



## Drafting an Effective, Enforceable “High-Low” Agreement

By Gary Bryant and Kevin Keller

There are few “certainties” in litigation, particularly if a case includes an open-ended claim involving “pain and suffering” or fiduciary breaches. If the claim makes it to the jury, an award may depend on factors over which the client and counsel have limited control, such as third party witnesses, a plaintiff’s medical history or a “smoking gun” produced in discovery. While recognizing that anything can happen in litigation, both plaintiff and defense lawyers can estimate a reasonable range of recovery. But, instead of making settlement decisions based on the estimated range, clients sometime consider the “best” or “worst” case scenario. Fear of a runaway jury can motivate a defendant to pay more than the estimated range, while concern over a motion to strike can convince a plaintiff to accept less than the range. High-low agreements give the parties their day in court without risking the extremes. But an effective high-low involves planning. Litigation is unlikely to end with a jury verdict if the parties enter into a high-low simply by picking a couple of numbers at the last minute while waiting for the jury to return.

A high-low, like any other settlement agreement, is a contract. Just as a lawyer would not dream of throwing

together a contract without careful consideration of the essential terms necessary for enforcement and the various contingencies that could alter the outcome, an attorney should not enter into a high-low without thinking through the terms and contingencies. While parties can enter into last minute high-low agreements, they should plan ahead, either by having a proposed agreement prepared for signature or at least having an understanding of the essential terms so that a satisfactory, enforceable agreement can be drafted at the last minute.

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### Note from the Editor:

This is the final paper version of Litigation News. Beginning with the Fall 2007 issue, Litigation News will be emailed to subscribers. If your email address has recently changed or if the Virginia State Bar does not have a record of your email address, please contact the VSB’s membership department toll free at (800) 552-7977 or, in the Richmond area, at (804) 775-0808. You may also contact the membership department by fax at (804) 775-0554.

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## Letter From The Chair

*Vicki Hansen Devine, Esq.*

It has been my pleasure to serve as Chair of your Board this past year and to have been a member of the Board for six years. Really. I cannot imagine a nicer, smarter, more enthusiastic group of people to work with. Our discussions were lively and, of course, there was never a lack of viewpoints on whatever subject we tackled.

I have reported to you throughout the year on our projects and will take this last opportunity to mention the highlights.

**Litigation News** We are now back on track and will have published our “regular” four issues per year. Our editor, Kevin Holt, is seemingly tireless. Because he is so good, I’m afraid we may have taken advantage of him. Not only did he get our quarterly newsletter back to being “quarterly,” he was drafted to keep our Section website up to date. We hope his job will get easier this year when, as is announced on the front page of this issue, we are going to publish *Litigation News* exclusively online beginning this fall. We are taking the plunge into the 21<sup>st</sup> century.

**Law In Society Essay Contest** We enjoy this project so much, we (and I include all who work on it) are trying to keep it growing. With your help, we were able to increase participation significantly this year. Next year, the Bar will start advertising and distributing literature in the fall, so that school teachers will have more time to incorporate the subject matter of the essay into their curricula. When you talk to friends, students, teachers or administrators of the high schools in your locality, please ask them to encourage their students to participate. For information, contact the Publications office at the VSB. If you wish to assist in any way, please let someone know. Volunteers are always welcome.

**Appellate Subcommittee** Steve Emmert has been a whirling dervish, or so it seems. While his initial task was to tackle the revision of the Appellate Handbook, rather than biding his time until the appellate rules revisions are finished, he began holding mini appellate seminars (he calls them “symposia”) for small groups around the state. With about 10 - 15 attendees at each symposium, the give and take of information and ideas has been quite successful.

Additionally, the Appellate Subcommittee is working with the Supreme Court of Virginia in putting together two panels of appellate lawyers (one panel of experienced appellate lawyers and the other panel not-so-experienced) to assist *pro se* parties. A team of two lawyers (one experienced and one not-so) will

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assist with the appeal. The *pro se* litigant benefits; the Court benefits; and the “not-so” experienced attorney benefits. It’s truly a win-win-win situation.

**Young Lawyers Committee** Sandra Chinn-Gilstrap is busy again. This time, she’s planning a seminar that will take place in August. The topic? *Voir dire*. She’s hoping to persuade Judge Alexander from Franklin County to be a featured speaker. *Voir dire*: the mystery subject. “What can I hope to learn about the potential jurors? Should I ask the questions or let the Court do so? What questions allow me to get a meaningful idea of the makeup of the panel members? Does the wording of the questions make a difference?” Just a few questions of my own.

Sandra’s last seminar on discovery was not only informative, but well-attended and highly successful. We know this one will be as well.

**My Thanks To All** The members of this Board are great, but I’ve already mentioned that, haven’t I? I must say, however, that this Board couldn’t function without our Liaison to the State Bar, Pat Sliger. She knows what to do, how to do it and when something needs to be done. I thank you, Pat, for your fine contributions to our Board.

**One Last Thing** I prepare cases for trial and sometimes even get to try them. The work is challenging and rewarding. Best of all, however, is the chance to work with other attorneys. Solid, professional, moral, ethical lawyers who make the practice of law not only a worthwhile and noble profession, but also bring much pleasure to the process. A friend of mine from law school who practices in New York City remarked after we had been out of school for a couple of years that in order to effectively represent a client, you had to be a (fill in this blank with any vile noun). I was amazed that he felt that way, since my limited experience had been so positive. Now, many years later, with a few minor exceptions (nobody’s perfect), my experiences remain positive.

I continue to cherish the friendships and professional relationships that have developed over the years and my hope for all young lawyers is that the same will happen for them. My advice to new lawyers? Listen; prepare; get good advice; enjoy yourself. ☒

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# “Life After Benitez: Same As It Ever Was or A Brand New Day?”

Robert L. Wise

For those of you who picked this up hoping to read an article by that attorney who got sanctioned ranting and raving about the Supreme Court of Virginia's decision in *Ford Motor Company v. Benitez*,<sup>1</sup> you can go ahead and stop reading now. This is not that article. But for those of you who are interested in reading one Virginia practitioner's perspective on how *Benitez* will affect everyone's practices, both plaintiff and defense, then, by all means, please keep reading.

To date, I have not had anyone who has read the *Benitez* opinion tell me that he or she thought its impact would be limited, or that the holdings were restricted to the specific case facts. If you happen to bump into anyone who does hold those opinions, I encourage you to suggest politely to that person that perhaps a second reading is in order.

