

RECENT DEVELOPMENTS IN THE LAW: COMMERCIAL LAW
Virginia State Bar 2010 Annual Meeting

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SALES OF GOODS:

1. *In Re: All Pending Chinese Drywall Cases*, 4 Cir. CL093105 (2010)

Judge Mary Jane Hall
Circuit Court of the City Of Norfolk
March 29th, 2010

This is a consolidation of a number of cases against manufacturers and installers of drywall manufactured in China alleging multiple claims under the UCC, negligence and other statutory causes of action. Dozens of these cases have swept the country. The Court made the following rulings:

Negligence

Defendants' demurrer to this count argued that the economic loss rule (the "ELR") bared Plaintiffs from recovering economic damages such as the cost to repair the drywall and repair the damage to their homes.

Defendants relied on *Sensenbrenner v. Rust*, 236 Va. 419, 374 S.E.2d 55 (1988), in which homeowners asserted a negligence claim against an architect and a pool subcontractor with whom they were not in privity, alleging that negligence in the design and construction of their swimming pool caused damage to their home. The Supreme Court of Virginia found that the homeowner could not recover in tort because both the pool and the home were elements of the "package" that was the subject of the parties' contract with their builder. In arriving at this conclusion, the Court reasoned that the plaintiffs alleged nothing more than disappointed economic expectations. The Court discussed the distinction between tort losses and disappointed economic expectations

Judge Hall recited with approval the reasoning of Judge Fallon in the United States District Court for the Eastern District of Louisiana, presiding judge over the Multi-District Litigation involving Chinese Manufactured Drywall (MDL No. 2047, Section L)

Judge Fallon analyzed the ELR under the laws of states that, like Virginia, have followed the precedent of the United States Supreme Court decision in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. at 858. He noted that "from the origin of the ELR in *East River*, through its development in various states, . . . it is clear that the ELR targets products which fail to meet a plaintiff's economic expectations, as distinguished from products which pose

an unreasonable risk of harm to a plaintiff's property and health, but do not fail to meet their intended purpose. For this latter group, the ELR has no relevance.”

The instant matter does not involve a non-operational product like the turbines in *East River*. Rather, the Chinese drywall in the instant matter is operating as intended — as an interior wall and/or ceiling, a room divider, a shell for insulation and wiring, and a base for hanging various items, such as lighting fixtures and decorative items. It is not crumbling, deteriorating, or failing to serve its intended purpose. The allegations involving the Chinese drywall are that it is contaminating the home by giving off noxious fumes, which are corroding certain metal elements located within the property where the drywall is installed, and is causing health problems to the inhabitants of this property. Factually, this contrasts with defective turbines which ceased to run.

Because the Chinese drywall was serving its intended purpose but was also posing an unreasonable risk of harm to property and health, Judge Fallon ruled that the ELR did not apply; and the negligence claims were not barred.

Judge Hall then ruled: “The Court holds that the duty to avoid creating an unsafe condition within Plaintiffs' homes and to avoid injuring Plaintiffs are duties imposed by law and not dependent upon the terms of their contracts with Plaintiffs.” She then quoted Professor Keeton's treatise: “Generally speaking, there is a duty to exercise reasonable care in how one acts to avoid physical harm to persons and tangible things. Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts.”

Negligence Per Se

In ruling that the Plaintiffs' assertion of negligence *per se* based on violations of the building code made out a proper cause of action, the Court cited *Butler v. Frieden*, [208 Va. 352, 353](#), 158 S.E.2d 121, 122 (1967):

A party relying on negligence per se does not need to establish common law negligence provided the proponent produces evidence supporting a determination that the opposing party violated a statute enacted for public safety, that the proponent belongs to the class of persons for whose benefit the statute was enacted and the harm suffered was of the type against which the statute was designed to protect, and that the statutory violation was a proximate cause of the injury.

