Lessons Learned in the Synthetic Stucco Litigation
By: Stephen A. Horvath, Esquire

Starting in the early 1990’s an exterior cladding for houses known as “EIFS” (Exterior Insulation Finish System) became popular in the Washington Metropolitan area. The product had a number of advantages. It looked like stucco, but did not have the weight of stucco, and would not crack like stucco. It had an insulation quality to it. There was a layer of a Styrofoam type product which made it as though you were wrapping your house in a Styrofoam cooler. It was decorative and could be easily shaped, to add attractive features to the exterior of the house. Finally, its finish was impervious to water, and would in theory keep water out.

The use of this popular cladding resulted in a large number of subcontractors being trained by the manufacturers of the product to install it on houses. Although some very strict installation requirements were set up, the subcontractors would frequently not follow the requirements. As a result, water could infiltrate between the house sheathing, and the EIFS, and the water would be trapped. Over time, the elevated moisture levels would cause rotting of the wood sheathing and framing.

In the mid to late-1990’s, as a result of newspaper articles and TV programs, the public became aware of a number of serious potential problems. For many of the homeowners the time for which to make a warranty claim under their purchase agreement had expired. Plaintiffs’ attorneys were left to try a number of novel approaches, including alleged fraud, or violation of consumer protection acts to develop a theory for recovery. With leaky homes and huge bills for repair, the homeowners were sympathetic plaintiffs.

The fraud allegation usually went like this: “I contracted to buy stucco. Stucco should be a cement based product which has been used for hundreds of years. The product you put on my house is Styrofoam and plastic. You have lied to me.” Hundreds of lawsuits were filed alleging stucco defects in the Northern Virginia area. The Fairfax Circuit Court created a special three judge panel to hear the stucco cases, to provide for uniformity in the decision making.

This firm handled almost one hundred of these cases, representing both the subcontractors and the general contractors. We were successful in either having the cases dismissed, or reaching resolutions on the cases, and paying only a small amount of the damages claimed. A number of lessons were learned in how to handle the homeowner building defect cases, and new law was developed by the Circuit Court and Virginia Supreme Court.

The first two cases that were tried by other firms in Fairfax County resulted in verdicts of approximately $1.4 million and $1 million. In those cases, there were no aggressive challenges to the plaintiffs’ experts and the attorneys “ran away” from the benefit and quality of the EIFS product. The third case in Fairfax County, which was tried by this firm, resulted in a $17,000 verdict, which was reduced to zero because of a prior settlement with the installer. While the Court did award costs and attorney’s fees, the attorney’s fees awarded were one-seventh of the amount requested.

Successful handling of these cases depended upon a number of factors: First, at the pleadings stage, the allegations were aggressively challenged by use of demurrers and motions craving oyer. While the plaintiffs’ attorneys attempted to sue subcontractors directly, through successful use of motions, most, if not all, the claims directly against the subcontractors were ultimately dismissed. Second, although EIFS did have its problems, the idea behind EIFS was excellent. It was a good idea, but had to be carefully installed. Attorneys who attempted to shift the burden to EIFS on behalf of their defendants, or who agreed that the product was freighted with problems, continued to have problems with their defenses. If the product was embraced, and it continued on page 7
1. Death of claimant allows insurer to withdraw settlement: Liability settlements are generally governed by principles of contract law: timely acceptance of an offer creates a binding agreement. The rules for settlements under the Virginia Workers Compensation Act are much different. Settlements are not binding until approved by the Virginia Workers Compensation Commission. Even after the settlement Order is entered, the Commission has discretionary authority to vary the award within twenty-one days for good cause. “Good cause” may be simply a change of mind by the claimant. Should that occur, then the settlement proceedings must be returned before the Commission will vacate the settlement Order.

In a recent full Commission decision, Pringle v. WMATA, VWC File Number 155-46-42 (December 22, 1997) where the Commission heard an appeal by the claimant requesting that a witness subpoena to be issued, the Commission concluded that federal claims are not binding upon the claimant, and granted an appeal to the ends.

