Business Litigation in Virginia: The Year-in-Review: 2007 (and Early 2008)

Virginia CLE and Civil Litigation Section of the Virginia Bar Association

First Advanced Business Litigation Institute

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Presented By:

David N. Anthony*
Stephen C. Piepgrass*
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.

* Stephen Piepgrass is an associate in the Richmond, Virginia office of Troutman Sanders LLP. Mr. Piepgrass' practice focuses on corporate litigation and state and federal regulatory compliance issues.

I. PROCEDURE, EVIDENCE, DISCOVERY AND JURISDICTION

A. Demurrer

Almy v. Grisham, 273 Va. 68, 639 S.E.2d 182 (2007) — It is error for a trial court to consider the "factual merit" of a party's factual contentions at the demurrer stage. It is also error for the trial court to consider a deposition transcript from a prior nonsuited proceeding involving the same claims and the same parties. This is distinguished from a situation in which a trial court properly takes judicial notice at the demurrer stage of a prior proceeding that gave rise to pending litigation. *See Fleming v. Anderson*, 187 Va. 788, 48 S.E.2d 269 (1948).

B. Affirmative Defenses

Ford Motor Company v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007) — Boilerplate affirmative defenses should not be raised unless they are well-grounded in fact formed after reasonable inquiry. Parties who discover facts during discovery may move the trial court for leave to amend so as to raise the affirmative defenses. Raising affirmative defenses on the hope that evidence will later be discovered to support them is improper and causes the harm that the sanctions statute, Va. Code § 8.01-271.1, was intended to prevent.

C. Evidence

Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007) — Before resigning to open a competing business, an employee drafted a "confidential" memorandum on his employer's computer. The employee drafted the memorandum to share information with his lawyer and to obtain legal advice. An employee handbook provided that no expectation of privacy existed with respect to information on company computers. The trial court permitted the employer to introduce the memorandum into evidence at a subsequent trial. The Supreme Court held that the trial court did not err because the privilege had been waived. "[T]he attorney-client privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said."

Banks v. Mario Industries, Inc., 274 Va. 438, 650 S.E.2d 687 (2007) — The admissibility and the sufficiency of evidence are two different things. A party must object to the admissibility of evidence (in this case, expert testimony) at the time it is proffered. A party tests the sufficiency of evidence upon a motion to strike at the close of a plaintiff's case or at the close of all the evidence.

D. Experts

John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007) — Trial court did not err in excluding expert opinions that were not disclosed in accordance with Rule 4:1(b)(4)(A)(i). One expert proposed to testify as to the level of asbestos in the ambient air, however, neither this subject matter nor the substance of this opinion was disclosed in the expert disclosure. Another expert planned to testify as to a topic that was disclosed, but to an opinion that was not disclosed. Both opinions were properly excluded by the trial judge. "[A] party is not relieved from its disclosure obligations under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert. Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony." Furthermore, "an opponent's ability to depose an expert or familiarity with such expert through prior litigation does not relieve a party from complying with the disclosure requirements of Rule 4:1(b)(4)(A)(i)."

E. Appeal

Nusbaum v. Berlin, 273 Va. 385, 641 S.E.2d 494 (2007) — Even though an attorney made the trial court aware of Due Process objections and noted the objections in the final order before the trial court entered the order, that was not enough to preserve the objections for appeal under Rule 5:25. The Supreme Court of Virginia held that the attorney was also required to ask the trial court to rule on the objections or to reconsider its rulings. Interestingly, Va. Code § 8.01-384 provides that, "[A]rguments made at trial via…recital of objections in a final order…shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." It also provides that, "[n]o party, after having made an objection…known to the court" shall be required to move for reconsideration of a ruling in order to preserve the objection.

