LIVING WITH *BANKS*: TRENDS AND LESSONS FROM THE FIRST FIVE YEARS

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The landmark Virgin Islands Supreme Court case of *Banks v. International Rental & Leasing Corp.*[1] was decided on December 15, 2011. The *Banks* decision was significant for the way it changed how courts applying Virgin Islands law approached matters of first impression. Prior to *Banks*, the approach was to apply Virgin Islands Code ("V.I. Code"), Title 1, section 4, which provided as follows:

> **Application of common law; restatements**
> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.[2]

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1. 55 V.I. 967 (V.I. 2011).

2. 1 V.I. CODE ANN. § 4 (repealed 2004). *See* Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004) (examining this statute and its implications). Also note that the Northern Mariana Islands Code includes a similar provision:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided, that no

Thus, prior to *Banks*, the American Law Institute's (ALI) Restatements of the Law ("Restatements") had a special status in the Virgin Islands, as a matter of statute, beyond the persuasive authority they supply in other United States jurisdictions. *Banks* made it clear that V.I. Code, Title 1, section 4 had been implicitly repealed by the establishment of the Virgin Islands Supreme Court in 2007 and prescribed a new approach to matters of first impression, which is described below. This approach has become commonly known as a "*Banks* analysis."

At least 120 cases have now cited the *Banks* decision and, now that a substantial body of decisions referencing *Banks* has developed, it is possible to examine the body of *Banks* caselaw as a whole, so as to identify some trends and best practices. Many of these cases cited *Banks* specifically for the *Banks* analysis and application of the three-factor *Banks* test described below, but perhaps a surprising number cited *Banks* for other reasons, such as its discussion of the Virgin Islands court system. This Article is primarily concerned with the cases that address the *Banks* analysis.

I. THE BANKS *ANALYSIS*

When Virgin Islands courts are asked to decide an issue that is not foreclosed by prior precedent, they conduct a *Banks* analysis. For this purpose, precedent does not include persuasive authority, which is why the word "foreclosed" was used in *Banks*. Thus, application of *Banks* necessarily raises the question of what constitutes binding authority.[3] A *Banks* analysis consists of three factors:

> (1) Whether any local courts have considered the issue and rendered any decisions upon which litigants may have grown to rely;

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person shall be subject to criminal prosecution except under the written law of the Commonwealth.

7 N. MAR. I. CODE § 3401 (1997).

3. *See* Katy Womble & Courtney Cox Hatcher, *Trouble in Paradise? Examining the Jurisdictional and Precedential Relationships Affecting the Virgin Islands Judiciary*, 46 STETSON L. REV. 441 (2017) (stating that courts were able to rely on the Restatements of Law as binding authority prior to *Banks*).

> (2) The position taken by a majority of courts from other jurisdictions; and
>
> (3) The best rule for the Virgin Islands, which is the most important factor.

The first factor serves as a reminder that *Banks* was not decided in a vacuum, but instead within the context of a significant body of Virgin Islands caselaw. With respect to the second factor, although the *Banks* analysis calls for a consideration of what other courts have done, Virgin Islands courts can and do sometimes adopt a minority position.[4] In considering the third element, the best rule for the Virgin Islands, there are several different approaches the courts have taken, which are considered later in this Article.[5]

Whenever the *Banks* decision is referenced, the 2014 Virgin Islands Supreme Court decision in *Government of the Virgin Islands v. Connor*[6] is likely to be part of the discussion, as well. *Connor* presents the clearest articulation of what each prong of the *Banks* analysis actually requires.[7] The key language from the *Connor* opinion is as follows:

> (1) The first step in the analysis — whether any Virgin Islands courts have previously adopted a particular rule — requires the Superior Court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely.[8]
>
> (2) The second step — determining the position taken by a majority of courts from other jurisdictions — directs the Superior Court to consider all potential sides of an issue by

4. *See*, *e.g.*, Antilles Sch., Inc. v. Lembach, No. 2015-0039, 2016 WL 948969 (V.I. Mar. 14, 2016) (providing a recent example of this phenomenon).

5. *See infra* notes 229–49 and accompanying text (discussing courts' differing approaches to *Banks* analyses).

6. 60 V.I. 597 (V.I. 2014).

7. The Superior Court opinion in Der Weer v. Hess Oil Virgin Islands Corp., SX-05-CV-274, 2016 WL 1019689, at *21 n.9 (V.I. Super. Ct. Mar. 15, 2016), describes *Connor* as having "effectively transformed the common law of the Virgin Islands" with respect to how the Restatements are to be used.

8. *Connor*, 60 V.I. at 603. *See*, *e.g.*, Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 981 (V.I. 2011) (discussing when it is appropriate to change the common law by judicial decision, and whether changing circumstances compel a court to renovate outdated law and policy by creating new public policy).

> viewing the potentially different ways that other states and territories have resolved a particular question.[9]
>
> (3) [T]he third step in the *Banks* analysis — identifying the best rule for the Virgin Islands — mandates that the Superior Court weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands.[10]

Connor's explication of the second element is particularly important given the changing role of the Restatements over time, as well as the changing role of the Restatements in the Virgin Islands. Courts and litigants may historically have relied on the Restatements as serving the same role as this second element—that is, as presenting an overview of the majority approach to each covered issue. This is because the Restatements historically had the reputation of describing what the law is rather than what scholars and commentators believe the law should be. Over time, however, the Restatements have without question become more normative.[11] Thus, the Restatements cannot be used as a substitute for the second factor of the *Banks* analysis.

II. THE CONTINUING INFLUENCE OF THE RESTATEMENTS

Having a substantial body of caselaw makes it possible to identify some trends in how the *Banks* decision has been interpreted and applied. First, turning to the treatment of the Restatements—now that *Banks* and its progeny have inaugurated a new approach to Virgin Islands jurisprudence, how have the Restatements been treated by courts applying Virgin Islands law? The short answer is that the Restatements are still influential, and Restatement rules have not often been clearly rejected by a court applying Virgin Islands law.

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9. *Connor*, 60 V.I. at 603. *See, e.g.*, Simon v. Joseph, 59 V.I. 611 (V.I. 2013) (discussing Virgin Islands precedent and how other jurisdictions approach the issue of legal malpractice against criminal defense attorneys).

10. *Connor*, 60 V.I. at 603.

11. *See* Adams, *supra* note 2, at 437 (demonstrating through courts' decisions and the work of other scholars that the Restatements have changed from their original purpose of restating the law as generally applied to remaking the law in a more ideal form).

A. Statistics on Usage

Of 120 cases closely reviewed, there are six in which a Restatement rule was considered, but rejected.[12] One of these cases was in the superior court; five were in the Supreme Court. In these cases, no particular Restatement was singled out for rejection. Instead, one case involved the Restatement (Third) of Property: Servitudes, three involved the Restatement (Second) of Torts, and two involved the Restatement (Third) of Restitution and Unjust Enrichment.

The Court's language in *Walters v. Walters*,[13] one of the cases in which a Restatement rule was rejected, is instructive. In that case, the Court rejected what it described as a minority viewpoint found in section 1 of the Restatement (Third) of Restitution and Unjust Enrichment with respect to the elements of an unjust enrichment cause of action. The court explained its holding as follows:

> Although the authors of the Third Restatement maintain that setting forth specific elements for an unjust enrichment cause of action is "not helpful" and "can lead to serious errors" because "[t]hey lend a specious precision to an analysis that may be simple or complicated but which at any rate is not susceptible of this form of statement," this section discounts the costs associated with an *ad hoc* case-by-case approach and the benefits of uniform and predictable outcomes.[14]

Despite the existence of cases like *Walters* in which a Restatement rule has been rejected, generally the Restatements are still quite influential in the Virgin Islands. Setting aside those cases in which a Restatement rule was partially adopted or perhaps adopted, in fifty-three cases, a Restatement rule was clearly accepted.[15] Seven of these decisions were by the District Court of the Virgin Islands; thirty-seven were by the Superior Court of the Virgin Islands; and nine by the Virgin Islands Supreme Court.

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12. The cases and the corresponding Restatements referenced in this Part may be found in Appendix A.

13. 60 V.I. 768 (V.I. 2014).

14. *Id.* at 778 (internal citation omitted).

15. The cases and the corresponding Restatements referenced in this Part may be found in Appendix B.

B. Identifying the Restatements that Remain Most Influential

With respect to the specific Restatements that are being followed, some trends have begun to emerge. One case each followed the Restatement (First) of Property, the Restatement (First) of Restitution, the Restatement (Third) of Suretyship and Guaranty, the Restatement (Third) of Unfair Competition, the Restatement (Third) of Agency, and the Restatement (Second) of Conflict of Laws. Two cases followed the Restatement (Third) of the Law Governing Lawyers. Six cases followed the Restatement (Second) or Restatement (Third) of Agency. Thirteen cases applied provisions of the Restatement (Second) of Contracts, and twenty-seven followed the Restatement (Second) or Restatement (Third) of Torts. These numbers are not surprising, but instead seem to reflect the general level of influence that each of these Restatements has had in U.S. jurisprudence. Thus, the trend in the post-*Banks* era seems to be that those Restatements of the Law that have generally been most influential in the United States are most influential in the Virgin Islands, as well. This trend seems especially apparent with respect to the Restatements of Torts and Contracts, which together account for such a significant number of the cases following a Restatement rule. The approximately seventy other *Banks* cases not accounted for in this tabulation were not included for one of several reasons: the Restatement was not considered, there was no express decision regarding whether to adopt a Restatement rule, or *Banks* was cited for a proposition of law other than the *Banks* analysis.

C. The Evolving Jurisprudence on the Role of the Restatements

There is continuing conversation about the role of the Restatements in the Virgin Islands. The superior court has emphasized, citing the Supreme Court, that "when a Restatement gains 'widespread acceptance' in the Virgin Islands, it is 'entitled to great respect' and 'there are definite burden[s] associated with

rejecting it, as to do so would disrupt the state of the law in the Virgin Islands.'"[16]

Building on the prior point, because *Banks* represented such an important change in the jurisprudence of the Virgin Islands, its implications did not become immediately apparent in a comprehensive way. Because the full meaning and significance of the *Banks* decision took time to unfold, it is important to put some of the opinions applying *Banks* into this larger context to determine which decisions are consistent with the instructions the Supreme Court has provided as to how *Banks* is to be applied.