Another example is provided by Grimes v. A-T Towing, VWC File Number 155-46-42 (December 22, 1997) where the Commission heard an appeal by the claimant requesting that a witness subpoena to be issued, the Commission concluded that federal claims are not binding upon the claimant, and granted an appeal to the ends.

2. Can you appeal before the case is over? The general rule is that only final Orders are appealable to the full Commission or Court of Appeals. However, the Virginia Workers Compensation Commission has created an exception in certain cases where it has allowed interlocutory appeals. Where there is a significant legal issue, or where one party may suffer material prejudice, an interlocutory appeal will be allowed. This means that the aggrieved party can appeal the decision even though no final award has been made.

However, not every legal or evidentiary issue justifies an interlocutory appeal. In Campbell v. Systems Applications, Inc., VWC File Number 217-62-55 (October 22, 2004), the full Commission held that an interlocutory appeal was not proper where a deputy commissioner refused to dismiss a claim on jurisdictional grounds. The Commission found that there was no substantial prejudice to the employer if the case was allowed to go forward, and that the claimant was entitled to present testimony, in addition to the allegations in her claim for benefits, to establish jurisdiction.

An interlocutory appeal was deemed appropriate in Echols v. R & T Construction, VWC File Number 185-92-20 (January 26, 1999). In that case, the employer requested review of a Deputy Commissioner’s decision holding that a claimant was entitled to benefits. Third, she claimed that her benefits survived the claimant’s death from an unrelated cause. Because a significant legal issue was involved, the full Commission considered the appeal, and upheld the Deputy Commissioner’s ruling that the claim did survive the claimant’s death.

Another example is provided by Grimes v. A-T Towing, VWC File Number 155-46-42 (December 22, 1997) where the Commission heard an appeal by the claimant requesting that a witness subpoena to be issued, the Commission concluded that federal claims are not binding upon the claimant, and granted an appeal to the ends.

3. When are employers subject to the Act? Every employer that regularly employs three or more employees in the Commonwealth of Virginia is subject to the jurisdiction of the Virginia Workers Compensation Commission, and is required to carry Workers Compensation insurance. The burden of proving that the employer does not regularly conduct business with three or more employees is upon the employer. That burden can be difficult to overcome, as discovered by the employer in Perry v. Tom Delute 66 R & T Construction, 44 Va. App. 415, 605 S.E.2d 330 (2004), re-hearing en banc February 1, 2005. The employer was a sole proprietor who operated a construction business for ten years.

The claimant sustained work-related injuries on April 6, 2001. The employer regularly employed one employee for three years prior to the injury, during 1998, 1999, and 2001. However, it had only two regular employees between December, 2000 and August, 2001.

The full Commission found that the employer met its burden of proving that it did not regularly employ three or more employees because three months prior to the accident, and four months thereafter, he operated with only two employees. On appeal, a panel of the Court affirmed the Commission’s decision, finding that the Commission applied an erroneous legal standard.

The majority held that “an employer cannot be allowed to oscillate between coverage and exemption as its labor force exceeds or falls below the minimum from day to day.” The employer regularly employed more than three employees for three years prior to the accident, and the mere fact that it employed only two employees for a period of seven to eight months was due to “transitory factors.” What may have most persuaded the majority however, is the fact that the owner hired, at his own expense, another individual to help construct his residence during 2000 and 2001. This individual was not hired on the payroll of R & T.

After the accident however, this individual and another employee were added to the payroll of the company as employees. Accordingly, the employer had three employees at the time of the accident and the employee individually hired was included; and four employees immediately following the accident.

The dissenting opinion would have affirmed the Commission’s factual finding that the employer’s regular business activities at the time of the accident did not require three or more employees. A re-hearing en banc was granted, and a final decision will be rendered by the Court of Appeals later this year. That decision will be reported in one of our future newsletters.

continued from page 1...
2. HB2559 and SH 1173—These are identical bills which passed both houses. They address matters involving medical malpractice litigation. The bills were strongly supported by the VADA and represent significant improvement in this area of legislation. The specifics of the legislation provide:

--expert witness must certify a breach of the standard of care and that such breach was a proximate cause of injury before a medical malpractice case may be filed.
--the development of an independent medical care provider to a patient shall not be used as evidence of an admission.