I have read *Benitez* several times. Well, actually, the first reading did not count, since I skipped right to the end hoping to see “reversed and final judgment.” When I actually read and re-read more than just the last page, several key points emerged.

First, this ruling is not and was not, I believe, intended to be limited to the specific facts of this one case. Indeed, if the only goal was to let the trial court's sanctions award stand, the Supreme Court could have reached that same result by simply denying the writ in the first place. Instead, the Court used *Benitez* to make far more sweeping statements about Virginia Code §8.01-271.1 and Virginia pleading and discovery practice in general.

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For instance, the Court began its analysis of § 8.01-271.1 by noting, “it is apparent that the General Assembly has the opportunity to make discretionary a court's imposition of sanctions upon finding a statutory violation, but elected not to do so.”<sup>2</sup> “Instead, it used the words ‘*shall* impose . . . an appropriate sanction.’”<sup>3</sup> Thus, after *Benitez*, trial courts should no longer apply a discretionary filter to sanctions motions. If the trial court finds § 8.01-271.1 was violated, according to *Benitez*, the trial court must impose sanctions.

Second, *Benitez's* holding is not limited to the filing of affirmative defenses. Certainly, the most obvious result from *Benitez* is that parties may not assert affirmative defenses that lack factual support when the answer is filed. Gone is the long-accepted practice of reserving affirmative defenses in the hopes that evidence may arise to support them and in the interest of not having those defenses waived.<sup>4</sup> If the Court wanted to stop there, however, and limit its holding to the practice of asserting and reserving affirmative defenses, it could have done that. It did not. Instead, the Court made it clear several times throughout the opinion that its statements applied to both “claims and defenses.”<sup>5</sup>

Third, *Benitez* will affect plaintiffs as much as, if not more than defendants. The Supreme Court explained, “[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.”<sup>6</sup> The clear message is that a plaintiff cannot use a complaint as a fishing pole, asserting claims without factual support and trying to later hook some support in discovery. The Court added, “[t]he remedy for a party who hopes that evidence may later come to light in support of a claim or defense is to move to amend his pleadings when such evidence becomes available.”<sup>7</sup>

This principle that a party must have facts to support a claim when filed may seem fundamental, but in practice, it has not been followed. Plaintiffs across the Commonwealth have routinely asserted speculative claims, without evidence to support them when pled, in

*Life After Benitez — cont'd on page 9*

## “High-Low” Agreement *cont'd from page 1*

The Virginia Supreme Court has considered only one case in which it was asked to construe the terms of a high-low agreement. In *Smith v. Settle*, 254 Va. 348 (1997), the plaintiff's vehicle was struck by an ambulance driven by the defendant. Although it is not clear when the agreement was negotiated, defense counsel stated on the record that the parties and the insurer had arrived at a high-low agreement. The low was \$350,000, which the plaintiff would get if there was a defense verdict. *Id.* at 350.

After deliberation, the jury returned a defense verdict. However, the plaintiff refused the \$350,000 tender from the insurer. Instead, the plaintiff moved to set aside the verdict and for a new trial alleging improper jury instructions. The defendant filed a motion to enforce the high-low agreement, even though the jury verdict had been in his favor. The court denied defendant's motion to enforce, and instead granted the plaintiff's motion for a new trial. But the jury in the new trial could not agree on the verdict. *Id.* at 350-51.

There was a *third* trial in which the jury again returned a defense verdict. This time, the court denied the plaintiff's motion to set aside the verdict, and instead sustained the plaintiff's alternative motion to enforce the high-low agreement which had been entered in the first trial, ordering the insurer to pay \$350,000 “as agreed by the parties.” *Id.* As discussed below, this case illustrates the importance of including in a high-low agreement terms designed to address any contingency.

### A. Authority

To be enforceable, the parties must agree to the high-low. While an attorney can certainly act on behalf of the client, the attorney can do so only after

securing the client's approval. An attorney who agrees to a high-low “subject to” client approval has agreed to nothing. What is more, the parties run the risk that the jury will return a verdict while one party attempts to secure client approval. The terms of any high-low should provide that the agreement becomes binding only when both parties communicate final approval or is terminated when the jury returns a verdict, whichever occurs first.

To the extent that insurers are involved, the parties must make certain that all are on board before the high-low becomes final. It is important to secure the insurer's approval not just with regard to the amount of the high-low, but with regard to other terms as well. For example, insurance policies only cover certain liabilities or damages. The parties are better served if the high-low agreement covers any and all liability, and the insurer agrees to pay the liability (up to the policy limits) regardless of the nature of the claim or the characterization of the damages. Otherwise, counsel may face an ethical dilemma if asked to con-

sider a high-low tied to claims or damages only some of which are covered by insurance.

Of course, if there are multiple plaintiffs and/or defendants, it is important to include in the terms of the high-low to whom it applies, and how the verdict is to be determined in the event of joint and several liability. Virginia Code Section 8.01-35.1 addresses the effect of a release or covenant not to sue given “to one of two or more persons liable in tort for the same injury.” Va. Code § 8.01-35.1(A). The Code specifically provides that such covenants include high-low agreements. Under the statute, the high-low does not discharge other tortfeasors, but any amount awarded against other tortfeasors will be reduced by the consideration given for the agreement. Thus, parties cannot

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include in a high-low agreement any limitation on the amount of offset to other tortfeasors as to do so would deprive them of rights under the statute.

Since high-low agreements represent a compromise or settlement, they may need to be blessed by the court. The Code specifically makes covenants, including high-low agreements, subject to the provisions of Sections 8.01-55 and 8.01-424, both of which require court participation in settlements. Section 8.01-55 authorizes a personal representative to compromise wrongful death claims “with the approval of the court in which the action was brought.” Moreover, the statute specifically provides that approval is secured through a petition process, and that the petition process requires “the convening of the parties in interest... .” Va. Code § 8.01-55. While it may be in everyone’s best interest to enter into a high-low agreement, no one wants to be in the position of having to convince a court after the verdict that a high-low is in a plaintiff’s best interest, particularly if there is a considerable disparity between the verdict and the high-low.

Similarly, Section 8.01-424 gives courts the power to approve and confirm a compromise on behalf of a person under a disability if it is “deemed to be in the interest of the parties.” Va. Code § 8.01-424(A). Again, while a court very well may approve the high-low after the fact, the parties should secure prior approval if at all possible. As a practical matter, these issues only arise when the jury verdict exceeds the high, and the court is asked to approve a compromise which reduces the amount the jury intended to award in either a wrongful death action or to a person under a disability. No court would refuse to enforce a high-low agreement as contrary to the interest of the parties if the low is more than the jury award.

