Business Litigation in Virginia: The Year-in-Review: 2008 (and early 2009)

Virginia CLE and Civil Litigation Section of the Virginia Bar Association

Second Advanced Business Litigation Institute

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Presented By:

David N. Anthony*
TROUTMAN SANDERS LLP
1001 Haxall Point
Richmond, Virginia 23219
(804) 697-1200
(804) 697-1339 (fax)
www.troutmansanders.com

* David Anthony is a partner in the Richmond, Virginia office of Troutman Sanders LLP. He regularly handles business litigation disputes in federal and state courts. Mr. Anthony is the immediate past Chair of the Civil Litigation Section of the Virginia Bar Association and serves as the Chair of the Richmond Chapter of the Federal Bar Association.

I. PROCEDURE, EVIDENCE, DISCOVERY AND JURISDICTION

A. Nonsuit

Hicks v. Mellis, 275 Va. 213, 657 S.E.2d 142 (2008). — An order reinstating a medical malpractice action against defendant entered without notice to defendant is voidable not void and thus not subject to collateral attack. The circuit court, pursuant to Virginia Code § 8.01-335(B), discontinued and struck the case from the docket after three years of inactivity and later reinstated the action without notice to defendant. Defendant did not challenge the reinstatement within the required twenty-one days. After plaintiff filed and served her motion for judgment, defendant filed a special plea of the statute of limitations which the circuit court sustained, dismissing the case with prejudice finding that because it had "improvidently allowed reinstatement" since the defendant did not receive notice. The Supreme Court of Virginia found the reinstatement order is voidable not void *ab initio* where the circuit court had jurisdiction and simply committed reversible error in failing to follow the notice provisions of the statute.

Johnston Mem. Hosp. v. Bazemore, 277 Va. 308, 672 S.E.2d 858 (2009). — A wrongful death suit filed by a family member who had not yet qualified as a personal representative of the decedent is a nullity and cannot be nonsuited.

B. Demurrer

Schmidt v. Household Finance Corp., 276 Va. 108, 661 S.E.2d 834 (2008). — The circuit court did not err in sustaining a demurrer to plaintiff's claim for rescission where plaintiff failed to allege sufficient facts to support such a claim.

C. Leave to Amend

1. Rules 16(b) and 15(a) of the Federal Rules of Civil Procedure

Nourison Rug Corp. v. Parvizian, 535 F.3d 295 (4th Cir. 2008). — The Fourth Circuit upheld the district court's denial of a defendant's Motion to Amend its answer to include a defense of release where a scheduling order entered in the case pursuant to Rule 16(b) set a deadline for amending pleadings and defendant's motion came nearly two months after that deadline. The court recognized the tension between Rule 16(b) which requires good cause and the judge's consent to amend a scheduling order and Rule 15(a) which states that leave to amend shall be given freely when justice so requires. Citing the need for effective case management tools that are provided by Rule 16, the Fourth Circuit found that Rule 16(b)'s good cause requirement needed to be met for leave to amend the answer to be granted. Defendant failed to establish good cause and the circuit court found no abuse of discretion in the district court's decision. This decision is one of the first published opinions in which the Fourth Circuit speaks directly to the conflict between Federal Rules 15(a) and 16(b). *See Montgomery v. Anne Arundel County*, 182 F.App'x 156 (4th Cir. 2006).

2. Futility

Cominelli v. Rector & Visitors of Univ. of Va., 589 F. Supp. 2d 706 (W.D. Va. 2008). — The court denied leave to amend plaintiff's claims for tortious interference of business expectancy and denial of due process under the Constitution of Virginia where amendment of such claims would be futile.

D. Evidence

Commonwealth v. Wynn, 277 Va. 92, 671 S.E.2d 137 (2009). — The Supreme Court of Virginia held that otherwise inadmissible hearsay evidence cannot be introduced through direct examination of an expert witness even where the expert relied upon the hearsay in forming an opinion. Virginia Code § 8.01-401.1 "does not authorize the admission in evidence, upon the direct examination of an expert witness, of hearsay matters of opinion upon which the expert relied in reaching his own opinion." *See McMunn v. Tatum*, 237 Va. 558, 560, 379 S.E.2d 908, 909 (1989). Similarly, Virginia Code § 37.2-908(C) which allows an expert to state a "basis for his opinion" does not create a hearsay exception.

Centra Health, Inc., t/a Lynchburg Gen. Hosp. v. Mullins, 277 Va. 59, 670 S.E.2d 708 (2009). — The circuit court did not err in failing to strike the evidence as to plaintiff's personal injury survival claim where defendant continued to dispute the issue of causation in the wrongful death claim and thus the jury was free to discount expert testimony concluding that the defendant's negligence caused plaintiff's decedent's death.