Breach of Implied Warranty of Merchantability

The Court allowed claims of breach of implied warranty of merchantability against the manufacturers and suppliers of the drywall finding that “[u]nder Va. Code Ann. § [8.2-105\(1\)](#), goods exist if they ‘are movable at the time of identification to the contract of sale.’ In context, the ‘contract of sale’ identifying the goods refers to the sale involving the seller that made the implied warranty — not simply the party with whom the claimant contracted.” But the Court ruled that “they are not available against the Builder/Developer Defendants, presumably because the goods had become fixtures as of the time of sale of the homes.

Breach of Implied Warranty of Fitness for Particular Purpose

The demurrers to these claims were sustained. Official Comment to Section 2-315 of the UCC explains:

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business, whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question

Virginia Consumer Protection Act

In finding that the Virginia Consumer Protection Act did not apply, the Court stated:

A sale between commercial parties of a good intended for use as a component part in the construction of a building is not a “consumer transaction” within the meaning of the VCPA. As discussed earlier, Plaintiffs had no direct contact with any of the Manufacturer/ Supplier Defendants. The transactions in Chinese drywall in which those parties participated involved builders, contractors, and developers and fall outside the VCPA definition of “consumer transaction.”

2. Warranties of merchantability and fitness are unknown at common law.

Scott v. City of Salem, 23 Cir. CL08369 (2010)

Judge Robert P. Doherty, Jr.

Circuit Court for the City of Salem

The plaintiff's suit alleged that the City of Salem purchased and installed defective playground equipment in a public city park on which the plaintiff was injured, claiming breaches of implied warranties of merchantability.

In granting the City's demurrer, to the claims of breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose, the Court stated: “These

warranties arise under the Uniform Commercial Code. . .” Citing *Dornan v. Penn Builders*, 21 Va. Cir. 267 (1990). The Court also observed that “warranties of merchantability and fitness are unknown at common law.”

The general rule requires privity of contract to maintain either a successful *ex contractu* or a negligence *ex delicto* claim arising out of breach of warranty. (Citations omitted). The Uniform Commercial Code abolishes the privity requirement only where the action is “brought against the manufacturer or seller of goods to recover damages for breach of warranty. . . [and] the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.” (Citations omitted). Taking the facts alleged in the pleadings as true, they are insufficient to support the claim. The City of Salem was not a manufacturer or seller of the playground equipment. Thus, privity is required for the claim to stand.

3. The period of limitations for implied warranty is tolled during the pendency of a lawsuit filed in state court.

RCI Contractors & Engineers v. Joe Rainero Tile, 677 F. Supp. 2d 914 (W.D. Va. 2010)

Judge James P. Jones

United States District Court, W.D. Virginia, Abingdon Division

This products liability action arose under Virginia law, the principal issue was whether a claim for breach of implied warranty was barred by the U.C.C.'s four-year statute of limitations. Because the Court found that the period of limitations was tolled during the pendency of a lawsuit filed in state court, it held that the action was not barred.

Under the Uniform Commercial Code, suit must be commenced “within four years after the cause of action accrues.” Code § 8.2-725(1). A breach of warranty claim accrues when goods are delivered, regardless of whether the plaintiff knows of the breach. *Id.* at § 8.2-725(2). RCI first filed suit in Alabama in a timely manner. Prior to the dismissal of the Alabama suit, RCI filed its action in the U.S. District Court in Virginia.

RCI's cause of action thus accrued when the product was delivered, which occurred, at the latest, in March of 2005. The present action was filed on June 30, 2009, more than four years following that date. Nevertheless, RCI contended that the suit was timely, because the statute of limitations was tolled during the pendency of the Alabama suit. Under Virginia law, a period of limitations is tolled during the time an action is pending when that action is dismissed without determining the merits. Code § 8.01-229(E)(1). Accordingly, in this case the statute was tolled. However, the defense argued that RCI's Alabama complaint contained only a breach of express warranty claim and the claim which the defense sought to bar was for a different cause of action — breach of implied warranty. In rejecting this position, the Court held that:

[Defendant's] narrow interpretation of section 8.01-229(E)(1) is contrary to the remedial purpose of the tolling statute, which should be "liberally construed." *Woodson v. Commonwealth Utils., Inc.*, 209 Va. 72, 161 S.E.2d 669, 670 (1968). Under Virginia law, a cause of action is broadly construed as a set of "operative facts which, under the substantive law," gives rise to a right of action. *Roller v. Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323, 326 (1989). RCI's Alabama lawsuit claimed, as in this action, that the EpoxyPro used in the jails caused staining and discoloration, and because of this, RCI suffered damages. While the Alabama complaint did not expressly use the words "implied warranty," the substance of the actions is the same, with the same operative facts and seeking the same relief against the same party. See *Rivers v. Woodfield*, No. 90-21-N, 1990 WL 303324, at *3-4 (E.D. Va. June 7, 1990) (applying 8.01-229(E)(1) where the "essence" of the two actions was the same).