801-399 is amended to allow all information from a treating provider to be used as evidence. This represents a significant improvement in the statute. Previously, information could be kept from the jury about the care and treatment of a patient. This statute has application in all personal injury matters.
--medical malpractice insurers shall submit annual reports regarding claims made against providers.
--requires the state medical board to assess the competency of any practitioner who has 3 claims paid in any 10 year period.

3. HB2209—General District Courts, Medical records.

This bill will apply to cases that are removed from General District Court. It will allow the removed case to use the General District Court rules regarding medical bills and records. In General District Court, the plaintiff may put on evidence of bills and records with use of an affidavit. Now, the plaintiff will be able to use the same procedure in Circuit Court on any removed case.

This represents a win for the plaintiff’s bar. It will be much easier for the plaintiff to get evidence before the jury, including medical records of health care providers. Usually, in Circuit Court, the evidence is inadmissible.

We should consider this statutory change when discussing whether to remove a General District Court case to Circuit Court.

If you have any questions about these issues, please give me a call.

continued on page 5

2. HB2559 and SH 1173—These are identical bills which passed both houses. They address matters involving medical malpractice litigation. The bills were strongly supported by the VADA and represent significant improvement in this area of legislation. The specifics of the legislation provide:

--expert witness must certify a breach of the standard of care and that such breach was a proximate cause of injury before a medical malpractice case may be filed.
--the development of an independent medical care provider to a patient shall not be used as evidence of an admission.

801-399 is amended to allow all information from a treating provider to be used as evidence. This represents a significant improvement in the statute. Previously, information could be kept from the jury about the care and treatment of a patient. This statute has application in all personal injury matters.
--medical malpractice insurers shall submit annual reports regarding claims made against providers.
--requires the state medical board to assess the competency of any practitioner who has 3 claims paid in any 10 year period.

3. HB2209—General District Courts, Medical records.

This bill will apply to cases that are removed from General District Court. It will allow the removed case to use the General District Court rules regarding medical bills and records. In General District Court, the plaintiff may put on evidence of bills and records with use of an affidavit. Now, the plaintiff will be able to use the same procedure in Circuit Court on any removed case.

This represents a win for the plaintiff’s bar. It will be much easier for the plaintiff to get evidence before the jury, including medical records of health care providers. Usually, in Circuit Court, the evidence is inadmissible.

We should consider this statutory change when discussing whether to remove a General District Court case to Circuit Court.

If you have any questions about these issues, please give me a call.

continued on page 5

A florist is a new and independent journey. A detour, on the other hand, is a mere departure from an assigned task. Here are some examples:

- Boss owns a grocery store in Atown. Employee is charged with driving to Btown to buy produce. As part of that trip, Employee usually stays with his brother in Btown for the evening, then returns to Atown in the early morning with the produce. One day, Employee gets into an accident on his way home. Is it treated as a work-related accident?
- Employee customarily drove D home or to the place of D’s choice after work was completed. One day, after work, V and D, en route to D’s place, stopped to drink beer and play horseshoes with friends. V and D then resumed their trip to D’s place. While drinking, V got into an accident where V was injured. Is B entitled to workers’ compensation benefits? According to the current law, B was not covered under a workers’ compensation policy because...windshield wipers were replaced was merely a detour from the regular course of business of traveling back to D’s place. Vaughn’s Landscaping & Maintenance v. Dodson, 282 Va. 270 (2001).
- C did the agent “intend to benefit” the principal through his actions?

1. Does a principal-agent relationship exist? The answer to this question is simple as A-B-C:
- A-Assent. There must be an agreement between the principal and agent to conduct work.
- B-Benefit. The agent's conduct must be for the principal's benefit or on behalf of the principal.
- C-Control. The principal must be able to exercise control over the agent. For example, the principal must have the power to supervise or direct the manner of the agent's work.

