the district court incorrectly held that U.S. Supreme Court precedent required including in the relevant geographic market definition all locations where product suppliers were headquartered. Rather, Supreme Court case law required that courts consider, in defining the relevant geographic market, where sellers operate and where purchasers can predictably turn for supplies. If U.S. consumers could predictably turn to supplies only in the United States, then the United States was the relevant geographic market. Because that was what the competitor alleged here, the district court erred in dismissing its counterclaim for failure to sufficiently plead a relevant geographic market.

B. Civil Conspiracy

Bane v. Bane, No. CL09-1168 (Roanoke 2011): Plaintiff claimed that defendants engaged in illegal acts in violation of Virginia's criminal and civil conspiracy statutes, thereby causing damage to her real property. The property in question was non-business property. The court held that a personal interest in property is not covered under the Virginia conspiracy statutes. The court found that the conspiracy statutes only protect reputation, trade, business, or profession when business property interests are threatened or injured. Since the plaintiff did not allege such a business interest, the demurrers to the conspiracy count were granted with prejudice.

Baylor v. Comprehensive Pain Mgmt. Ctrs., Inc., 2011 U.S. Dist. LEXIS 37699 (W.D. Va. Apr. 6, 2011): A physician claimed that a pain management center breached its contract with him and that the owner, business manager, and another center doctor had committed several business torts against him, including statutory civil conspiracy. In response to a motion for summary judgment, the court held that "under the intracorporate immunity doctrine, acts of corporate agents are acts of the corporation itself, and corporate employees cannot conspire with each other or with the corporation." The court concluded

the personal stakes of all of the individual defendants were dependent on the interest and success of the pain management center.

Healy v. Chesapeake Appalachia, LLC, 2011 U.S. Dist. LEXIS 759 (W.D. Va. Jan. 5, 2011): Plaintiff Healy alleged that Chesapeake refused to pay royalties pursuant to gas leases executed between her and the company. This case reinforced the rule that principals and agents cannot conspire with one another, but it allows the civil conspiracy claim for the period prior to the formation of the agency relationship. The court said that the allegations that the defendant gas company intentionally concealed or falsified records in an effort to deprive plaintiffs of royalty payments were sufficient to state claims for breach of contract, fraud, and conversion, and that therefore there was sufficient "underlying wrongdoing" allegedly resulting from the conspiracy to allow the conspiracy claim to go forward.

Scott & Stringfellow, LLC v. AIG Commer. Equip. Fin., Inc., 2011 U.S. Dist. LEXIS 38554 (E.D. Va. Apr. 8, 2011): Plaintiff asserted that defendant subsidiary and its parent corporation conspired for the purpose of breaching a contract between the plaintiff and the wholly-owned subsidiary. The plaintiff pled a claim of statutory conspiracy against the subsidiary defendant. The court dismissed the conspiracy claim, holding as a matter of law that a parent corporation is unable to conspire with its wholly owned subsidiary.

Burchett v. Carilion Clinic, et al., CL09001529-00 (Roanoke 2011): The plaintiff alleged that the defendant medical clinic, as well as certain of its wholly-owned subsidiaries and employees, had conspired to promulgate an internal plan to prevent patients from being referred to specialists that were employed outside of the clinic system, in breach of the applicable standard of care. The defendants moved to dismiss the claim on the basis of the intracorporate immunity doctrine, which holds that a corporation cannot conspire with itself as a matter of law. In April 2010, the court sustained the defendants' demurrer without leave to amend, holding that such a claim was a legal impossibility under Virginia law.

C. Defamation

D'Alfio v. Theuer, 2010 Va. Cir. LEXIS 288 (Norfolk 2010): In this case the court overruled a lawyer's demurrer to a defamation action filed by a sea captain against the lawyer, who gave a reporter a copy of a North Carolina lawsuit and an EEOC complaint filed by a seaman alleging the captain's shipboard intoxication, threats, and retaliation for complaints of race discrimination. The court held that the defendant lawyer had a qualified privilege for sharing exact copies of the complaint and the suit, but absence of malice sufficient to overcome the privilege is a jury question.

