

CORPORATE COUNSEL NEWS

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Virginia State Bar Corporate Counsel Section

<http://www.vsb.org/sections/cc/index.htm>

Has Virginia Adopted the Doctrine of the Unconscionability of Contracts of Adhesion?

By Douglas D. Callaway, Vice President & Senior Litigation Counsel, Wachovia Securities, LLC

PART I*

Many years ago, I ventured to a General District Court in Southside Virginia to defend my financial services company client against a consumer claim. During arguments on a motion to strike, I reviewed with the Court the exculpatory provisions of the contracts between my client and the plaintiff. The Court's response was, in effect, that the contract was a "contract of adhesion" and therefore it should not be enforced. I did not recall in all my years as a commercial litigator, that Virginia ever adopted the principle that contracts were unenforceable under some definition of "adhesion."

When I returned to my office, I conducted a computer based definitional search of "adhesion" in Virginia law. Nearly all the references were of construction cases describing the failure of building materials to properly seal. I found no Virginia case adopting a doctrine where a court defined "contract of adhesion" was rendered unen-

forceable. As I later discovered, much has changed since I conducted my earlier research.

ADHESION CONTRACTS

My research efforts then turned to adhesion contracts in general. Adhesion contracts are defined as those contracts that are offered to consumers of goods and services on a non-negotiated basis without affording the consumer a realistic opportunity to bargain, offering no other option to acquire the goods or services except by accepting the contract. The contract is generally a standardized form and the consumer is regarded as the weaker party in the bargaining process. The contract is then declared as an unconscionable contract and is void as violating "public policy."¹

John Edward Murray, Jr. in his treatise MURRAY ON CONTRACTS cites *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A2nd 69, 75 (1960) as the representative landmark case in the delimitation of the doctrine of the

unconscionability of a contract of adhesion. The case turned on the disclaimer or warranty in the purchase of an automobile. The New Jersey Court of Appeals stated that:

"The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the carmakers in the area of express warranty. Where can the buyer go to negotiate for better protection?"

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*Editor's Note – Part I of Mr. Callahan's article addresses the basic concepts of and case law pertaining to Contracts of Adhesion. In Part II of his article, Mr. Callaway reviews more recent Virginia case law on the subject and concludes that serious inroads have been cut into the enforceability of certain types of consumer contracts. Due to space limitations, only Part I of his article appears in this edition of the Newsletter. However, Mr. Callahan's article, including Part II, is published in its entirety on the Corporate Counsel Section web site located at <http://www.vsb.org/sections/cc/index.html>.

View from the Chair

By Edward Henry Beck, Exxon Mobil Corporation

On behalf of all the members I would like to thank Jennifer McClellan, our outgoing Chairperson, for her leadership and dedication over the last year. I'd also like to congratulate our new Board Members and Officers and welcome all the new members of the Section. We are closing in on a membership of over 1000 Corporate Counsel and are one of the VSB's fastest growing Sections.

We have an ambitious agenda for the present year's activities. I would very much like to continue and expand our program of presenting to all the Law Schools in the Commonwealth seminars on the subject of life as a corporate counsel. These seminars, presented by our Section members, have been extremely well received. If you are interested in participating in one of these programs, please get in touch with me or one of the other Board Members.

Additionally, I would like to see the Section continue with its relatively new practice of commenting on various proposed

Rule changes that may affect corporate practice in Virginia. Over the past two years several of our positions have been adopted by the VSB and/or the Supreme Court. We will plan on submitting requests for Legal Ethics and Unauthorized Practice of Law opinions in circumstances that affect corporate counsel.

As in the past, we will co-sponsor various CLE programs of interest to our members. I also look forward to our continuing to host the Section's traditional Spring luncheons for our members and their guests in various geographic locations throughout the Commonwealth.

All of these activities take the precious time of our Section members to organize and effectuate. Please consider volunteering for one or more of these very worthwhile projects.