NGM Ins. Co. v. Secured Title & Abstract, Inc., Civil Action No. 3:07cv536, 2008 U.S. Dist. LEXIS 84193 (E.D. Va. Sept. 11, 2008). — The court sustained plaintiff's motion to strike certain portions of defendants' affidavits which contained hearsay statements including defendants' statements that they "had been assured by bank authorities that the problems concerning the drafts issued, which had not been supported by sufficient funds, would be corrected." However, the statements in the affidavits "reciting [defendants'] self-serving protestations of a lack of fraudulent or malevolent intent are relevant and admissible in defense of the claims that include a requested enhancement for punitive damages."

E. Discovery

1. Information for Impeachment Purposes

Capital One Bank (USA) N.A. v. Hess Kennedy Chartered, LLC, Civil Action No. 3:08cv147, 2008 U.S. Dist. LEXIS 76385 (E.D. Va. Sept. 30, 2008). — Discoverable information need not be admissible and may be sought for impeachment purposes. Plaintiff is entitled to tax documents, correspondence, advertisements, and certain documents related to any regulatory action against defendants including bar actions.

2. Objections to Discovery Requests

Capital One Bank (USA) N.A. v. Hess Kennedy Chartered, *LLC*, Civil Action No. 3:08cv147, 2008 U.S. Dist. LEXIS 76385 (E.D. Va. Sept. 30, 2008). — The court limited the time frame of certain of plaintiff's requests for production and emphasized that the scope of requests for production should be limited to the subject matter of the litigation in sustaining defendants' objection to plaintiff's request for "any and all documents, including but no limited to, letters and/or emails, sent to, or received from any other defendant to this litigation, as well as all documents which in any way mention, regard, or relate to any other defendant."

ACMA USA Inc. v. Surefil LLC, Civil Action No. 3:08cv071, 2008 U.S. Dist. LEXIS 51636 (E.D. Va. July 7, 2008). — The Court held that defendant's general objections to plaintiff's discovery requests set forth in six paragraphs at the beginning of the document and "incorporating these objections into the responses below" violate Rules 36 and 37 of the Federal Rules of Civil Procedure, which require that objections be stated specifically.

3. Requests for Admission: Form

ACMA USA Inc. v. Surefil LLC, Civil Action No. 3:08cv071, 2008 U.S. Dist. LEXIS 51636 (E.D. Va. July 7, 2008). — Even though defendant failed to submit timely objections to plaintiff's requests for admission, the court found these requests were not worded such that the responding party could "simply admit or deny any individual request as required by Rule 36(a)(4)" and denied plaintiff's motion to compel on this issue. The court allowed plaintiff to submit proper Requests for Admission within the discovery period.

4. Rule 30(b)(6) of the Federal Rules of Civil Procedure

Spicer v. Universal Forest Prods., Civil Action No. 7:07cv462, 2008 U.S. Dist. LEXIS 77232 (W.D. Va. Oct. 1, 2008). — In this wrongful termination case, plaintiff sought sanctions against defendants for violating discovery rules including failing to meet its obligations to provide a knowledgeable person for a corporate deposition under Fed. R. Civ. P. 30(b) (6). The court struck defendant's defenses related to issues for which defendant failed to provide a knowledgeable witness and awarded attorney's fees to plaintiff.

F. Personal Jurisdiction

Labriola v. Southeast Milk, Inc., Civil Action No. 1:08cv893, 2008 U.S. Dist. LEXIS 84404 (E.D. Va. Oct. 21, 2008). — The court held that no *in personam* jurisdiction existed for plaintiff's claims against a guarantor located in Florida. Plaintiff's claims of personal jurisdiction were based solely on Virginia's long-arm statute — Virginia Code § 8.01-328.1(A)(1). The court disagreed that this was a valid basis for jurisdiction: "No substantial part of the negotiations for formation or performance of the guaranties occurred in Virginia." Defendant's contractual duties were "not an invocation of the benefits and protections of Virginia law" and defendant "did not select Virginia as a site for the [Guaranties' performance]."

W.O. Grubb Steel Erection Inc. v. Rail Trusts Equip., Inc., Case No. CL07-3529 (Rich. Cir. Ct. July 21, 2008). — Default judgment is proper where a foreign corporation conducted business in Virginia and is thus subject to the Virginia long-arm statute, Virginia Code § 8.01-328.1. Even where defendant did not actually receive notice of the claim, plaintiff used the information reasonably available to it to serve defendant and could reasonably expect defendant would receive it.

G. Removal Jurisdiction

Johnson v. Advance America, 549 F.3d 932 (4th Cir. 2008). — The Fourth Circuit ruled that defendant failed to establish minimal diversity under 28 U.S.C. § 1332(d)(2)(A) and thus cannot remove the case to federal court. Plaintiffs and defendant are citizens of South Carolina and "defendant cannot carry its burden of demonstrating that any member of plaintiff's class is a citizen of a state different from Advance America."