F. Nonsuit

Board of Zoning Appeals of Fairfax County v. Board of Supervisors of Fairfax County, No. 070318, 2008 Va. LEXIS 31, 657 S.E.2d 147 (Feb. 29, 2008) — A nonsuit cannot be taken pursuant to Va. Code § 8.01-380(B), in an appeal of a Board of Zoning Appeals decision pursuant to Va. Code § 15.2-2314 because such a proceeding is "in the nature of an appeal, not a trial proceeding," and Va. Code § 8.01-380 "applies to trial, not appellate, proceedings."

G. Personal Jurisdiction

Roanoke Cement Co., LLC v. Chesapeake Prods., No. 2:07cv97, 2007 U.S. Dist. LEXIS 50935 (E.D. Va. July 13, 2007) — E-mailing and corresponding with plaintiff in Virginia to personally negotiate contract was sufficient to establish minimum contacts for corporate officers, individually, when they ignored the existence of their corporation as a corporate entity and their duties as corporate officers. Also, single wire transfer from a company in Virginia to a company out of state was sufficient to establish minimum contacts for fraudulent conveyance (a tort) claim. Also, a wire transfer originating in Virginia takes place in Virginia for purposes of jurisdictional analysis.

H. Venue

Garland v. Shoosmith Bros., Inc., 73 Va. Cir. 515 (City of Hopewell 2007) — Venue was not permissible in Hopewell when total revenue from business in Hopewell amounted to less than 1% of total revenue for the year. This was insufficient for purposes of Va. Code § 8.01-262(3), which provides that a forum is permissible "wherein the defendant regularly conducts business activity."

I. Choice of Law

Settlement Funding, LLC v. Von Neumann-Lillie, 274 Va. 76, 645 S.E.2d 436 (2007) — A loan agreement contained a choice of law provision stating that all disputes would be determined in accordance with the law of Utah. Utah has no usery law. The trial court refused to apply Utah law, however, finding that counsel for the lender failed to prove Utah law at trial. The Supreme Court of Virginia reversed, holding that Utah law (including the lack of any usery law) applied and that, "[i]f a contract specifies that the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should be applied." Contrary to the trial court's ruling, the lender provided sufficient information to the trial court as to the substance of Utah law.

J. Colorado River Abstention

AME Financial Corp. v. Kiritsis, No. 3:07cv95 (E.D. Va. Sept. 5, 2007), (Payne, J.) — Rather than file a counterclaim in a lawsuit filed in state court, plaintiff chose to file a new diversity lawsuit against defendant in federal court. Defendant in federal court action (and state court plaintiff) moved for a stay of the federal action, citing *Colorado River* abstention. Although the suits arose out of the same set of facts, there were some different parties, different issues, different claims and different remedies sought in each suit. Despite some overlap, *Colorado River* abstention does not apply, and the federal court lawsuit can proceed simultaneously with the state court action.

K. Rule 12(b)(6) motion

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) - In *Twombly*, the Court stated that a motion under Federal Rule of Civil Procedure 12(b)(6) should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Twombly* has been interpreted as creating a heightened federal pleading requirement. *See Schlegel v. Bank of Am., N.A.*, 505 F. Supp. 2d 321, 324 n.3 (W.D. Va. 2007) stating:

> The Supreme Court recently held . . . that *Conley* "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). Indeed, in *Twombly*, the Supreme Court explicitly abrogated the 'no set of facts' language from Rule 12(b)(6) jurisprudence. *See id.* ("Conley's 'no set of facts' language has been questioned, criticized, and explained away long enough"; "after puzzling the profession for 50 years, this famous observation has earned its retirement.").

L. Civil Conspiracy

Almy v. Grisham, 273 Va. 68, 639 S.E.2d 182 (2007) — Virginia does not recognize a cause of action for conspiracy to intentionally inflict emotional distress.