### ***B. Add-Ons***

Virtually all judgments include an interest element and some involve other “add-ons” to the award. Even if the verdict is more than the designated high, a plaintiff may argue that interest should be added, and should be calculated based on the high. What if the jury verdict is within the high-low? Is interest added to increase the verdict? If authorized by statute, are attorney’s fees added? As an example, under Virginia’s Business Conspiracy Act, courts sometimes conduct a post-verdict hearing to determine the cost of suit, including reasonable attorney’s fees, to be awarded to a prevailing

plaintiff. The Act also authorizes the court to treble certain damages. If the parties do not consider and address these add-ons in the high-low agreement, then the defendant may argue that the high-low contemplates the jury verdict, and nothing more, while the plaintiff will argue that the high-low includes any recoverable damages, including costs and attorney’s fees available even if not included in the verdict. To avoid confusion, the high-low should state specifically that the amount awarded will be either the high, the low or the verdict amount *without* add-ons, or state specifically

which add-ons will be included and whether the add-ons can push the amount to be awarded above the high. Regardless of who has the prevailing argument, absent a term addressing add-ons, the dispute may lead to additional litigation to determine the intent of the parties.

### ***C. The Verdict***

Most high-low agreements are entered to eliminate the risk of an extreme verdict, and to end the litigation. In light of these goals, parties are well served to include

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## “High-Low” Agreement *cont'd from page 5*

a provision that resolves litigation in the event that there is no verdict. This can result from a mistrial, a nonsuit or a hung jury. Of course, the parties can provide that, if there is no verdict, there is no high-low agreement. Indeed, if the parties do not address the issue, it is implied as a high-low is impossible to enforce without a verdict absent a specific provision providing for resolution in the event of a hung jury or mistrial.

Some parties enter into high-lows because they are convinced that they will reap the better of the bargain. But if the case “turns south,” either during trial or as evidenced by the verdict, can a party take steps to avoid the high-low? Can a plaintiff nonsuit? Can either party move for a mistrial or for a new trial? Can a party intentionally “draw the foul” to cause a mistrial? As all but the last of these legal maneuvers are perfectly legitimate, is there anything to prohibit a party from taking advantage of them? The answer likely depends on whether there is a jury verdict.

### 1. *Avoiding the Verdict*

If the plaintiff takes a nonsuit or a mistrial is granted before the verdict, the court is unlikely to enforce the high-low agreement unless it includes terms outlining a resolution in the event of a nonsuit, mistrial or hung jury.

If the parties are intent on ending litigation in the event of a hung jury, a resolution is relatively straightforward. The parties typically pick a compromise number to be awarded if the jury cannot agree on a verdict.

Virginia Code Section 8.01-380 gives a plaintiff the right to nonsuit a case at any time before it is submitted to the jury. The only reason a plaintiff would nonsuit with a high-low agreement in place is to avoid the possibility that the plaintiff will end up with the low. In essence, it is an attempt to avoid the agreement. For

this reason, plaintiffs should not be allowed to escape the agreement by nonsuiting the case. However, Virginia courts are loathe to deny a plaintiff the statutory right to a nonsuit, and courts may interpret the statute as giving a plaintiff the absolute right regardless of whether a high-low is in place. To make certain that the litigation ends in the event of a nonsuit, the terms of the high-low should specifically state that, should the

plaintiff move for a nonsuit, the low will be awarded. Nothing in the Code suggests that such an agreement would not be enforced.

Including terms in a high-low that ends litigation in the event of a mistrial (other than a hung jury) is much more difficult. Unlike a hung jury or nonsuit, mistrials occur when something goes wrong, and the judge suspects that the verdict will be tainted.

Moreover, mistrials may occur through no fault of the litigants, *i.e.*, the result of improper third party witness testimony or juror misconduct. Accordingly, to the extent that the parties decide to address the issue in the high-low, the terms usually provide that the agreement has no effect in the event of a mistrial.

### 2. *Challenging the Verdict*

Jury verdicts can be affected by errors which occurred during trial such as the introduction of inadmissible evidence, improper argument or erroneous jury instructions. If a party enters into a high-low and yet believes that the jury verdict is the result of error, is there any way to avoid the agreement? In all likelihood, not without including specific terms in the high-low agreement addressing such errors. The trial court in *Smith v. Settle* granted the plaintiff’s motion to set aside the verdict because the judge was convinced that the jury was not properly instructed. However, when the case finally made its way to the Supreme Court, the resulting opinion suggests that, once the jury renders a

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verdict, the high-low is binding and enforceable unless the parties included in the agreement terms allowing relief from the verdict.

On appeal in *Smith v. Settle* was the trial judge's enforcement of the high-low in the third trial. The defendant insisted that he was no longer bound by the high-low because the plaintiff repudiated the agreement by refusing the tender of \$350,000 following the jury verdict in the first trial. The Supreme Court agreed with the defendant that the original high-low agreement was no longer in place, reversed the trial judge's enforcement of the high-low, and entered judgment for the defendant. 254 Va. at 352.

Implicit in the ruling is the Court's conclusion that the defendant had the right to enforce the high-low agreement in the first trial and that the plaintiff repudiated the agreement by moving for a new trial. To reach this result, the Court had to conclude that the plaintiff did not have a right to repudiate the high-low agreement in light of erroneous jury instructions:

Recognizing that there is no explicit provision in the agreement requiring the jury to be "properly instructed on the law," plaintiffs assert that it "was an implicit term of the agreement [and]... there was no agreement not to seek post verdict relief in the trial court."

254 Va. at 354. The Court, however, found "nothing in counsel's statement implying that a 'properly instructed' jury was part of the agreement or that either party could seek post-verdict relief in the trial court." The Court refused to "rewrite the agreement to impose provisions that are neither stated nor implied therein. The plaintiff's unjustified refusal of the tender prevented performance of the agreement and gave [the defendant] the right to regard it as terminated." *Id.* (citations omitted).

Does this decision mean that there is nothing a party can do to protect itself against errors that may affect the jury verdict? The Court answers the question in its refusal to "rewrite the agreement to impose provisions" that are not stated or implied. If the parties would like to preserve the right to challenge errors, they

can do so by including provisions in the high-low agreement preserving the right, either through post-trial motions, an appeal or both. But if the goal of a high-low agreement is to end litigation, then the parties may be better served to accept whatever jury verdict is rendered, relying on the judge to prevent or correct any errors that occur during trial.