Our Section is one of the Bar's most vibrant...join me in our effort to keep it that way. ❖

Mark Your Calendars

October 13 – 15, 2006 - The Virginia Women Attorneys Association Conference, Williamsburg Hospitality House in Williamsburg, Virginia

September 28, 2006 - VSB Professionalism Course*, Richmond Convention Center, Richmond, Virginia

November 9 – 16, 2006 – VSB Annual Midyear Legal Seminar

December 7, 2006 – VSB Professionalism Course*, Sheraton Premier, Vienna, Virginia

June 14 – 17, 2007 - VSB Annual Meeting, Virginia Beach, Virginia

February 7 – 13, 2007 – American Bar Association Mid-Year Meeting, Miami, Florida

August 9 – 14, 2007 – American Bar Association Annual Meeting, San Francisco, California

* For a complete listing of Professionalism course dates, check the VSB website:
<http://www.vsb.org/calendar.htm>

Editorial Policy

CORPORATE COUNSEL NEWS is published by the Corporate Counsel Section of the Virginia State Bar. Our goal is to provide information of interest and benefit to in-house counsel and others with similar interests and to serve as a forum for the exchange of relevant ideas. Statements or expressions of opinion or comments appearing herein are those of the editors, authors and contributors and should not be deemed as endorsed by the Corporate Counsel Section or the Virginia State Bar.

CORPORATE COUNSEL NEWS welcomes articles of interest to fellow members of the Corporate Counsel Section for publication in future editions.

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CLE Programs at the Beach

By Eileen Morgan Johnson, Whiteford, Taylor & Preston LLP, Past Chair

This year the Corporate Counsel Section co-sponsored two CLE programs at the Virginia State Bar's annual meeting at Virginia Beach on June 16, 2006.

Our first program of the day, co-sponsored with the Intellectual Property Section, was entitled *Mining Diamonds in Your Basement: Finding and Managing Corporate Intellectual Property Assets*. Our panel was balanced with the moderator, Ross Vincenti, Senior Counsel of Sprint Nextel Corp., and David Carson, Senior Counsel with Genworth Financial, Inc., each of whom presented the in-house perspective, and Michael J. Jacobs, Counsel with Crowell & Moring LLP, and Charles F. Wieland, a shareholder with Buchanan Ingersoll, PC, who presented the views of outside counsel. Audience participation was encouraged and the audience accepted that challenge by challenging the speakers, asking probing questions, and sharing advice. The panel, whose experience covered the spectrum from working with small start up tech companies to large established international companies, shared information with the audience on how to start an intellectual property asset management program from scratch: identifying what assets the company has that are worthy of protection; working with management, the IT department and other staff to develop procedures to safeguard trade secrets; and identifying ways to develop and encourage a culture of rewarding innovation and setting goals for patent filings were discussed.

Program materials included very useful sample forms such as a policy on handing unsolicited ideas and inventions, a manager's innovation handbook, a patent assess-

ment questionnaire, and an innovation disclosure form. Information was also provided on how to set up an intellectual property asset management council to determine which new innovations are worthy of being protected by patents.

Our panel had much fun with this presentation that was so well received that there is certainly interest for producing a sequel next year.

Our second program, co-sponsored with the Administrative, Antitrust and Business Law sections, was an ethics program titled *Practicing Law in a House of Mirrors – Dilemmas Posed by Shifting Alliances and Latent Conflicts When Representing Multiple Parties*. Our panelists included the Honorable Walter D. Kelley, Judge, U.S. District Court, Eastern District of Virginia, E. Ford Stephens, Partner, Christian & Barton, and Thomas G. Slater, Jr., Partner, Hunton & Williams. Michael J. Quinan, Partner, Christian & Barton, ably moderated the program. .

The panel walked through a series of scenarios of multiple party representation in the corporate setting and discussed the ethics of initial and continued representation given the fact patterns in each scenario. Judge Kelley revealed his aversion to joint representation and, in actual practice, seeks to discourage it by speaking with the parties individually when they first come into court and pointing out the potential negative consequences of joint representation. The panel discussion also focused on when joint representation is permissible, how to deal with a change in circumstances which necessitates withdrawing from representation, and how to handle multiple clients and their interests when multiple representation is allowed. ❖

Corporate Counsel Section Requests UPL Opinion on Pro Bono Practice

by David Ross Rosenfeld

An attorney who fully licensed and an active member of the Virginia State Bar but who is employed as in-house counsel in Virginia may not render *pro bono* legal services in the Commonwealth. At least that appears to be one of the holdings of Unauthorized Practice of Law Opinion #167 issued by the VSB Standing Committee of the Virginia State Bar in March 1993. A major concern to Chief Justice Hassel and the Virginia State Bar is the need for our profession to increase the availability of *pro bono* legal services throughout the Commonwealth. Given this need and focus, how can the holding of UPL Opinion 167 be justified?