Palisades Collections, LLC v. Shorts, 552 F.3d 327, *r'hg denied*, 2009 U.S. App. LEXIS 678 (4th Cir. Jan. 15, 2009). — The Fourth Circuit confirms that the Class Action Fairness Act ("CAFA") does not change the well-established rule that only an original defendant may remove a case from state court to federal court.

Ellenburg v. Spartan Motors Chassis, 519 F.3d 192 (4th Cir. 2008). — The Fourth Circuit had jurisdiction to review the case because the remand order was not based on a lack of subject matter jurisdiction but rather on procedural insufficiencies of the Notice of Removal. Plaintiff did not file a motion raising such procedural insufficiency; therefore, the district court's order was outside the scope of 28 U.S.C. §1447 (c).

Phillips v. BJ's Wholesale Club, Inc., 591 F. Supp. 2d 822 (E.D. Va. 2008). — The court held that the involuntary dismissal of a nondiverse party does not create grounds for removal. Complete diversity did not exist where plaintiff, a citizen of Virginia and one of the defendants who was involuntarily dismissed from the case, was also a citizen of Virginia. The case was remanded to the Circuit Court for the City of Norfolk.

H. Remand

Ellenburg v. Spartan Motors Chassis, 519 F.3d 192 (4th Cir. 2008). — On review of a *sua sponte* remand by the district court to the state court for defendant's failure to make a factual showing of the amount in controversy in its Notice of Removal, the Fourth Circuit found that the district court exceeded its statutory authority to remand case where it remanded a case *sua sponte* based on a procedural defect without a motion from a party. As an additional ground for reversal, the court found that the Notice of Removal was sufficient as a matter of law based on the provisions of 28 U.S.C. 1446(a) which requires "a short plain statement of the facts" and signature pursuant to Rule 11.

I. Venue

Coors Brewing Co. v. Oak Beverage Inc., 549 F. Supp. 2d 764 (E.D. Va. 2008). — In granting defendant's motion to transfer venue, the Alexandria federal court found that the forum selection clause in a beer distributor agreement was unenforceable because it violated the New York Alcoholic Beverage Control law which was also incorporated into the agreement and superseded the forum selection clause. Even if the clause were enforceable, the factors of 28 U.S.C. §1404(a) weighed in favor of transfer since plaintiff's choice of forum is foreign to plaintiff and thus carried little weight, the Eastern District of Virginia has no connection to the case, the witnesses' inconvenience weighs in favor of transfer, and it is in the interests of justice to transfer.

Scott v. Branch Banking & Trust Co., 588 F. Supp. 2d 667 (E.D. Va. 2008). — Weighing the factors of 28 U.S.C. § 1404, the district court granted the motion to transfer venue where the plaintiffs' initial choice of venue was not a home venue, the convenience of the witnesses supports transfer and the Western District houses most of the documentary evidence.

J. Summary Judgment

Brown v. Hoffman, 275 Va. 447, 657 S.E.2d 150 (2008). — The Supreme Court of Virginia ruled that the trial court erred in striking plaintiff's evidence and entering summary judgment where the testimony of defendant and one other witness was at odds with the testimony of two other witnesses. Reasonable minds could differ as to whether an anomalous anatomical situation existed and thus the issue should have been decided by the jury.

K. Res Judicata

Gray Diversified Asset Mgmt., Inc. v. Canellis, Case No. CL 2007-15759 (Fairfax Co. Cir. Ct. Oct. 7, 2008). — The court granted defendant's motion for sanctions where plaintiff's claims were barred by *res judicata* and a reasonable inquiry would have alerted plaintiff to that fact. Counsel for plaintiff signed the complaint in violation of Rule 1:4 which required him to make a reasonable inquiry into plaintiff's claims. Counsel for plaintiff specifically was informed that the claims had been previously litigated to conclusion, did not speak to his client's former counsel or otherwise review documents regarding the claims that would have placed him on notice that the claims were barred and continued to assert the claims were

well-grounded in fact and law after defendant filed a plea in bar asserting *res judicata* and after defendant filed her motion for sanctions. The court imposed a sanction of $26,625.60 on counsel for plaintiff.

L. Preliminary Injunction

Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365 (2008). — Finding the Ninth Circuit preliminary injunction standard of "*possibility*" of harm too lenient, the United States Supreme Court held that plaintiffs seeking preliminary relief must demonstrate that irreparable injury is *likely* in the absence of an injunction. Preliminary injunctions are extraordinary remedies that must be determined by balancing the competing claims of injury and the effect of granting or withholding the relief. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. at 375. Moreover, even if plaintiffs here had demonstrated a likelihood of irreparable harm, the harm is "outweighed by the public interest and the Navy's interest in effective training of its sailors" which the lower courts failed to give sufficient weight. *Id*. at 376.

