



# LITIGATION NEWS

**VS**

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## Supreme Court Defines Customer's Duty to Discover and Report Payment of Forged Checks

by Kevin P. Oddo

Despite the prevalence of check fraud, there have been few decisions from Virginia courts concerning those sections of the Uniform Commercial Code pertaining to the rights of an account holder to recover from its bank for improper payment of a check. In particular, the rules governing a customer's duty to review its monthly bank statements for forged or altered checks had never been addressed by the Supreme Court of Virginia until this past June, when it issued its opinion in *Halifax Corporation v. First Union National Bank*, 262 Va. 91, 546 S.E.2d 696 (2001).

*Halifax Corp.* presented a typical case of employee embezzlement. Between August 1995 and January 1997, Halifax's comptroller, Adams, wrote at least 88 checks on Halifax's account at Signet Bank, which was subsequently acquired by First Union. The checks were made payable to Adams, who without authorization used facsimile signatures on the checks. The checks were deposited by Adams in her personal account at Wachovia Bank. Each check was paid by First Union and charged against Halifax's account.

First Union sent monthly statements to Halifax reflecting the unauthorized checks. Halifax, however, failed to notify First Union of the unauthorized signatures within one year after the statements were sent to Halifax.

*Kevin P. Oddo is a partner with Flippin, Densmore, Morse & Jessee in Roanoke, Virginia.*

Halifax discovered the embezzlement in January 1999, by which time Adams had stolen in excess of \$15,000,000 from the company. Halifax then filed suit against First Union, alleging *inter alia* (1) a violation of Virginia Code § 8.4-401 (for charging against its account checks that were not authorized and therefore not properly payable), and (2) breach of its deposit agreement. The circuit court granted summary judgment to First Union, and Halifax appealed.

On appeal, the Supreme Court addressed several issues under articles 3 and 4 of the UCC (codified in Titles 8.3A and 8.4 of the Virginia Code). First, the Court analyzed § 8.4-406(f), which provides, in pertinent part:

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the cus-

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## Letter from the Chair

# Is a Farewell to Contributory Negligence in Sight?

Virginia is one of only four states, plus the District of Columbia, that still retains common law contributory negligence. Most states have abolished the doctrine by statute; other jurisdictions have done so by judicial fiat. At the Boyd-Graves Conference last October, the prevailing sentiment of those in attendance was that contributory negligence should be on its last legs in Virginia. The problem, however, was finding a consensus as to the negligence scheme that should replace it.

Advocates for change in Virginia argue the inherent concept behind contributory negligence is unfair: a party that is found to be 2% negligent cannot recover from a wrongdoer who is 98% negligent. Those who oppose any change in the system, however, point out that juries generally get such cases "right" despite the fears of philosophers, and that revamping the law will create many new headaches. The question of whether these potential headaches can be ironed out will likely determine whether revisions to the system will go forward.

At the outset, it seems unlikely Virginia will move toward "pure comparative negligence," *i.e.* a system by which a plaintiff who is 90% negligent in causing a car crash can still collect 10% of his damages from a defendant who was 10% negligent. The majority of "comparative negligence" states employ a "50% Rule," where the plaintiff can recover unless her negligence is greater than the combined negligence of all other parties — in other words, a plaintiff may

recover unless her negligence is greater than 50%. (A minority of jurisdictions employ a "49% Rule" which allows a plaintiff's recovery as long as the plaintiff is less than 50% negligent.)

Cases involving multiple defendants can be problematic. An area that poses particularly difficult decisions is the future of joint and several liability in a comparative negligence framework.

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For example, if joint and several liability is abandoned, a defendant might be responsible only for its share of the negligence; *i.e.* a deep pocket defendant that is only 10% negligent in a million dollar verdict would be able to cap its liability at \$100,000 (10% of \$1,000,000). This might leave deserving plaintiffs without a means of recovering jury awards. On the other hand, if joint and several liability is retained, a defendant that is only 5% negligent could find itself responsible for all of the same million

dollar verdict if the other defendants are insolvent.

Other states that have done away with contributory negligence have faced unexpected dilemmas from which Virginia reformers can learn. Certainly the Bar will need to consider the effects comparative negligence will have on the future of handling contribution, mixed tort/contract/warranty claims, and a variety of other issues. Change looms before us. Let the Litigation Section Board know how you feel about it.