In August of this year the Corporate Counsel Section filed a formal request with Virginia's UPL Committee to address and consider the question and whether there is any justification for prohibiting fully licensed and active Virginia attorneys from rendering *pro bono* legal services. The Section anticipates a response to this request within the next four months.

A copy of the Unauthorized Practice Of Law Opinion Request Form filed by the Corporate Counsel Section of the Virginia State Bar may be found on our web site: <http://www.vsb.org/sections/cc/index.html>. ❖

Corporate Counsel Career Program

by David Ross Rosenfeld

For the past several years, the Corporate Counsel Section of the Virginia State Bar has sponsored Career Corporate Counsel programs for students attending law school in Virginia. Utilizing panels comprised of volunteer attorneys from various sectors of the corporate community, these programs are designed to illuminate the role of in-house corporate counsel in the public and the private sector and to afford law students an opportunity to gain some first hand information and insights from seasoned corporate counsel.

The programs, generally lasting about an hour, are co-sponsored by the individual law schools, have been uniformly welcomed, and have been very well attended by from thirty-five to seventy-five law students at each session.

This year, the Section greatly expanded the Career Corporate Counsel program with the goal of producing these career programs at every law school in the Commonwealth. During the past nine months, the Section succeeded in producing five separate programs at five of Virginia's law schools.

For the third year in a row, the Section produced a program for The George Mason University Law School in Arlington, Virginia. Organized by David Rosenfeld and held on November 2, 2005, the panel of volunteer corporate attorneys included Edward Beck of ExxonMobil and this year's Section Chair, Scott Snyder of St. Paul/Travelers' Offices of Roger S. Makey, Catherine Dunlap Mayes, now an independent consultant, Britton N. Murray of Freddie Mac, and Eileen Johnson of Whiteford, Taylor & Preston LLP., a former Section Chair.

On March 15, 2006, a Career Corporate Counsel program was presented at the University of Virginia Law School, Charlottesville, Virginia. Organized by this year's Section Chair, Edward Beck, Ed was joined on the panel by David Ross Rosenfeld, Jennifer McClellan of Verizon Corporation,

Eileen Johnson, and Scott Snyder.

The Section also produced a career program at Liberty University Law School, one of Virginia's newest law schools. The program, held on April 13, 2006, was organized by Robert Chambliss Light of Nationwide. Douglas Callaway of Wachovia Securities, Nicole Ingle of Advance Auto Parts, Bill Paxton of Davidson and Garrard Investment Counsel, and Jimmy Watts of Scott Insurance joined Mr. Chambliss on the panel.

Also on April 14, 2006, Guenet Beshah of Capital One Services, Inc, produced a career program for law students at T.C Williams School of Law, Richmond, Virginia. Participating volunteer attorneys on that program also included Philip Hart of Genworth Financial, Jennifer McClellan, and Dana Hale of Capital One.

Finally, a career program was produced by Randal S. Noe of Norfolk Southern Corporation for the students at the William & Mary School of Law. This program, held on March 1, 2006, featured a panel of corporate attorneys consisting of Henry Burt of CarMax, Inc., David Coleman of Norfolk Southern Corporation, Maqui Parkerson of Norfolk Southern Corporation, and John Valdivielso also of CarMax, Inc.

Unfortunately, the Career Corporate Counsel program scheduled to have been given on March 17, 2006, at Regent University Law School was canceled.

For further information about these programs, including the dates of upcoming programs and how you can volunteer to serve on a panel, please contact any of the members of the Section's Board of Governors or Catherine Huband, the section's Senior Administrative Assistant (804-775-0514 or whitehead@vsb.org.

Please consider volunteering for the next program being given at your local law school. ❖

Corporate Counsel Luncheons *by David Ross Rosenfeld*

In an effort to increase the occasions for Virginia's in-house corporate counsel to meet and interact, each year during the month of May the Corporate Counsel Section sponsors annual luncheons held throughout the Commonwealth. Attended by both in-house corporate counsel, their guests, and other attorneys interested in the delivery of legal services to corporations and similar entities, these luncheons have consistently provided our members with opportunities to meet, greet, exchange views and opinions, and learn more about their profession and their practice.