For example, two cases could be read to suggest that the Restatements will still be applied automatically and that new Restatements will be adopted as a matter of course as soon as they are released by the ALI. This, of course, is how the Restatements were applied in the Virgin Islands in the pre-*Banks* era. In the first of the two cases, *Davis v. Hovensa, LLC*,[17] the superior court held as follows: "[Adopting a portion of the Restatement (Third) of Torts] is consistent with the trend of the Virgin Islands courts' routine transition to newer [R]estatements upon approval, or even before final approval, by the American Law Institute."[18] Similarly, in *Thomas v. Roberson*,[19] the district court acknowledged the Virgin Islands Supreme Court's view that "a strong preference exists for following the most recent Restatement over an older version" and thus held that the Court would use the language of the Third Restatement.[20] Without further context, one might read this language and be uncertain as to the current role of the Restatements in the Virgin Islands. Read within the full body of *Banks* jurisprudence, however, it is clear that the Virgin Islands courts should not follow the Restatements in the same way as they did in the pre-*Banks* era.

16. Bell v. Radcliffe, ST-13-CV-392, 2015 WL 5773561, at *7 (V.I. Super. Ct. Apr. 30, 2015) (citing Matthew v. Herman, 56 V.I. 674, 680 (V.I. 2012)). The *Matthew* court cited the pre-*Banks* Supreme Court opinion in *People v. Todmann*, which was decided in 2010. 53 V.I. 431, 438 n.6 (V.I. 2010). The "significant burden" language comes from the *Banks* opinion itself, as the court acknowledged the burden associated with rejecting a Restatement rule that had been previously applied. *Matthew*, 56 V.I. at 680.

17. 63 V.I. 475 (V.I. Super. Ct. 2015).

18. *Id.* at 489 (holding that "[t]his new standard provides a clearer test for design defect claims than the standard previously relied upon by the courts in this jurisdiction").

19. 58 V.I. 662 (D.V.I. 2013).

20. *Id.* at 675 n.12 (quoting Banks v. Int'l Rental & Leasing Corp., 680 F.3d 296, 299 (3d Cir. 2012) (internal citation omitted)).

There are also two cases that could be read as indicating that Restatements will be applied automatically unless the Supreme Court has expressly held otherwise. Again, these opinions should be viewed as examples of *Banks* jurisprudence in transition. In *Virgin Islands Taxi Ass'n v. Virgin Islands Port Authority*,[21] for example, the court held as follows: "Pursuant to Virgin Islands Code [T]itle 1, section 4, the Restatements of the Law are the law of the Virgin Islands in the absence of local laws to the contrary."[22] Similar language appears in the district court case of *Smith v. Katz*,[23] which was a torts case involving an alleged negligent failure to protect from a harmful condition: "The Virgin Islands Supreme Court has interpreted [1 V.I. Code section 4] to require[ ] Virgin Islands courts to apply the most recently adopted version of the Restatement at the time of consideration, unless and until the Supreme Court decides to depart from that portion of the relevant Restatement."[24] This quotation cites *Banks* for the proposition that, in the ordinary course of deciding cases, Virgin Islands courts must "mechanically apply the most recent Restatement."[25] The *Smith* case could be read as indicating that lower courts applying Virgin Islands law can continue to apply Restatements that have been previously cited, so long as the Supreme Court has not acted affirmatively in departing from the rule articulated in that Restatement. The Supreme Court, however, has clarified that courts applying Virgin Islands law are to undertake a *Banks* analysis affirmatively whenever the relevant Supreme Court precedent relies mechanistically on the Restatement.[26] Notably, both *Virgin Islands Taxi Ass'n* and *Smith* were rather early post-*Banks* decisions, and it seems fair to suppose that the courts were, at that time, still in the process of figuring out the implications of the *Banks* case.

A more recent district court opinion also includes similar language. In *Board of Directors of Sapphire Bay Condominiums*

21. 59 V.I. 148 (V.I. Super. Ct. 2013).
22. *Id.* at 158.
23. CV 2010-39, 2013 WL 1182074 (D.V.I. Mar. 22, 2013).
24. *Id.* at *8 n.2.
25. Banks v. Int'l Rental and Leasing Corp., 55 V.I. 967, 976 (V.I. 2011).
26. *See* Antilles Sch., Inc. v. Lembach, 64 V.I. 400, 428–29 (V.I. 2016) (stating that any Virgin Islands court addressing an issue of first impression shall follow the three factor test the Supreme Court established in *Banks*).

West v. Simpson,[27] a case involving common law claims for unfair competition, trademark infringement, anti-dilution, tortious interference, and misappropriation, the district court adopted provisions of the Restatement (Third) of Unfair Competition. In so holding, the court reasoned as follows:

> [T]his Court will employ the language of the most recent Restatements, because the Virgin Islands Supreme Court has noted "that a strong preference exists for following the most recent Restatement over an older version" and this Court is unaware of any statutes or Virgin Islands Supreme Court precedent requiring it to deviate from the most recent Restatements.[28]

The jurisprudence that has developed since these three cases has made it clear that, rather than following the Restatements unless the Supreme Court has held otherwise, courts have an affirmative obligation to conduct a *Banks* analysis if no binding precedent exists on a given point.

Even some post-*Banks* Supreme Court opinions from 2012 suggest that the full implications of *Banks* were still in the process of being determined. In *Burd v. Antilles Yachting Services, Inc.*,[29] the Supreme Court cited the *Banks* case for the proposition that "[u]nder Virgin Islands law, by operation of 1 V.I.C. [section] 4, the Restatement provisions just quoted, in addition to others that may be applicable under the facts presented, serve as the rules of decision on this issue."[30] This case involved duress by threat of criminal prosecution and the court followed the Restatement (Second) of Contracts without conducting a *Banks* analysis.[31] Similarly, in *Maso v. Morales*,[32] the Supreme Court held as follows: "In the absence of a local law on the subject, or binding case law, [s]ection 4 of Title 1 provides that the Restatements of Law shall be the rules of decision applied by the courts."[33] In the very next sentence, however, the

27. CV 04-62, 2014 WL 4067175 (D.V.I. Aug. 13, 2014) *aff'd sub nom.* Bd. of Dirs. of Sapphire Bay Condos. W. v. Simpson, Nos. 14–3922, 14–3999, 2015 WL 9267712 (3d Cir. Dec. 21, 2015).

28. *Id.* at *10 (quoting *Banks*, 55 V.I. at 982).

29. 57 V.I. 354 (V.I. 2012).

30. *Id.* at 359 n.1.

31. *Id.* at 359.

32. 57 V.I. 627 (V.I. 2012).

33. *Id.* at 633 n.8.

Court cited the *Banks* case and V.I. Code, Title 1, section 4 for the proposition that the Court may create common law rules, and, therefore, is not bound by the Restatements.[34] Thus, it is important not to take the quoted language out of context. The *Maso* case involved the issue of availability of damages representing the repair costs for a car that no longer existed and, as with the *Burd* case, the Court applied the Restatement (Second) of Torts without conducting a *Banks* analysis.[35] The discussion that follows is focused on the proper role of the Restatements, and the level of influence they have, in the post-*Banks* era.

III. CLARIFYING THE ROLE OF THE RESTATEMENTS

A. Rejecting the Former Dominance of the Restatements

The fact that many opinions, as discussed above, continue to apply the Restatements may reinforce the false impression that the Restatements remain categorically dominant. The Supreme Court of the Virgin Islands' decision in *King v. Appleton*[36] serves to dispel any notion that the courts will or should continue to apply the Restatements mechanistically, as they did in the pre-*Banks* era. The *King* court emphasized that, although it ultimately adopted a rule similar to the Restatement rule on point, it did so as a result of the *Banks* analysis:

> [A]lthough the elements of an express trust we ultimately adopt here are similar to those outlined in the Restatements, this does not mitigate the necessity of conducting a *Banks* analysis in order to avoid "mechanistic and uncritical reliance on the Restatements," which "has the effect of inappropriately delegating the judicial power of the Virgin Islands to the American Law Institute and to the governments of other jurisdictions."[37]

Similarly, the Supreme Court's decision in *Cacciamani & Rover Corp. v. Banco Popular de Puerto Rico*[38] provides a

34. *Id.*
35. *Id.* at 635–36.
36. 61 V.I. 339 (V.I. 2014) (addressing the issue of an express trust at common law).
37. *Id.* at 349–50 (citing Gov't of the V.I. v. Connor, 60 V.I. 597, 602 (V.I. 2014)).
38. 61 V.I. 247 (V.I. 2014).

reminder that V.I. Code, Title 1, section 4 has been repealed such that the Restatements are no longer to be applied via that provision:

> Although the Superior Court and the parties appear to be under the impression that some version of the Restatement of Restitution applies to this matter through former 1 V.I.C. [section] 4 (repealed 2004), this Court recently defined the elements of a common law claim for unjust enrichment in the Virgin Islands after conducting the appropriate analysis under *Banks v. Int'l Rental & Leasing Corp*.[39]

B. The Continued Persuasive Role of the Restatements

Even so, the *Ross v. Hodge*[40] and *Chapman v. Cornwall*[41] opinions make it clear that the Restatements maintain persuasive influence in the same way that they do in any other jurisdiction. The *Ross* court cited *Banks* for the proposition that, "although 1 V.I.C. [section] 4 does not incorporate all of the Restatement provisions as if they were actual statutory text, those provisions are nevertheless persuasive authority."[42] The *Chapman* case, likewise, demonstrates that courts may still use the Restatements in appropriate cases, and explains how: "Restatements of the Law may apply to the Virgin Islands through 1 V.I.C. [section] 4, subject to the authority of this Court and the Superior Court to shape the common law of the Territory."[43] Both of these statements are consistent with the stated purpose of the Restatements as set forth on the American Law Institute's webpage: "The Institute's founding Committee recommended that the first undertaking should address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was."[44] As the Virgin Islands Supreme Court held in *Simon v. Joseph*,[45]

39. *Id.* at 251 n.2 (citing Walters v. Walters, 60 V.I. 768 (V.I. 2014)).
40. 58 V.I. 292 (V.I. 2013).
41. 58 V.I. 431 (V.I. 2013).
42. *Ross*, 58 V.I. at 304 (internal citation omitted).
43. *Chapman*, 58 V.I. at 441 n.14. Similar language exists in the case of Pollara v. Chateau St. Croix, LLC, 58 V.I. 455, 471 n.10 (V.I. 2013).
44. The American Law Institute, *Institute Projects*, ALI.ORG, https://www.ali.org/about-ali/institute-projects/ (last visited Feb. 26, 2017) [hereinafter "*Institute Projects*"].
45. 59 V.I. 611 (V.I. 2013).