M. Breach of Fiduciary Duty

Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007) — A manufacturer stated a breach of fiduciary duty claim against a former employee and two former sales representatives who served as the manufacturer's exclusive representatives in certain territories. The sales representatives were not employees of the manufacturer, but one of them admitted "that she owed [the manufacturer] a duty of loyalty" and her job was to faithfully represent the manufacturer's interests in her territory. The defendants worked to open a competing business while working for the manufacturer. The Supreme Court of Virginia concluded that the trial court properly denied a motion to strike the breach of fiduciary duty claim. The employee was clearly an agent. A jury could reasonably have found that the sales representatives were the manufacturer's agents. Agents owe fiduciary duties to their principals.

N. Fraud

Western Capital Partners, LLC v. Allegiance Title & Escrow, Inc., 520 F. Supp. 2d 777 (E.D. Va. 2007) — Escrow agreement was not obtained by actual or constructive fraud where there were no facts imposing a duty on the lender to disclose the terms of an accommodation letter to the seller, particularly as this was an arms-length business transaction between sophisticated parties. There also were no facts showing that the lender concealed the accommodation letter. The court also found that, even without the lender's

signature, which was not obtained until after closing, the escrow agreement was enforceable against the seller.

O. Contract vs. Tort

Augusta Mutual Insurance Company v. Mason, 274 Va. 199, 645 S.E.2d 290 (2007) — The Supreme Court of Virginia's latest effort to manage the dividing line between contract and tort law. An insurance agent sold an Augusta Mutual homeowner's insurance policy to a home owner. When completing the application for the policy, the agent allegedly fraudulently misrepresented that the home had a masonry flue lined with tile. Six years later, when a fire destroyed the home, Augusta Mutual denied coverage based on the misrepresentation concerning the flue. In the homeowners' coverage suit against Augusta Mutual, Augusta Mutual filed a third-party complaint against the agent on claims of fraud in the inducement and breach of fiduciary duty. Augusta Mutual theorized that it was fraudulently induced by the agent to issue the policy to the homeowners. A demurrer to these claims was sustained. The Supreme Court of Virginia affirmed, holding that any duties running from the agent to Augusta Mutual existed by virtue of the agency contract between the two. Accordingly, Augusta Mutual was limited to a breach of contract claim against the agent. (Of course, any such claim was barred by the statute of limitations, leaving Augusta Mutual with no remedy at all.)

P. Breach of Commercial Lease

Select Management Resources, LLC v. The Runnymede Corporation, 273 Va. 710, 643 S.E.2d 177 (2007) — Commercial lease required prior landlord approval of "alterations or improvements" to the leasehold. Without notifying landlord, tenant unilaterally painted a classic stone building an obnoxious red and yellow color scheme. The Supreme Court affirmed the trial court's ruling that this amounted to a violation of the lease. The Court held that, for a change in a building to constitute an "alteration," it must be "substantial, not trifling. It must be one that alters the nature and character of the building." This was a substantial alteration because a classic stone building was "given the mark of crass commercialism, which can only be erased with the expenditure of a significant sum of money." Compared to the monthly rent, this amount of money was substantial.

Q. Derivative Suits

Little v. Cooke, 274 Va. 697, 652 S.E.2d 129 (2007) — Limited partners who filed a derivative suit against a general partner were not entitled to recover "tax damages" resulting from the general partner's failure to consider a like-kind exchange when selling the partnership's real estate, which resulted in higher tax liability for the limited partners. In a derivative suit, only damages incurred by the partnership as a distinct legal entity are recoverable. Damages to the individual limited partners are not recoverable because "[t]he claim asserted in the suit belongs to the limited partnership, not to the limited partners, and the limited partnership itself must have sustained injury."

Firestone v. Wiley, 485 F. Supp. 2d 694 (E.D. Va. 2008) — Plaintiff could not maintain shareholder derivative claims because she lost her status as a shareholder when she returned an executed appraisal form. Plaintiff also failed to make a demand on the corporation. Under Virginia law, "[w]ithout exception . . . to maintain a derivative action a written demand must be made on the corporation."