4. You can't assert anticipatory breach if you keep shipping.

Tandberg Inc. v. Advanced Media Design Inc. (VLW 009-3-600)

Applying a 2009 contract case from Virginia's high court, an Alexandria U.S. District Court held that the defendant supplier of videoconferencing equipment did not commit an anticipatory breach of the parties' sales agreement because plaintiff kept shipping equipment in response to defendant's purchase orders.

TRUTH IN LENDING

1. If you want to rescind and get your money back, close first.

Weintraub v. Quicken Loans, Inc., 594 F.3d 270 (4th Cir. 2010)
NIEMEYER, Circuit Judge

15 U.S.C. § 1535 provides in relevant part:

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the

creditor, in accordance with regulations of the Board, of his intention to do so. . .

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise. . .

Prior to closing on a loan to refinance their principal residence, Rita and Barry Weintraub attempted to exercise the right to rescind given by the Truth in Lending Act, 15 U.S.C. § 1635(a), and demanded a refund of their \$500 deposit. The lender, Quicken Loans, Inc., refunded the balance of the deposit after deducting the costs of a credit report and an appraisal but refused to refund the entire \$500.

In finding that the Truth in Lending Act did not apply, the Court held that it applied only where the transaction was completed and then rescinded. Since the loan has not closed when the Weintraub's backed out, they were not entitled to the Act's protection. The Court recited a litany of analogous cases in which it similarly had ruled that completion of a transaction was required before access could be had to statutory remedies. What the Court did not explain was what the substantive difference is between rescinding before and after completion of the transaction. It did say that allowing borrowers to get their money back could encourage frivolous loan applications resulting in lenders having to bear the cost of appraisals and the like, but the Court did not explain how that was not just as possible where the transaction was completed and a frivolous borrower chose for no good reason to back out.

The statute is remedial in nature, which normally means it is to be broadly applied to effect its purpose. Here it seems clear that the purpose is to allow for borrowers remorse and give people an opportunity to get out of a deal when they realize it was improvident to get into it in the first place. The language of the statute refers to "any consumer credit transaction . . . in which a security interest, including any such interest arising by operation of law, is *or will be* retained or acquired. . ." This does not sound like a statute which is limiting its application to only completed transactions. If it was Congresses intent to limit the Act's application to completed transactions, it would have been easy to just say so. I suppose the lesson is, don't wake up to the need to back out until you have gone all the way or, if you do, go ahead and spend more time and more of the lender's money by closing the transaction before you back out – it will save you money in the long run.

SECURITIES

1. The discovery rule explained.

Merck & Co. v. Reynolds, 559 U.S. ____ 08905 (2010)
Justice Breyer

Justice Breyer succinctly summarized the opinion as follows:

This case concerns the timeliness of a complaint filed in a private securities fraud action. The complaint was timely if filed no more than two years after the plaintiffs “discover[ed] the facts constituting the violation.” 28 U.S.C. § 1658(b)(1). Construing this limitations statute for the first time, we hold that a cause of action accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, “the facts constituting the violation” — whichever comes first. We also hold that the “facts constituting the violation” include the fact of scienter, “a mental state embracing intent to deceive, manipulate, or defraud,” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n. 12 (1976).

It is important to note that the Court held discovery of the necessary scienter to be necessary to the beginning of the running of the statute.

2. Insider information from a non-insider is still a no-no.

United States SEC v. Pirate Investor LLC, 580 F.3d 233 (4th Cir. 2009)

An investment newsletter publisher must disgorge profits from an e-mail stock tip “Blast” that misrepresented that the stock tip came from an industry insider; the 4th Circuit rejects the First Amendment claim advanced by amici powerhouse publishers.