M. Preemption

1. Securities Litigation Uniform Standards Act (SLUSA)

Wiggenhorn v. AXA Equitable Life Ins. Co. (In re Mut. Funds Inv. Litig.), No. 06-1788, 2009 U.S. App. LEXIS 2062 (4th Cir. Jan. 30, 2009). — A class action cannot be maintained by a private party for alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a security." 15 U.S.C. § 78bb(f)(1)(A). These "market timing" suits are preempted by SLUSA. In four related cases plaintiffs' allegations involved a "misrepresentation or omission" because plaintiffs simply allege that the defendants incorrectly priced investments offered under the annuities and such alleged misrepresentations occurred "in connection with" the sale or purchase of securities. SLUSA applies to claims brought by holders, purchasers, and sellers of securities. These cases are part of multi-district litigation pending in the United States District Court for the District of Maryland. See *In Re: Alger, Columbia, Janus, MFS, One Group, Putnam, Allianz Dresdner*, No. 1:04-md-15863 (D. Md. 2009).

2. Federal Cigarette Labeling and Advertising Act and FTC

Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008). — The United States Supreme Court found that smokers of "light" cigarettes made by defendants could proceed with state claims under the state unfair trade practices act for fraud. The Supreme Court reiterates the principal that "questions of express or implied preemption" begin with "the assumption that the historic police powers of the States [are] not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. at 543 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court stated, that when a preemption clause is susceptible to "more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption.'" *Id*. (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Here, neither the text of the Federal Cigarette Labeling and Advertising Act, nor the previous decisions of the FTC regarding statements of tar and nicotine content preempt defendant's duty not to deceive under the Maine Unfair Trade Practices Act. This decision makes clear that the presumption against federal preemption in cases involving state police powers is alive and well.

3. Pharmaceutical Labeling

Wyeth v. Levine, 129 S. Ct. 1187 (2009). — Plaintiff's claim is not preempted where the Food and Drug Administration (FDA) approved drug label failed to contain an adequate warning about the method for IV-

push administration and the manufacturer had a responsibility to warn the public of the drug's risks. Defendant's argument that it could not change its label without approval from the FDA is rejected where the regulation permits defendant to strengthen its warning and where there is evidence Congress did not intend for the FDA to be the exclusive means for ensuring drug safety and effectiveness. This case reaffirms the holding in *Altria*, *supra*, that there is a presumption against federal preemption in cases involving the historic police power of the states. The case also indicates that the Court is withdrawing from its prior decisions finding implied preemption based on a conflict between state law and the purpose of federal regulations.

N. Appeal

Dillard's Inc. v. Judkins, ___ Va. ___, 661 S.E.2d 487 (2008). — In two identical cases, appellants filed Notices of Interlocutory Appeal to the Supreme Court of Virginia on the circuit court's oral ruling, but *before* entry of its final orders denying appellants motion to compel arbitration. Because a trial court "speaks only through its written orders," the Supreme Court of Virginia ruled that appellants failed to comply with Rule 5:9(a) because "an order is entered when it is signed by the trial judge," and appellants did not file any other notice of appeal *after* entry of the final orders. The appeals were dismissed.

Kleffner v. Grogan, Case No. CL07-3443, VLW 008-8-119 (Richmond Cir. Ct. April 17, 2008). — The Richmond Circuit Court found it had no jurisdiction to hear appeals of sanctions imposed by a general district court against two lawyers because such matters are "ancillary" and are not "final orders or judgments" subject to appeal. A final order is one that "disposes of the whole subject of the case and gives all relief contemplated." *Ragan v. Woodcroft Village Apartments*, 255 Va. 322, 327, 497 S.E.2d 740, 743 (1998). In this case, the court entered a final judgment on the merits of the case separately from the order for sanctions and "disposed of all relief prayed for, including attorney's fees."

O. The Law of the Case Doctrine

SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008). — The law of the case doctrine did not apply to bar SuperValu's challenge to the jury verdict where the parties had not agreed on an improper jury instruction. While jury instructions that contain incorrect statements of law but that are agreed upon by the parties become the law of the case, the jury instructions in this case, read as a whole, make it clear the court properly instructed the jury as to the claims for fraud and constructive fraud.

II. CLAIMS

A. Intentional Infliction of Emotional Distress

SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008). — The circuit court erred in failing to set aside the verdict with respect to the claim of intentional infliction of emotional distress where plaintiff failed to present clear and convincing evidence that "the alleged harmful conduct was directed intentionally toward" Johnson individually. This tort does not encompass the personal consequences of business conduct.

B. Tortious interference with Contract or Business Expectancy

DuretteBradshaw, P.C. v. MRC Consulting, L.C., 277 Va. 140, 670 S.E.2d 709 (2009). — Defendant must act with the intent to interfere with the specific contract to which plaintiff was a party for plaintiff to have a claim for tortious interference with contract rights. Defendant disclosed confidential information to another party with the intent of having that party cancel its contract with yet another party, not the plaintiff. Plaintiff

is not entitled to damages for lost profits as a result of defendant's interference with a contract to which it is not a party. Plaintiff must allege defendant intended to interfere with or induce or cause a breach of *its* contract, not a contract between two other entities that ultimately resulted in the termination, breach or business expectancy of plaintiff's agreement with one of those parties.