R. Liability of Corporate Officers

Buffalo Wings Factory, Inc. v. Mohd, No. 1:07cv612 (JCC), 2007 U.S. Dist. LEXIS 91324 (E.D. Va. Dec. 12, 2007) — Plaintiff alleged former employees had conspired to establish a competing business that copied plaintiff's business, lured away its employees and deliberately misled customers about its

relationship to plaintiff's business. These were sufficient allegations that the former employees had personally committed tortious conduct that Lanham Act claims could be brought against them as individual defendants. Such conduct was also outside the scope of the former employee's employment, so the intra-corporate immunity doctrine did not apply. Plaintiff also stated a claim for breach of fiduciary duty, even though defendants had already been terminated at time of alleged breach because of allegation that that defendants were disclosing to third persons trade secrets given to them only for the principal's use.

Hung-Lin Wu v. Tseng, No. 2:06cv346, 2007 U.S. Dist. LEXIS 5025 (E.D. Va. Jan. 23, 2007) — Debtor sought to use the theories of veil-piercing and alter ego defensively to protect him from the claims of a creditor, just as those theories were traditionally used to allow a creditor to reach a debtor's assets. The court held that the alter ego doctrine could not be used defensively by a debtor to avoid liability and refused to apply the equitable doctrine of alter ego, as this would achieve a result opposing the purpose of the doctrine. "Reverse veil piercing" was not permitted.

In re Rowe Cos., 2007 Bankr. LEXIS 4283 (Bankr. E.D. Va. 2007) — Debtor parent corporation owned 100% of the stock of its subsidiary, but this fact, standing alone, was not sufficient to pierce the corporate veil of the subsidiary. The mere fact the stock in one company is owned by another company does not justify invoking the "mere instrumentality" rule. Something more is needed, such as fraud, illegality, or wrongdoing which produced the injury or complaint, otherwise the corporate entity will stand.

McFarland v. Va. Ret. Servs. of Chesterfield, LLC, 477 F. Supp. 2d 727 (E.D. Va. 2007) — Owners and managers were dismissed as improper defendants to wrongful discharge claim. Complaint failed to allege that owners and managers participated in tort, so they were shielded by Virginia's Limited Liability Company Act from personal liability for actions of LLC.

S. Indemnity

Estes Express Lines, Inc. v. Chopper Express, Inc., 273 Va. 358, 641 S.E.2d 476 (2007) and *W.R. Hall, Inc. v. Hampton Roads Sanitation District*, 273 Va. 350, 641 S.E.2d 472 (2007) — Indemnification provisions worded so as to indemnify a party against his own negligence are valid and are not contrary to Virginia public policy. Parties to arms-length contract negotiations can agree to indemnify themselves even against their own negligence.

T. Creditor's Rights

Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 654 S.E.2d 898 (2008) — Va. Code § 55-59.1(A), governing notice of a foreclosure sale, presupposes that the creditor has an accrued right to accelerate the debt. The creditor issued a written notice of proposed sale in compliance with Code § 55-59.1(A). That statute provides that a notice in compliance with the statute "shall be deemed an effective exercise of any right of acceleration contained in such deed of trust or otherwise possessed by the party secured relative to the indebtedness secured." But the deed of trust contained another notice provision that served as a "condition precedent" to any right of acceleration. The creditor failed to comply with the notice provision in the deed of trust. Accordingly, no right of acceleration ever accrued to the creditor and Code § 55-59.1(A) was "of no benefit" to the creditor.

U. Uniform Commercial Code

Nizan v. Wells Fargo Bank, 274 Va. 481, 650 S.E.2d 497 (2007) — The equitable common law defense of "double recovery" is available to a debtor in a UCC-based claim. Under Va. Code § 8.1A-103, principles of law and equity supplement the provisions of the UCC "[u]nless displaced by the particular provisions of the [UCC]." Because no particular provision of the UCC displaces the defense of double

recovery, it is available in a UCC-based claim. In addition, "the defense of double recovery arises from a claim as to the same damages, not the same basis of liability for the damages." Thus, if a creditor obtains relief from one person for certain damages based on one cause of action and then seeks recovery of the same damages based on another cause of action from a second person, the defense of double recovery applies.