BUSINESS ENTITIES

1. Out of state limited partnership.

Valone v. Valone, 4 Cir. CL085249 (2010)

A Norfolk Circuit Court determined that it had no power to dissolve a limited partnership formed out-of-state, even if all connections are with Virginia.

2. Where is the principal place of business?

Hertz v. Friend (Feb. 2010) –

The US Supreme Court ruled that principal place of business is the nerve center, usually its corporate headquarters.

3. Impeding due diligence.

White v. Nicholas Potocska PC (USDC-ED) (VLW 008-3-552)

Defendant buyers of an accounting business, sued on their \$145,000 promissory note, lose on summary judgment their counterclaim alleging fraud based on claims that plaintiff sellers failed to make disclosures and impeded buyers' efforts to perform due diligence on the firm prior to completing the asset purchase agreement, in this case from the Norfolk U.S. District Court.

4. SB 100 Stock Corporation Act; Conforms provisions of the Virginia Stock Corporation Act to revisions to the Model Business Corporation.

Act prepared by the Business Law Section of the American Bar Association, and makes several clarifying revisions. Elements of the measure include (i) expanding provisions governing the electronic transmission of notices and other communications; (ii) providing that notice to a shareholder that is sent by U.S. mail is effective upon deposit in the U.S. Mail; currently, such mailings to shareholders are effective five days after mailing; (iii) authorizing corporate officers to make equity compensation awards; (iv) confirming shareholders' authority to adopt proxy access and proxy expense reimbursement bylaws; (v) permitting a board of directors to establish separate record dates for determining shareholders entitled to notices of, and to vote at, meetings; (vi) allowing shareholders to participate remotely in shareholders meetings; (vii) addressing the authority of a circuit court to resolve disputes relating to a vote by shareholders; (viii) repealing the existing provision that limits the power of the board of directors to alter the board's size to an amount not greater than 30 percent of its existing size; (ix) confirming the authority of a board of directors to require the corporation to provide indemnity, including advancement and reimbursement; (x) authorizing a corporation to obligate itself to provide indemnification, and advance funds to pay for or reimburse expenses, in advance of the act or omission giving rise to a proceeding; (xi) requiring class voting by affected classes with respect to mergers, unless otherwise provided in the articles of incorporation; and (xii) requiring that the articles of merger in a parent-subsidary merger recite the Code section under which the merger is being effected.

INTELLECTUAL PROPERTY

1. Watch for this case about whether a financial process, rather than an actual device, can be patented.

Bilski v. Kappos – US Supreme Court – not yet decided:

A major patent case that involves a dispute over whether a financial process, rather than an actual device, can be patented, this could be one most important decisions of this session. Bilski's application for a patent on a commodities trading risk management tool he created was denied on the grounds that the creation was not a "machine or apparatus"; nor did it produce or transform any current object. Those are the two tests that courts use to determine if something warrants a patent or does not. Bilski argues that while his creation may not produce anything tangible, it still warrants a patent. The Court will decide the controversial question of whether business methods are patentable.

2. Couldn't sue for misappropriation of trade secrets.

State Analysis v. American Financial Services, 621 F. Supp. 2d 309 (E.D. Va. 2009)

StateScape, a website that sells access to its searchable, proprietary database of local, state and federal bills and regulations, cannot sue defendants – including a former client-turned-competitor, a second former client, and a former marketing director hired by the competitor – for misappropriation of a trade secret for use of an allegedly purloined password; but StateScape may sue for copyright violation and breach of contract.

TAXATION

1. HB 523 Income tax, state; exemption for any income taxed as long-term capital gain for federal income tax.

Grants an income tax deduction for any income taxed as a long-term capital gain for federal income tax purposes or any income taxed as investment services partnership interest income, on or after January 1, 2011, that is related to a qualified investment in a technology and science start-up business having a principal office or facility in the Commonwealth and less than \$3 million in annual revenues in the fiscal year prior to the investment. The deduction would relate to investments made between April 1, 2010, and June 30, 2013.

