

# **2007 UPDATE**

## **VIRGINIA FINANCIAL SERVICES LEGISLATION**

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## **DEWEY B. MORRIS**

Dewey Morris has represented banks and other creditors since 1967 in commercial loan transactions and in complying with federal and state consumer credit laws. He is a member of the Consumer Financial Services Committee of the ABA Section on Business Law and currently represents two Virginia associations, and many of their members, consisting of consumer finance companies, sales finance entities, and brokers and lenders licensed under the Virginia Mortgage Lender and Broker Act. He regularly represents such clients before Virginia regulatory agencies, including the Virginia Bureau of Financial Institutions. His practice areas also include banking, business law and asset based lending. He regularly serves as Virginia counsel in connection with multi-state and international credit facilities.

Mr. Morris is listed in *Best Lawyers in America*, *Virginia Business' Legal Elite* and *Virginia Super Lawyers*. He is a permanent member of the Judicial Conference of the Fourth Circuit and is a Founding Fellow of The American College of Consumer Financial Services Lawyers.

## **THOMPSONMCMULLAN, P.C.**

*ThompsonMcMullan, P.C.* was formed in 1973 to serve the legal needs of growing businesses and their owners. The firm is located in the historic Shockoe Slip area of downtown Richmond, Virginia. Firm lawyers have been active and held leadership roles in legal, business and civic organization in the City and surrounding counties, as well as in local, Virginia, and American Bar Associations. The firm's clients expect and receive excellent, responsive and cost-effective service for virtually all of their legal needs. The firm strives to create and maintain long term relationships which can only be built upon the trust that comes from the consistent delivery of timely and quality service.

## **DISCLAIMER**

This paper is presented solely as a source of information. For the most part, the descriptions of the bills were based on the summaries prepared by the Division of Legislative Services of the General Assembly. This paper does not constitute legal advice and does not create an attorney-client relationship. If you have questions about the bills addressed in this paper, seek advice from your lawyer. This paper was last updated on April 6, 2007, and does not address any developments after that date. As a result, information in this paper may become outdated. In no event will the author or his law firm be liable for any direct, indirect, consequential or other damages resulting from and/or related to the use of this paper.

## **2007 Virginia Financial Services Legislation**

This update contains my annual summary of bills passed by the Virginia General Assembly that may be of interest to creditors providing consumer financial services. Except for House Bill 1657 that was effective February 5, 2007, the bills will be effective July 1, 2007.

There may be other bills in which you would have an interest, but the following seem most relevant to providers of consumer credit. For the most part, the following summaries are based upon summaries prepared by the Division of Legislative Services of the General Assembly.

A brief discussion at the end of this update addresses the Administrative Letter dated March 29, 2007, issued by the Bureau of Financial Institutions. It applies to licensees under the Virginia Mortgage Lender and Broker Act and relates to nontraditional mortgage products.

### **Mortgage Loans**

#### **HB 1909      Deeds – Recording Requirements; Responsibility of Attorney or Party Who Prepares a Document for Recordation**

This bill amends § 17.1-223 to place the responsibility of complying with the requirements of § 17.1-223.A on the attorney or party who prepares a writing for recordation.

The preparer is responsible for removing the social security number from the writing prior to the instrument being submitted for recordation.

The preparer must ensure that a deed conveying not more than four dwelling units states on its first page the name of the title insurance underwriter or that the existence of title insurance is unknown to the preparer.

The bill also provides that the writing, once recorded, shall be returned to the grantee unless an alternate address to which the writing shall be returned is indicated on the face of the writing.

#### **HB 2058SB 826      Notaries Public –Electronic Notarization; Requirements for Notarial Certificates**

This bill amends, adds and repeals numerous Code sections to rewrite the provisions for notary law, including electronic notarization. Electronic provisions become effective July 1, 2008. The bill creates a technology fee account for the Secretary of the Commonwealth's use. A list of prohibited acts for notaries is included that subject the notary to suspension, removal, or reprimand. The bill also creates a Class 1 misdemeanor for obtaining, concealing, etc., electronic notarization software or

hardware. The bill also increases the Secretary's fee for commissioning a notary. The fee for notarizing a document remains at \$5, and the fee for electronic notarization is not to exceed \$25.