Frank K. Friedman  
Chair, Litigation Section

# The "Runaway Jury": Current Issues in Punitive Damages

by Harry M. Johnson, III

## Introduction

The law of punitive damages remains one of the most persistently controversial, and fluid, subjects in civil practice throughout the country.<sup>1</sup> The United States Supreme Court has decided five significant punitive damages cases during the past ten years, all involving allegations of runaway punitive damages awards.<sup>2</sup> Although other states have felt far greater immediate impact from these decisions than Virginia, the Supreme Court of Virginia is beginning to see cases that must be decided in the context of this evolving federal constitutional law. The Supreme Court of Virginia recently granted a petition for appeal in one of these cases,<sup>3</sup> the decision of which should provide some insight into our court's current views on large punitive damages awards.

This article examines the United States Supreme Court cases and the potential impact they may have on Virginia law and practice. Specifically, the author believes that the Supreme Court of Virginia will undertake an even more detailed analysis of large punitive damages awards (even after the statutory cap is applied), and may show less deference to circuit court findings, perhaps even reviewing punitive damages awards *de novo*.

## United States Supreme Court Cases

Critics of punitive damages long contended that the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution placed limits on the imposition of punitive damages. There were many arguments. Among others, the critics attacked the criteria for awarding punitive damages as being impermissibly vague and standardless, thus failing to

*Henry M. Johnson, III is a partner in the Litigation, Intellectual Property and Antitrust Team in the Richmond, Virginia office of Hunton & Williams. He is a member of the Virginia State Bar Litigation Section Board of Governors.*

provide fair notice. They further argued that jury awards of punitive damages were so arbitrary and capricious that defendants were denied equal protection. And, they asserted that the courts were providing inadequate oversight and review of the size of the awards. In 1991, the Supreme Court began to address these challenges.<sup>4</sup>

*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)  
*TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993)

The Supreme Court affirmed large punitive damages awards in *Pacific Mut. Life Ins. Co. v. Haslip* and *TXO Prod. Corp. v. Alliance Res. Corp.* But, the Court ruled in both cases that the Constitution, and specifically due process, constrains the discretion of courts to award punitive damages in private litigation:

One must concede that unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind, we review the constitutionality of the punitive damages awarded in this case.<sup>5</sup>

In *Haslip*, the Court approved an Alabama state court punitive damages award of \$840,000 against an insurance company, although it acknowledged that the award may be "close to the line":

We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses...and, of course, is much in excess of the fine that could be imposed for insurance fraud under [Alabama statutes.].... While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.<sup>6</sup>

*Punitive Damages — cont'd on page 4*

## **Punitive Damages**

*cont'd from page 3*

Likewise, the Court affirmed an award from a West Virginia state court in *TXO*. The jury's punitive damages award was \$10 million, which was a stunning 526 times the compensatory damages awarded. The Court, however, "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." In upholding the award, the Court noted that the appellate court in West Virginia had properly found egregious conduct and a pattern of fraud, trickery, and deceit potentially affecting many other victims.<sup>7</sup>

In both cases, the Court considered and expressly rejected mathematical, objective, or rigid approaches. The potential circumstances in cases warranting punitive damages are simply too diverse for simple formulas. Nevertheless, the Court left no doubt that the Constitution constrains the latitude of trial courts to inflict "excessive" punishments. Rather than focusing on a specific objective test or formula to determine excessiveness, the Court focused heavily on the procedural protections afforded the defendants.<sup>8</sup>

### ***Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)**

The Court continued its focus on the procedural safeguards of appellate review in *Oberg*. An Oregon state court had awarded punitive damages of \$5 million in a products liability case. The Supreme Court of Oregon construed its guarantee of a jury trial to prohibit any excessiveness inquiry and declined to review the award on that basis. The Supreme Court ruled that "Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment."<sup>9</sup> On remand, the Supreme Court of Oregon again upheld the \$5 million punitive damages award as within the range that rational jurors would be entitled to award, and this time the Supreme Court denied review.<sup>10</sup> The Supreme Court clearly was looking in these first several cases to encourage careful appellate review as the safeguard to protect against unconstitutionally excessive awards.<sup>11</sup>

### ***BMW v. Gore*, 517 U.S. 559 (1996)**

*BMW v. Gore* is the most significant in this line of cases. It was the first Supreme Court decision finding an award of punitive damages to be excessive and to violate due process. In this case, BMW had not disclosed that it had re-touched the paint on a \$40,000 car before selling it as new. The Alabama jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages. On appeal, the Alabama Supreme Court, without providing a detailed basis for selecting a new amount, ordered a remittitur to \$2 million.