the Restatements "remain a helpful guide to determining how other jurisdictions approach [various legal questions]."[46]

C. The Use of Borrowed Rules or Statutes

A related inquiry is the extent to which other jurisdictions' statutes, or borrowed rules, may appropriately be used within the Virgin Islands. The *Ottley v. Estate of Bell*[47] and *People v. Ventura*[48] cases addressed these issues, respectively. In *People v. Ventura*, the superior court considered Superior Court Rule 135 granting defendants the possibility of a new trial when required in the interest of justice.[49] Noting that this rule had been borrowed from the federal rules, the court then examined how such a rule is to be interpreted:

> Unlike borrowed statutes—which presume that the legislature of the borrowing jurisdiction is aware of and intends to adopt the interpretations of the borrowed statute by the highest court of the jurisdiction from which it is taken—borrowed rules are generally not construed the same. In other words, courts do not state that borrowed rules incorporate the construction given them by the highest court of [the] jurisdiction from which they were borrowed. Instead, courts typically view such earlier constructions of borrowed rules as persuasive, not mandatory.[50]

In *Ottley*, the Court considered how to apply precedent from another jurisdiction interpreting a statute substantially similar to a Virgin Islands statute.[51] In considering the issue in the context of section 606, which addresses jurisdiction over a claim that is made against an administrator or executor of an estate, the Supreme Court noted two prior Supreme Court opinions in

46. *Id.* at 623; *see also* Baptiste v. Rohn, No. 2013-0104, 2016 WL 1261072, at *2 (D.V.I. Mar. 29, 2016) (recognizing that, although "the Supreme Court of the Virgin Islands has held that the Restatements of the Law no longer constitute binding legal authority in the Virgin Islands," they are still valuable in determining the approach taken by other jurisdictions with respect to different legal causes of actions).

47. 61 V.I. 480 (V.I. 2014).

48. No. SX-2012-CR-076, 2014 WL 3767484 (V.I. Super. Ct. July 25, 2014), *aff'd*, 64 V.I. 589 (V.I. 2016).

49. *Id.* at *14.

50. *Id.* at *15 (internal citations omitted).

51. *See Ottley*, 61 V.I. at 494–96 (discussing the Oregon Supreme Court's interpretation of an Oregon statute identical to the one under the court's consideration).

which the Court had looked for guidance to the courts of another jurisdiction, to see how they had interpreted the statute in question.[52] Such guidance would be considered persuasive rather than binding.

IV. DIFFERENTIATING AMONG THE ALI'S VARIOUS PROJECTS

Setting aside for a moment the changing applicability of the Restatements in the Virgin Islands, it is important to differentiate among the ALI's different projects. At this time, the ALI has twenty-one active projects: twelve are Restatements, two are portions of the Model Penal Code, five are Principles projects, and one involves proposed revisions to several Articles of the Uniform Commercial Code.[53] Principles projects serve a different purpose from Restatements. In the case of the ALI's Principles of the Law of Family Dissolution, for example, which the Virgin Islands Supreme Court considered in *Jung v. Ruiz*,[54] one purpose was to guide legislatures in drafting statutory law.[55] The ALI's website indicates that Principles projects are different from Restatements in that Principles projects are undertaken in areas thought to need substantial legal reform. Thus, Principles projects normally culminate in extensive recommendations for change in the law.[56]

The specific issue being considered in the *Jung* case was modification of custody upon relocation of one parent, and the *Banks* question was whether to apply the ALI's Principles of Family Dissolution.[57] In determining not to do so, the Court held as follows:

> [T]he American Law Institute opted to draft Principles rather than a [R]estatement because most of the relevant law in the area of family law is statutory—as such, the Principles were designed to assist legislatures and courts in drafting and interpreting their own laws. Nevertheless, the fact remains

52. *Id.* at 495.

53. The American Law Institute, *Current Projects*, ALI.ORG, https://www.ali.org/projects/ (last visited Feb. 26, 2017).

54. 59 V.I. 1050 (V.I. 2013).

55. *Id.* at 1058 n.4.

56. *Institute Projects*, *supra* note 44.

57. *Jung*, 59 V.I. at 1058 n.4.

> that although the Principles may contain the recommendations of the American Law Institute, they are *expressly* not a [R]estatement. Moreover, adoption of a [R]estatement is subject to this Court's authority to shape the common law, and is, thus, not mandatory. . . . Moreover, in the "Chief Reporter's Foreword," the drafters note . . . that although the chapter may be utilized by courts to interpret and apply their own statutes, it is preferable that the provisions be adopted through legislation. Accordingly, considering the above, as well as the fact that the Virgin Islands does not have a statutory provision providing factors to balance when modifying a custody arrangement, we decline to deviate from the spirit of our stance in *Madir*—that the designation of particular criteria to govern this set of circumstances is a matter that is best left to the Legislature.[58]

Thus, the *Ruiz* case suggests that, even setting aside the fact that courts applying Virgin Islands law need not follow the ALI's Restatements, a court might be even more hesitant to apply provisions of the ALI's Principles projects that are generally intended to serve as a tool for legislatures rather than an interpretive tool for courts.

V. COURTS' EXPECTATIONS OF THE PARTIES

In addition to modifying how courts use the ALI's Restatements of the Law, the *Banks* case and its progeny have provided guidance on how litigants and their attorneys should brief and plead their cases.

A. Briefing

With respect to briefing, the September 2012 Virgin Islands Supreme Court case of *Brodhurst v. Frazier*[59] provides a useful discussion of the Supreme Court's expectations of both parties and the superior court. The *Brodhurst* Court actually declined to decide the issue that would have been the result of a *Banks* analysis, had one been done. The issue presented was whether the Restatement (Third) of Property: Servitudes should govern creation of a servitude implied by a description of land.[60] Rather

58. *Id.* (internal citation omitted).
59. 57 V.I. 365 (V.I. 2012).
60. *Id.* at 370.

than resolving the issue, the Supreme Court remanded the matter to the superior court, inviting the parties to brief the issue of what law should be applied.[61] This case demonstrates the Supreme Court's expectation that parties and lower courts should take an active role in *Banks* analysis.

Turning from the Supreme Court to the superior court, *Benjamin v. Coral World*[62] articulated the superior court's expectations of parties in conducting a *Banks* analysis. In footnote thirty-eight, the court provides the following reminder:

> [L]itigants [must comply with] the requirements of [Local Rules of Civil Procedure] (LRCi) 11.1. By signing a motion or supporting memorandum, an attorney certifies that the applicable law in this jurisdiction has been cited, including authority for or against the position being advocated by counsel. LRCi 11.1(a). Therefore, in the absence of discussion addressing: (1) whether cited authority is binding upon this Court or presented as persuasive authority; and (2) why the Court should adopt this view as the "appropriate common law rule based on the unique characteristics and needs of the Virgin Islands" and the parties, the Court may begin striking motions as fatally deficient.[63]

This case is often cited as precedent for the possibility of sanctions against an attorney who fails to brief a *Banks* analysis when needed.[64]

B. Whose Responsibility?

There has been some uncertainty as to whether the parties are responsible for conducting a *Banks* analysis, or whether only the court must do so. In *Lembach v. Antilles School, Inc.*,[65] the

61. *Id.* at 369 n.3.

62. No. ST-13-CV-065, 2014 WL 2922306 (V.I. Super. Ct. June 12, 2014).

63. *Id.* at *3 n.38 (internal citations omitted). Note that identical language is found in Berry v. Performance Constr., No. ST-13-CV-524, slip op. at 4 n.14 (V.I. Super. Ct. Mar. 4, 2015).

64. *See, e.g.*, Percival v. People, 62 V.I. 477, 491 (V.I. 2015) (alluding to the possibility of sanctions for failing to brief a *Banks* analysis); SBRMCOA, LLC v. Morehouse Real Estate Invs., LLC, 62 V.I. 168, 190 n.75 (V.I. 2015) (suggesting that litigants who simply cite the Restatements in their briefs without discussing *Banks* may be subject to sanctions); Cacciamani & Rover Corp. v. Banco Popular de Puerto Rico, 61 V.I. 247, 251 n.2 (V.I. 2014) (implying that lawyers who merely cite the Restatements in their briefs without addressing *Banks* could be sanctioned).

65. No. ST-12-CV-613, 2015 WL 920631 (V.I. Super. Ct. Feb. 25, 2015).

superior court clarified that only the court is required to conduct *Banks* analyses.[66] Even so, parties are not discouraged from doing so.[67] In addition, as the *Lembach* court held, "[P]arties are required to contribute to the analysis by citing to binding authority when faced with questions of law that lack precedent."[68]

The superior court in *Pate v. Government of the Virgin Islands*[69] provides further information regarding the litigants' obligations. The *Pate* opinion indicates that, as part of litigants' obligation to cite binding authority, they should be prepared to discuss "(1) whether any cited authority is binding upon [the] [c]ourt[,] [or instead] presented as persuasive authority; and (2) if persuasive, why the [c]ourt should adopt" the rule being argued for.[70] To present a compelling case on the latter, the parties should be prepared to persuade the court of "the 'appropriate . . . rule based on the unique characteristics and needs of the Virgin Islands' and the parties."[71]

C. The Implications of Improper Pleading

When the parties do not cite binding authority, or do not discuss whether the cited authority is binding, the court may strike their motions or pleadings as fatally deficient. Specifically, relying on the Restatements without further analysis may result in a court's striking the motion or pleading as fatally deficient. *Abdallah v. Abdel-Rahman*[72] is an example of a case in which the court held that the parties' motions were deficient, although it stopped short of actually striking them. The court described the plaintiff's motions as follows: "[T]hroughout their motions, the parties occasionally either fail to cite to any authority for their arguments, or cite cases and statutes without reference to or discussion of actual binding authority."[73] The court went on to

66. *Id.* at *8.
67. *Id.*
68. *Id.*
69. No. ST-14-CV-479, 2014 WL 7188999 (V.I. Super. Ct. Dec. 11, 2014).
70. *Id.* at *8.
71. *Id.* (quoting Benjamin v. Coral World VI, Inc., No. ST-13-CV-065, ST-13-CV-294, 2014 WL 2922306, at *3 n.38 (V.I. Super. Ct. June 12, 2014)). Identical language is also presented in Edwards v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc., No. ST-14-CV-222, 2015 WL 476216, at *10 (V.I. Super. Ct. Jan. 29, 2015).
72. No. ST-13-CV-227, slip op. (V.I. Super. Ct. Mar. 4, 2015).
73. *Id.* at 5 n.22.