Crump v. Mack, Civil Action No. 6:08cv00017, 2008 U.S. Dist. LEXIS 86194 (W.D. Va. Oct. 22, 2008). — The court dismissed plaintiff's claim against individual defendants for tortious interference with contract and business expectancy because he failed to allege the existence of a contract which is necessary for both claims. An individual cannot interfere with his own contract or business expectancy, the act must be committed by an intervening party. Here, plaintiff failed to allege that any of the individual defendants acted outside of their scope of employment with respect to such claims. Agents of the defendant LLC are incapable of interfering with any business expectancy or contract.

Cominelli v. Rector & Visitors of Univ. of Va., 589 F. Supp. 2d 706 (W.D. Va. 2008). — The court dismissed plaintiff's claim for tortious interference with business expectancy where he failed to allege facts that defendant intentionally interfered with his contract expectancy or otherwise used "improper means."

Woody v. Carter, Case No. CL08-3192, 2008 Va. Cir. LEXIS 154 (Montgomery Co. Oct. 13, 2008). — Plaintiff alleged that defendant used a blog as a conduit for false and misleading complaints. The court sustained defendants' demurrer to plaintiff's claim for tortious interference with contract where plaintiff failed to state any existence of an economic relationship or expectation, whether defendants knew of any such relationship, the existence of a reasonable certainty that in the absence of intentional misconduct by defendants the complainant would have continued the relationship and a competitive relationship between the parties.

C. Liability of Agents of an LLC

Crump v. Mack, Civil Action No. 6:08cv00017, 2008 U.S. Dist. LEXIS 86194 (W.D. Va Oct 22, 2008). — The court dismissed plaintiff's claims for quasi contract and unjust enrichment where plaintiff only alleged existence of an agreement with and an expectation to be compensated by defendant LLC and not the individual defendants outside of their roles as agents of the LLC. Virginia Code § 13.1-1019 shielded the individual defendants that were agents of defendant LLC from personal liability for company obligations.

D. Defamation

Cominelli v. Rector & Visitors of Univ. of Va., 589 F. Supp. 2d 706 (W.D. Va. 2008). — The statute of limitations barred plaintiff's defamation claim. In Virginia, an action for defamation must be brought within one year after the cause of action accrues. The alleged defamatory acts occurred on June 11, 2007, and plaintiff filed his claim on August 29, 2008. A tolling agreement entered on June 15, 2008 specifically stated that it tolled any claims that were "not barred thereby as the date" of the agreement and thus did not toll the statute of limitations as to the defamation claim. Additionally, the facts do not state a claim for defamation because they do not support a conclusion that defendant's statements were false.

Hyland v. Raytheon Technical Servs. Co., 277 Va. 40, 670 S.E.2d 746 (2009). — The Supreme Court of Virginia held the circuit court erred in granting defendants summary judgment based on isolated factual segments of allegedly defamatory statements where the law is clear that allegedly defamatory statements must be considered as a whole, including implications, inferences, or insinuations that may reasonably be drawn from the statements. Whether an allegedly defamatory statement is false is a decision for the jury unless plaintiff admits the truth of the statement. Here, plaintiff did not admit the truth of the statements and did not concede the statements and is therefore entitled to a jury trial on the statements.

Woody v. Carter, Case No. CL08-3192, 2008 Va. Cir. LEXIS 154 (Montgomery Co. Oct. 13, 2008). — Plaintiff alleged that defendant used a blog as a conduit for false and misleading complaints. The court sustained defendants' demurrer to plaintiff's claim for use and publication of libelous and insulting words where the words were not "fighting words" but are merely conclusory allegations.

Donner v. Rubin, Case No. CL08-1410 (Chesapeake Cir. Ct. Dec. 2, 2008). — The court overruled defendant's demurrer to a defamation claim where statements made in defendant's letter to plaintiff, an attorney, imputed conduct tending to injure and prejudice plaintiff in his profession including statements that alleged plaintiff made such statements knowing they were false. However, the court sustained defendant's demurrer to plaintiff's claim for insulting words in violation of Virginia Code § 8.01-45 without leave to amend as the alleged statements did not, in their usual construction tend to violence and breach of the peace and no amendment would cure this deficiency.

E. Immunity

Donner v. Rubin, Case No. CL08-1410 (Chesapeake Cir. Ct. Dec. 2, 2008). — Defendant is not entitled to immunity for his defamatory statements because the immunity does not extend to communications that occur before the litigation begins or after the litigation ends; it applies only to communications during the litigation. Here the final order had been entered in the underlying litigation and no appeal was filed.