Mansfield v. Bernabei, 2011 Va. Cir. LEXIS 48 (Fairfax County Apr. 28, 2011): Plaintiff attorney filed an action for defamation against defendants, a former building manager and others. Defendants filed a demurrer. The building manager claimed that a letter the attorney wrote to the members of the board of directors of his employer, who the attorney also worked for, made false and defamatory statements about him. In another action, the building manager filed a complaint against the attorney and others. The issue before the court in the instant action was whether a complaint alleging defamation should be dismissed because of the attorney's asserted absolute privilege to publish statements to prospective defendants in a draft complaint. The statements about the attorney were published in a draft complaint to prospective defendants, including the attorney, eight days before the building manager filed the complaint in that action. The court found that the draft complaint was entitled to the protection of absolute privilege. The draft complaint and the complaint filed were sufficiently similar. The draft complaint was prepared in anticipation of litigation and was published only to the potential defendants. It was necessary for the building manager to share information with his lawyers to allow the lawyers to properly advocate that case. Defendants' demurrer was sustained.

Sharpe v. TWCC Holding Corp., No. CI09-6738, (Norfolk 2010): A former Navy officer sued a newspaper for publishing an editorial attacking him as "openly racist and anti-Semitic." After the plaintiff nonsuited, the court held that unless plaintiff has new evidence or law, the law of the case doctrine bars relitigation of the court's earlier decision that he is a public official, but not a public figure.

SolA Verde, LLC v. Town of Front Royal, No. L 10000-521-00, 2011 Va. Cir. LEXIS 71 (Fairfax County 2011): Defendants, town and council members, filed a demurrer to plaintiffs' action for defamation, tortious interference with a business relationship, damage to reputation, and emotional distress. The basis of the plaintiffs' defamation claimed was the publication of a defamatory statement to the newspaper by a member of the town council. The court found that the alleged defamatory statement was not made by the demurring council members. Two of the members asked a legal question of the town attorney about whether the incentives offered by the plaintiffs were bribes within the meaning of the law. Such a statement was not defamatory. The third council member did not make a statement about the plaintiffs; he merely wanted the matter investigated by the police. The town was entitled to sovereign immunity. Consequently, the plaintiffs failed to state claims for defamation, tortious interference with a business relationship, and emotional distress against the town or the demurring council members. The demurrer was sustained as to the defamation, tortious interference with a business relationship, and emotional distress claims; leave was granted to file an amended complaint against the council members only.

D. Tortious Interference

Clark v. Napper, 2010 U.S. Dist. LEXIS 130444 (E.D. Va. Nov. 3, 2010): A psychologist hired to assist a company with confidential evaluations for its senior executives may have expressed dissatisfaction with a company administrative assistant's possible role in a "Lost Report Incident," and have requested that another staff person be assigned to him prior to the assistant's termination. The court found, however, that there was no evidence that the methods of the psychologist defendant were improper, or that the psychologist had the requisite intent to satisfy tortuous interference. While it would be enough to show that the psychologist defendant knew the termination would result from his account of the administrative assistant's role in the Lost Report Incident, this was not proven either. As such, the court awarded summary judgment in favor of the defendant psychologist.

E. Fraud

Station #2, LLC v. Lynch, 280 Va. 166, 695 S.E.2d 537 (2010): Appellant company alleged breach of contract and fraudulent inducement by appellees, developer and its principal, and statutory conspiracy among the principal, the developer, and appellees, building owners. The company argued that the circuit court erred in sustaining the demurrer to the fraudulent inducement claim because the complaint alleged all elements necessary for a claim of fraud or fraudulent inducement. An omission or non-performance of a duty may sound both in contract and in tort, but only where the omission or non-performance of the contractual duty also violated a common law duty. The court found that the only duty the company alleged was contractual: that the developer and the principal had agreed to allow the company access to install the soundproofing material. Consequently, the company had not pleaded a proper claim for fraudulent inducement and the circuit court did not err in sustaining the demurrer that claim. The developer and the principal did not prove that the agreement required more than the grant of a license to which the statute of frauds did not apply. Therefore, the circuit court erred in sustaining their plea in bar on the breach of contract claim because there was no evidence to support it. Moreover, the Court rejected a claim for conspiracy to breach a contract as circumventing the requirements of the economic loss doctrine.