CONSTRUCTION

1. Bid Challenge under the Virginia Public Procurement Act

General Excavation, Inc. v. City of Harrisonburg, 26 Cir. CL10000112 (2010) (Rockingham County)

In a lawsuit filed under the Virginia Public Procurement Act (“VPPA”), the Circuit Court ruled that GEI did not have standing to challenge the City’s failure to award it the bid. Strictly construing the VPPA, the Court determined that because the City had rejected all bids, no plaintiff would have had standing, because the VPPA requires the award of a bid before its relief mechanisms are triggered. This was true even though the Court acknowledged that GEI had alleged that the City had rejected all bids solely to avoid awarding the project to GEI, which would seem to be a violation of Va. Code § 2.2-4319.

2. Accord & Satisfaction

Helton v. Phillip A. Glick Plumbing, Inc., 277 Va. 352, 672 S.E.2d 842 (2009)

A homeowner’s check for partial payment of a plumber’s bill was an accord and satisfaction, even though the plumbing company crossed out the homeowner’s “Paid in Full” notation and added “No” and the balance due prior to depositing the check. The Virginia Supreme Court 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.

3. No Setoff for Non-Miller Act Claims

United States (for the benefit of Acoustical Concepts) v. Travelers Cas. and Sur. Co. of America, 635 F. Supp. 2d 434 (E.D. Va. 2009)

Defendants were sureties under the provision of the Miller Act. Plaintiff Acoustical Concepts did subcontract work on a government project in which Whiting-Turner was the general contractor. Following a dispute in a non-governmental project, Whiting-Turner withheld a portion of the payment on the governmental contracts from Acoustical. Acoustical then sought payment from the Defendants.

Defendants refused payment, arguing that because Whiting-Turner's withholding was proper under the Miller Act, they could not be liable. The Court disagreed, noting that the language in the payment bond relieved them of their obligation only if Whiting-Turner made prompt payment to Acoustical. Because Whiting-Turner had withheld payment, even if appropriate, Defendants were still on the hook as sureties.

4. **HB 789 Public Procurement Act**; increases cost of construction for which state or local public body may use.
 - a. Virginia Public Procurement Act; methods of procurement. Increases from \$1 million to \$1.5 million the cost of a construction contract for which a state or local public body may use competitive negotiation instead of competitive bidding to procure the construction.

EMPLOYMENT

1. Discrimination claims under the ADEA

Gross v. FBL Financial Services, Inc., 557 U.S. ____ 08441 (2009)

Gross establishes that plaintiffs pursuing claims of age discrimination under the federal Age Discrimination in Employment Act (ADEA) will be held to the more stringent "but for" standard of proof than plaintiffs pursuing claims under the other principal federal anti-discrimination statutes. The Supreme Court also repudiated the concept that the burden of persuasion should shift to defendant in a federal age discrimination mixed motive case. Both of these holdings distinguish age discrimination claims from other types of mixed motive discrimination claims.

Specifically, the Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." Moreover, "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."

Proceedings Below

At trial, the District Court's jury instructions stated, in part, that a verdict must be returned in *Gross*'s favor if he proved by a preponderance of the evidence that FBL demoted him

and his age was a “motivating factor.” The jury instructions stated that Gross’s age was a “motivating factor” if it played a part or role in the decision to demote him. The trial court further instructed the jury that if they found FBL proved by a preponderance of the evidence that it would have demoted Gross regardless of his age, a verdict must be returned in FBL’s favor. The jury returned a \$50,000 verdict in favor of Gross.

On appeal, the Eighth Circuit reversed and remanded, holding that the jury had been incorrectly instructed under the burden-shifting standard established in the Title VII case *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the Eighth Circuit’s interpretation of *Price Waterhouse*, the burden of persuasion shifts to the defendant only upon the plaintiff’s demonstration, by direct evidence, that an illegitimate factor played a substantial role in an adverse employment decision. Because Gross conceded that he did not present direct evidence of discrimination – evidence that shows a specific link between the alleged discriminatory animus and the challenged decision – the intermediate appellate court held that a mixed-motive instruction was not warranted under the *Price Waterhouse* rule and the burden of persuasion should have remained with the plaintiff.