F. Civil Conspiracy

Woody v. Carter, Case No. CL08-3192, 2008 Va. Cir. LEXIS 154 (Montgomery Co. Oct. 13, 2008). — Plaintiff alleged that defendant used a blog as a conduit for false and misleading complaints. The court sustained defendants' demurrers to plaintiff's claims for conspiracy to harm complainant's business where plaintiff failed to allege specifically what harm the complainant suffered to his reputation.

G. Breach of Fiduciary Duty

NGM Ins. Co. v. Secured Title & Abstract, Inc., Civil Action No. 3:07cv536, 2008 U. S. Dist. LEXIS 78204 (E.D. Va. Sept. 11, 2008). — On motion for summary judgment, the court sustained plaintiff's claim for breach of fiduciary duty where defendants failed to disburse the proceeds to a sale of property to plaintiff after closing. Defendants asserted that their bank did not have the proper funds for disbursement. Virginia law required defendants to segregate and maintain the funds and pay to plaintiff. Defendants' acknowledged failure to do so sustains the claim.

In re: Estate of William H. Spears, Sr., Case No. FI-2002-68679, 2008 Va. Cir. LEXIS 149 (Fairfax Co. Nov. 3, 2008). — An executor or administrator who continues a decedent's business without the appropriate authority becomes personally liable for all debts of the business and losses incurred. Affirming all of the findings of the commissioner of accounts, the circuit court found widow's failure to account for post-death profits and rents of property she owned with decedent as tenants in the entirety was a breach of fiduciary duty. The widow engaged in self-dealing and had to restore $49,078 to the estate.

H. Breach of Contract

Cominelli v. Rector & Visitors of Univ. of Va., 589 F. Supp. 2d. 706 (W.D. Va. 2008). — The court dismissed plaintiff's breach of contract and wrongful termination claims where plaintiff did not, as required by statute, present his pecuniary claims to the President of the University of Virginia and have those claims rejected before filing his complaint in circuit court. *See* Va. Code Ann. § 2.2-814.

I. Fraud

Schmidt v. Household Finance Corp., 276 Va. 108, 661 S.E.2d 834 (2008). — The Supreme Court held the circuit court did not err in sustaining a plea in bar of the statutes of limitations for claims for actual and constructive fraud where plaintiff failed to allege facts to support a finding that he could not have discovered the alleged fraud within the applicable limitations period.

NGM Ins. Co. v. Secured Title & Abstract, Inc., Civil Action No. 3:07cv536, 2008 U.S. Dist. LEXIS 78204 (E.D. Va. Sept. 11, 2008). — The district court dismissed plaintiff's claim for fraud as the claim was an "alternative to the breach of fiduciary claim where the same relief was sought and any award on both claims would constitute impermissible double recovery."

SuperValu, Inc. v. Johnson, 276 Va. 356, 666 S.E.2d 335 (2008). — The evidence is insufficient to support the jury verdict as to constructive fraud where such claim is based solely on promises of future assistance and "under no circumstances . . . will a promise on future action support a claim for constructive fraud." The circuit court erred in not setting aside the jury verdict as to this claim. Id. at 368, 666 S.E.2d at 343 (citing *Richmond Metro Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 560, 507 S.E.2d 344, 348 (1998)).

J. Fraudulent Joinder

McGeorge Camping Ctr., Inc. v. Affinity Group, Inc., Civil Action No. 3:08cv38, 2008 U.S. Dist. LEXIS 18611 (E.D. Va. March 11, 2008). — The court rejected defendant's claim that complete diversity is not necessary and removal is appropriate under the doctrine of fraudulent joinder. A court may find that a nondiverse defendant was fraudulently joined if the removing party shows "there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts." The court could not find that there was no possibility plaintiff could sustain a civil conspiracy claim against the supposedly fraudulent joined defendant.

K. Attorney-Client Privilege

Flexible Benefits Counsel v. Feldman, Civil Action No. 1:08cv371, 2008 U.S. Dist. LEXIS 93039 (E.D. Va. Nov. 13, 2008). — The district court denied the defendants' fourth objection to a magistrate judge's compelling defendants to disclose communications defendants assert were protected by the attorney-client privilege. The court held that the magistrate judge's decision was not "clearly erroneous" and the communications at issue were not covered by the privilege. No attorney-client privilege existed as to the documents because defendants were communicating as business associates, not as attorney and client, on the topic. Alternatively, the communications reflect defendants' efforts to commit a fraud. The crime-fraud exception to attorney-client privilege excludes communications where the client seeks advice of counsel to further or to commit a crime or fraud. The Fourth Circuit also applies this exception to tortious conduct.