An amendment to § 47.1-15 will require, effective July 1, 2007, that the notarial certificate must be on the same page as the signature of the person giving the acknowledgment. For example, in the case of a deed of trust, if the grantor's signature appears at the bottom of page 4, then the notarial certificate must also appear on page 4 and not on page 5.

The definition of a "notarial certificate" in § 47.1-2 says, among other things, that it must show the "notary registration number". My understanding is that the Secretary of the Commonwealth, when issuing a commission to someone to become a notary public, has given that person an identification number. The amendment in this bill to § 47.1-8 says that the Secretary, when preparing a notary commission, must now include a registration number.

#### **HB 2059/SB 822    Recordation Tax**

These bills amend § 58.1-802 to clarify that the additional recordation tax rate paid by the grantor of a deed is applied to the greater of the consideration paid or the value of the interest conveyed.

#### **HB 2292/SB 794    Limited Liability Companies – Parties to Actions, and Recordation Tax Exemptions**

These bills amend §§ 13.1-1002, 13.1-1020, 13.1-1123 and 58.1-811 to clarify that a member of a limited liability company is not barred from being a party in an action against a limited liability company when the member has an interest in the action independent of being a member of the limited liability company. Among other things, the bills also provide that the term "professional corporation" shall not be deemed to include a professional limited liability company when it is used in any section of the Virginia Professional Limited Liability Company Act or in Chapter 7 of Title 13.1.

The bills also provide that the state recordation tax levied on every deed admitted to record and on every contract or memorandum thereof relating to real or personal property admitted to record shall not apply to any deed conveying real estate or lease of real estate to the surviving or new limited partnership or business trust upon a merger to which two or more business entities are parties.

#### **HB 2729    FEMA Special Flood Hazard Area Map – Notification of Changes**

This bill adds § 15.2-976 to require any locality notified by the United States Federal Emergency Management Agency ("FEMA") that a change in the FEMA floodplain map concerns or relates to real property within the locality to notify each

owner of any such property of such change, including contact information for the National Flood Insurance Program.

**SB 745      CRESPA – Prohibits Felons from Acting as Settlement Agent**

This bill amends § 6.1-2.21 to prohibit any person who has been convicted of a felony, unless he has had his civil liberties restored, been pardoned, or granted a writ of actual innocence, from acting as a settlement agent under CRESPA. Persons convicted of a felony involving fraud, deceit or misrepresentation are also prohibited from working for settlement agents in a capacity involving the receipt or disbursement of funds from real estate settlements.

**SB 866      State Corporation Commission – Property Title Records**

This bill amends various sections to make uniform the provisions in the various business entity statutes that relate to the recordation of certificates in circuit court deed books to maintain the continuity of title records. The measure also makes \$6 the standard fee for the State Corporation Commission's issuance of certificates of fact in the various business entity acts and makes technical amendments intended to clarify and conform business entity statutes.

**Liens**

**HB 2579      Mechanic's Lien – Adds a Certification of Mailing to § 43-5 and a Required Statement to §§ 43-8 and 43-10**

This bill amends §§ 43-5, 43-8 and 43-10 to add a certification of mailing to § 43-5, the statutory form for a memorandum for mechanic's lien claimed by a general contractor. This bill also adds a statement to the statutory mechanic's lien forms for general contractors, subcontractors (§ 43-8), and sub-subcontractors (§ 43-10) that provides that it is the intent of the claimant submitting the form to claim the benefit of a lien. These statements and the certification are required to be in a mechanic's lien memorandum under § 43-4.

**HB 2580      Mechanic's Liens – Certification of Mailing Not Required for Certain Contractors**

This bill amends § 43-4 to clarify that subcontractors and sub-subcontractors are not subject to the same requirement as are general contractors to file along with a memorandum of lien a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address.

**HB 3083      Liens – Nonexoneration Thereof Against Bequeathed Property**

This bill amends § 64.1-157.1 to state that any mortgage, pledge, security interest or other lien on a specific item of property shall pass encumbered by said lien unless a contrary intent is clearly set out in the will. A general directive in the will to pay debts shall not be evidence of a contrary intent. The bill excepts out circumstances where an agent holding a durable power of attorney or a conservator, guardian or committee grants the lien in question.

