

# IN BRIEF

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## An Insurance Industry Newsletter of Recent Issues and Opinions in Virginia Law By

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### **IN YOUR HEART, YOU KNEW YOU WERE RIGHT!!!**

The good news! An article in the August 8, 2008 edition of The New York Times proclaims that plaintiffs are generally better off if they take a settlement offer than if they go to trial. The article cites a study which is to be published in the September issue of the Journal of Empirical Legal Studies co-authored by Randall L. Kiser at DecisionSet, a firm that consults on litigation decisions. The study, based on 2,054 cases that went to trial from 2002 to 2005, found that plaintiffs made the wrong decision about proceeding to trial in 61% of the cases, while the defense miscalculated in 24% of the cases. In the remaining 15% of cases both sides made the right decision – the defendant paid less than the plaintiff's demand, but the plaintiff received more than the defendant's offer. But now here's....

The bad news! “On average, getting it wrong cost plaintiffs at about \$43,000; the total could be more because information on legal costs was not available in every case. For defendants, who were less often wrong about going to trial, the cost was much greater: \$1.1 million.” The defense makes the right decision about going to trial much more often, but defense miscalculations are much more costly.

The study also included a survey of trial outcomes over a 40 year period ending in 2004. The authors found that in recent years poor decisions to go to trial are made more frequently; the field is not improving its performance. The authors found that poor trial decisions made by plaintiffs occurred most often in cases involving contingency fees. Poor decisions made by the defense were most often associated with cases in which insurance coverage was lacking.

One co-author, Martin A. Asher, an economist at the University of Pennsylvania, finds the study results consistent with studies done on the human response to risk taking. “Psychologists have found that people are more averse to taking a risk when they are expecting to gain something, and more willing to take a risk when they have something to lose.” He states that if you offer two choices to the students in a class, to write a check for \$200 or to flip a coin, heads \$500, tails nothing, “most students will take the \$200 rather than risk getting nothing”. However, if the student must write the \$200 check or flip the coin as before, most students “will choose to flip the coin, risking a bigger loss because they hope to pay nothing at all.” In this scenario, perhaps the plaintiffs are represented by the first group of students; most plaintiffs will take the settlement offer rather than risk the flip of the coin and receive nothing at trial. Is the defense represented by the second group of students? When large settlements are involved, is it human nature to choose to flip the coin and risk a bigger loss in hopes of paying nothing at all? Is this a tendency that should be taken into consideration, along with all of the other factors, when evaluating a large case? The statistics are intriguing, their message may not be so clear; but it is food for thought.

[Since this summary of the New York Times article was drafted, the *Journal of Empirical Legal Studies* has published the article upon which it was based. That article is titled “Let’s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations” by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane. If you would like to read the study in its entirety, you may find it in Volume 5, Issue 3, 551-591, September 2008 of the *Journal*. The internet link is <http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/HTMLSTART>]

**DECISIONS BY THE SUPREME COURT OF VIRGINIA  
REGARDING INSURANCE INDUSTRY ISSUES  
September 8-12, 2008 SESSION**

The case summaries that follow involve insurance litigation or related issues. We have downloaded these summaries directly from the Virginia Supreme Court website. We offer them to you without further legal analysis. However, if you would like a brief legal analysis or the full text of any of these cases, please make your request by return e-mail. If you would like to discuss the ramifications of any of the decisions, please call (804) 378-7600: ext. 3304 for Ray; 3305 for Kevin or 3316 for Mark.

**[071421](#) Travelers Property Casualty Co. v. Ely 09/12/2008**

In consolidated appeals from the Court of Appeals of Virginia, certain policies of workers' compensation and employers' liability insurance were not "nonrenewed by the insurer" within the intendment of Code § 65.2-804(B), where the insureds failed to timely pay insurance premiums necessary to renew such policies. As a result, the insurer was not required to provide notice to the Virginia Workers' Compensation Commission before the policies could be terminated. The judgments of the Court of Appeals are reversed and final judgments are entered in favor of the insurer.

**071978 Perreault v. The Free Lance-Star 09/12/2008**

In wrongful death litigations under Code § 8.01-50 in which settlement agreements were achieved through mediation, the circuit court did not err in requiring the settling parties to file written petitions reciting the financial terms of the compromise settlements in order to obtain court approval pursuant to Code § 8.01-55. The presumption of public access to court records mandated by Code § 17.1-208 and the provisions of Code § 8.01-581.22 governing confidentiality of mediation proceedings are considered, and the decision of the circuit court denying a request to partially seal the records in these cases by permitting the redaction of the monetary amounts of the compromise settlements in the court records is reviewed. The judgment is affirmed and the case is remanded for filing of unredacted records.

**071995 SuperValu, Inc. v. Johnson 09/12/2008**

In a suit based upon business decisions by a grocery wholesaler and its subsidiary alleged to have destroyed plaintiff's competing grocery businesses, the circuit court erred in refusing to set aside a multi-million dollar jury verdict in plaintiff's favor on claims of constructive fraud and intentional infliction of emotional distress where the evidence was insufficient as a matter of law to support either claim. Plaintiff failed to present evidence that defendants negligently or innocently misrepresented a present or pre-existing material fact, and the tort of intentional infliction of emotional distress does not encompass conduct intended to cause economic damage to a business or the personal consequences of such conduct. Issues concerning the adequacy and timing of jury instructions are also addressed. The judgment is reversed and final judgment is entered in defendants' favor.

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