

26105984D

HOUSE BILL NO. 449
AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the House Committee Courts of Justice
 on _____)

(Patron Prior to Substitute—Delegate Simon)

A BILL to amend and reenact §§ 17.1-405 and 59.1-204 of the Code of Virginia and to amend the Code of Virginia by adding in Title 8.01 a chapter numbered 5.2, consisting of sections numbered 8.01-267.10 through 8.01-267.16, relating to civil actions filed on behalf of multiple persons; class actions; violations of Virginia Consumer Protection Act; award of damages.

Be it enacted by the General Assembly of Virginia:

1. That §§ 17.1-405 and 59.1-204 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 8.01 a chapter numbered 5.2, consisting of sections numbered 8.01-267.10 through 8.01-267.16, as follows:

CHAPTER 5.2.
CLASS ACTIONS.

§ 8.01-267.10. Requirements for certification; types of class actions.

A. One or more members of a class may, as representative parties on behalf of all members, bring a civil action or may be proceeded against in a civil action, provided that:

1. The class is so numerous that joinder of all members is impracticable;
 2. There are questions of law or fact common to the class;
 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class;
- and

4. The representative parties shall fairly and adequately protect the interests of the class.

B. An action may be certified as a class action if all the requirements of subsection A are satisfied and if:

1. Prosecuting separate actions by or against individual class members would create a risk of (i) inconsistent or varying adjudications of individual class members that would establish incompatible standards of conduct for the opposing party or (ii) adjudications of individual class members that, as a practical matter, would be dispositive of the interests of the other members that are not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
2. The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole; or
3. The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. In making this finding, the court may consider (i) the class members' interests in individually controlling the prosecution or defense of separate actions, (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members, (iii) the desirability or undesirability of concentrating the litigation of the claims in a particular forum, (iv) the likely difficulties in managing a class action, and (v) the practical ability of individual class members to pursue their claims without certification.

§ 8.01-267.11. Certification order; notice to class members; judgment.

A. A class action shall be certified by order only if the requirements described in § 8.01-267.10 are met. Such order shall define the class and class claims being certified, identify the representative party or parties, and appoint class counsel pursuant to the criteria set forth in § 8.01-267.12. The court shall determine as early as is practicable after a person brings an action or an action is brought against a person as a class representative whether to certify the action as a class action. Any order that grants or denies class certification may be amended or altered prior to final judgment.

B. For any class certified pursuant to subdivision B 1 or 2 of § 8.01-267.10, the court may direct appropriate notice to such class. For any class certified pursuant to subdivision B 3 of § 8.01-267.10, or upon ordering notice pursuant to § 8.01-267.13 to a class proposed to be certified for the purposes of settlement in accordance with subdivision B 3 of § 8.01-267.10, the court shall direct to class members notice as is reasonable under the circumstances, including sending individual notice to all members that can be identified through reasonable effort. The notice may be sent through the United States Postal Service, electronic means, or any other appropriate means. The notice shall state clearly and concisely in plain, easily understood language (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney; (v) that the court shall exclude from the class any member that requests exclusion; (vi) the time and manner for requesting such exclusion; and (vii) the binding effect of a class judgment on members in accordance with subsection C.

C. Whether or not favorable to the class, the judgment in a class action shall, for any class certified pursuant to subdivision B 1 or 2 of § 8.01-267.10, include and describe those that the court determines to be

class members, and, for any class certified pursuant to subdivision B 3 of § 8.01-267.10, include and specify or describe those to which notice pursuant to this section was directed, that have not requested exclusion, and that the court finds to be class members.

D. In certain cases, an action may be brought or maintained as a class action for particular issues.

E. When appropriate, a class may be divided into subclasses that are each treated as a class pursuant to this chapter.

§ 8.01-267.12. Class counsel; duties; order of appointment.

A. Unless otherwise provided by law, a court that certifies a class shall appoint at least one discreet and competent attorney-at-law as class counsel. In making such appointment, the court shall consider (i) the work such attorney has done in identifying or investigating potential claims in the action; (ii) such attorney's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) such attorney's knowledge of the applicable law; and (iv) the resources such attorney shall commit to representing the class. The court may also consider any other matter pertinent to such attorney's ability to fairly and adequately represent the interests of the class.

B. The court may order potential class counsel to provide information on any subject pertinent to such appointment and to propose terms for attorney fees and costs and may include provisions about such attorney fees and costs in the order of appointment. The court may make any further necessary orders in connection with such appointment.

C. When any attorney seeks appointment as class counsel, the court shall only appoint such attorney if he adequately meets the considerations pursuant to this section. If more than one applicant seeks appointment, the court shall appoint the applicant or applicants it deems best able to represent the interests of the class.