The Court's decision in *Smith v. Settle* suggests that the plaintiff had no right to appeal the jury verdict had the trial judge denied the motion for a new trial. It would not make sense for the Supreme Court to allow an appeal to address errors which could not be corrected pursuant to a motion for a new trial. Nevertheless, in order to put an end to the litigation once the jury renders a verdict, it is important to include in a high-low agreement the waiver of any right to appeal.

#### ***D. Enforcing the Agreement***

When the jury verdict is rendered, the parties should advise the court of the high-low agreement and request that judgment not be entered. Both the Virginia Code and case law suggests that a high-low agreement is a settlement. *See* Va. Code § 8.01-35.1; *Smith v. Settle*, 254 Va. at 351 (characterizing a high-low as an "agreement" that would not be rewritten by the court); *see also Cunha v. Shapiro*, \_\_\_ N.Y.S.2d \_\_\_, 2007 WL 1295844 (App. Div. May 1, 2007) (unanimous panel of appellate division holds that a high-low is a settlement and subject to a statutorily required general release). If the parties settle a case, no judgment is entered. Indeed, many defendants count the absence of a recorded judgment as one of the many benefits of settlement. To avoid any dispute, if it is important that no judgment be entered, the high-low should say so.

It is up to the parties to comply with the high-low. Any refusal to honor the agreement will be treated the same as any other breach. To the extent that the agreement is written, it will be interpreted the same as any other written contract. To the extent that the agreement is unwritten, there may be a hearing to determine its terms. To avoid post-trial litigation to enforce a high-low, the parties should reduce the agreement to

*"High-Low" Agreement — cont'd on page 8*

## “High-Low” Agreement *cont’d from page 7*

writing and include as many terms as possible including payment terms to help avoid further litigation costs. Again, it is important to make sure that any insurers involved in the litigation agree to the payment terms included in the high-low so that the insurers will not be heard to complain if the payment terms differ from the standard procedures for paying settlements.

The *Smith v. Settle* case demonstrates the importance of complying with the terms of the high-low agreement. The plaintiff clearly saw the high-low as a “fall back” and moved for a new trial after both the first and second defense verdicts. However, the plaintiff tried to keep the high-low agreement as a “fall back” option. While moving for a new trial after the second defense verdict, the plaintiff alternatively moved to enforce the high-low agreement. The Supreme Court made clear that the plaintiff’s refusal to acknowledge the high-low after the first jury verdict eliminated the defendant’s obligation. 254 Va. at 354. No doubt the Court’s conclusion was motivated by the fact that a defendant who entered into a high-low in an attempt to end litigation was forced to try the case not once, not twice, but three times. Would the case have been any different had the trial judge *denied* the motion for new trial after the first defense verdict, a ruling the plaintiff likely would have appealed? While no reported cases address the issue, another jurisdiction was faced with a similar situation.

In April of 2006, the Maryland Court of Special Appeals in *Maslow v. Vanguri*, concluded that a plaintiff’s appeal after an adverse judgment forfeited the defendant’s obligation to pay pursuant to a high-low agreement. The court reached this result because the

high-low agreement specifically provided that, with a jury verdict, the parties would waive any right of appeal. The plaintiff argued, among other things, that the jury instructions were in error. When the appeal failed, the plaintiff attempted to enforce the high-low agreement. The defendant argued that the appeal was a material breach, permitting rescission of the agreement. While the plaintiff conceded that appealing was a breach, she argued that it justified damages only, and not total rescission. The court disagreed, holding that after the jury rendered its verdict, the plaintiff was bound by its obligation not to appeal, and repudiation of the obligation left the defendant free to pursue rescission. *See Maslow v. Vanguri*, 896 A.2d 408 (Md. Ct. Spec. App.), cert. denied, 903 A.2d 416 (Md. 2006).

The Supreme Court’s decision in *Smith v. Settle* and the Maryland Court of Special Appeals’ decision in *Maslow v. Vanguri* reflect a consistent judicial attitude toward high-low agreements. They are contractual obligations, and will be enforced

pursuant to their terms. Courts do not, and should not, scrutinize jury verdicts for error or prejudice when a high-low is in place. Litigation is fraught with risk, including the risk of an extreme result. The high-low agreement removes the risk of an extreme result and in its place imposes a range acceptable to both parties. Once a case is submitted to the jury and a verdict is rendered, the court should leave the parties with the benefit and burden of their bargain. ■

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the hopes that something might turn up in discovery. Defendants routinely serve contention interrogatories asking such basic information as “why is our client being sued,” “what is the basis for the theory of liability” or “what is the alleged product defect.” More often than not, the plaintiff will answer that “discovery is ongoing” and “this answer will be supplemented.” After *Benitez*, it should be clear that this is improper. If a plaintiff does not have some facts which would allow her to answer a contention interrogatory explaining why she even filed suit at the time that her attorney signed the complaint, then she should not file the case in the first place. This pronouncement from the Supreme Court should come as a welcome message to defendants across the Commonwealth.

In terms of how *Benitez* will shape Virginia practice, the immediate effects are certainly more readily apparent. Every attorney with whom I have spoken has recognized the need to do an internal audit of their pleadings and discovery responses to ensure that there are none that would violate *Benitez's* holding. With regard to affirmative defenses, the prevailing practice appears to be filing notices of withdrawal for those “reserved and not waived” defenses that may have been without facts when pled.

On the other hand, the longer-term impacts of *Benitez* are more difficult to determine. Many attorneys with whom I have spoken have confirmed that, immediately after they perform an audit on their own pleadings, they are going to turn to the other side's pleadings to determine if there are grounds for a § 8.01-271.1 motion. Already, attorneys have sent “*Benitez* letters,” trying to posture for offensive motions.

It seems almost certain that *Benitez* will increase the number of motions for leave to amend. If nothing else, attorneys should feel more comfortable withholding speculative claims and defenses at the outset and instead relying on the Court's assurance that “[l]eave to amend shall be liberally granted in furtherance of the ends of justice.”<sup>8</sup>

Another area potentially affected by *Benitez* will be discovery practice. Certainly, both sides will focus their attention on contention interrogatories, with a particular emphasis on what facts a party had when certain claims or defenses were first asserted. *Benitez*, however, may also affect the scope of discovery.