P&J Arcomet v. Perini Corp., No. 1:07cv342, 2007 U.S. Dist. LEXIS 84343 (E.D. Va. Nov. 14, 2007) — The evidence failed to show a meeting of the minds. The defendant did not manifest an intent to be bound by a contract because, had defendant's transmission of a purchase order number actually been an offer, defendant's intent to be bound by a contract was conditioned upon defendant being awarded a separate contract. Moreover, had it been an offer, it was not accepted by plaintiff as the document containing the handwritten purchase order number was not signed by plaintiff, and instead, plaintiff sent a response, which included materially different terms and conditions.

V. Exculpatory Agreements

Kocinec v. Public Storage, Inc., 489 F. Supp. 2d 555 (E.D. Va. 2007) — The plaintiff challenged an exculpatory clause in its contract with a public storage facility. The court held that exculpatory clauses are enforceable in Virginia and are evaluated through a three-part test. "[A] defendant seeking to avoid liability under an exculpatory agreement must show (1) that the agreement does not contravene public policy, (2) that it could be readily understood by a reasonable person in the plaintiff's position, and (3) that it clearly and unequivocally releases the defendant from precisely the type of liability alleged by the plaintiff."

W. Breach of Unwritten Contract

Frank Brunckhorst Co. v. Coastal Atlantic, Inc., No. 2:07cv314, 2008 U.S. Dist. LEXIS 6748 (E.D. Va. Jan. 29, 2008) — For more than 20 years, the sellers sold deli products to the buyers, for resale, but the parties had no written contract. When sellers ceased shipments due to problems with product, they filed suit. Buyers filed counterclaims for breach of contract, fraud and tortious interference. Held: No breach of contract because the contract was terminable at will. Fraud claim failed because the alleged fraudulent representations and concealments related to events that occurred after formation of the distribution agreement. The constructive fraud counterclaim failed because there was no showing that the sellers owed the buyers any duty apart from the oral contract. The tortious interference with contract and tortious interference with business expectancy claims failed since there were no allegations that the sellers employed any illegal or independently tortious means, violated a trade or professional standard, or engaged in unethical conduct.

II. REMEDIES

A. Liquidated Damages

Boots, Inc. v. Singh, 274 Va. 513, 649 S.E.2d 695 (2007) — In a commercial real estate sales contract, a provision stating that a $50,000 (3.3%) deposit was non-refundable was not an unenforceable penalty. To determine if such a clause imposes an unenforceable penalty, the issue is whether the "actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of all proportion to the probable loss." The issue is not whether the amount of the liquidated damages later turns out to put the seller in a better position than he would have been had the purchaser performed the contract. The seller kept the non-refundable deposit and sold the land to another purchaser on terms that produced a net profit that was $39,000 higher than

would have resulted had the original sale closed. A 3.3% deposit is "certainly not disproportionate in comparison."

B. Specific Performance

Hamlet v. Hayes, 273 Va. 437, 641 S.E.2d 115 (2007) — When a shareholder in a closely-held corporation offered to sell his shares to the corporation, thereby triggering rights of first refusal held by other shareholders to purchase his shares, the offeror shareholder could not then rescind the offer. The other shareholders were entitled to specific performance of the offeror's obligation to sell his shares to them. Shares in a closely-held corporation are unique and there is no adequate remedy at law.

C. Punitive Damages

Banks v. Mario Industries of Virginia, Inc., 274 Va. 438, 650 S.E.2d 687 (2007) — A jury's award of punitive damages was supported by sufficient evidence when an employee formed, while employed, a business that would compete with his employer. This created a jury issue as to whether the employee had the requisite malice to injure his employer.