This year, the Section sponsored luncheons in Richmond, Norfolk, and Northern Virginia. The Richmond program, organized by J. Philip Hart, Senior Real Estate Counsel, Genworth Financial, Inc., was held on May 18, 2006, at the Downtown Club in Richmond. Meeting with the Richmond Bar, the attendees were treated to a brief

presentation by James W. Dunn, the President and CEO of the Greater Richmond Chamber of Commerce. Mr. Dunn discussed Vision 2010, a program focusing on promoting growth and development of Richmond, and provided the audience with information about the goals and projections of the project and its progress to date.

The Annual Luncheon in Northern Virginia was organized by Scott Snyder, Staff Counsel, Law Offices of Roger S. Mackey, held on May 18, 2006, at Clydes of Tysons Corner, was well attended, and in Norfolk, the Luncheon, organized by Randal S. Noe, General Attorney, Norfolk Southern Corporation, proved to be a great success and a welcomed event.

Check the next edition of this Newsletter and the Section web site for the dates of next Spring's Corporate Counsel Section luncheons. ❖

An Ethics Quiz for Corporate Counsel

by David Ross Rosenfeld

A practical problem focusing on legal ethics in the corporate arena will be presented in each edition of the newsletter. The solution to the problem along with letters commenting on the problem and solution will be published on the corporate counsel section web site: <http://www.vsb.org/sections/cc/index.html>.

This Month's Question

The Wally Widget Co. manufactures the finest and most expensive widgets, which are sold worldwide through a network of independent distributors. The distributor purchases bulk loads of widgets from Wally on credit with a promise to pay within ninety days. Dependable Distributors, Inc. has been doing business with Wally for years but has now appears to owe Wally almost \$20,000 that Wally would like to collect.

Wally's and Dependable's general counsel have exchanged letters over this claim during which Dependable has presented colorable defenses. However, Wally's last letter to Dependable draws a line in the sand demanding that Dependable either pay the disputed \$20,000 claim or Wally will refer the matter for collection.

Dependable's general counsel has replied in writing as follows:

This responds to your August 1, 2006, letter. Dependable rejects your claim as frivolous and advises that it will respond vigorously to any suit filed thereon. At a minimum, Dependable will seek all available sanctions against both Wally and each and every attorney involved in any way in bringing the action against Dependable. Dependable will also refer each of those attorneys to the Virginia State Bar for disciplinary action. Furthermore, it is clear that Wally's demand and assertions of wrongdoing by Dependable are nothing more than a thinly veiled attempt at extortion, which, if pursued, will be referred to law enforcement authorities.

Has Dependable's general counsel stepped over any ethical lines? If so, which lines and what are Wally's options and alternatives? ♦

A Warm Goodbye and a Hearty Hello

By David Ross Rosenfeld

With deep appreciation for her outstanding service to the Corporate Counsel Section over the years, the Section says farewell to Dolly Shaffner, our former Senior Administrative Assistant and hello and welcome to her replacement, Catherine Huband.

Ms. Shaffner, working for the VSB since 1992, began providing support administrative services to the Corporate Counsel Section in 1994. She served with unstinting devotion in this role until this past spring when she was rechristened "Special Projects Administrative Assistant," and sent off to serve other entities and interests of the VSB. The Section gratefully recognizes Ms. Shaffner's myriad contributions to its growth and success and wishes her well in her

new position.

Filling the void left by Ms. Shaffner's departure, the Section is fortunate to have, and heartily welcomes, Catherine Huband. Having been previously employed by the Bar as a summer assistant, Ms. Huband is well versed in the ways of the VSB. Now, in her new position as Senior Administrative Assistant for Bar Services, Ms. Huband will provide staff support to the Environmental Law, the Administrative Law, the Taxation, and the Corporate Counsel Sections, and certainly appears up to the task.