2. Was the agent acting within the scope of the relationship? To determine if the act occurred within the scope of the principal-agent relationship, the following must be answered in the affirmative:
- A. Was the conduct “of the kind” the agent was hired to perform? This is a factual question that should be answered by comparing the actions of the employee to the type of work the employee was hired to perform or the type of work that is incidental to an employee's job. This is troublesome to many insurers because of the omnibus clause requirement under Virginia Code §33-321.2. An insured coverage to any person legally operating a motor vehicle with the express or implied permission of the owner if an employee was not acting within the scope of his or her employment, however, the actions will not be deemed to be within the permission of the owner.

However, there are some instances when an employer may be liable even if his employee was operating a vehicle without permission. If an employee drives his vehicle to an employer that is knowingly an uninsured driver, the employer may be liable despite the fact that the employee was acting outside the scope of employment. See, e.g., McNeil v. Spindler, 191 Va. 680 (1950) (where no proof shown that driver was unfit); see also Cowan v. Duncan, 145 Va. 489 (1926) (where father had told his son that he was not. B.Did the tort occur “on the job”?

If a tort occurs “on the job,” then the actions of an employer will be deemed to be within the permission of an owner. Likewise, if a tort is committed outside the scope of employment, the actions will be deemed outside the permission of the employer. To determine whether an action is “on the job” or not, ask yourself whether the employee’s actions constitute a florist or a detour. Continued on page 6

3. HB2209—General District Courts, Medical records.

This bill will allow the removed case to use the General District Court rules regarding medical bills and records. In General District Court, the plaintiff may put on evidence of bills and records with use of an affidavit. Now, the plaintiff will be able to use the same procedure in Circuit Court on any removed case.

This represents a win for the plaintiff’s bar. It will be much easier for the plaintiff to get evidence before the jury, including medical records of health care providers. Usually, in Circuit Court, the evidence is inadmissible.

We should consider this statutory change when discussing whether to remove a General District Court case to Circuit Court.

If you have any questions about these issues, please give me a call.

continued on page 5

A florist is a new and independent journey. A detour, on the other hand, is a mere departure from an assigned task. Here are some examples:

- Boss owns a grocery store in Atown. Employee is charged with driving to Btown to buy produce. As part of that trip, Employee usually stays with his brother in Btown for the evening, then returns to Atown in the early morning with the produce. One day, Employee gets into an accident on his way home. Is it treated as a work-related accident?
- Employee customarily drove D home or to the place of D’s choice after work was completed. One day, after work, V and D, en route to D’s place, stopped to drink beer and play horseshoes with friends. V and D then resumed their trip to D’s place. While drinking, V got into an accident where V was injured. Is B entitled to workers’ compensation benefits? According to the current law, B was not covered under a workers’ compensation policy because...windshield wipers were replaced was merely a detour from the regular course of business of traveling back to D’s place. Vaughn’s Landscaping & Maintenance v. Dodson, 282 Va. 270 (2001).
- C did the agent “intend to benefit” the principal through his actions?

1. Does a principal-agent relationship exist? The answer to this question is simple as A-B-C:
- A-Assent. There must be an agreement between the principal and agent to conduct work.
- B-Benefit. The agent's conduct must be for the principal's benefit or on behalf of the principal.
- C-Control. The principal must be able to exercise control over the agent. For example, the principal must have the power to supervise or direct the manner of the agent's work.

2. Was the agent acting within the scope of the relationship? To determine if the act occurred within the scope of the principal-agent relationship, the following must be answered in the affirmative:
- A. Was the conduct “of the kind” the agent was hired to perform? This is a factual question that should be answered by comparing the actions of the employee to the type of work the employee was hired to perform or the type of work that is incidental to an employee's job. This is troublesome to many insurers because of the omnibus clause requirement under Virginia Code §33-321.2. An insured coverage to any person legally operating a motor vehicle with the express or implied permission of the owner if an employee was not acting within the scope of his or her employment, however, the actions will not be deemed to be within the permission of the owner.

However, there are some instances when an employer may be liable even if his employee was operating a vehicle without permission. If an employee drives his vehicle to an employer that is knowingly an uninsured driver, the employer may be liable despite the fact that the employee was acting outside the scope of employment. See, e.g., McNeil v. Spindler, 191 Va. 680 (1950) (where no proof shown that driver was unfit); see also Cowan v. Duncan, 145 Va. 489 (1926) (where father had told his son that he was not. B.Did the tort occur “on the job”?