III. UNIFORM COMMERCIAL CODE

A. Payment in Full

Helton v. Phillip A. Glick Plumbing Inc., 277 Va. 352, 672 S.E.2d 842 (2009). — Plaintiff's payment by instrument contained a conspicuous statement that it was *intended as full payment*. The Supreme Court of Virginia adopted the majority view that the UCC does not change the common law, which does not

allow acceptance with alteration of an instrument tendered in good faith as a full payment of the disputed debt.

B. Statute of Frauds

Delta Star, Inc. v. Michael's Carpet World, 276 Va. 524, 666 S.E.2d 331 (2008). — The Supreme Court of Virginia reversed the decision of the trial court holding the lower court erred in failing to apply the Uniform Commercial Code Statute of Frauds, Virginia Code § 8.2-201, to an oral contract for the sale of goods where such goods were not specifically manufactured, there is no confirmatory writing, the parties course of dealing does not establish the existence of a contract, partial performance does not apply, and the party sought to be charged with the contract does not admit to its existence.

IV. WRONGFUL DEATH SETTLEMENTS

Perrault, Am'x v. The Free Lance-Star, 276 Va. 375, 666 S.E.2d 352 (2008). — Virginia Code § 8.01-581.22 allows parties to agree to confidential terms of a mediation or settlement, but this statute does not trump the specific requirement that wrongful death settlements be approved by the court and that the petitions for approval of such settlements "state the compromise, its terms, and the reason therefor." Thus, court orders approving wrongful death settlements required under Virginia Code § 8.01-55 should not be sealed and are part of the court records that may be inspected by public under Virginia Code § 17.1-208.

V. EX PARTE COMMUNICATIONS

Bryant v. Yorktowne Cabinetry, Inc., 548 F. Supp. 2d 239 (W.D. Va. 2008). — Denying defendant's motion to prohibit further *ex parte* contacts between plaintiff and defendant's former employees and to remedy those that have occurred. The Court found the contacts were not prohibited where the former employee was not represented by counsel, the communication did not extend to privileged matters, and the attorney did not intend to impute liability to the defendant for anything said or done by the employee. The court set forth the following guidelines for conducting *ex parte* communications with other former employees of defendant: (1) counsel shall immediately identify himself as the attorney representing the plaintiff in the instant suit and specify the purpose of the contact; (2) counsel shall ascertain whether the former employee is associated with defendant or represented by counsel and if so, such contact must immediately terminate; (3) counsel shall advise the former employee that (a) participation in the interview is not mandatory and that (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for defendant. Counsel must terminate the interview if the individual does not want to participate; (4) counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate materials and counsel shall not attempt to solicit such information and shall terminate the conversation if it appears the interviewee may reveal such information; and (5) counsel must create a list of all former employees contacted, the dates of such contacts and shall maintain all statements or notes related thereto which may be the subject of *in camera* review.

VI. RECOVERY OF ATTORNEYS' FEES

A. Based on Contract

Corinthian Mortgage Corp. v. ChoicePoint Precision Mkt'g., LLC, Civil Action No. 1:07cv832, 2009 U.S. Dist. LEXIS 723 (E.D. Va. Jan. 5, 2009). — Defendant prevailed on a Motion for Summary Judgment and sought attorneys' fees pursuant to the underlying agreement between the parties which specifically stated if litigation arose from the agreement, the prevailing party "shall be entitled to an award of its reasonable

attorneys' fees and costs." Using the twelve factors in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court reduced the rates charged by defendant by ten percent (10%) "to achieve an overall reasonable collection of hourly rates for this litigation," found that apportionment of the fee requests by claim was unnecessary where plaintiff's claims were "sufficiently intertwined and related to a common set of facts," and reduced the total fees based on document production and review, and limited recovery for fees associated with certain motions and defenses, limited recovery of the costs for production of documents. The court awarded attorneys' fees and costs totaling almost $800,000.

B. Future Attorneys' Fees

Akula v. Airbee Wireless, Inc., Civil No. 1:08cv421, 2009 U.S. Dist. LEXIS 3222 (E.D. Va. Jan. 14, 2009). — A court may deny future attorney's fees where it finds the necessity and amount of such fees sought is speculative. Plaintiff may seek and award of future fees once incurred.

C. As a Sanction

Tax Accounting & Payroll Servs., Inc. v. Loans & Mortgages LLC, Case No. 2006-16046 (Fairfax Co. Cir. Ct. May 26, 2008). — A judge awarded over $78,000 in attorneys' fees against defendant and its attorneys in finding that the "tenor of the counterclaim and the way it occurred and the scope of it and multiple counts, most of which were dropped, was imposed for intimidation in this case." The court held that these tactics were improper and unnecessarily increased the cost of litigation for the other party in violation of Virginia Code § 8.01-271.1. Fees were recoverable here both under the contract and as a sanction.