**Banks, Industrial Loan Associations and Credit Unions**

**HB 1657      Banks – Financial Activities**

This bill amends §§ 6.1-39.3, 6.1-44.2, and 6.1-44.8 and repeals §§ 6.1-232.2 and 6.1-232.3 to prohibit a bank from establishing or maintaining a branch in Virginia on the premises or property of an affiliate if the affiliate engages in commercial activities, which are defined as activities in which a bank holding company, a financial holding company, a national bank, or a national bank financial subsidiary may not engage under federal law. The measure repeals provisions regarding the commercial activities of industrial loan associations and industrial loan companies. The measure was effective February 5, 2007.

**HB 2772      False Statements to Obtain Property or Credit; Fraudulent Credit Card Application**

This bill amends §§ 18.2-186 and 18.2-195.2 to raise the penalty for making a false statement to obtain credit from a Class 2 to a Class 1 misdemeanor. It characterizes the crime of fraudulently obtaining less than \$200 worth of goods, services, etc. as petit larceny rather than a Class 1 misdemeanor. It defines a written false statement to include information transmitted by computer, facsimile, e-mail, Internet, or any other electronic medium other than by voice transmission through any such medium.

**Privacy; Identity Theft**

**HB 1795      Identity Theft – Clarification of Who May Be a Victim of Identity Theft**

This bill amends § 18.2-186.3 to correct a possible reference to a false or fictitious person as a person who may be dead or alive.

## Real Estate

### **HB 2829      Doctrine of Worthier Title**

This bill amends § 55-14.1 to abolish the doctrine of worthier title as a rule of law and as a rule of construction.

According to Black's Law Dictionary, the doctrine of worthier title comes from the common law and relates to the situation where a testator undertakes to devise to an heir exactly the same interest in land as the heir would take by descent. Descent was regarded as the "worthier title", and the heir would therefore take by descent rather than by devise.

### **HB 2017      Real Estate Time-Share Act – Provides for Limited Liability of Developer for Injuries to Persons**

This bill amends §§ 55-362, 55-370, 55-370.01 and 55-374 and adds §§ 55-376.3 and 55-376.4 to provide for limited liability of a developer, time-share association, or managing agent for injuries to persons using the time-share facilities if the developer, time-share association, or managing agent posts notice of such limited liability. The bill also provides that the homestead exemption cannot be claimed against the debt or lien of the association. The bill allows for the use of e-mail in certain circumstances and adds several new definitions relating to the limitation of liability described above.

### **SB 1114      Residential Property Disclosure Act – Violation of Zoning Ordinance**

This bill amends § 55-519 to require an owner of residential property to notify purchasers that there are no pending violations of any local zoning ordinances that the owner has not abated or remedied, within a time period set out in the written notice of violation or established by a court of competent jurisdiction.

## Corporate/Organizational

### **HB 2142      Limited Partnership and Partnerships – Prohibits Transaction of Business Unless Registered; Numerous Technical Amendments**

This bill amends numerous Code sections to prohibit the transaction of a business as a limited partnership unless the business is a Virginia limited partnership or a foreign limited partnership registered to transact business in Virginia. The measure includes numerous technical amendments that ensure that terminology in the Virginia Limited Partnership Act and Partnership Act conforms to provisions of other Virginia business entity laws. Other provisions centralize and expand the delayed effective date provisions for Virginia limited partnership organizational documents; move the

provisions for the conversion of a partnership to a limited partnership to the Limited Partnership Act; amend the filing fees for limited partnership and registered limited liability partnership amendments and cancellations; and transfer responsibility for the filing of amended and restated certificates of limited partnership in circuit court from the Commission to the limited partnership.

**HB 3164      Comprehensive Permitting Programs for Small Businesses**

This bill adds § 2.2-904.1 to establish a one-stop permitting program for small businesses. The program is to be administered by a business registration and permitting center in the Department of Business Assistance. Owners of small businesses, defined as establishments with no more than 100 full-time employees, will be able to complete a master application online to register their businesses with the state.