If a tort occurs “on the job,” then the actions of an employer will be deemed to be within the permission of an owner. Likewise, if a tort is committed outside the scope of employment, the actions will be deemed outside the permission of the employer. To determine whether an action is “on the job” or not, ask yourself whether the employee’s actions constitute a florist or a detour. Continued on page 6
PREFERENCE ACTIONS: 
WHEN PAYMENT BY A DEBTOR CAN BE TAKEN AWAY! 
By Stephen A. Marshall, Esquire

If your business supplies materials on a credit basis, goods, or labor, you may one day become all too familiar (if you haven’t already) with a very powerful bankruptcy tool called a preference action. These actions are filed against businesses, like yours, by a Trustee in bankruptcy, a creditor, or a governmental body, who all expect to be fairly compensated for them. In this case, you have only received payment that is rightly due to your business for what it has already provided to the client. The Bankruptcy Trustee seeks to strip you of the compensation to which you are rightly entitled.

The United States Congress created the preference powers under Section 547 of Title 11 of the United States Code (commonly known as the Bankruptcy Code). Briefly, 11 U.S.C. § 547 holds that payment immediately prior to the debtor’s bankruptcy filing would not receive more than that “fair share.” In effect, it is a one year period to catch payment to any creditor.

Why are these preference actions so noteworthy? Their effect on businesses, like yours, is substantial and there are an increasing number of these actions appearing in the bankruptcy courts.

The preference action arises from a federal statute in Title 11 of the United States Code (commonly known as the Bankruptcy Code). Briefly, 11 U.S.C. § 547 holds a trustee (or any of the entities mentioned above) may avoid any transfer or any of an interest of the debtor (in bankruptcy) that the debtor made to a creditor within ninety days of the filing of the bankruptcy petition, while the debtor was insolvent. This three month period is extended to an entire year if the creditor had a “presumption of Insolvency.” The “presumption of insolvency” for any transfers the debtor made during this period.

What is the point of this law? Our goal is to give a creditor, like yours, the upper hand and have him or her recover the full amount of the transfer. However, the courts have interpreted this rule in different ways and it is not clear what Congress intended when it created the statute. Nevertheless, the bankruptcy preference, for the meantime, is here to stay and your business must act quickly and decisively when faced with a preference action. Although the preference action may seem a daunting entity, there are very effective ways to defend against such an opponent.

Section 547 provides statutory defenses to a preference claim.

1. The first is a contemporaneous exchange between the creditor and debtor for new value given to the debtor. This is a two-pronged test. First, a creditor must show that it and the debtor had the requisite intent to make a contemporaneous exchange for new value. Establishing the debtor’s intent is the most crucial element in this test. Second, the exchange must actually be contemporaneous in time. The second defense is a transfer that was made in the ordinary course of business or financial affairs of the debtor and the creditor. This payment must be for a debt incurred by the debtor in the ordinary course of its business and must be made according to ordinary business terms. The third defense is transfer to a financially distressing debtor that create a security interest in inventory of the debtor on the proceeds of the inventory. This is commonly known as the “collateral loan.”

2. The third defense is transfer to an insider of the debtor. This is commonly known as the “enabling loan.” This is most common for purchase money security interest (PMSI). Another defense is transfer that create a security interest in inventory of the debtor on the proceeds of the inventory. This is known as the “floating lien.”

Section 547 provides other defenses to the preference action, but all of them are quite technical and beyond the scope of this article. The best proven defense, however, to a preference action is active defense against the claim. Obtain legal counsel when faced with a potential preference problem and resolve the matter quickly. Often trustees file many preference actions in the same petition and have little time to conduct discovery. All the normal rules for federal discovery apply in an Adversary Proceeding. Therefore, use this opportunity to propound discovery requests upon the Trustee to assess the strength of the preference claim. Discovery will clearly cause the Trustee to scrutinize your matters and rescind any of the claims that are found to be weak or without merit. Above all, take control of the preference action to resolve the matter as quickly as possible to avoid delays and unneeded payments.