remind the parties of what does and does not constitute binding authority.[74]

The issue of proper pleading standards often comes up in the context of the parties' obligations under Local Rules of Civil Procedure 11.1, as mentioned above.[75] The court may decline to do a *Banks* analysis if it finds the party making the claim has failed to plead sufficient facts to support it.[76] In *Brunn v. Dowdye*,[77] although the Court found that it had "yet to speak to the elements required to sustain claims of negligent hiring, training, retention, or supervision of an employee," it found that it did not need to decide the issue of whether the Restatements—or some other common law rule—should govern the issue, "because Brunn's notice of claim . . . failed to set forth the minimum required factual allegations to enable her claims to proceed."[78]

Likewise, in *Mayhem Enterprises, LLC v. Powell*,[79] the superior court provides guidance as to its expectations of the parties. The court denied plaintiff Mayhem's motion for summary judgment on the issue of promissory estoppel, but provided guidance as to how the claim should be pursued, if at all: "Mayhem's briefing is insufficient in that it does not cite to any authoritative source of law and instead relies on the Restatement (Second) of Contracts. If Mayhem intends to pursue this claim further, it should ensure that it provides authoritative citations."[80]

74. *Id.* This topic is further discussed below in Part VI(A).

75. *See supra* note 63 and accompanying text (noting attorneys' obligation under Local Rule of Civil Procedure 11.1 when filing motions, memoranda, or briefs, to certify to the court that applicable law has actually been cited). *See also* Christopher v. Skinner, No. ST-13-CV-575, slip op. at *8 n.29 (V.I. Super. Ct. Sept. 26, 2014) ("Although only the Superior Court is required to conduct *Banks* analyses, litigants are reminded of the requirements of LRCi 11.1.").

76. *See, e.g.*, Jacobs v. Roberts, No. ST-14-CV-193, 2015 WL 3406561, at *4 n.23 (V.I. Super. Ct. May 21, 2015) (declining to conduct a *Banks* analysis because defendants "failed to allege sufficient facts establishing a claim for contribution").

77. 59 V.I. 899 (V.I. 2013).

78. *Id.* at 911 n.10.

79. No. ST-10-CV-125, 2015 WL 6784233 (V.I. Super. Ct. Oct. 30, 2015).

80. *Id.* at *4 n.11 (internal citations omitted).

*VI. REVISITING PRE-*BANKS *JURISPRUDENCE*

A. What is Binding Authority?

There has been fairly extensive discussion at both the superior court and the Supreme Court level of what constitutes binding authority. The superior court has held that the only decisions binding upon it are those rendered by the Virgin Islands Supreme Court, the Third Circuit Court of Appeals when serving as the *de facto* court of last resort in the Virgin Islands, and the Appellate Division of the District Court of the Virgin Islands.[81]

With respect to Third Circuit precedent, the superior court has held that a pre-*Banks* Third Circuit case based on V.I. Code, Title 1, section 4 is not binding authority. Instead, all prior cases explicitly relying on V.I. Code, Title 1, section 4 are now effectively repealed.[82] Even so, when the Supreme Court has not yet provided an interpretation of local law, the superior court has indicated it will continue to follow the Third Circuit's interpretation.[83] Along the same lines, in *Garcia v. Garcia*,[84] the Supreme Court held as follows:

> [W]e reiterate our longstanding position that decisions of the Third Circuit interpreting local Virgin Islands law issued during the period in which that court served as the *de facto* court of last resort for the Virgin Islands are "entitled to great respect." And while this Court unquestionably possesses the authority to depart from those holdings, we recognize that there are costs associated with doing so, such as potentially "disrupt[ing] the state of the law in the Virgin Islands."[85]

The Third Circuit has held similarly:

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81. Courts generally cite *Connor* for this proposition. Gov't of the V.I. v. Connor, 60 V.I. 597, 605 n.1 (V.I. 2014). *See, e.g.*, Pate v. Gov't of the V.I., No. ST-14-CV-479, 2014 WL 7188999, at *8 n.79 (V.I. Super. Ct. Dec. 11, 2014) (explicating the types of decisions that are binding on the superior court).

82. Nicholas v. Damian-Rojas, 62 V.I. 123, 129 n.5 (V.I. Super. Ct. 2015).

83. The Nature Conservancy, Inc. v. Louisenhoj Holdings, LLC, No. ST-13-CV-124, 2014 WL 3509046, at *1 n.1 (V.I. Super. Ct. July 8, 2014).

84. 59 V.I. 758 (V.I. 2013).

85. *Id.* at 776 (citing Defoe v. Phillip, 56 V.I. 109, 120 (V.I. 2012)); Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 981 (V.I. 2011) (internal citations omitted); People v. Todmann, 53 V.I. 431, 438 n.6 (V.I. 2010).

> We . . . conclude that the Virgin Islands Supreme Court may reject our local decisions that predate its establishment. Of course, just as the Supreme Court of Guam was subject to a manifest-error standard of review during the Ninth Circuit's short-lived certiorari period, the Virgin Islands Supreme Court is subject to the same standard of review during our certiorari period. This standard certainly limits the Supreme Court's freedom to reject our decisions. But it does not force the Supreme Court to follow us in lock-step.[86]

With respect to district court precedent, the superior court has held that it is not bound by opinions issued by the district court when it was acting as a trial court.[87] The superior court has also held that it is not bound by Supreme Court opinions in which the Court did not do a *Banks* analysis.[88]

B. The Role of Lower Courts in the Law-Making Process

The superior court itself also has a role in shaping Virgin Islands common law. By way of example, in the case of *Anderson v. Bryan*,[89] having determined that there was no controlling Virgin Islands law on the issue in question, the superior court had the power to decide which common law rule should apply.[90] This case involved the issue of how definite the description of an area must be in determining whether the statute of frauds has been satisfied with respect to an easement. The court held that, since the easement itself was sufficiently certain to satisfy the statute of frauds, the fact that the description did not make it clear what portion was to be paved was not relevant.[91]

In *3RC & Co. v. Boynes Trucking System, Inc.*,[92] the Supreme Court described how it uses lower court *Banks* analyses in crafting its own *Banks* analysis. In so doing, the Supreme Court clarified the superior court's role in the law-making process.[93] The Supreme Court is, of course, not bound by superior court *Banks*

86. DeFoe v. Phillip, 702 F.3d 735, 745 (3d Cir. 2012).
87. *The Nature Conservancy, Inc.*, 2014 WL 3509046, at *1 n.2.
88. Edwards v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc., No. ST-14-CV-222, 2015 WL 476216, at *4 n.21 (V.I. Super. Ct. Jan. 29, 2015).
89. 57 V.I. 134 (V.I. Super. Ct. 2012).
90. *Id.* at 138.
91. *Id.* at 139.
92. 63 V.I. 544 (V.I. 2015).
93. *Id.* at 551–52.

analyses, but has made it clear that the lower court's analysis is very useful. This is one reason the Supreme Court will remand when the superior court has not yet provided a *Banks* analysis.[94] The *3RC* case involved the question of how the superior court's previously articulated standards for a preliminary injunction should be weighed.[95] In deciding the issue, and ultimately adopting a formulation slightly different from what the superior court had recommended, the Court held that independent decisions of the superior court improve the quality of the Supreme Court's own decisions, and that "the appropriate time to examine [an] issue and determine the proper injunction standard under Virgin Islands law" is therefore after the Court has "the benefit of a comprehensive examination of this issue from the Superior Court . . . in addition to the commentary on this issue in a number of other Superior Court decisions."[96]

C. The Role of the Supreme Court

As the superior court noted in *People v. Willis*,[97] Supreme Court Rule 38 established a procedure for federal courts to ask the Supreme Court to answer a question of Virgin Islands law in instances in which it appears that there is no controlling precedent.[98] This procedure is based on the authority granted to the Virgin Islands Supreme Court as the highest local court in the jurisdiction to answer certified questions pursuant to V.I. Code, Title 4, section 32(b).[99]

In determining what constitutes controlling precedent, the Virgin Islands Supreme Court has also differentiated between cases that analyze and decide issues of law and those that merely reference legal issues without deciding them. Specifically, the Court has held that "fleeting references" in opinions to issues that were never raised or discussed should not be cited as controlling authority.[100] By way of example, the Virgin Islands Supreme

94. *Id.*
95. *Id.* at 550.
96. *Id.* at 551–52.
97. Nos. ST-14-CR-074, ST-14-CR-075, 2015 WL 652439 (V.I. Super. Ct. Feb. 12, 2015).
98. *Id.* at *2 n.11.
99. *Id.*
100. Hansen v. O'Reilly, 62 V.I. 494, 516 n.23 (V.I. 2015); Estick v. People, 62 V.I. 604, 624 n.7 (V.I. 2015).

Court has declined to follow a district court case that was only slightly more than two pages long and cited to no caselaw, even though other Virgin Islands courts had relied upon that decision.[101]

Joseph v. Daily News Publishing Co., Inc.,[102] a 2012 Virgin Islands Supreme Court case, demonstrated how a court should approach a *Banks* analysis when a local court has already addressed the issue, but has not conducted a *Banks* analysis.[103] *Joseph* was a defamation case in which the Court was considering the basic elements of a defamation claim.[104] *Kendall v. Daily News Publishing Co.*,[105] another Virgin Islands Supreme Court case, had already addressed these elements, albeit pre-*Banks*.[106] Rather than using the *Kendall* case to determine—as some courts have—that no *Banks* analysis is needed, the Court took a better and clearer approach, using *Kendall* to establish the first element of the *Banks* analysis—how local courts have previously addressed an issue.[107]

D. Parties' Affirmative Obligation to Request Review of a Pre-*Banks* Rule When Desired

Although the Virgin Islands Supreme Court has the authority to raise a *Banks* issue *sua sponte*, several Supreme Court decisions make it clear that the Court is generally not inclined to do so when the litigants have not raised the issue or requested that the Court exercise its inherent power to adopt a different rule. Instead, the Court will normally consider adopting a different rule only after receiving the benefit of the parties' briefing.[108] The Supreme Court's decision in *Williams v. People of the Virgin Islands*[109] provides an example. The *Williams* case

101. Rennie v. Hess Oil Virgin Islands Corp., 62 V.I. 529, 539 (V.I. 2015) (citing Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 983 (V.I. 2011), which discredited the precedential value of a district court case that, despite having been cited with approval by other Virgin Islands courts, lacked sufficient substantive analysis to lend itself to having even persuasive value).