D. The court may designate interim counsel to act on behalf of a putative class at any time prior to determining whether to certify the action as a class action.

E. Class counsel appointed pursuant to this section shall have a duty to fairly and adequately represent the interests of the class.

§ 8.01-267.13. Conducting a class action.

A. In conducting a class action pursuant to this chapter, the court may issue orders that:

1. Determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

2. Require, for the purpose of protecting class members and conducting the action fairly, giving appropriate notice to some or all class members about (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise join the action;

3. Impose conditions on the representative or intervening parties;

4. Require that the pleadings be amended to eliminate allegation about representation of absent persons and that the action proceed accordingly; or

5. Deal with similar procedural matters.

B. An order issued pursuant to this section may be altered or amended under limited circumstances and may be combined with an order for a pretrial conference.

C. A claim for attorney fees and costs shall be made by motion, and, upon such motion, the court may award reasonable attorney fees and costs as authorized by law or by agreement of the parties. A class member or party from whom payment is sought may object to such motion for attorney fees and costs. The court may award attorney fees as a percentage of the common fund, if applicable.

§ 8.01-267.14. Settlement, voluntary dismissal, or compromise; court approval required.

A. The claims, issues, or defenses of a certified class or a class proposed to be certified for purposes of settlement may be settled, voluntarily dismissed, or compromised only with the approval of the court.

B. Notice of the proposed dismissal of an action previously certified as a class action shall be provided to all members of the class. Notice shall be given in such a reasonable manner as the court directs. The court may order such dismissal without notice if such dismissal is to be without prejudice to the class or with prejudice to the plaintiff only. Such notice may be given by any appropriate means as approved by the court, including through first-class mail, email, or publication.

C. The parties seeking approval shall file a statement identifying any agreement made in connection with such proposed settlement, voluntary dismissal, or compromise. If the proposed settlement, voluntary dismissal, or compromise would bind class members, the court may approve such proposal only upon a hearing and a finding that such proposal is fair, reasonable, and adequate. In making such finding, the court shall consider whether:

1. The class representatives and class counsel have adequately represented the class;

2. The proposal was negotiated at arm's length;

3. The relief provided for the class is adequate, including the costs, risks, and delay of a trial and appeal, the effectiveness of any proposed method of distributing relief to the class, the agreement identified by the parties seeking approval required by this subsection, and the terms of any proposed award of attorney fees; and

4. *The proposal treats the class members equitably relative to each other.*

D. *If the class action was previously certified pursuant to subdivision B 3 of § 8.01-267.10, the court may refuse to approve a settlement unless such settlement affords a new opportunity for an individual class member to request exclusion if such individual class member had an earlier opportunity to request exclusion but did not do so.*

E. *In addition to the procedures enumerated in subsection C, a class member may object to the proposed settlement, voluntary dismissal, or compromise if such proposal requires court approval. Such class member shall state whether such objection applies only to the objector, to a specific subset of the class, or to the entire class, and shall state specifically the grounds for such objection. Unless such proposal is approved after a hearing, no payment or other consideration shall be provided for forgoing or withdrawing such objection or forgoing, dismissing, or abandoning an appeal from a judgment approving such proposal.*

F. *Any order approving a settlement pursuant to this section that establishes a process for compensating class members shall provide for the disbursement of residual funds, if any.*

§ 8.01-267.15. Venue and transfer.

A. *For the purposes of this chapter, venue shall be proper in accordance to the provisions of Chapter 5 (§ 8.01-257 et seq.).*

B. *When two or more separate civil actions requesting certification of a class pursuant to this chapter involve common questions of law or fact arising out of the same transaction, occurrence, or series of transactions or occurrences and such classes, if certified, would encompass one or more of the same plaintiffs suing in the same capacities, any party may apply to a panel of circuit court judges designated by the Supreme Court of Virginia for an order of transfer. Such panel of judges shall consider (i) the nature of common questions of law or fact; (ii) the convenience of the parties, witnesses, and counsel; (iii) the efficient use of judicial facilities and personnel; (iv) the calendar of the courts; and (v) any other relevant factors.*

§ 8.01-267.16. Interlocutory appeal.

A. *The Court of Appeals may permit an appeal to be taken from an order certifying or declining to certify a class pursuant to § 8.01-267.11.*

B. *The Court of Appeals may allow an appeal to be taken from any other order of the circuit court in an action pursuant to this chapter although the order is not a final order, provided that the written order of the circuit court states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation.*

C. *Application for an appeal pursuant to this section shall be made within 10 days after the entry of the order and shall not stay proceedings in the circuit court unless the circuit court or the appellate court shall so order.*

§ 17.1-405. Appellate jurisdiction — Administrative agency, Virginia Workers' Compensation Commission, and civil matter appeals.