To you and your business, a preference action seems to be inequitable and unfair (and it may very well be so). You entered into your business to provide goods and services and you may expect to be fairly compensated for them. In this case, you have only received payment that is rightly due to your business for what it has already provided to the client. The Bankruptcy Trustee seeks to strip you of the compensation to which you are rightly entitled.

The United States Congress created the preference powers under Section 547 of the Bankruptcy Code to ensure that any unsecured creditor receives payment immediately prior to the debtor’s bankruptcy filing would not receive more than that “fair share.” In effect, it is a one year period to catch payment to any creditor.

Picking an Expert

by: Sandy Mastro Jack, Esquire

In certain cases, time is of the essence in investigating the scene or objects leading to the claim. Although ideally an expert would be picked once a lawsuit is filed and the case has been referred to defense counsel, some claims require immediate attention to ensure a review be qualified in time by the individuals who may later be required to testify. In those times when it is necessary to obtain an expert early on the case, here are a few tips of what to do and do not when trying to find the right expert:

Do . . .

1. Review the resume or curriculum vitae of the expert

Although it may seem obvious, one of the most important things to do before retaining an expert is to review his or her qualifications. Look at the individual’s training and experience to make sure that your expert’s background matches the wrapper field in which you are looking for testimony and expertise! Although some personal holdings themselves out as experts may have a great deal of education, they may be lacking in practical or useful experience in the field which could hinder their ability to testify. Aim for an expert that appears well rounded in training, experience and prior expert testimony.

2. Be as specific as possible

The closer you get in experience and training to the exact field of testimony, the better. General experience in engineering is not as helpful as bio-mechanical engineering or electrical engineering, etc. If your case requires specific scientific or medical testimony, the best expert will be the one whose expertise is in the specialized area of the testimony.

3. Talk to the expert

A qualified expert with massive experience and extensive training does not automatically lead to the best testimony. Presenting testimony to a jury requires the ability to effectively communicate and express ideas, as well as using language and examples that will make the subject matter comprehensible to a jury. Take the time to put a call in to your expert to personally discuss the issues you need addressed and make your own determination as to how that person will appear to a jury.

4. Consider location

When looking for an expert, keep in mind the venue in which suit may eventually be filed. It will save you and defense counsel time and money to pick an expert that is geographically located in the area where the case will be tried.

Don’t . . .

1. Use an “expert for all seasons”

Be wary of individuals who hold themselves out to be an expert in many fields in various areas of study. Self-proclaimed experts may assert knowledge and expertise that they do not have to the degree that you would want for your case. Make sure to do a little digging into the expert’s background to make sure there is support for the assertions that your expert is making and that they are familiar with the issues you need addressed. For example, one member of our firm interviewed an expert with a degree in mechanical engineering and concluded thatexpert was unqualified to make a statement that a certain polymer actually was. We did not retain that expert.

2. Rely solely on an expert database or service

Although expert services may be helpful in providing potential names or avenues to explore for expert witnesses, they should not be relied on solely. This is a good place to start, but it is still necessary to do the research on any individual name that is provided to ensure that the person meets your needs. The database services categorize experts into field names that may not exactly fit what you are looking for. Do not rely only on the services offered. Do . . .

1. Understand the qualifications of these experts with clear problems in a case, or may help the opposing party strike your expert. Make sure to do your own homework before allowing these services to help.

2. Note on medical experts...

Although in general, a medical expert or doctor to perform an independent medical examination will not be necessary until suit is filed, in certain cases it may become important to obtain a doctor early in the case. In these cases, counsel with defense counsel to get an independent medical exam once the case has been filed if the plaintiff went through an exam prior to filing suit. It therefore becomes important to determine what doctor the defense attorney would suggest to defend the case.

If you have questions about how to pick an expert or what type of expert you will need, please feel free to contact us.

(703) 385.1000 • Fax (703) 385.1555 • www.vadctriallaw.com

TRICHLÔ, BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.