Rule 4:1 defines the scope of discovery according to the asserted claims and defenses of the parties.<sup>9</sup> If a party has not raised a particular claim or defense for lack of currently known, supporting facts, the opposing party may be able to limit the scope of discovery only to those issues related to the claims and defenses actually pled, thereby precluding the development of facts to support the unasserted claims or defenses.

Similar language in Rule 26 of the Federal Rules of Civil Procedure, to which Virginia courts often look for guidance, has been interpreted to mean that a fact sought in discovery “must be germane to a specific claim or defense asserted in a pleading for information concerning it to be a proper subject of discovery.”<sup>10</sup> The Advisory Committee notes explain that Rule 26 “signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”<sup>11</sup> Virginia's Rule 4:1(b)(1) does not track Federal Rule 26(b)(1) verbatim. Thus, it will be interesting to see how Virginia courts interpret the scope of discovery under the Rule 4:1(b)(1) “claim or defense” language, and whether they will, as under the Federal Rules, limit discovery only to those claims or defenses asserted in the pleadings, or whether they will permit more broad discovery aimed at developing new claims or defenses.<sup>12</sup>

The *Benitez* opinion seemed to convey that the Supreme Court did not believe it was saying anything new, and that it was simply reiterating longstanding principles of Virginia law. In other words, as far as the Court was concerned, after *Benitez*, Virginia practice should be the same as it ever was. However, from the many practitioners with whom I have spoken, and in

*Life After Benitez — cont'd on page 10*

## Life After Benitez *cont'd from page 9*

reading the legal commentary since this opinion was handed down, I can safely say that this impression is not shared. As one commentator wrote, "This ruling shouldn't come as a shock to those who read the sanctions statute literally, with no historical context. It will probably come as a major shock to those who (like me) have been pleading in exactly this fashion for years."<sup>13</sup> Clearly, while the Supreme Court may have thought that *Benitez* just meant "business as usual," attorneys practicing in the litigation trenches see it as a brand new day.

Without a crystal ball, it is hard to predict exactly what the impact of *Benitez* will be in the long term. I think I can safely say that no one, neither the plaintiffs' bar nor the defense bar, wants to see an increase in sanctions motions. Nonetheless, there are still a lot of cases out there with unsupported claims and defenses in them. Unless and until those claims and defenses are voluntarily dismissed or withdrawn, it is likely the bar will see at least a short-term increase in "*Benitez*" motions under § 8.01-271.1. Perhaps, in the short term, that is what is needed to get the Bar to where the Supreme Court in *Benitez* seemed to indicate we should have been all along. ☒

<sup>1</sup> \_\_\_ Va. \_\_\_, 639 S.E.2d 203 (2007).

<sup>2</sup> *Id.* at 206.

<sup>3</sup> *Id.* at 206 (emphasis in original).

<sup>4</sup> *See id.* at 207-08.

<sup>5</sup> *See, e.g., id.* at 207, 208 (emphasis added).

<sup>6</sup> *Id.* at 207.

<sup>7</sup> *Id.* at 208. It may prove to be that actually obtaining this proposed "remedy" is easier said than done. For instance, one of the considerations on a motion to amend is whether the movant has previously requested leave to amend. *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 296, 467 S.E.2d 778, 782 (1996) (reversing a denial of leave to amend in part because the party "had not previously amended his motion for judgment."). It remains to be seen whether a party who did not assert or reserve a claim at the outset will later be denied leave to amend to add that claim or defense because she already previously sought and obtained leave to amend to add other claims or defenses as they became known. Yet, a party also cannot wait to add several claims or defenses all at the same time either. *See Herndon v. Wickham*, 198 Va. 824, 827, 97 S.E.2d 5, 7 (1957) (noting the defendants were "tardy" in filing the motion for leave to amend).

<sup>8</sup> *Id.* at 208. What remains to be seen is how liberal the circuit courts actually will be in exercising their discretion on requested amendments.

<sup>9</sup> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." R. S. Ct. Va. 4:1(b)(1).

<sup>10</sup> 6 *Moore's Federal Practice*, § 26.41[2][a] (Matthew Bender 3d ed.).

<sup>11</sup> Fed. R. Civ. P. 26(b)(1) advisory committee's note (2000) (reproduced verbatim at 6 *Moore's Federal Practice*, § 26App.10[2]).

<sup>12</sup> Rule 26, however, uses a two-tiered system, whereby the court may, for good cause shown, expand the scope of discovery to include "any matter relevant to the subject matter involved in the action." Fed. R.

Civ. P. 26(b)(1).

<sup>13</sup> Steven L. Emmert, Virginia Appellate News & Analysis, Archives, Analysis of January 12, 2007 SCV Opinions, available at [http://www.virginia-appeals.com/aspbite/categories/index.asp?int\\_CatID=194](http://www.virginia-appeals.com/aspbite/categories/index.asp?int_CatID=194) (on file with the author). Another blogger called the *Benitez* opinion his "Outrage of the Day," writing, "Even if the main holding is correct, and I would not have gone along with it, the Court should have let this particular lawyer off the hook, as it frequently has done in the past in cases such as *Jordan v. Clay's Rest Home*, 253 Va. 185, 483 S.E.2d 203 (1997). The reason is, whether the judges know it or not, every defense lawyer in Virginia has been writing answers this way, since I've been a lawyer. Doesn't every dog get one bite?" Steve Minor, "Outrage of the Day," SW Virginia Law Blog (Jan. 12, 2007), available at <http://www.swvalaw.blogspot.com/search?q=benitez> (on file with the author).

## View From the Bench

*The Hon. William H. Ledbetter, Jr.*

# The Impact of Benitez

Preparing the complaint for a specific performance suit, the attorney writes that the defendant breached the parties' contract, that there is no adequate remedy at law, and therefore the court should compel the defendant to perform his obligations under the contract. Thinking ahead, the attorney requests monetary damages in the event the court finds that the plaintiff has an adequate remedy at law. Covering all bases, the attorney next asserts that the plaintiff should recover in quantum meruit if an enforceable contract does not exist. Finally, trying to be prudent and thorough, the attorney adds a fraud count, including a prayer for punitive damages and attorney's fees.

Twenty-one days after the defendant is served, papers appear in the clerk's office denying all the allegations in the complaint. The pleading also contains a laundry list of ex contractu defenses including laches, waiver, estoppel, impossibility of performance, unclean hands, failure to mitigate damages, failure to tender performance, and no valid contract. As an afterthought, the cautious defense attorney reserves the "right" (whatever that means) to amend the answer with further defenses as the need may arise.