**SB 1286      Nonstock Corporation Act – Updates to Make Consistent with Changes to Stock Corporation Act**

This bill amends, adds, and repeals numerous Code Sections to update the Virginia Nonstock Corporation Act to make several provisions consistent with changes to the Virginia Stock Corporation Act that were enacted in 2005, based upon recent amendments to the Model Business Corporation Act. Specific areas of substantive change include setting forth procedures for the approval of a business opportunity; defining “disinterested director”; permitting several corporate actions to be taken electronically; updating provisions regarding member voting and elections; staggering the terms of directors; indemnifying directors and officers; streamlining the process for combining corporations with other types of business entities; and asserting claims against dissolved corporations.

**Uniform Commercial Code**

**SB 1005      State Corporation Commission – Fees Charged by Clerk for Copies of Uniform Commercial Code**

This bill amends § 12.1-21.1 to provide that the fee for providing copies of a Uniform Commercial Code record is a \$0.50 per page regardless of the number of pages, and increases the fee for providing a certified copy of a Uniform Commercial Code record from \$1 to \$3.

**Miscellaneous**

**HB 1953      Burial and Funeral Expenses – Preneed Contracts**

This bill amends §§ 6.1-5, 54.1-2820 and 54.1-2822 to authorize an incorporated association that is authorized to sell burial association group life insurance certificates,

and that has the principal purpose of assisting its members in financial planning for their funerals and burials and obtaining insurance for the payment for funeral and burial expenses, to serve as the trustee of a trust established to fund a preneed funeral contract. The bill also clarifies the method of calculating the inflation adjustment that is required when a life insurance or annuity contract is used to fund a preneed funeral contract.

**HB 2528      Garnishment – Exemption of Child Support Payments**

This bill amends §§ 8.01-512.4 and 20-108.1 to provide that child support payments received by a parent for the support of a child in his custody are not subject to garnishment. This bill does not affect the ability to garnish the income of a child support obligor. A depository wherein child support payments have been deposited has no obligation to determine what portion of the deposits are subject to garnishment.

**HB 2766      Retirement Benefits – Exemption from Creditor Process**

This bill amends § 34-34 to conform the state exemption of retirement benefits to that allowed under new federal bankruptcy law.

**HB 2864      Powers of Attorney – Duties and Liabilities of a Holder of a Power of Attorney**

This bill amends §§ 11-9.1, 11-9.6 and 37.2-1018 to state that a holder of any power of attorney has a fiduciary relationship with the subject of the power of attorney and may be held liable for any breach of that fiduciary duty. The bill also expands the financial accounting requirement for a holder of the power of attorney from two years prior to the request to five years. The bill also provides that if the holder of the power of attorney is removed from his position by the court due to abuse, neglect, or exploitation of the principal, the holder of the power of attorney shall bear the costs and fees associated with the performance of his duties.

**Administrative Letter BFI-AL-1611**

This Administrative Letter, dated March 29, 2007, contains a description of information that licensees under the Virginia Mortgage Lender and Broker Act (non-depository lenders and mortgage brokers) should provide to applicants for residential mortgage loans. The letter contains recommended practices for non-traditional mortgage products, including the timing, content and clarity of information presented to consumers. It addresses topics such as payment shock, negative amortization, prepayment penalties and cost of reduced documentation loans. It also says that licensees should avoid practices that obscure significant risk to the consumer and gives examples of practices that should be avoided.

Please let me know (at (804) 698-6225 or [dbmorris@t-mlaw.com](mailto:dbmorris@t-mlaw.com)) if you have any questions regarding any of the foregoing bills or other actions of the General Assembly.

### **Seminar**

The Virginia Association of Mortgage Brokers (the "VAMB") is sponsoring a seminar at the Hilton Garden Inn/Innsbrook in Richmond on Wednesday, June 6. The cost is \$65 for members and \$90 for non-members. I plan to begin speaking at 10:00 a.m. and to stop around 4:00 p.m. A new outline of Virginia laws affecting mortgage lenders and mortgage brokers will be provided. If you wish to attend or need more information, contact the VAMB at (804) 285-7557.