102. 57 V.I. 566 (V.I. 2012).

103. *Id.* at 585 n.10.

104. *Id.* at 585–86.

105. 55 V.I. 781, 787–88 (V.I. 2011).

106. *Joseph*, 57 V.I. at 585–86.

107. *Id.* at 585 n.10.

108. Estick v. People, 62 V.I. 604, 619 n.7 (V.I. 2015).

109. 58 V.I. 341 (V.I. 2013).

involved the question of whether a defendant must be physically present at re-sentencing.[110] In considering the issue, the court pointed out that the defendant cited only a single federal case and, more important, declined to cite a more recent Virgin Islands Supreme Court case on point.[111] Because the parties had advanced no argument as to why the Court should revisit its prior holding, the Court followed its own recent decision.[112]

Perez v. Ritz-Carlton (Virgin Islands), Inc.,[113] likewise, demonstrated that, when there has been previous reliance on a Restatement in a pre-*Banks* case and neither party has raised the issue of whether this rule should be revisited, the parties should not expect the Supreme Court to raise the issue *sua sponte*.[114]

VII. WHEN COURTS DO OR DO NOT PERFORM A BANKS *ANALYSIS*

Studying Supreme Court and superior court cases applying *Banks* provides some useful perspectives on when the courts conduct a *Banks* analysis, and when they choose not to do so.

A. Statistics on When a *Banks* Analysis is Completed[115]

Looking at the body of cases citing *Banks*, when *Banks* is cited, a *Banks* analysis is actually completed in just over forty percent of the cases. In sixty-seven cases, either no *Banks* analysis was deemed necessary or *Banks* was cited for a different reason, such as a discussion of federalism or the history of the Virgin Islands judiciary.[116] Twenty-five of these cases were at the Supreme Court level, one was a Third Circuit case, seven were at the district court level, thirty-three were superior court cases, and one case was decided in the District Court for the Eastern District of New York. In fifty-one cases, a *Banks* analysis was conducted. Fourteen were Supreme Court cases, three were

110. *Id.* at 352.
111. *Id.*
112. *Id.*
113. 59 V.I. 522 (V.I. 2013).
114. *Id.* at 529 n.5.
115. These statistics have been gathered from relevant Virgin Islands cases from the issuance of the *Banks* opinion in 2011 through October 31, 2016.
116. Der Weer v. Hess Oil V.I. Corp., No. SX-05-CV-274, 2016 WL 1644948, at *4 (V.I. Super. Ct. April 25, 2016), is an example of a case in which *Banks* was cited for its discussion of the history and development of the Virgin Islands judiciary.

district court cases, and thirty-four were at the superior court level. Whether courts do or do not perform a *Banks* analysis is not always a binary inquiry; instead, some courts use some of the language of *Banks* without doing a full *Banks* analysis.

B. Matters Controlled by Statute

The superior court has stated that a *Banks* analysis is not needed when the matter is controlled by statute. In *Alleyne v. Diageo USVI, Inc.*,[117] for example, the court noted that a prior court had conducted a *Banks* analysis to determine the definition of nuisance, but held that it was unnecessary to have done so because there is a statute on point.[118] Likewise, in *Der Weer v. Hess Oil Virgin Islands Corp.*,[119] the superior court found that no *Banks* analysis was needed on the topic of amending a complaint to add a survival claim to a wrongful death cause of action because the matter was controlled by statute.[120] Even so, the court held that a new analysis was needed "because courts in the Virgin Islands have uncritically relied on the trial-level decisions of the District Court of the Virgin Islands . . . which . . . are merely persuasive [for] the Superior Court."[121] This case thus demonstrates that *Banks* analyses are not the only kind of new analysis that is required of matters that have not yet been determined by binding authority.

Having said this, the superior court has on occasion distinguished those statutes based on the common law or closely tied in to the common law as being appropriate fodder for a *Banks* analysis. The *Lembach* court clarified that a *Banks* analysis is appropriate not only when a question of common law lacks precedent, but also in certain circumstances when the question involves a statute.[122] The court cited *Rennie v. Hess Oil*

117. 63 V.I. 384 (V.I. Super. Ct. 2015).

118. *Id.* at 405 n.6.

119. 61 V.I. 87 (V.I. Super. Ct. 2014).

120. *Id.* at 98. A later Superior Court opinion in this same matter clarified that, had a *Banks* analysis been required, the parties could not have avoided such an analysis being done by failing to raise the issue, since "the parties cannot stipulate to the law." Der Weer v. Hess Oil V.I. Corp., SX–05–CV–274, 2016 WL 1019689, at *16 (V.I. Super. Ct. Mar. 15, 2016) (quoting Matthew v. Herman, 56 V.I. 674, 682 (2012)).

121. *Der Weer*, 61 V.I. at 105 n.4.

122. Lembach v. Antilles Sch., Inc., No. ST-12-CV-613, 2015 WL 920631, at *8 (V.I. Super. Ct. Feb. 25, 2015).

Virgin Islands Corp.,[123] *Machado v. Yacht Haven*,[124] and *Christopher v. Skinner*,[125] cases addressing wrongful discharge, assumption of risk, and partition, respectively, as all "cases [that] deal with statutes that were either based on or have significant interaction with the common law."[126]

C. Prior Adoption of a Restatement Rule or Prior *Banks* Analysis

Superior court precedent suggests that the court may choose not to conduct a *Banks* analysis when another court has already decided that a given Restatement is applicable. In *Cifre v. Daas Enterprises, Inc.*,[127] for example, the court decided not to conduct a *Banks* analysis as to the elements of a public nuisance claim, because it was satisfied with the soundness of a *Banks* analysis conducted by another superior court, and thus incorporated its analysis and definition of nuisance by reference.[128] *Pickering v. Arcos Doradas Puerto Rico, Inc.*[129] presents a similar analysis: although the Supreme Court had not yet issued an opinion defining the elements of an intentional infliction of emotional distress cause of action, two superior court opinions had done so.[130] Because the court was satisfied with the analysis and conclusion in each of those cases, it adopted the analyses of both.[131] As one final example of this trend, the court in *Cintron v. Polston*[132] held that no *Banks* analysis of the elements of *respondeat superior* and the scope of employment was needed when the same judge had already conducted such an analysis of

123. 62 V.I. 529 (V.I. 2015).
124. 61 V.I. 373 (V.I. 2014).
125. No. ST-13-CV-575, slip op. (V.I. Super. Ct. Sept. 26, 2014).
126. *Lembach*, 2015 WL 920631, at *8 n.53.
127. 62 V.I. 338 (V.I. Super. Ct. 2015).
128. *Id.* at 358.
129. No. ST-15-CV-313, 2015 WL 6957082 (V.I. Super. Ct. Nov. 9, 2015).
130. *Id.* at *4.
131. *Id.* (citing Joseph v. Sugar Bay Club & Resort Corp., No. ST-13-CV-491, 2014 WL 1133416, at *3 (V.I. Super. Ct. Mar. 17, 2014), *rev'd in part,* No. 2014-0048, 2015 WL 682117 (V.I. Feb. 17, 2015)); Donastorg v. Daily News Publ'g Co., Inc., 63 V.I. 196, 294–96 (V.I. Super. Ct. 2015). Notably, all three decisions were rendered by the same judge, Judge Denise M. Francois. *See also* Pate v. Gov't of the V.I., No. ST-14-CV-479, 2014 WL 7188999, at *3 n.24 (V.I. Super. Ct. Dec. 11, 2014) (applying the hybrid sliding scale test from the superior court's *Banks* analysis in *SBRMCOA*).
132. 62 V.I. 144, 148 (V.I. Super. Ct. 2015).

this issue in the case of *Walker v. Virgin Islands Waste Management Authority*.[133]

By way of contrast, *Alleyne* is an example of a case in which the superior court declined to apply a *Banks* analysis done by another court at the same level.[134] The case involved the elements of intentional trespass and the question of whether negligent trespass is a separate cause of action.[135] The superior court had already conducted a *Banks* analysis of the elements of trespass[136] but had not, according to the *Alleyne* court, differentiated between intentional and negligent trespass. Instead of adopting what it characterized as the broader rule articulated by the *Radcliffe* court, the *Alleyne* court decided to adopt the Restatement formulation of intentional trespass.[137] Thus, there are instances in which a court defers to a prior *Banks* analysis done at the same level, and instances in which a court does not.

Still other cases involve superior courts declining to follow pre-*Banks* Supreme Court decisions or even post-*Banks* decisions in which the Supreme Court did not conduct a *Banks* analysis. In *Cifre v. Daas Enterprises, Inc.*,[138] the superior court held that it need not follow a pre-*Banks* Supreme Court decision that had mechanistically applied the Restatements.[139] Ultimately, the *Cifre* court found that it need not reach the issue that would have been the basis of the *Banks* analysis anyway.[140] In *Slack v. Slack*,[141] the court went a step further and declined to follow a post-*Banks* Supreme Court decision that it held had mechanistically applied the Restatements.[142] In so doing, the court cited the *Connor* decision for its language indicating that the Supreme Court had "adopted a practice of reconsidering its pre-*Banks* decisions which were based solely on former 1 V.I. [Code section] 4, and therefore, the Superior Court 'should not be foreclosed from departing from those holdings in an appropriate

133. 62 V.I. 53, 60 (V.I. Super. Ct. 2014).
134. 63 V.I. 384, 414 (V.I. Super. Ct. 2015).
135. *Id.*
136. Bell v. Radcliffe, No. ST-13-CV-392, 2015 WL 5773561, at *5–7 (V.I. Super. Ct. Apr. 30, 2015).
137. *Alleyne*, 63 V.I. at 417.
138. 62 V.I. 338 (V.I. Super. Ct. 2015).
139. *Id.* at 364–65.
140. *Id.* at 365.
141. 62 V.I. 366 (V.I. Super. Ct. 2015).
142. *Id.* at 378.

case, provided that it thoroughly explains the reasoning for its decision.'"[143]

D. Prior Pre-*Banks* Decisions or Decisions in Which No *Banks* Analysis Was Done

Notably, the superior court has sometimes declined to depart from Supreme Court precedent, even when the Supreme Court did not do a *Banks* analysis, when the superior court has found that the Restatement is the best fit.[144] Alternatively, the superior court has also declined to do a *Banks* analysis in several cases in which it indicated it was "unaware of any local law, including caselaw, which would require deviation" from a Restatement rule[145] or when a Restatement rule has been widely cited in the Virgin Islands and other jurisdictions.[146] One case employing this language was *MRL Development I, LLC v. Whitecap Investment Corp.*, in which the court elected to apply the Restatement (Second) of Contracts rule with respect to privity of contract and third-party beneficiaries.[147] Similar language appears in *In re Prosser*, a district court case: "Although the Supreme Court of the Virgin Islands has stated that no Restatement should be mechanically applied in all cases, this Court is unaware of any local law, including case law, which would require deviation in this case."[148]

A variation of this analysis appears in *Virgin Islands Port Authority v. Callwood*,[149] in which the court declined to deviate from a pre-*Banks* Third Circuit opinion applying Restatement

143. *Id.* (quoting Gov't of the V.I. v. Connor, 60 V.I. 597, 605 n.1 (V.I. 2014)).