Common scenario? Yes ... well, at least until January 12, 2007. On that day, the Supreme Court unsettled litigators across the Commonwealth (most particularly, the defense bar) by upholding a trial court's imposition of sanctions against a defense attorney who had employed the drafting technique described above.

In *Ford Motor Company v. Benitez*, 273 Va. 242 (2007), neither Ford nor Berta was really before the Court. Rather, the appeal was taken by the defense attorney who had been personally sanctioned under Virginia Code Sec. 8.01-271.1 for filing a pleading asserting unsupportable defenses in a products liability case.

The procedural facts of the case are important. The plaintiff sued the manufacturer and the seller of the car in which she was a passenger, alleging that she was injured by a defective air bag which deployed when her vehicle collided with another vehicle. The defendants responded. Extensive discovery was conducted before the case was nonsuited. Later, the plaintiff timely filed a new suit with the same allegations.

The defendants responded with a pleading that contained 13 affirmative defenses such as contributory negligence, assumption of the risk, lack of notice of warranty claim as required by the UCC, failure to comply with the terms of the warranty, statute of limitations, and failure to mitigate damages. As an extra safeguard, the defendants' attorney pleaded "all other defenses that may become applicable or available...."

Seven months before trial, the plaintiff filed a motion to strike the affirmative defenses on the ground that discovery requests had revealed that the defendants could supply no factual support for them. At the hearing in Fairfax County Circuit Court, the trial judge questioned counsel on each defense, one by one, to see what factual basis he had for alleging them. Getting no satisfactory answers to at least six of the defenses, the court granted the plaintiff's motion for sanctions in the amount of \$2,000.00 against the attorney who had signed the grounds of defense.

The Court walked through the clauses in the 20-year-old sanctions statute. By signing a pleading, an attorney certifies that (1) he or she has read the pleading, (2) to the best of his or her 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 change of existing law, and (3) it is not interposed for any improper purpose such as unnecessary delay or harassment.

*The Impact of Benitez — cont'd on page 12*

*Judge Ledbetter is a Retired Judge in the Fifteenth Judicial Circuit.*

## The Impact of Benitez *cont'd from page 11*

The Court analyzed each facet of the statute and its application:

- The three clauses are stated in the conjunctive. Therefore, an attorney is subject to sanctions for failure to comply with any *one* of them. In other words, the trial judge does not necessarily have to find that the attorney had an improper purpose in filing a pleading if it finds that the attorney violated the first or second clause.
- The General Assembly did not make the imposition of sanctions discretionary. Instead, it elected the mandatory words “shall impose an appropriate sanction” when the statute is violated.
- The heart of the *Benitez* decision is the Court’s holding that the sanctions statute is triggered *at the time the pleading is signed*. Consequently, it is the information available to the attorney at the time he or she signs the pleading, not what information might come to light later, that is pertinent.
- An *objective* standard of reasonableness is applied in determining whether an attorney could have formed a reasonable belief that the pleading is well founded.
- Finally, the Supreme Court applied an “abuse of discretion” standard in reviewing the trial court’s determination that the statute had been violated.

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The VADA and the VTLA filed amicus briefs. Basically, both sides argued, in one fashion or another, for a rather considerate application of the statute. VADA’s brief focused on the danger of waiver; i.e., the defense might lose the ability to assert a later discov-

ered defense if it isn’t asserted in the initial response. The VTLA, on the other hand, argued the particulars of the instant case, echoing the trial court’s finding that the affirmative defenses were asserted *after* counsel had extensive information through discover in the previous nonsuited case that showed no factual support for the defenses.

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It is impossible to criticize the Court’s analysis of the statute and its application to the circumstances of the case before it. How could the Court have come to any other conclusion but that the factual underpinning for assertions in a pleading *must* exist at the time the pleading is signed and filed? How could the Court have construed the statutory language other than that the three clauses are in the conjunctive, necessitating a finding of a violation of only one of the clauses, not all three, and thereby eliminating improper purpose as a prerequisite circumstance? How could the Court have found that the imposition of sanctions is purely discretionary when the legislature used the word “shall”?

So, it is not the analysis that is bothersome; rather, it is the result. It strikes at a practice used by defense attorneys in civil cases for generations: plead every defense you can think of, and retreat later, when discovery indicates that there is no basis for pursuing them. By implication, it also reminds plaintiffs’ attorneys to use great care in pleading alternatives unless supported by facts available to the drafter at the time the pleading is signed and filed.

What will be the effect of *Benitez*? It depends. Many commentators assume that the decision will have a sweeping impact, so that all litigators now must take extra caution to include in their pleadings only those factual assertions that are well grounded at the time the pleading is drafted, trusting the trial court to grant leave to amend under Rule 1:8 in the event new claims or defenses are discovered later.

Others take a more restrained view, pointing out the unusual circumstances — i.e., the previous case — in *Benitez*. Maybe the most significant sentence in the entire opinion is this one: “All information obtained by counsel in that earlier case was known to the attorney who signed the grounds of defense in this case.” If that is an accurate observation, the impact

will be more limited, perhaps of precedential value only in those cases where it is obvious that the attorney had good reason to know at the time he drafted the pleading that the claims or defenses asserted have no factual basis. (For instance, in *Flippo v. CSC Associates*, 262 Va. 48 (2001), defense counsel alleged fraud in a counterclaim based on a letter between the parties. After reviewing the contents of the letter, the Court held that it could not have supported a reasonable belief that a claim of fraud was well grounded.)

Predictions abound, but only time and more decisions will give litigators better guidance. However, one consequence can be predicted with relative ease: more motions to amend under Rule 1:8 are on the way. Courts will have to grapple with those motions and with the dicta in *Benitez* reminding the judiciary and the bar that such amendments should be liberally granted and that a failure to do so may constitute an abuse of discretion on the part of the trial judge. Because pretrial scheduling orders normally allow discovery to within close proximity of the trial date (a date that has been set in some courts for as long as a year or two), it will be interesting to see the interplay between the *Benitez* decision and a last-minute motion to amend a complaint or a responsive pleading, which if granted would surely generate a motion for continuance of the trial, which in turn would have a tendency to play havoc on a busy court's trial docket.