Saunders v. Equifax Information Services, LLC, 469 F. Supp. 2d 343 (E.D. Va. 2007) —Defendant had failed to provide plaintiff with a coupon book and failed to accept payments on vehicle loan, claiming plaintiff had no loan with defendant. After loan was discovered, defendant repossessed the vehicle and reported detrimental information on plaintiff's credit report. Plaintiff was awarded $80,000 in punitive damages and $1,000 in statutory damages. Defendant sought remittitur on the punitive damages. Court looked at reprehensibility of defendant's conduct, considering: (1) whether plaintiff was financially vulnerable, (2) whether the conduct involved repeated actions or was an isolated incident, (3) whether factors mitigated reprehensible conduct of defendant, and (4) whether the punitive damages award was properly based on an award of compensatory, rather than statutory damages. After examining these factors, the court upheld the $80,000 punitive damage award.

III. RECOVERY OF ATTORNEYS' FEES

A. Based on Contract

West Square, L.L.C. v. Communications Technologies, Inc., 274 Va. 425, 649 S.E.2d 698 (2007) — An attorneys' fees provision in a commercial lease entitled the prevailing party in a lease dispute to recover all costs and attorneys' fees. The trial court awarded the prevailing party $35,000 in damages. The prevailing party then sought more than $80,000 in attorneys' fees and costs. Finding this amount "exorbitant" and unreasonable, the trial court awarded only $10,000 in attorneys' fees and zero dollars in costs. On appeal, the Supreme Court of Virginia affirmed the reduction in attorneys' fees, but reversed, in part, the denial of all costs. "A prevailing party who seeks to recover attorneys' fees pursuant to a contractual provision such as the one before us has the burden to present a prima facie case that the requested fees are reasonable and that they were necessary." In reviewing an application for fees,"[a] fact finder may consider, *inter alia*, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." However, these are factors that a fact finder "may consider," and there is no requirement that it "must consider" them. "In the determination of reasonable attorneys' fees, particular factors may have added or lessened significance depending on the circumstances of each case." Compensation may not be awarded for "work performed on unsuccessful claims." Here, the trial court considered these factors and did not abuse its discretion in reducing the fees to $10,000. The trial court should have, however, awarded certain costs that were attributable to the

successful claims, such as the filing fee. Other costs, such as deposition costs, were properly denied because the prevailing party failed to carry its burden of allocating them to the successful claims.

B. Based on Statute

1. Va. Code § 8.01-271.1

Ford Motor Company v. Benitez, 273 Va. 242, 639 S.E.2d 203 (2007) — An attorney signed an answer containing affirmative defenses the attorney knew or should have known, from prior litigation, were not well-grounded in fact after reasonable inquiry. The Supreme Court of Virginia affirmed the trial court's sanction award against the attorney and rejected the attorneys' position that discovery might have turned up support for the defenses. "A pleading that puts the opposing party to the burden of preparing to meet claims and defenses the pleader knows to have no basis in fact is oppressive. It constitutes an abuse of the pleading process and results in the wrong that Code § 8.01-271.1 was enacted to prevent. * * * That wrong is not dispelled by couching the pleading in language that merely threatens the use of the unsupported claim if it should later become available. The opposing party must still shoulder the burden of preparing to meet it."

Williams & Connolly v. PETA, 273 Va. 498, 643 S.E.2d 136 (2007) — Under Va. Code § 8.01-271.1, an attorney makes three certifications when signing a pleading: (1) he has read the pleading, (2) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the pleading is signed in violation of any one of these three enumerated sections, the attorney is subject to sanctions.