The United States Supreme Court premised its reversal of the award on fair notice grounds: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."<sup>12</sup> Most important, *BMW* articulated for the first time factors or "guideposts" that courts must consider when conducting a substantive review of the constitutionality of a punitive damages award.<sup>13</sup> The guideposts are as follows: (1) the reprehensibility of the conduct; (2) the ratio of punitive damages to the harm to the plaintiff; and (3) the difference between the award and civil or criminal penalties for comparable misconduct.<sup>14</sup> A court must undertake a "detailed examination" of these factors to ensure that the punishment is not excessive.<sup>15</sup> Analyzing the award against these three factors, the Court concluded that the "grossly excessive" \$2 million punishment was unconstitutional.

Since the *BMW* decision, these three guideposts have been debated and applied in a number of cases, both state and federal. It is beyond the scope of this article to address all the varying and divergent interpretations of the guideposts, which undoubtedly will continue to be litigated for years to come. Rather, the significance here is that there is now a judicially-sanctioned framework for analyzing the outer limits of a trial court's discretion to inflict punishment through punitive damages. How those guideposts will be used by the Supreme Court of Virginia is an open issue, since that Court has not yet cited *BMW* in any decision.

*Punitive Damages — cont'd on page 13*

## Code §30-5: A Legislator's Shield and Sword

by Randolph C. DuVall

Code §30-5<sup>1</sup> is a long standing part of Virginia jurisprudence. Originally designed as a shield to protect members of the General Assembly, and clients who had employed lawyers who were members of the General Assembly, the statute has evolved over the years and can now be wielded as sword by lawyer/legislators of a mind to do so. Where once the statute sought to make certain there was a level playing field, the statute now tilts the playing field in favor of clients whose attorney is a member of the General Assembly. That the statute has not been the subject of more reported decisions is surprising.

Code §30-5 was first enacted in 1906.<sup>2</sup> The statute originally allowed a continuance of a court proceeding as a matter of right when the General Assembly was in session if a party to that action had employed a member of the General Assembly to represent him in such action prior to the beginning of the session. Through a number of subsequent amendments, the statute has been significantly broadened. The statute was first amended in 1919. The last amendment occurred in 1987. Today's version of Code §30-5 bears little resemblance to its first incarnation.

Code §30-5 is written in three sentences. Although it would be logical to assume that the three sentences must be read in conjunction with one another, the statute as applied has been read as if the sentences bore little relationship to one another. The first sentence contemplates a pending matter and provides that when a party "prior to or during the session of the General Assembly" has employed a lawyer/legislator as counsel, that party "shall be entitled to a continuance as a matter of right" during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment thereof or during a

period beginning one day prior to any reconvened or veto session of the General Assembly or any committee or subcommittee meeting thereof and ending one day after the adjournment thereof. The second sentence provides that any pleading or the performance of any act relating thereto required to be filed or performed by any statute or rule during the period beginning 30 days prior to the commencement of the session and ending 30 days after the adjournment of the session shall be extended until not less than 30 days after such session. The third sentence of the statute provides that the failure of any court to grant a continuance "when requested so to do" shall constitute reversible error.

The Supreme Court of Virginia has held that the language of the statute is clear, absolute and unequivocal.<sup>3</sup> The Supreme Court has stated the statute requires no construction nor any interpretation. It is a preemptory statute "designed to prevent embarrassment and conflict to a member of the General Assembly in the performance of his public and private duties."<sup>4</sup> As anyone who has ever encountered the statute knows, the language is anything but clear and unequivocal in certain circumstances. The use of the statute has also become divorced from the need to prevent embarrassment and conflict to a member of the General Assembly.<sup>5</sup>

The most basic use of the statute is to continue a hearing or trial. Where a matter is set down for hearing or trial on a date that falls within 30 days of the start of the General Assembly or any later date up to 30 days after the adjournment of the session, the matter must be continued when the lawyer/legislator requests that it be continued. There is no time constraint on when the motion for the continuance must be made in order to be timely made. *See Rice v. Commonwealth.*<sup>6</sup> In that case, a criminal defendant requested that a matter be continued because his counsel was a member of the General Assembly. The trial court did not grant the continuance request on the ground that it was not timely made. The Supreme Court of Virginia reversed and remanded for a new trial. Quoting the third sentence of the statute, the

*Randolph C. DuVall is a partner with the firm Breeden, Salb, Beasley & DuVall in Norfolk, Virginia.*

*Code §30-5 — cont'd on page 8*

