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**HOUSE BILL NO. 1063**

Offered January 14, 2004

Prefiled January 14, 2004

*A BILL to amend and reenact §§ 8.01-230, 8.01-249, 8.01-281, and 64.1-145 of the Code of Virginia, and to amend the Code of Virginia by adding a section numbered 8.01-221.2, relating to damages resulting from legal malpractice in preparation of testamentary instruments.*

Patrons—Armstrong, Hurt and Marshall, D.W.

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 8.01-230, 8.01-249, 8.01-281 and 64.1-145 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 8.01-221.2 as follows:**

*§ 8.01-221.2. Claim based upon future potential liability.*

*A claim, counterclaim, cross-claim or third-party claim for contribution, indemnity, subrogation, or contract, express or implied, may be based on future potential liability. Damages therefore may be recoverable upon proper proof.*

*§ 8.01-230. Accrual of right of action.*

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250, 64.1-145, or other statute.

*§ 8.01-249. When cause of action shall be deemed to accrue in certain personal actions.*

The cause of action in the actions herein listed shall be deemed to accrue as follows:

1. In actions for fraud or mistake and in actions for rescission of contract for undue influence, when such fraud, mistake, or undue influence is discovered or by the exercise of due diligence reasonably should have been discovered;

2. In actions or other proceedings for money on deposit with a bank or any person or corporation doing a banking business, when a request in writing be made therefor by check, order, or otherwise;

3. In actions for malicious prosecution or abuse of process, when the relevant criminal or civil action is terminated;

4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma, or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person;

5. In actions for contribution or for indemnification, when the contributtee or the indemnitee has paid or discharged the obligation. A third-party claim permitted by subsection A of § 8.01-281 and the Rules of Court may be asserted before such cause of action is deemed to accrue hereunder. *A claim based upon future potential liability permitted by § 8.01-221.2 may, in accordance with § 64.1-145, be asserted before such cause of action is deemed to accrue hereunder;*

6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

7. In products liability actions against parties other than health care providers as defined in § 8.01-581.1 for injury to the person resulting from or arising as a result of the implantation of any prosthetic device for breast augmentation or reconstruction, when the fact of the injury and its causal connection to the implantation is first communicated to the person by a physician;

8. In actions on an open account, from the later of the last payment or last charge for goods or services rendered on the account.

*§ 8.01-281. Pleading in alternative; separate trial on motion of party.*

INTRODUCED

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59 A. A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may  
60 plead alternative facts and theories of recovery against alternative parties, provided that such claims,  
61 defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim,  
62 counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or  
63 contract, express or implied; it may be based on future potential liability *pursuant to § 8.01-221.2*, and it  
64 shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party  
65 claim has made no payment or otherwise discharged any claim as to him arising out of the transaction  
66 or occurrence.

67 B. The court may, upon motion of any party, order a separate trial of any claim, counterclaim,  
68 cross-claim, or third-party claim, and of any separate issue or of any number of such claims; however,  
69 in any action wherein a defendant files a third-party motion for judgment alleging that damages to the  
70 person or property of the plaintiff were caused by the negligence of the third-party defendant in the  
71 operation of a motor vehicle, the court shall, upon motion of the plaintiff made at least five days in  
72 advance of trial, order a separate trial of such third-party claim.

73 § 64.1-145. Action for goods carried away, waste or damage to estate of decedent.

74 A. Any action at law for damages for the taking or carrying away of any goods, or for the waste,  
75 destruction of, or damage to any estate of or by the decedent, whether such damage be direct or indirect,  
76 may be maintained by or against the decedent's personal representative. Any such action shall survive  
77 pursuant to § 8.01-25.

78 B. *Any action for damages to the decedent's estate resulting from legal defects in testamentary*  
79 *instruments, which defects are not known or which do not result in damages incurred prior to death,*  
80 *shall accrue at the time of death and may be maintained by the executor of the estate or the decedent's*  
81 *personal representative. If such damages become known but will not be incurred by the testator prior to*  
82 *his death, and cannot reasonably be avoided under existing law, an action shall be deemed to have*  
83 *accrued and may be initiated for such damages.*

84 **2. That the provisions of this act are declaratory of existing law.**