2. Va. Code § 13.1-773(c)

Martin v. FNB Corp., No. CL 07-2099 (Montgomery County Oct. 11, 2007) (copy provided) — Plaintiff, a shareholder, had sent a request to the defendant corporation to copy a list of "shareholder names, addresses and number of shares held by each." Corporation made available the records of its existing shareholders, but plaintiff alleged that the list was incomplete because the corporation failed to keep and did not produce a list of "beneficial" owners of stock. After parties reached agreement regarding release of additional information, the plaintiff sought attorney's fees and costs, pursuant to Va. Code § 13.1-773(C), which required that the plaintiff prove "that the corporation refused inspection without a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." Held: The corporation had a good faith basis to believe that the records demanded did not need to be produced. No attorney's fees or costs were awarded.

3. Va. Code § 50-73.65

Little v. Cooke, 274 Va. 697, 652 S.E.2d 129 (2007) — In the context of a derivative suit, attorneys' fees recovered by a successful plaintiff pursuant to Va. Code § 50-73.65 are to be awarded from the "common fund" of damages recovered for the partnership. They are not to be awarded in addition to the damages recovered by the partnership.

C. Based on Misconduct

Nusbaum v. Berlin, 273 Va. 385, 641 S.E.2d 494 (2007) — Pursuant to the "American Rule," a Virginia court may not impose monetary sanctions on an attorney in the form of fee shifting unless the conduct in

question fits within a statute, rule or contract permitting the shifting of attorneys' fees from one party to another. The "inherent power" of the court to regulate the conduct of attorneys does not permit fee shifting in Virginia state courts. *But see Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (holding that a federal district court has "inherent power" to impose sanctions even for misconduct that does not fit within Rule 11 or another fee-shifting rule or statute). It should be noted that, in *Nusbaum*, the Supreme Court of Virginia left open the possibility that monetary fee-shifting sanctions could be imposed on an attorney pursuant to the trial court's civil contempt powers. 273 Va. at 399 n.5; 641 S.E.2d at 501 n.5 (noting that, "the issue whether a trial court can impose a monetary sanction when using its contempt power is not before us").

IV. ARBITRATION

Mission Residential, LLC v. Triple Net Properties, LLC, 275 Va. 157, 654 S.E.2d 888 (2008) — An arbitration clause in a limited liability company's operating agreement required all disputes between the "members" to be submitted to arbitration. One of the two members commenced an arbitration proceeding against the other. One of the claims was a derivative claim on behalf of the limited liability company. The respondent member in the arbitration proceeding filed an action in Virginia circuit court and asked the circuit court to stay the arbitration proceeding. It also asked the arbitrator to defer ruling on the arbitrability of the derivative claim pending a judicial determination of that issue. The arbitrator denied that motion. The circuit court concluded that the arbitrator correctly decided that issue, and denied the motion to stay arbitration. The Supreme Court of Virginia reversed in holding that basic principles of contract interpretation govern the arbitrability of disputes. Here, the parties' operating agreement provided for the arbitration of disputes between the members, but did not provide for the arbitration of a derivative suit between the limited liability company and one of the members.

BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 645 S.E.2d 467 (2007) — An arbitration panel's award of liquidated damages was upheld even though it may have been contrary to Virginia law, which says that a party is not entitled to liquidated damages unless that party suffered actual damages. The Court held that Va. Code § 8.01-581.010 enumerates the exclusive grounds for vacating an arbitration award and provides further that, "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award." Thus, "[i]n determining whether the arbitrators exceeded their authority pursuant to Va. Code § 8.01-581.010(3), the issue we decide is not whether the award was legally correct. We decide only whether the arbitrators had the power to decide the parties' dispute." Because the arbitrators had such power, the award was upheld.

Atl. Textiles v. Avondale, Inc. (*In re Cotton Yarn Antitrust Litig.*), 505 F.3d 274 (4th Cir. 2007) – Party alleging conspiracy sought to avoid arbitration on grounds that terms of arbitration agreement prevented joinder of claims against multiple parties, which would require separate arbitration of claims against alleged co-conspirators. The court held that the arbitration clause must be enforced because plaintiff was not "prevented" from vindicating its statutory rights when it could do so in two separate arbitrations – one against each alleged conspirator.