144. This language appears in Edwards v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc., No. ST-14-CV-222, 2015 WL 476216, at *8 n.62 (V.I. Super. Ct. Jan. 29, 2015); Abdallah v. Abdel-Rahman, No. ST-13-CV-227, slip op., at 4 n.13 (V.I. Super. Ct. Mar. 4, 2015); Berry v. Performance Constr., No. ST-13-CV-524, slip op., at 5 n.17 (V.I. Super. Ct. Mar. 4, 2015) (citing both pre-*Banks* and post-*Banks* Supreme Court opinions in which the superior court indicated no *Banks* analysis was done).

145. MRL Dev. I, LLC v. Whitecap Inv. Corp., No. CV 2013-48, 2014 WL 793132, at *2 n. 2 (D.V.I. Feb. 26, 2014).

146. Huggins v. Chungani, No. ST-14-CV-115, 2014 WL 4662323, at *2 n.2 (V.I. Super. Ct. Sept. 18, 2014).

147. 2014 WL 793132, at *2–3.

148. No. 06-30009 (JFK), 2013 WL 5422881, at *3 n.2. (D.V.I. Sept. 27, 2013); *see* Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 980 (V.I. 2011) (explaining that because the court's decision constitutes "local law," the court has the discretion to decline to follow the Restatement).

149. No. ST-11-CV-305, 2014 WL 905816 (V.I. Super. Ct. Feb. 28, 2014).

(Second) of Torts sections 525, 526, and 549.[150] In that case, the court noted that it was not "'foreclosed from adopting a different common law rule' than those cited by otherwise binding authority," but also was not required to conduct a *Banks* analysis because the court found no reason to depart from the Third Circuit's application of the Restatement provisions in question.[151] Because these cases represent a significant trend, it is notable that the Supreme Court has articulated, as recently as in the March 2016 *Antilles School, Inc. v. Lembach*[152] case, that pre-*Banks* Virgin Islands Supreme Court cases "should not be 'blindly follow[ed]' if they 'were predicated solely on 1 V.I. [Code section] 4.'"[153] It will be interesting to see whether the superior court demonstrates that its decision to follow such precedent has not been blind.

E. Using Prior Adoption of One Restatement Rule to Justify Adopting Others

Sometimes, superior courts have actually gone a bit further in deferring to prior use of a Restatement rule. For example, the court might use the Supreme Court's prior adoption of one section of a Restatement to justify application of other Restatement sections relating to the same concept. In *Guardian Insurance Co. v. Estate of Knight-David*,[154] for example, the court noted that the Supreme Court had not done a *Banks* analysis in *Ross v. Hodge*,[155] a post-*Banks* case, before applying the elements of conversion from the Restatement (Second) of Torts.[156] Even so, the court held that there was no reason to depart from this analysis because it found the *Ross* decision to be consistent with the needs of the Virgin Islands.[157] Importantly, the court then went on to apply additional Restatement provisions relating to conversion.[158] Similarly, in *Creative Minds, LLC v. Reef*

150. *Id.* at *5 n.43.
151. *Id.* (quoting Gov't. of the V.I. v. Connor, 60 V.I. 597, 605 n.1 (V.I. 2014)).
152. No. 2015-0039, 2016 WL 948969 (V.I. Mar. 14, 2016).
153. *Id.* at *5 n.5 (quoting *Connor*, 60 V.I. at 605 n.1).
154. No. ST-08-CV-189, slip op. (V.I. Super. Ct. Mar. 4, 2015).
155. 58 V.I. 292, 308–10 (V.I. 2013).
156. *Guardian Ins. Co.*, slip op., at 4 n.16 (V.I. Super. Ct. Mar. 4, 2015).
157. *Id.*
158. *Id.* at 4–5. The court did something very similar in Police Benevolent Assoc. v. Brooks, No. ST-12-CV-123, slip op., at 3 n.10 (V.I. Super. Ct. Mar. 4, 2015).

Broadcasting, Inc.,[159] the court used the prior Supreme Court analysis in the *Arlington Funding*[160] case, in which the court had applied Restatement (Second) of Contracts section 235, to justify its use of both that section and "portions of the Restatement clarifying or expanding upon"[161] that section. The Supreme Court has now made it clear, in the *Antilles School, Inc. v. Lembach* case, that "the fact that [the Supreme Court] may have cited to—or even adopted a section of—a particular Restatement should not be construed as a 'wholesale adoption' of the Restatements," and provides several examples of Supreme Court decisions rejecting a section of a Restatement after agreeing with another section of the same Restatement.[162] Thus, the Supreme Court has now rejected the approach taken in the *Guardian Insurance* and *Creative Minds* cases.[163]

By contrast, in *Jacobs v. Roberts*,[164] the court noted that the superior court had already conducted a *Banks* analysis adopting Restatement of Torts sections 22 and 23, but had focused on the limitations of actions for contribution and indemnity, rather than the question at bar, which related to the elements of such a cause of action.[165] Although the court expressed uncertainty as to whether a *Banks* analysis was needed, it went ahead and conducted a limited *Banks* inquiry anyway.[166] Following the *Antilles School* case, this seems clearly to have been the right approach.

F. Parties' Failure to Establish a Genuine Issue of Material Fact

When a party has failed to establish a genuine issue of material fact regarding an issue that would require

159. No. ST-11-CV-131, 2014 WL 4908588, at *5 n.21 (V.I. Super. Ct. Sept. 24, 2014).

160. Arlington Funding Services, Inc. v. Geigel, No. CIV. 2008-007, 2009 WL 357944 (V.I. Feb. 9, 2009).

161. *Creative Minds, LLC*, 2014 WL 4908588, at *5 n.21.

162. No. 2015-0039, 2016 WL 948969, at *3 n.1 (V.I. Mar. 14, 2016).

163. Consistent with the *Antilles School, Inc.* holding, the Superior Court in *Tutein v. Ford Motor Co.* held that a *Banks* analysis was necessary to determine whether section 3 of the Restatement (Third) of Torts: Products Liability should be adopted, notwithstanding the prior adoption of the first two sections. No. SX-10-CV-18, 2016 WL 3186481, at *5 (V.I. Super. Ct. Mar. 18, 2016).

164. No. ST-14-CV-193, 2015 WL 3406561 (V.I. Super. Ct. May 21, 2015).

165. *Id.* at *2.

166. *Id.*

reconsideration of a Restatement rule, the court may decline to do a *Banks* analysis to determine the applicability of the rule. This issue arose in *Roebuck v. Virgin Islands Housing Authority*,[167] in which the matter in question was the applicability of Restatement (Second) of Contracts section 205 dealing with the implied covenant of good faith and fair dealing.[168]

G. Prior Supreme Court Precedent

In addition, the superior court should find that no *Banks* analysis is needed if the Supreme Court has already addressed the issue that would be the subject of a *Banks* analysis. In *Stapleton v. WenVI, Inc.*,[169] the court found that there was no need for a *Banks* analysis because there was post-*Banks* Supreme Court precedent applying the common law construction of fraud in the context of good faith and fair dealing.[170] Similarly, in *FirstBank Puerto Rico v. Webster*,[171] because the Supreme Court had previously affirmed the superior court's granting of summary judgment based on a party's failure to establish a genuine issue of material fact under Restatement (Second) of Contracts section 205, the superior court held that no *Banks* analysis was necessary.[172] Likewise, if the Supreme Court has already adopted elements of a cause of action in a post-*Banks* analysis, it need not revisit the issue.[173]

H. Matters of Well-Established Law

The superior court has also held that a *Banks* analysis is not needed if the legal issue under consideration is well established as a matter of basic law practice. In *Walsh v. Daly*,[174] for example, the court found a *Banks* analysis of the elements of breach of

167. 60 V.I. 137 (V.I. Super. Ct. 2014).

168. *Id.* at 145.

169. No. CV 2012-035, 2014 WL 3765855 (D.V.I. July 30, 2014).

170. *Id.* at *3 n.3.

171. No. ST-12-CV-239, 2014 WL 985144 (V.I. Super. Ct. Mar. 7, 2014) *reconsideration granted, order vacated in part,* ST-12-CV-239, 2014 WL 3592093 (V.I. Super. Ct. July 16, 2014).

172. *Id.* at *1 n.3 (citing Chapman v. Cornwall, 58. V.I. 431 (V.I. 2013)).

173. *See, e.g.*, Simpson v. Capdeville, P.C., S. Ct. Civ. No. 2013-0144, 2016 WL 1592411, at *4 (V.I. Apr. 18, 2016) (citing the post-*Banks* Supreme Court decision of Joseph v. Daily News Publ'g Co., 57 V.I. 566, 585–87 (V.I. 2012), in which elements of defamation had been adopted).