Wells Fargo Bank, N.A. v. Smith, 2010 U.S. Dist. LEXIS 118141 (E.D. Va. Nov. 5, 2010): In a breach of contract case, plaintiff lender moved to dismiss defendant borrower's fraud counterclaim. According to plaintiff, defendant Wells Fargo misrepresented his obligations under the second and fourth credit guaranties. Plaintiff alleged that an employee of the bank informed him that by signing "Sec" and "Pres" next to his signature he would evade personal liability, even though this directly contradicted the terms of the guaranties. Since the terms contradicted the employee's statements, plaintiff could have assessed the truth or falsehood of the representation by ordinary vigilance and attention. The counterclaim failed because the alleged misrepresentation upon which the borrower's claim relied concerned the legal effect of a contract, his reliance was not reasonable, and he ratified each credit agreement, including the ones allegedly induced by fraud, by making payments under the forbearance agreement. He released his claims against the lender by signing and making payments under the forbearance agreement. The bank's motion to dismiss was granted.

Global Bankcard Servs. v. Global Merch. Servs., 2011 U.S. Dist. LEXIS 60928 (E.D. Va. June 7, 2011): In a fraud action, the court held that a counterclaimant had failed to plead facts that allege that a duty not to solicit a company's employees while employed by such company exists in common law or arises out of a Virginia statute. Accordingly, the court held that the action sounded exclusively in contract, and it dismissed the claim for fraud.

F. Statute of Frauds

C. Porter Vaughan, Inc. v. DiLorenzo, 279 Va. 449, 689 S.E.2d 656 (2010): A real-estate broker alleged that it had entered into an oral contract with a property owner to sell certain property. The broker had introduced the seller to the ultimate purchaser, but the seller refused to pay a commission on the sale. The seller demurred to the broker's complaint, citing the statute of frauds. In response, the broker identified four writings that, it claimed, satisfied the requirement of the statue of frauds. The trial court held that these writings did not satisfy the statute of frauds and therefore sustained the demurrer. The Supreme Court reversed, holding that the four documents satisfied the statute of frauds, noting that the "memorandum" component of statute of frauds only requires that the writing contain the essential terms. The writing need not state all the terms of the contract.

H. Contract

Bennett v. Sage Payment Solutions, Inc., No. 100199 (Va. S.Ct. 2011): An executive who asked for a raise in pay to $1 million and said that if he did not get it he would look for another job lost his contract suit for severance pay. The Supreme Court affirmed the jury verdict for the employer, holding that even though the executive may have continued to perform some duties under the contract after his ultimatum, the employer could rely on a defense of repudiation, thereby negating any future obligations under the relevant employment contract.

Suntrust Mortg., Inc. v. AIG United Guar. Corp., 2011 U.S. Dist. LEXIS 70818 (E.D. Va. June 30, 2011): Plaintiff insured was entitled to partial summary judgment on the issue of liability with respect to its claim that certain loans were covered under a particular insurance policy because the insurer failed to show that a clear and unambiguous provision in the policy excluded the loans from coverage, and the clear policy language provided for coverage. On this basis, the court awarded $40 million in damages under the plain language of the contract, rejecting the defendant's theory that the plaintiff was not entitled to damages due to "avoided costs" from the defendant's non-performance of the contract.

V. EVIDENCE

A. Daubert

Harvester, Inc. v. Rule Joy Trammell + Rubvio, LLC, 2010 U.S. Dist. LEXIS 66519 (E.D. Va. July 2, 2010): In a lawsuit brought by an architectural firm alleging defendant firm infringed plaintiff's copyright on architectural drawings for a project to restore a hotel, defendant move to strike plaintiff's expert. Defendant argued that the expert's opinions lacked the requisite scientific basis and validity required by *Daubert*. The court ruled that the expert's method of review satisfied the necessary requirements of *Daubert* and the court denied defendant's motion to strike the expert's testimony.