The Supreme Court’s Analysis

The Court held that the burden of persuasion does not shift to the defendant and a plaintiff bringing an ADEA claim must show by a preponderance of the evidence that age was the “but for” cause of the employer’s adverse employment decision. In addition, the Court found that an employer need not show it would have made the same decision regardless of age, even if the employee produces some evidence that age may have been a contributing factor in the decision.

In its decision, the Court explicitly rejected the notion that a plaintiff may establish discrimination by showing that age was simply a “motivating factor.” Of particular significance to the Court was that, unlike Title VII, the ADEA has not been amended to include “motivating factor” language. Under the text of the ADEA, it is unlawful for an employer to discriminate against an individual “because of” age. As interpreted by the Court, “because of” age means that age was the “reason” the employer decided to act. Therefore, “[t]o establish a disparate-treatment claim under the plain language of the ADEA...a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”

In addition, the Court held that “the plaintiff retains the burden of persuasion” in ADEA cases. As a result, henceforth ADEA cases will not be governed by the long-followed *Price Waterhouse* burden-shifting framework. Rather, the burden of persuasion necessary to establish employer liability is the same in mixed-motive cases as in any other ADEA disparate-treatment action – a plaintiff must prove, by a preponderance of the evidence, that age was the “but for” cause of the challenged employer decision.

2. DC Courts greatly expand reach of DC Human Rights Law

Monteilh v. AFSCME, AFL-CIO, 982 A.2d 301 (D.C. 2009)

The District of Columbia Court of Appeals found that the D.C. Human Rights Act would apply to a discrimination claim made by an employee because some of the decisions the employee complained of occurred in the district, even though the employee had never applied for a job in the district and had never performed any work whatsoever in the district.

The court stated that “recognizing jurisdiction under the DCHRA where actual discriminatory (and/or retaliatory) decisions by an employer are alleged to have taken place in the district is most faithful to the statutory language and purpose.” Slip Op. at 6. The court reasoned that limiting jurisdiction to discrimination “whose effects an employee has experienced inside the district” would be inconsistent with the broad remedial purposes of the DCHRA and previous court statements that the DCHRA’s provisions should be construed broadly. Slip Op. at 7. The court clarified that having a company headquartered in the district would not suffice to establish subject matter jurisdiction under the DCHRA. Instead, “[e]ither the decision must be made, or its effects must be felt, or both must have occurred, in the District of Columbia.” Slip Op. at 7.

3. Genetic Information Nondiscrimination Act

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information doesn’t tell the employer anything about someone’s current ability to work.

4. Va. Code 40.1-29 – allows employers to pay wages through pre-paid debit cards instead of checks.

“Payment of wages or salaries shall be (i) in lawful money of the United States, (ii) by check payable at face value upon demand in lawful money of the United States, (iii) by electronic automated fund transfer in lawful money of the United States into an account in the name of the employee at a financial institution designated by the employee, or (iv) by credit to a prepaid debit card or card account from which the employee is able to withdraw or transfer funds with full written disclosure by the employer of any applicable fees and affirmative consent thereto by the employee. However, an employer that elects not to pay wages or salaries in accordance with clause (i) or (ii) to an employee who is hired after January 1, 2010, shall be permitted to pay wages or salaries by credit to a prepaid debit card or card account in accordance with clause (iv), even though such employee has not affirmatively consented thereto, if the employee fails to designate an account at a financial institution in accordance with clause (iii) and the employer arranges for such card or card account to be issued through a network system through which the employee shall have the ability to make at least one free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card account as the employee may elect, using such card or card account at financial institutions participating in such network system.”

CONTRACTS

1. ‘Mutuality Of Remedy’ Won’t Knock Out Specific Performance Request

Sayres v. Wheatland Group, 20 Cir. CL56160 (2009) (Loudon County)

Though the trial court recognized the doctrine of mutuality of remedies, it denied Plaintiff’s demurrer on those grounds. Plaintiff had argued that the language of the purchase contract, which gave the seller the option of specific performance or rescission but gave buyer

only the remedy of rescission, triggered that same doctrine. Instead, the Court held that the seller was entitled to full payment because “complete performance may, if shown, afford a party specific performance of the contract for the sale of land.”