174. No. ST-01-CV-165, 2014 WL 2922302 (V.I. Super. Ct. June 18, 2014).

contract to be unnecessary, for two reasons. First, the Supreme Court had "repeatedly upheld the basic elements of a breach of contract claim."[175] Second, the court held that the elements of a breach of contract claim are "so fundamental to the common law jurisprudence in the Virgin Islands that a *Banks* analysis [was] unnecessary."[176] *Marian v. Fraser*[177] included similar analysis with respect to the elements of common law negligence. Although the court noted that the Supreme Court had not explicitly conducted a *Banks* analysis on this issue, it held that the elements had been implicitly adopted in a number of Supreme Court opinions.[178] In addition, the court held that the "essential elements of negligence are so widely accepted and fundamental to the practice of law in the United States and the Virgin Islands, that requiring a *Banks* analysis in this instance would yield the same result."[179]

Other courts, however, have taken the opposite approach. In *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*,[180] the superior court noted that the Supreme Court of the Virgin Islands has never defined the elements of a breach of contract case, post-*Banks*, without relying on either the Restatements or precedent drawn from the Restatements.[181] The court disagreed with other superior court cases holding that the elements are so fundamental that no *Banks* analysis is needed, but also noted that its "task [was] greatly simplified by the near-uniform treatment of this cause of action."[182] Likewise, in *Government v. American Federation of Teachers, Local 1825*,[183] the court noted that, although "[t]he parties do not dispute that *functus officio* applies in this matter" and is a "longstanding common law concept," a *Banks* analysis was needed because there was no binding precedent expressly adopting the principle and articulating the relevant exceptions.[184] As a practical matter, then, litigants should be ready to fully brief the three *Banks*

175. *Id.* at *6 n.52.
176. *Id.*
177. No. ST-13-CV-549, 2014 WL 1239492 (V.I. Super. Ct. Mar. 17, 2014).
178. *Id.* at *2 n.14.
179. *Id.*
180. No. ST-2014-CV-513, 2015 WL 9031220 (V.I. Super. Ct. Nov. 10, 2015).
181. *Id.* at *3 n.31.
182. *Id.*
183. 61 V.I. 34 (V.I. Super. Ct. 2014).
184. *Id.* at 39.

factors whenever there is not already binding authority in the form of a prior *Banks* analysis on point.[185]

As a slight variation on this theme, if the court is not adopting a specific standard, but is instead simply referring to some element that can be considered widely accepted in the Virgin Islands, the court may find that a *Banks* analysis is not necessary. For example, in *Powell v. Chi-Co's Distributing, Inc.*,[186] although the superior court noted that there was no local statute addressing the issue of gross negligence or the standard for determining when punitive damages should be assessed for gross negligence, it concluded that no *Banks* analysis was needed because, rather than adopting a specific standard, the court was simply making reference to the "recklessness" element of the tort.[187] The court described this element as having been "widely accepted" both in the Virgin Islands and in a majority of other jurisdictions, citing *Tutein v. Parry*[188] for its discussion of how various jurisdictions had defined gross negligence.[189] The *Powell* court held that the "least stringent standard adopted" of those it had considered had included reckless conduct.[190] An alternative approach would have been for the court to have conducted a *Banks* analysis, but used the fact that recklessness has been widely adopted both in the Virgin Islands and in a majority of other jurisdictions to satisfy the first and second elements of the test.

I. Additional Procedural Reasons Not to Do a *Banks* Analysis

In at least two cases, the superior court has declined to conduct a *Banks* analysis for procedural reasons not already discussed. For example, in *Fenster v. Dechabert*,[191] the court held that what it termed the "inordinate time pressure" it faced to render a decision on a party's request for a temporary restraining

185. Antilles Sch., Inc. v. Lembach, S. Ct. Civ. No. 2015-0039, 2016 WL 948969, at *14 n.13 (V.I. Mar. 14, 2016).
186. No. ST-13-TOR-14, 2014 WL 1394183 (V.I. Super. Ct. Apr. 3, 2014).
187. *Id.* at *2 n.11.
188. 48 V.I. 101 (V.I. Super. Ct. 2006).
189. *Powell*, 2014 WL 1394183, at *2 n.11.
190. *Id.* (citing *Tutein*, 48 V.I. at 106–07).
191. No. SX-16-CV-343, 2016 WL 3913574 (V.I. Super. Ct. July 13, 2016).

order prevented it from undertaking a *Banks* analysis.[192] Instead, the court looked to pre-*Banks* Third Circuit caselaw that was rendered prior to the establishment of the Virgin Islands Supreme Court.[193] In addition, in *In re Refinery Dust Claims*,[194] although the court held that the question of whether contribution and indemnification remain viable causes of action post-*Banks* must be answered, it determined that the defendants' Motion for Leave to File a Third-Party Complaint did not present the appropriate vehicle for such an analysis.[195] Specifically, the court held, "[T]he majority of the proposed third-party defendants were not brought into the first-party lawsuit, and therefore, have not been served with this Motion."[196]

J. *Banks* Analysis Deemed Futile

As one final example, the superior court might choose not to conduct a *Banks* analysis if it determines that the analysis would be futile. By way of example, when the court considered the subject of prima facie torts in the case of *Edwards v. Marriott Hotel Management Co.*,[197] the court declined to conduct a *Banks* analysis because it held that prima facie torts could conceivably be an immeasurable concept and thus not amenable to a *Banks* analysis.[198] In so holding, the court cited its own concurrent authority to shape Virgin Islands common law and thus develop new torts and other causes of action to further the causes of justice.[199]

VIII. WHEN MUST A BANKS *ANALYSIS BE DONE?*

A. Guidance to Parties

The superior court has provided guidance to parties as to when a *Banks* analysis is appropriate, noting instances in which the parties have "hesitantly and partially applied *Banks*," making

192. *Id.* at *6.
193. *Id.*
194. No. SX-06-CV-78, 2016 WL 2865735 (V.I. Super. Ct. May 3, 2016).
195. *Id.* at *5.
196. *Id.*
197. No. ST-14-CV-222, 2015 WL 476216 (V.I. Super. Ct. Jan. 29, 2015).
198. *Id.* at *6 n.42.
199. *Id.*

note that they were not sure whether the analysis was required.[200] In so holding, the *Lembach v. Antilles School, Inc.*[201] court clarified that it is ultimately the court's responsibility to conduct this analysis, as discussed above, but that the parties "are required to contribute to the analysis by citing to binding authority when faced with questions of law that lack precedent."[202]

The court held that "*Banks* analyses are appropriate when a question of law lacks precedent concerning [the following]: the common law, application of a Restatement of Law, or, even, in certain circumstances, when the question involves a statute."[203] As discussed above, a *Banks* analysis would be appropriate in a case controlled by statute, if the statute was either based on or had significant connection with the common law.[204] The Supreme Court opinion in this same case clarified the obligations of the parties: "Members of the Virgin Islands Bar . . . must be cognizant of their responsibility to serve as advocates for their clients, which includes making all necessary legal arguments, including a non-perfunctory analysis of all three *Banks* factors when one is required."[205]

B. Guidance to Magistrate Courts

The superior court has also provided some guidance to the magistrate court—making it clear that it may remand a matter to the magistrate court (rather than doing the *Banks* analysis itself) if the magistrate court relied on V.I. Code, Title 1, section 4 and a mechanical application of the Restatements. In *Wild Orchid Floral & Event Design v. Banco Popular de Puerto Rico*,[206] the court noted that there had been a dispute previously as to

200. Lembach v. Antilles Sch., Inc., No. ST-12-CV-613, 2015 WL 920631, at *8 (V.I. Super. Ct. Feb. 25, 2015).

201. *Id.*

202. *Id.*

203. *Id.* (internal citation omitted).

204. *See supra* Part VII(B) and accompanying text. (asserting that statutes based on common law or significantly tied to common law may be appropriate grounds for a *Banks* analysis).

205. Antilles Sch., Inc. v. Lembach, S.CT.CIV. 2015-0039, 2016 WL 948969, at *14 n.13 (V.I. Mar. 14, 2016).

206. 62 V.I. 240 (V.I. Super. Ct. 2015) *opinion corrected sub nom.* Wild Orchid Floral & Event Design v. Banco Popular de Puerto Rico, No. SX-12-SM-600, 2015 WL 1726437 (V.I. Super. Ct. Apr. 13, 2015).

whether Magistrate Division cases would be considered local law. The court acknowledged the open question as to whether a decision of a single judge in the Appellate Division would bind—or just be persuasive to—other superior court judges in the Appellate Division, as well as the Magistrate Division.[207] Even so, the court emphasized that Magistrate judges share the power and responsibility of shaping the common law and thus cannot subordinate their rule to the ALI via mechanistic application of the Restatements.[208] The court thus remanded the matter to the Magistrate Division to do a *Banks* analysis rather than doing the analysis itself.[209] This opinion clarified the role of magistrate courts in the common law process:

> [L]ike "every judicial system in the United States" the Virgin Islands has its court system "arranged in a pyramid, with trial courts at its base and a single court at the top with ultimate authority," through which the "independent decisions of lower courts" leads to improved "quality of appellate decisions."[210]

Thus, this case makes it clear that magistrate courts are responsible for their own *Banks* analyses even though their decisions are not final until they are reviewed by a superior court judge in the Appellate Division. In *Ferris v. Withey*,[211] similarly, the superior court remanded a matter involving abatement of rent to the magistrate court, because the magistrate court had not identified the authority it was relying upon to permit rent abatement.[212] In explaining its holding, the superior court stated that, although the "magistrate court's legal conclusions are reviewed under a plenary standard . . . 'meaningful review is not possible where the trial court fails to sufficiently explain its reasoning.'"[213]

207. *Id.* at 250.
208. *Id.* at 253.
209. *Id.*
210. *Id.* at 245–46 (internal citations omitted).
211. No. SX-2014-SM-038, 2014 WL 4056321 (V.I. Super. Ct. May 9, 2014).
212. *Id.* at *1.
213. *Id.* at *2 (internal citations omitted) (quoting Rieara v. People, 57 V.I. 659, 668 (V.I. 2012)).

C. Guidance to the Superior Courts

Likewise, the Supreme Court has indicated that it will remand a matter to the superior court when it should have completed a *Banks* analysis and has not done so. In *Bertrand v. Mystic Granite & Marble, Inc.*,[214] the Supreme Court remanded a matter in which the superior court had relied on former V.I. Code, Title 1, section 4 to apply the Restatements as the binding law of the territory.[215] In so holding, the Court expressed its expectation that the superior court would complete a *Banks* analysis when the Supreme Court has not yet done so.[216]

IX. WHICH FACTOR CONTROLS?

The next issue to be considered is, when a *Banks* analysis is done, which of the three *Banks* factors controls? Is there a dominant *Banks* factor? In undertaking to answer this question, I tallied individual *Banks* analyses within cases, and thus some cases were counted more than once. When it was possible to identify a factor that seemed to control the outcome, either because the court so indicated, or because I felt comfortable making that determination based on the court's analysis, I categorized the case accordingly.