The Section welcomes Ms. Huband and looks forward to a long, productive relationship. ♦

Contracts of Adhesion *Continued from page 1*

Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through the application of strict common-law principles of freedom of contract.”²

Arguably, Virginia rejected this doctrine in *Marshall v. Murray Oldsmobile Company, Inc.* 204 VA 972, 154 S.E. 2d 140 (1967) where the court specifically stated that “...A reading of the *Henningsen* case and a tracing of its questionable acceptance in other jurisdictions since it was decided in 1960 failed to convince us of the efficacy of following the action of the New Jersey Court. We are loath to make such abrupt changes in the settled law and reluctant to declare invalid the formal undertakings of parties for such vague reasons of public policy.”³ With a seeming rejection of this “contract of adhesion” doctrine, has there been any development in the common law of Virginia since?

The N.J. Court took “the forthright position that the attempted disclaimer is that the instant case was so inimical to the public good as to compel an adjudication of its invalidity.”⁴ Do form contracts with extensive risk limiting provisions generally rise to the level of unconscionability under Virginia common law? The standard for reaching unconscionability in Virginia is not an easy threshold to obtain. Under Virginia common law, an unconscionable bargain is one in which no man in his senses and not under a delusion would make and no that no fair man would accept. The conscience must be shocked. *Smyth Bros., McCleary, McClellan Co. v. Beresford*, 128 Va 137, 104 S.E. 2 371 (1920).

UNCONSCIONABILITY

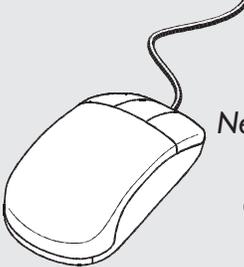
The issue of unconscionable contracts as reflected in Virginia has most often appeared in the context of the interpretations and enforceability of separation agreements and property settlement agreements in divorce matters. In *Derby v. Derby*, 8 Va App. 19, 378 S.E. 2d 74 (1989) the Court of Appeals of Virginia set aside a separation agreement where the husband had conveyed nearly all of his marital property to the wife. In this case, counsel was not present for either party during the negotiation phase. The wife had her attorney draft the one-sided agreement in advance and had her husband sign it before he reviewed it with counsel, holding out the prospect of reconciliation. The Court refused to enforce the agreement ruling that the contract was unconscionable. The Court stated that in reviewing a settlement agreement it is concerned with the intrinsic fairness of the terms in relation to all attendant circumstances, including the relationship

and duties between the parties. According to the Court, the wife may not have committed fraud but she has engaged in such overbearing and oppressive conduct in securing an agreement which is so patently unfair that a court of equity may refuse to enforce the agreement.⁵ In a later case, *Pelfrey v. Pelfrey*, 25 Va. App 239 (1997) the Court of Appeals of Virginia declared the settlement agreement unconscionable and set the standard for conscionability in Virginia:

“To determine whether the agreement is unconscionable, the court must examine adequacy of price or quality of value: if adequacy of price or inequality of value are the only indicia of unconscionability the case must be extreme to justify equitable relief...If gross disparity in value exchanged exists under the agreement, the Court should consider whether oppressive influences affected agreement to the extent that the process was unfair and the terms of the resulting agreement unconscionable.”⁶

The Court stated that the initial threshold for a finding of unconscionability is to present by clear and convincing evidence a great disparity in value. If such evidence is not present, then the court would not further examine the circumstances surrounding the formation of the contract to determine whether there exists oppressive influences. ❖

1. John Edward Murray, Jr., *MURRAY ON CONTRACTS*, p.350 (2nd Revised Ed. 1974).
2. *Henningsen v. Bloomfield Motors, Inc.*, 87 161 A. 2d 69, 87 (1960)
3. *Marshall v. Murray Oldsmobile Company, Inc.*, 204 Va. 972, 977 (1967)
4. *Henningsen, supra*, 161A. 2d, at p. 95
5. *Derby v. Derby*, 8 Va. App. 19, 32. (1989)
6. *Pelfrey v. Pelfrey*, 25 Va. App. 239, 244, 245. (1997)



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- Corporate Counsel Pro Bono work Writing for the newsletter
 Producing a Corporate Counsel continuing legal education program
 Working on the CLE program for the annual meeting
 Hosting a regional Corporate Counsel luncheon in May, 2005
 Working with local law schools on the Corporate Counsel Career Program
 Producing materials for the website Other _____

Mail to: **Catherine Whitehead**, Virginia Corporate Counsel Section
Virginia State Bar
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Or Fax to: Catherine Whitehead at (804) 775-0501 Or Email to: whitehead@vsb.org

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