2. Clauses Limiting Liability

All Business Solutions, Inc. v. NationsLine, Inc., 629 F. Supp. 2d 553 (W.D. Va. 2009)

Following a referral relationship gone awry, All Business Solutions, Inc. (“ABS”) sued Nationsline, Inc. for misappropriation of trade secrets and business conspiracy. The conspiracy claim arose from Nationsline’s termination of their contractual relationship in favor of another vendor in the same field.

The contract between ABS and Nationsline, Inc. contained a limitation of liability clause, which Nationsline argued precluded any cause of action arising from their contractual arrangement. The specific language was:

“Limitation of Liability: In no event shall NATIONSLINE be liable for special, indirect, incidental, punitive or consequently damages, including loss of profits, arising through the relationship or the conduct of business contemplated herein. The sole liability of NATIONSLINE to All Business Solutions is for commissions actually earned and due under the contract, subject to NATIONSLINE's rights of set-off. “

Nationsline argued that this language precluded ABS from raising a statutory business claim based on actions Nationsline took pursuant to the contract or its cancellation, even where such action might be considered a conspiracy to unlawfully terminate the contract.

Though the Western District could not identify any Virginia cases directly on point, it held that “[i]n light of this trend in case law from other jurisdictions, as well as the clear provisions of the Restatement and other treatises, the court is of the opinion that the Virginia Supreme Court would not enforce an agreement that purports to exempt a party from liability resulting from that party's future intentional misconduct.”

CORPORATIONS

1. Starting September 1, 2009, businesses may not place prerecorded marketing calls to their existing customers in other states (FTC regulation)

Prior to this amendment, companies could deliver prerecorded messages to any consumer with whom they had an established business relationship without running afoul of the Telemarketing Sales Rule. The new rule, effective September 1, 2009, prohibits companies from delivering prerecorded messages to any consumers who have not previously agreed in writing to receive such calls.

The amended rule does permit a seller to obtain agreements by any electronic means authorized by the E-SIGN Act. The E-SIGN Act establishes that the use of an electronic record to provide information is sufficient as long as 1) the consumer has effectively consented; 2) the consumer, prior to consenting, received a clear and conspicuous statement informing the consumer of the option to have the record provided in a paper form, the right to withdraw consent, and whether the consent applies only to the immediate transaction; and 3) the consumer

is provided a statement describing the system used to electronically store the information and signs electronically in such a way that demonstrates the consumer can access the information. Pre-recorded informational calls, such as a message alerting a consumer of a loan due date or a message reminding a consumer of a scheduled appointment, are unaffected by this rule, but the FTC has cautioned against making sales calls under the guise of purported “informational” calls.

2. Va. Code §16.1-81.1 – corporations can now represent themselves in GDC under the following circumstances:

- a. Amount in Controversy is less than \$2500, exclusive of fees (including attorneys fees) – though how does one ask for attorneys fees if no counsel is present?
 - b. Corporation’s stock is held by no more than 5 people;
 - c. The stock is not publicly offered; and
 - d. The officer so appearing has unanimous consent of shareholders to represent corporation
- 3. SCC adopting e-filing** – currently limited to changing registered agent, but expanding over time.

4. HB 797 Architects, Professional Engineers, Land Surveyors, etc.; limitation of liability contract clauses.

- e. Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects; limitation of liability contract clauses. Allows entities consisting of design professionals to include limitation of liability clauses in their contracts to perform services; but provides that individual licensees are not relieved of any responsibility that may exist for services performed by reason of employment or other relationship with an entity. The bill contains a technical amendment

5. HB 1265 Professional corporations; includes certified interior designers in organizations managed by board.

- f. Professional corporations; board of directors. Includes certified interior designers in the types of professional organizations managed by a board of directors. The bill allows nonlicensed employee-directors to serve on the board of directors of a professional organization, provided they do not make up more than one-third of all of the members of the board of directors