A. *Unless otherwise provided by law, any aggrieved party may appeal to the Court of Appeals from:*

1. *Any final decision of a circuit court on appeal from (i) a decision of an administrative agency, or (ii) a grievance hearing decision issued pursuant to § 2.2-3005;*

2. *Any final decision of the Virginia Workers' Compensation Commission;*

3. *Except as provided in subsection B of § 17.1-406, any final judgment, order, or decree of a circuit court in a civil matter;*

4. *Any interlocutory decree or order pursuant to § 8.01-267.8, 8.01-267.16, or 8.01-675.5;*

5. *Except as provided in subsection B, any interlocutory decree or order involving an equitable claim in which the decree or order (i) requires money to be paid or the possession or title of property to be changed or (ii) adjudicates the principles of a cause; or*

6. *Any final judgment, order, or decree of a circuit court (i) involving an application for a concealed weapons permit pursuant to Article 6.1 (§ 18.2-307.1 et seq.) of Chapter 7 of Title 18.2, (ii) involving involuntary treatment of prisoners pursuant to § 53.1-40.1 or 53.1-133.04, or (iii) for declaratory or injunctive relief under § 57-2.02.*

B. *Except as provided in § 8.01-675.5, no interlocutory decree or order shall be appealed if such decree or order involves:*

1. *Affirmance or annulment of a marriage;*

2. *Divorce;*

3. *Custody of a minor child;*

4. *Spousal or child support;*

5. *Control or disposition of a minor child;*

6. *Any other domestic relations matter arising under Title 16.1 or 20; or*

7. *Any protective order other than a final protective order issued by a circuit court.*

§ 59.1-204. Individual action or class action for damages or penalty.

A. *Any person who suffers loss as the result of a violation of this chapter shall be entitled to initiate an action to recover actual damages, or \$500 per violation, whichever is greater. If the trier of fact finds that the*

184 violation was willful, it may increase damages to an amount not exceeding three times the actual damages
185 sustained, or \$1,000 *per violation*, whichever is greater. Any person who accepts a cure offer under this
186 chapter may not initiate or maintain any other or additional action based on any cause of action arising under
187 any other statute or common law theory if such other action is substantially based on the same allegations of
188 fact on which the action initiated under this chapter is based.

189 B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such
190 person also may be awarded reasonable attorneys' fees and court costs.

191 C. No cure offer shall be admissible in any proceeding initiated under this section, unless the cure offer is
192 delivered by a supplier to the person claiming loss or to any attorney representing such person, prior to the
193 filing of the supplier's initial responsive pleading in such proceeding. If the cure offer is timely delivered by
194 the supplier, then the supplier may introduce the cure offer into evidence at trial. The supplier shall not be
195 liable for such person's attorneys' fees and court costs incurred following delivery of the cure offer unless the
196 actual damages found to have been sustained and awarded, without consideration of attorneys' fees and court
197 costs, exceed the value of the cure offer.

198 D. In any action *in* which the parties desire to settle all matters in dispute, the question of whether the
199 plaintiff shall be awarded reasonable attorneys' fees and court costs in accordance with subsections B and C
200 may be tendered to the court for consideration of the amount of such an award, if any.

201 E. *Nothing in this section shall be construed to require proof that the person relied upon a prohibited*
202 *practice or representation to establish that such person or class member has suffered a loss as a violation of*
203 *the provisions of this chapter.*

204 F. *To the extent practicable, the provisions of this section shall also apply in a class action pursuant to*
205 *Chapter 5.2 (§ 8.01-267.10 et seq.) of Title 8.01 where the class claims allege a loss suffered by class*
206 *members for violations of this chapter.*

207 **2. That the provisions of this act are procedural in nature and shall become effective on January 1,**
208 **2027. Any conduct occurring prior to January 1, 2027, may be filed as a class action after January 1,**
209 **2027, provided that such conduct is otherwise actionable pursuant to relevant law.**

210 **3. That the provisions of subsection A of § 59.1-204, as amended by this act, are declarative of existing**
211 **law.**

212 **4. That the provisions of subsection E of § 59.1-204, as amended by this act, shall only apply to actions**
213 **filed on or after January 1, 2027, and are intended to reverse the holding in *Owens v. DRS Auto.***
214 ***Fantomworks, Inc.*, 288 Va. 489 (2014).**