In a recent sequel to *Benitez*, the Supreme Court affirmed sanctions against attorneys who made allegations in a recusal motion that were not grounded in fact. In *Williams & Connelly v. PETA*, 273 Va. \_\_\_\_\_, 643 S.E.2d 136 (2007), the Court used an objective standard of reasonableness in evaluating the attorneys' representations in the motion just as it did with the pleadings in *Flippo* and *Benitez*. Finding the allegations wholly unsupported by the facts, and further finding that they were not warranted by law, the Court upheld sanctions amounting to \$40,000.00. (Regrettably, the representations in the motion also contained unusually harsh accusations against the trial judge.)

Commenting on the unfounded representations in the motion as well as the "contemptuous language" employed in those representations, the Court said "distorted representations in a pleading never serve a

proper purpose...within the meaning...of Section 8.01-271.1." Among its other purposes, the Court said, the sanctions statute "deters abuse of the legal process and...promotes public confidence and respect for the rule of law."

Thus, litigators should not make factual assertions where there is no objectively reasonable basis to support them at the time they are made.

Instead, counsel should move to amend the pleading *promptly* upon discovering a new claim or a new defense. These motions to amend will be viewed skeptically by the trial judge, for obvious reasons, especially on the eve of trial. So, in arguing for the amendment, counsel must be prepared to show the trial court that he or she has acted diligently in the matter; that nothing could have been done differently under the circumstances; and that the ends of justice necessitate an amendment even though a substantial new issue is injected into the case that perhaps creates the need for a continuance of the trial.

There is some suggestion that the legislature should amend the sanctions statute to provide a "safe harbor" within which litigators may withdraw unsupported claims and defenses—at least where the representations are not deliberately and mischievously distorted. Unless and until that change, or some other, is made, however, there seems to be no sure alternative to the approach suggested above. ☒

# Too Fast, Too Furious? Are the New 'Civil Remedial Fees' Vulnerable to a Constitutional Challenge?

*Reginald M. Skinner, Esq.*

There's a new sheriff in town for traffic offenders, and he goes by the name "civil remedial fee." The fees are a central feature of the transportation bill enacted by the General Assembly and signed into law during the 2007 legislative session. House Bill 3202, otherwise known as the Virginia Transportation Reform Act, generates revenue for new transportation projects by assessing civil remedial fees against "dangerous drivers whose proven driving behavior places significant financial burdens upon the Commonwealth."<sup>1</sup>

The fees are steep, ranging anywhere from \$750 to \$3,000, and apply to a wide variety of traffic offenses. For example, a conviction for driving 20 mph over the maximum speed limit garners a civil remedial fee of \$1,050 plus the usual fine of about \$200 and court costs. A first time conviction for driving while intoxicated results in a \$2,250 civil remedial fee on top of the applicable fine and court costs. The fees are also assessed against certain "prepayable" offenses (that is, relatively minor violations where the defendant can pay a standard fine and processing fee and thereby avoid having to appear in court). For instance, possessing an

open container of alcohol while driving a motor vehicle is a \$35 prepayable offense, but it results in a \$900 civil remedial fee under the new law passed by the General Assembly.

The law affords judges no discretion to suspend or reduce the civil remedial fee. In other words, the fee must be assessed in full if it applies to a particular offense. Also, the offender must pay the fee in three annual installments, the first of which the court collects immediately upon conviction. The defendant pays the second and third installments to the Department of Motor Vehicles.

State legislators expect the civil remedial fees to raise \$65 million to \$120 million for transportation improvements.<sup>2</sup> Court clerks expect chaos from the "angry hordes learning about the fees for the first time at the payment window."<sup>3</sup> Lawyers and traffic court judges anticipate a sharp increase in the number of trials and the number of defendants hiring attorneys to contest the heavy fees.<sup>4</sup> (Indeed, in some circles, the new law has been dubbed the "Lawyer Full Employment Act.")<sup>5</sup>

A question that has not yet been explored, however, is whether the General Assembly's attempt to raise transportation funds from "dangerous" drivers is constitutional. The fees are so substantial as to practically invite a challenge that they constitute an "excessive fine" under the Constitution of the United States<sup>6</sup> and the Constitution of Virginia.<sup>7</sup> Such a challenge would have to establish that the civil remedial fee is designed to punish offenders as opposed to compensate the government for a loss. If the fee constitutes punishment, it is unconstitutional only if it grossly exceeds the gravity of the offense. A separate issue is the fact that civil remedial fees are assessed only against Virginia residents, which naturally raises concerns that that the measure denies similarly-situated persons equal protection under the law. If residents and non-residents alike violate the Commonwealth's traffic laws, is there any rational basis for assessing the civil remedial fee only against Virginia residents?

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### Analysis Under the Excessive Fines Clause

For purposes of the constitutional prohibition against excessive fines, the word “fine” means any payment to the government “as punishment for some offense.”<sup>8</sup> Because the Excessive Fines Clause limits the government’s power to punish, any measure that is not designed to punish a wrongdoer, but to compensate the government for a loss falls outside the prohibition against excessive fines. Accordingly, the key distinction is whether the statute in question is punitive or remedial in nature.

The fact that a law carries a “civil” or “criminal” label is “not of paramount importance” in determining whether it constitutes punishment, since “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law.”<sup>9</sup> Rather, a measure is considered punitive if it serves the twin goals of punishment: deterrence and retribution.<sup>10</sup> Recognizing that some laws may serve both punitive *and* remedial purposes, the Supreme Court of the United States has determined that unless a measure is exclusively remedial, it is subject to the limitations of the Excessive Fines Clause. As the Court stated in *Austin v. United States*, a law “that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.”<sup>11</sup>

In determining whether a payment is punitive or remedial, courts consider factors “such as the language of the statute creating the sanction, the sanction’s purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction.”<sup>12</sup> Applying these factors to the civil remedial fee, the language of HB 3202 plainly states that fee is remedial: “The purpose of the civil remedial fees imposed in this section is to generate revenue from drivers whose proven dangerous driving behavior places significant financial burdens upon the Commonwealth.”<sup>13</sup> Other factors, however, strongly suggest that the civil remedial fee also serves the goals of punishment.