Phillips v. BJ's Wholesale Club, Inc., 591 F. Supp. 2d 822 (E.D. Va. Dec. 15, 2008). — In a case involving involuntary dismissal of a nondiverse party there was no evidence that defendant acted in bad faith by removing the case from state to federal court. Involuntary dismissal does not create grounds for removal. Complete diversity did not exist where plaintiff, a citizen of Virginia, and one of the defendants who was involuntarily dismissed was also a citizen of Virginia. The court denied attorney's fees.
Wu v. Tseng, Civil Action No. 2:06cv580, 2008 U.S. Dist. LEXIS 73688 (E.D. Va. Sept. 22, 2008). — Plaintiffs attempted to satisfy an $11 million judgment against Stanley Tseng in a Florida state court. Finding that defendants had acted in bad faith in failing to comply with certain discovery requests and a court order to comply with such requests, the court imposed sanctions on defendants under Fed. R. Civ. P. 37 and E.D. Va. Local Rule 37(D). Plaintiffs demonstrated defendants were acting in bad faith, that their conduct prejudiced defendants, there is a need to deter defendants behavior (unwillingness to comply with the most basic types of discovery request), and that less drastic sanctions were not appropriate based on defendants' prior conduct including blatant violation of a discovery order. The court awarded plaintiffs' attorney's fees in the amount of $11,650.

D. In Excess of the Verdict

Nedelka v. Kia Motors of Am., Case No. CL07-3598 (Norfolk Cir. Ct. Feb. 10, 2009). — In a lemon law case, the court found that "fees charged by competent litigators often exceed the value of an automobile. If the attorney's fees awarded in such cases were limited to a proportion of the verdict, few plaintiffs could afford to seek vindication" under the statute.

E. Under Federal Rule 30(b)(6)

Spicer v. Universal Forest Prod., Civil Action No. 7:07cv464, 2008 U.S. Dist. LEXIS 77232 (W.D. Va. Oct. 1, 2008). — Finding the defendant failed to provide a knowledgeable witness under the requirements of Fed. Rule Civ. P. 30 (b)(6), the court ordered defendant Universal to pay plaintiff's attorneys' costs and

fees associated with the preparation and filing of the Rule 30(b)(6) Notice, and Amended Notice, any motions filed concerning the scope of these notices, travel to the Rule 30(b)(6) deposition, and filing preparation and argument on the motion for sanctions. A corporation must make a good-faith effort to designate people with knowledge of the matter sought and must adequately prepare its representatives for deposition.

F. New Supreme Court Rule 3:25: Claims for Attorney's Fees.

Rule 3:25 of the Rules of the Supreme Court of Virginia requires parties seeking recovery of attorney's fees, *except* for fees sought under Virginia Code § 8.01-271.1 and those sought in domestic relations cases, to plead the claim for fees and provide a legal basis for the claim in the compliant, counterclaim, cross-claim, third party pleading or responsive pleading. Failure to demand the fees in accordance with the new rule constitutes waiver unless the court grants the party leave to amend. The rule also allows the court to address the procedure for litigating the attorney's fee claim before trial either upon the motion of a party or its own motion. Rule 3:25 is effective May 1, 2009.

VII. RECUSAL: JUDICIAL BIAS AND DUE PROCESS

Caperton v. A.T. Massey Coal Co., Inc., No. 8-22 (U.S. 2009). — The United States Supreme Court heard oral arguments on March 2, 2009 in this case that deals with the standard for judicial bias. The core issues is whether judges should be forced to recuse themselves from cases if there is even the appearance or possibility of bias. The decision is pending.

VIII. ARBITRATION

Qorvis Communications, LLC v. Wilson, 549 F.3d 303 (4th Cir. 2008). — Plaintiff cannot overturn enforcement of an arbitration award by arguing that his employment agreement did not specifically call for judicial enforcement under 9 U.S.C. § 9 of the Federal Arbitration Act. The language of the employment agreement, conduct of the parties, and plaintiff's pursuit of the court ordered arbitration show that the parties agreed to enforcement of and entry of a judgment on the arbitration award. The agreement authorizes the district court to enter judgment on the arbitration award.

Seguin v. Northrop Grumman, 277 Va. 244, 672 S.E.2d 877 (2009). — The Supreme Court of Virginia ruled that an order to compel arbitration cannot be appealed under the Virginia Uniform Arbitration Act. The trial judge ordered arbitration, and the employee appealed, citing a 2002 case that held the Supreme Court had "jurisdiction to review a circuit court's order that denies or compels arbitration." The court ruled, however, that the case involved a denial of arbitration so that the "or compels" language was dictum that could not overcome the clear language of the statute that provides for an appeal from the denial or an application to compel arbitration but not from an order compelling it.

Arthur Andersen, LLP v. Carlisle, No. 08-146 (U.S. 2009). — This case is pending in the U.S. Supreme Court. The issues are whether a litigant who is not a party to an arbitration agreement entered under the Federal Arbitration Act can enforce the agreement and whether that party can appeal a federal court decision refusing to stay litigation pending arbitration.