B. Exclusion of Expert Witness Testimony

Minnesota Lawyers Mutual Insurance Co. v. Batzli, 2010 U.S. Dist. LEXIS 14487 (E.D. Va. Feb. 19, 2010): Defendant and plaintiff each opposed the testimony by the opposing side's expert witness. The court ruled that each expert's proffered evidence was inappropriate for the case. While expert testimony would have been helpful to the jury, neither expert's opinion addressed the issue of the case. Instead, each expert's testimony addressed factual issues that lay jurors can independently understand and assess. The court also rejected defendant's argument that plaintiff's expert's report was ghost-written by counsel. The court focused on the fact that plaintiff's expert reviewed several pieces of evidence before formulating his opinion and verbally related it to counsel for plaintiff, who prepared the report. Plaintiff's expert then reviewed a draft of the report and made changes. Clearly, plaintiff's counsel did not prepare the expert report from "whole cloth" and then simply ask the expert to sign it as his product.

Rolls-Royce PLC v. United Techs. Corp., 2011 U.S. Dist. LEXIS 48984 (E.D. Va. May 4, 2011): The court held that although plaintiff had more than ten months to develop its damages theory, its claim for $3.2 billion in price erosion and lost profit damages was based on misstatements of the law, a lack of sound evidence, and unsupported economic assumptions. The court noted that the expert report read more like a lawyer's brief seeking the highest possible damage award rather than an expert trying to assist the trier of fact in reaching a reasonable verdict.

C. Hearsay

Treads United States, LLC v. Boyd LP I, 83 Fed. R. Evid. Serv. (Callaghan) 922 (W.D. Va. 2010): Plaintiffs, investors in a wood products business, claim their business manager enlisted an unscrupulous supplier who sold equipment to the business as inflated prices and then paid kickbacks to the manager. The evidence in question consisted of business records, a schedule of historic currency exchange rates, checks, deposit tickets, and fund transfers. The court ruled that the documents proffered do not fall within Rule 807, in that they are not more probative on the point than evidence that the proponent can procure through reasonable efforts. The motion in limine seeking to preclude plaintiffs from introducing certain hearsay evidence under the residual exception in Rule 807 was granted.

D. Spoliation

Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010): Plaintiff filed its fourth motion for sanctions alleging defendants' destruction of the key evidence and other forms of misconduct and seeking a default judgment as the only effective method to punish such egregious conduct, deter others, and fully mitigate the prejudice to plaintiff and the judicial process. Plaintiff also sought a civil fine and a referral for criminal prosecution against defendant individual and attorney's fees and costs. Defendants

admitted that certain company electronically stored information (ESI) was deleted by defendant's computer engineer and/or others after defendant company was served with the lawsuit and after a preservation order was issued, although they denied that the deletions were done for the purpose of withholding ESI from plaintiff. The court found that defendants took repeated, deliberate measures to prevent the discovery of relevant ESI, clearly acting in bad faith. The court also found that defendant individual knew of the preservation and production orders and acted willfully to thwart those orders, thereby causing harm to plaintiff. Plaintiff's motion was granted in part and denied in part. The court ordered that defendant individual's acts of spoliation be treated as contempt of court, and that as a sanction, he be imprisoned for a period not to exceed two years, unless and until he paid to plaintiff the attorney's fees and costs that would be awarded after plaintiff has submitted an itemized accounting of the attorney's fees and costs.

VI. ARBITRATION

A. "Arbitrability"

Cent. W. Va. Energy, Inc. v. Bayer Cropscience LP, 2010 U.S. Dist. LEXIS 53865 (E.D. Va. 2010): In a coal contract dispute, an arbitration panel issued an award of $10.5 million in favor of Bayer. CWVE contended the validity of the agreement was not an arbitrable issue in West Virginia, but that instead it should have been arbitrated in Richmond. The court said that where an issue is arbitrated is a procedural question and under the agreement, was for arbitral, rather than judicial, resolution.