First, state legislators openly acknowledge that the fees are designed in part to deter violation of the Commonwealth’s traffic laws. According to one copatron of HB 3202, “[t]he whole point is to try and discourage people from doing something they shouldn’t be doing anyway.”<sup>15</sup> Another legislator has stated that the new fees create “stiffer penalties for DUIs and reckless drivers.”<sup>15</sup> “Many of these folks are repeat offenders who are routinely breaking the law.”<sup>16</sup>

Second, and most important, the assessment of the civil remedial fee is triggered only by the defendant’s criminal conviction. Courts have repeatedly acknowledged the importance of this factor in determining whether a law is punitive or remedial in nature. For example, in *United States v. Bajakajian*,<sup>17</sup> the defendant violated a federal law against attempting to leave the country without reporting that he was transporting more than \$10,000 in currency. The law required the defendant to forfeit the full \$357,144 seized by customs agents. The Supreme Court had “little trouble” concluding that the forfeiture constituted punishment.<sup>18</sup> A key factor in the Court’s analysis was that the forfeiture hinged upon the defendant’s criminal conviction. In particular, the Court observed that:

The forfeiture is . . . imposed at the culmination of a criminal proceeding and requires a conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation.<sup>19</sup>

In *Department of Revenue v. Kurth Ranch*,<sup>20</sup> the defendants pleaded guilty to drug charges, and in a separate civil proceeding, were assessed a \$181,000 tax on 1,811 ounces of marijuana under the Montana Dangerous Drug Tax Act. Assessment of the tax “hinge[d] on the commission of a crime,” a fact that led the Supreme Court to conclude that the law constituted punishment despite the tax’s revenue-generating effect.<sup>21</sup> Indeed,

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## Too Fast, Too Furious *cont'd from page 15*

the Court observed that “[p]ersons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.”<sup>22</sup>

The same analysis applies with equal force to the civil remedial fee. The fee is assessed solely upon the defendant’s conviction of a crime covered by the statute. Traffic offenders thus constitute the entire class of persons subject to the fee. These features of the civil remedial fee, much like the laws at issue in *Bajakajian* and *Kurth Ranch*, are “significant of penal and prohibitory intent rather than the gathering of revenue.”<sup>23</sup> As a result, it is difficult to conclude that the fee is exclusively remedial. To the contrary, a court could easily find that the fee also serves a deterrent or retributive purpose, such that it constitutes punishment for purposes of the Excessive Fines Clause.

Even if the fee constitutes punishment, it violates the Excessive Fines Clause only if the sanction is “grossly disproportional to the gravity of the defendant’s offense.”<sup>24</sup> Factors that are obviously relevant to this analysis are the defendant’s level of culpability and the degree of harm caused by the defendant’s conduct. In addition, one measure of proportionality that courts have often relied upon is the amount of the challenged sanction in comparison to the applicable criminal fine. If the sanction is many times greater than the maximum applicable criminal fine, it is more likely to be held unconstitutional as an excessive fine. For example, in *Bajakajian*, where the forfeiture was \$357,144 and the maximum criminal fine for the defendant’s offense was \$5,000, the Supreme Court declared that the forfeiture violated the Excessive Fines Clause.<sup>25</sup>

With regard to the civil remedial fees, the amount of the fee is clearly excessive in the case of prepayable offenses. As noted earlier, a defendant convicted of driving with an open container of alcohol faces a \$900 civil remedial fee in comparison to a \$35 criminal fine. The fact that the fee is more than 25 times greater than the maximum applicable criminal fine offers strong support for the conclusion that the civil remedial fees

are excessive as applied to prepayable offenses. However, the answer is not so clear when considering more serious driving offenses. Without a doubt, driving while impaired is a grave offense given the likelihood of serious harm, including death. A first-time DWI offender is subject to a \$2,250 civil remedial fee, which is less than the maximum criminal fine of \$2,500.<sup>26</sup> The fee and the maximum criminal penalty are reasonably proportional (indeed virtually identical), a fact that would seriously undermine any “excessive fine” challenge to the civil remedial fee as applied to DWI offenses.

### Analysis Under the Equal Protection Clause

The civil remedial fees will not be assessed against the thousands of non-residents who violate the Commonwealth’s traffic laws every year. The fee might appear to be vulnerable to a challenge that it denies similarly-situated persons equal protection of the laws. However, the civil remedial fee does not restrict the exercise of a fundamental right or classify persons on the basis of a suspect characteristic. Accordingly, “the Equal Protection Clause requires only that the classification further a legitimate state interest.”<sup>27</sup> “In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification.”<sup>28</sup> One such justification for imposing the fee exclusively upon Virginia residents could be the concern that forcing non-residents to pay the fee might reduce the flow of interstate travel through Virginia and thereby harm the Commonwealth’s billion dollar tourism industry. Whether the impact on tourism actually figured into the legislature’s decision to impose the fee solely upon Virginia residents is unclear. However, such a justification for treating residents and non-residents differently would likely survive the highly-deferential rational basis review.

### Conclusion

Even before the first assessments under the new law take place, Virginians have begun to question whether the civil remedial fees make sense as a tool for generat-

ing transportation funds. In addition, the fees will face a raft of constitutional challenges on various grounds, including the charge that they constitute “excessive fines” as well as violate the constitutional guarantee of equal protection. Without a doubt, the law will be tested, and other states will be paying close attention to see whether Virginia’s attempt to raise transportation funds from dangerous drivers is up to the challenge. ☒

<sup>1</sup> House Bill 3202; new Virginia Code § 46.2-206.1(A).

<sup>2</sup> See Tom Jackson, “Hefty Fees In Store for Misbehaving Va. Drivers,” *Washington Post*, June 23, 2007, A1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

<sup>7</sup> “[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .” Va. Const. art. I, § 9.

<sup>8</sup> *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989).

<sup>9</sup> *United States v. Halper*, 490 U.S. 435, 447-448 (1989).

<sup>10</sup> *Id.* at 448.

<sup>11</sup> *Austin v. United States*, 509 U.S. 602, 610 (1993).

<sup>12</sup> *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001).

<sup>13</sup> HB 3202; new Va. Code § 46.2-206.1(A).

<sup>14</sup> David Reynolds, “New Law May Surprise Traffic Offenders With Big Fees,” *Daily-News Record Online (Harrisonburg, VA)*, at <http://www.dnronline.com> (last visited June 12, 2007).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *United States v. Bajakajian*, 524 U.S. 321 (1998).

<sup>18</sup> *Id.* at 328.

<sup>19</sup> *Id.* (internal quotes and footnote omitted).

<sup>20</sup> *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

<sup>21</sup> *Id.* at 781.

<sup>22</sup> *Id.* at 782.

<sup>23</sup> *Id.* at 781.

<sup>24</sup> *Bajakajian*, 524 U.S. at 334.

<sup>25</sup> *Id.* at 338.

<sup>26</sup> Va. Code §§ 18.2-266, 18.2-270, 18.2-11.

<sup>27</sup> *Nordlinger v. Hahn*

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