



# LITIGATION NEWS

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## Virginia's "New" New Business Rule

by Robert E. Scully, Jr.

For more than 70 years it has been a truism of Virginia damage law that a plaintiff cannot recover lost future profit damages caused by a defendant's destruction of his new or unestablished business. *Clark v. Scott*, 258 Va. 296, 520 S.E.2d 366 (1999); *Scheduled Airlines Traffic Offices, Inc. v. Objective: Inc.*, 180 F.3d 583 (4th Cir. 1999); *Mullen v. Brantley*, 213 Va. 765, 195 S.E.2d 696 (1973) (collecting cases).

Until quite recently, this New Business Rule was applied with eager vigor in both breach of contract and intentional tort cases. Cf. *Lockheed Information Management Systems Co. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000) (for intentional interference with a business expectancy, the degree of proof is relaxed in favor of the injured party); with *Murray v. Hadid*, 238 Va. 722, 385 S.E.2d 898 (1989) (defrauded builder of custom homes denied projected profit he would have made on a townhouse project); and *PBM Products, Inc. v. Mead Johnson & Co.*, 174 F.Supp. 2d 424 (E.D. Va. 2001) (applies in tort cases).

On April 6, 2002, Governor Warner signed into law an act designed to ameliorate the sometimes-harsh results dictated by Virginia's New Business Rule. The new Code section is Va. Code Ann. § 8.01-221.1 "Unestablished business damages; lost profits."

Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not

be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.

Will this statute revolutionize contract and business tort damages in Virginia? Will the proverbial floodgates open up, resulting in huge lost future profit damage awards to plaintiffs? Only time will tell. However, the experience in other jurisdictions suggests that the answer is no.

The new Virginia statute eliminates the *per se* rule that a new or unestablished business without a history of profits cannot recover lost future

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