B. Collective Bargaining Agreement

Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847 (2010): During a strike, the employer and the unions agreed to a new collective bargaining agreement ("CBA") with a no-strike clause but the unions continued to strike pending resolution of a back-to-work agreement, and a dispute arose concerning whether the new CBA was ratified before the continuation of the strike. The unions contended that the ratification date of the CBA was subject to arbitration under the arbitration clause of the CBA. The U.S. Supreme Court held that the dispute over the CBA's ratification date was a matter for the district court, not an arbitrator, to resolve. The presumption in favor of arbitration did not override the principle that arbitration was only required when the parties agreed to submit the specific dispute at issue to arbitration, and judicial resolution was thus required concerning when the CBA was formed and whether its arbitration clause covered the matters which the unions sought to arbitrate.

C. Enforceability of Arbitration Agreements

Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010): The employee had signed an arbitration agreement that provided for arbitration of disputes arising out of his employment, including discrimination claims. The agreement also provided that the arbitrator, and not a court, had exclusive authority to resolve any dispute relating to the enforceability of the arbitration agreement. The employee argued that the arbitration agreement was unconscionable under state law. The court of appeals found that the threshold question of unconscionability was a matter for the court rather than the arbitrator. The Supreme Court held that the agreement's delegation of authority to the arbitrator to decide whether the agreement was valid was severable from the rest of the agreement, such that a challenge to the validity of the delegation provision itself was required before a court could intervene. The employee's unconscionability arguments challenged the validity of the arbitration agreement as a whole and did not challenge the delegation provision in particular. Therefore, the delegation provision had to be treated as valid and any challenge to the validity of the agreement as a whole had to be left for the arbitrator.

D. Stay Pending Arbitration

C.B. Fleet Co. v. Aspen Ins. UK Ltd., 743 F. Supp. 2d 575 (W.D. Va. 2010): In this insurance action, the matter before the court was the defendants' motion to stay proceedings pending arbitration. The principal disagreement between the parties concerned the interpretation of defendants' Insurance Binder. Defendants argued that the Insurance Binder was subject to a written arbitration agreement expressly incorporated therein, because the Binder provided it would "follow form" to the Swiss Re policy wording, which included its arbitration clause requiring the arbitration of "any dispute, controversy or claim arising out of or relating to this insurance agreement or the breach, termination or invalidity thereof." Plaintiff contended that not only was there no express reference to arbitration in the Insurance Binder, but that no agreement to arbitrate was incorporated by reference. The court found that the parties unambiguously agreed to arbitrate "any dispute, controversy or claim arising out of or relating to" the Insurance Binder. The court also found that plaintiff had not met its "heavy burden" of showing either that defendants' statements, or their conduct in the litigation, amounted to either explicit or implicit waiver of its right to arbitration. The defendants' motion to stay proceedings pending arbitration was granted.

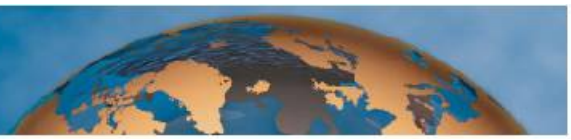
E. Vacating an Arbitration Award

Cotton Creek Circles, LLC v. San Luis Valley Water Co., 279 Va. 320, 689 S.E.2d 675 (2010): A dispute arose when an entity affiliated with an LLC arguably violated the LLC's non-compete provision. The dispute was arbitrated pursuant to the operating agreement's broad arbitration clause, with the arbitration panel finding that the non-compete clause was violated. Nevertheless, the panel ruled that the entity could retain the option on the land that violated the non-compete clause. The other members of the LLC sought to vacate the arbitration award, arguing that the panel exceeded its power under the Federal Arbitration Act in allowing the entity to retain the option. The trial court refused to vacate the award. The Supreme Court affirmed the lower court decision, noting that arbitrators do not exceed their powers if they misinterpret a statute or make errors of law.

MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849 (4th Cir. 2010): After the instant court's prior decision in a public contract dispute, all concerned parties agreed to arbitration, where appellee city was awarded $14,939,004. The contract concerned expansion and upgrade of a wastewater treatment plant. When construction was substantially delayed, the city terminated the contract. The parties first went to court and then agreed to arbitration. On appeal of the arbitration award, the appellate court held that it was not abuse of discretion to certify the judgment as final under Fed. R. Civ. P. 54(b) even though there were outstanding issues with the project designer, because the relationship between the adjudicated and unadjudicated claims was severed by virtue of the parties' own admissions. The district court did not err in denying the contractor and bonding company's motion to vacate the arbitration awards. The record did not support their contentions that the liability award was obtained through undue means, that the arbitration panel exceeded the scope of its powers to issue the damages award, or that the damages award did not draw its essence from the contract. Finally, the district court did not abuse its discretion in denying the contractor's motion to remand. The damages award was not ambiguous, and the arbitration agreement did not require the arbitration panel to issue a reasoned award.

VII. TRUSTS AND ESTATES

Broyhill v. Bank of America, 2010 U.S. Dist. LEXIS 106766 (E.D. Va. Oct. 6, 2010): plaintiff Marvin T. Broyhill, III's father died, leaving a marital trust for his wife Audrey. Under the terms of the trust, Audrey had the authority to assign the trust assets upon her death. In the absence of an assignment, the trust assets were to be equally divided between Audrey's then-living children, Broyhill and his sister, Deborah. After a legal dispute between Audrey and the original trustee, Bank of America was named trustee.



Broyhill alleges that Bank of America allowed his sister, Deborah, to deplete Audrey's assets. Broyhill argued that some - if not all - of his claims should be governed by the five-year statute of limitations under the Virginia Uniform Trust Code. The court ruled that because all of Broyhill's claims arose before the enactment of the VUTC, he could not avail himself of VUTC's five-year statute of limitations. Instead, the statute of limitations that applied to each of his causes of action was used, barring each cause of action.

Ladysmith Rescue Squad Inc. v. Newlin, Executor, 280 Va. 195, 694 S.E.2d 604 (2010): The testator die unmarried and with no descendants. His will have all his assets to trustees, to hold in a charitable remainder unitrust for the benefit of four named individuals. The will provided that when the four named individuals passed away, the residue of the trust was to be distributed between two charitable beneficiaries. The trustees, two surviving named individuals, and one of the charitable beneficiaries moved the court to authorize the trustees to divide the trust into two equal trusts for each of the charitable beneficiaries. The other charitable beneficiary opposed this. The court concluded that the Uniform Trust Code has not altered the principle that the testator's intent prevails over the desires of the beneficiaries. The beneficiaries were not allowed to defeat the terms of the testator's will merely because they would rather have their money today than wait. The court ruled that the circuit court erred in granting the motions to divide the trust.

Parish v. Parish, 281 Va. 191, 704 S.E.2d 99 (2011): Appellant son of the deceased qualified as his administrator. Appellees, former co-conservators, petitioned the circuit court, to have the son removed as administrator. The son filed a counterclaim to impeach the deceased's will. The court found that the co-conservators proved by clear and convincing evidence that the deceased had testamentary capacity and was not subjected to undue influence. The son appealed. On appeal the son assigned error to the circuit court's ruling that the deceased's adjudications of incompetence did not invoke a presumption that he lacked capacity. The court found that the mere fact that one was under a conservatorship was not an adjudication of insanity and did not create a presumption of incapacity. None of the conservator statutes at issue required a specific factual finding that the deceased was incompetent to such an extent that he could not execute a will. Accordingly, the circuit court correctly ruled that the deceased's adjudications of incompetence due to encephalopathy and the attendant appointments of conservators did not create a presumption of incapacity. The testimony of the paralegal who assisted the deceased in drafting the will that the deceased knew what he was doing when he signed the will, and the testimony of the treating physician that the deceased could understand what property he owned and to whom he was giving it, was sufficient to support the circuit court's ruling that the co-conservators proved the deceased's testamentary capacity. The judgment of the circuit court was affirmed.

W.A.K. v. Wachovia Bank, N.A., 712 F. Supp. 2d 476 (E.D. Va. 2010): A family trust was created and through a series of bank mergers, shares of the trustee bank came to comprise a substantial portion of trust assets. The trust beneficiary filed suit alleging violation of the trustee's fiduciary duties of loyalty and prudence for failure to diversify trust assets. The court ruled in favor of the Wachovia on summary judgment, finding no violation of the trustee's fiduciary duties.