A. Cases in Which a Prior Local Court Ruling or a Local Statute was Dominant

In twelve of the cases in which a *Banks* analysis was conducted, it appeared that the dominant factor was the first factor, which examines local courts' rulings or a relevant local statute. *Joseph v. Sugar Bay Club & Resort Corp.*[217] is an example of this kind of analysis. In that case, the court considered the elements of intentional infliction of emotional distress and found that "the general rule [found in the Restatement (Second) of Torts] has been adopted by virtually every Virgin Islands court to address intentional infliction of

214. 63 V.I. 772 (V.I. 2015).
215. *Id.* at 783 n.5.
216. *Id.*
217. No. ST-13-CV-491, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2014), *rev'd in part,* No. 2014-0048, 2015 WL 682117 (V.I. Feb. 17, 2015).

emotional distress."[218] After noting, in its analysis of the second element, that a majority of jurisdictions follow the same rule, the court's analysis of the third element refers back to the first: "[C]onsidering the longstanding application of this construction of Intentional Infliction of Emotional Distress in Virgin Islands courts, the [c]ourt finds that the Restatement (Second) of Torts [section] 46 represents the soundest rule for the Virgin Islands, and is in accord with local public policy."[219] Thus, the first *Banks* element seems to influence the court's holding most heavily.

B. Cases in Which the Majority Approach Was Dominant

In five of the cases in which a *Banks* analysis was conducted, the second factor—the approach taken by a majority of jurisdictions—seemed most influential. The case of *Virgin Islands v. Velasquez*[220] provides an example of this kind of analysis. In that case, the court examined the judiciary's authority to grant bail once detention has been determined.[221] The court noted, in analyzing the first factor, the existence of a pre-*Banks* Virgin Islands Supreme Court decision in a case called *Browne v. People*.[222] In analyzing the second factor, however, the court reasoned that continuing to follow *Browne* would place the Virgin Islands in the minority of jurisdictions.[223] Because it identified several historical factors in its analysis of the third factor, supporting the majority rule as the best rule for the Virgin Islands, the superior court elected to follow the majority rule rather than *Browne*.[224] Thus, although the court performed a full *Banks* analysis, the second factor seemed most important to the court.

218. *Id.* at *3.

219. *Id. See also* Bell v. Radcliffe, No. ST-13-CV-392, 2015 WL 5773561, at *5 (V.I. Super. Ct. Apr. 30, 2015) (prior decisions of Virgin Islands courts seemed most important to the court); Ronan v. Clarke, 63 V.I. 95, 100 (V.I. Super. Ct. 2015) (prior legislative act seemed to carry the day); Sickler v. Mandahl Bay Holding, Inc., No. ST-10-CV-331, 2014 WL 3107449, at *3 (V.I. Super. Ct. July 7, 2014) (Virgin Islands statute on public nuisance seemed to be the most influential factor).

220. 60 V.I. 22 (V.I. Super. Ct. 2014).

221. *Id.* at 24.

222. 50 V.I. 241 (V.I. 2008).

223. *Velasquez*, 60 V.I. at 31.

224. *Id.* at 39.

C. Cases in Which the Best Rule for the Virgin Islands Was Dominant

In thirty-seven cases in which a *Banks* analysis was conducted, the third element—the best rule for the Virgin Islands—seemed most influential. Notably, this is the element that the Supreme Court has identified as being most important. Some of these cases treated the third factor as almost a mathematical equation of the first and second elements—that is, if local courts had previously taken a certain position, and a majority of other jurisdictions had done the same, then that approach must be clearly best for the Virgin Islands. Other courts conducted a discrete, independent analysis of the third element. The *Connor* case can be read as supporting both approaches. Specifically, where the *Connor* opinion directs courts to "weigh all persuasive authority both within and outside the Virgin Islands," this language seems to support what I have called the "mathematical" approach, while the language inviting courts to "determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands" seems to support the discrete analysis of the third factor employed by other courts.[225]

1. The "Mathematical" Approach

Isaac v. Crichlow[226] is an example of a case applying the "mathematical" approach. That case involved allegations of common law conversion, fraudulent misrepresentation, and civil conspiracy.[227] With respect to the first and second causes of action, the court held that the respective Restatement (Second) of Torts rules on each had been widely adopted in both the courts of the Virgin Islands and a majority of other jurisdictions.[228] With respect to the third, the court held that the Restatement rule had been adopted in a majority of jurisdictions and, while not yet cited in the Virgin Islands explicitly, was not inconsistent with the rule that Virgin Islands courts had articulated.[229] The court

225. Gov't of the V.I. v. Connor, 60 V.I. 597, 603 (V.I. 2014).
226. 63 V.I. 38 (V.I. Super. Ct. 2015).
227. *Id.* at 47.
228. *Id.* at 59–60.
229. *Id.* at 64.

held that, because the first and second elements both militated in favor of the Restatement rule, the Restatement rule was the best rule for the Virgin Islands.[230] Thus, the court used evidence of a rule that has been widely adopted in the Virgin Islands, plus evidence that the same rule has been followed in a majority of jurisdictions, to support using that rule as the best rule for the Virgin Islands.

2. The Independent Approach

The courts that conducted a separate analysis of the third prong emphasized historical, economic, and policy considerations supporting the various alternatives being offered. *Thomas v. Virgin Islands Board of Land Use Appeals*[231] provides an example of such an analysis. In that case, in considering the appropriate construction of a restrictive covenant, the court decided not to follow the Restatement (Third) of Property: Servitudes.[232] In so holding, the court noted, in analyzing the first element, that rather than following the Restatement on this point, courts in the Virgin Islands "have strictly construed restrictive covenants in a manner that allowed property owners to use their land to its greatest benefit."[233] With respect to the second element, the court noted that many courts had followed the same approach as the Virgin Islands, employing the "historical common law preference for permitting the free use of land, and thus construing restrictive covenants narrowly."[234] With respect to the third element, the court began by noting that "[l]and in the Virgin Islands is a particularly valuable and scarce resource" and that the Legislature has created comprehensive zoning rules for its use.[235] The court also held that it would be "highly disruptive" to adopt the Restatement rule, especially because so many covenants had been drafted during a time when covenants were strictly construed.[236]

230. *Id.*
231. 60 V.I. 579 (V.I. 2014).
232. *Id.* at 595.
233. *Id.* at 591.
234. *Id.* at 592.
235. *Id.* at 593.
236. *Id.*

In *Malloy v. Reyes*,[237] likewise, the Supreme Court considered the unique history of the Virgin Islands in formulating a rule for abandonment of a public easement. In that case, because there was no local court analysis of the issue, the Court began by analyzing the second element. In so doing, the Court noted that "virtually every United States jurisdiction recognizes that '[o]nce a highway, always a highway' is an ancient maxim of the common law."[238] The Court went on to analyze the third element. In holding that "[a]llowing the extinguishment of the public's right to an easement through simple neglect would make little sense given that no other public property interest may be lost this way," the Court considered the unique history of the Virgin Islands with respect to property law.[239]

> [T]he last century has seen significant changes in the administration of the Territory—transitioning from a Danish colony to a U.S. territory, first under the administration of the Navy, then the Department of the Interior, then attaining greater local autonomy—providing countless opportunities for the loss of records and the neglect of certain governmental functions . . . . Such simple neglect should not prejudice Virgin Islanders' right to the use of historically public rights-of-way that have existed for centuries.[240]

In *Tutein v. Arteaga*,[241] the Court used the Legislature's demonstrated intent to establish the best rule for the Virgin Islands. In that case, which involved the superior court's authority to appoint a guardian *ad litem*, no local court had previously addressed the issue, so the Court began with the second element.[242] After noting with respect to the second element that a majority of jurisdictions have permitted the court to appoint a guardian *ad litem* to investigate, report, and make recommendations to the court in a custody proceeding, the Court addressed the third element.[243] With respect to the third element, the Court held that the legislature had made it clear that it expected Virgin Islands courts to resolve custody disputes

237. 61 V.I. 163 (V.I. 2014).
238. *Id.* at 176–77.
239. *Id.* at 178.
240. *Id.* at 179.
241. 60 V.I. 709 (V.I. 2014).
242. *Id.* at 716.
243. *Id.* at 718–19.

according to the best interests of the child, which, it held, mandated a finding that a guardian *ad litem* should be appointed.[244]

In *Better Building Maintenance of the Virgin Islands, Inc. v. Lee*,[245] the Court's analysis of the third element rested on its interpretation of the most logical result. That case involved the reduction of damages to present value.[246] The Court ultimately adopted the approach the Third Circuit had used in federal tort actions which, it noted in its analysis of the first element, is the approach that the superior court and district court have consistently followed.[247] In analyzing the second element, the Court found that federal appellate courts had been consistent, but that state courts were more closely divided.[248] With respect to the third element, the Court held as follows:

> In no other situation does the plaintiff have the burden of introducing evidence undermining her recovery; instead, when there is reason to reduce a plaintiff's recovery—such as when she was comparatively negligent or failed to mitigate her damages—it is uniformly the defendant's burden to raise the issue and support it with appropriate evidence.[249]

Thus, the Court held that the approach it selected was the more logical and reasonable one.

Similarly, in *Robbins v. Port of $ale, Inc.*,[250] the court decided to follow the rule from the Restatement (Second) and Restatement (Third) of Torts as to whether the limitations period for indemnity and contribution should be the same as those for the predicate tort.[251] The court's analysis of both the first and second elements militated against coterminous limitations periods, but it is its analysis of the third element that is most notable. The court held that to impose coterminous limitations periods would encourage "'the injured party [to] foreclose a

244. *Id.* at 718.
245. 60 V.I. 740 (V.I. 2014).
246. *Id.* at 746–47.
247. *Id.* at 757.
248. *Id.* at 758.
249. *Id.* at 760.
250. 62 V.I. 151 (V.I. Super. Ct. 2015).
251. *Id.* at 156–57.

tortfeasor's right to contribution [or indemnity] by waiting to bring his action until just before the statute of limitations period ran on his claim.'"[252] Otherwise, the court held, "[R]esponsible persons who fear potential litigation [will be required] to preemptively file for indemnity or contribution [even] before the plaintiff in tort files a complaint."[253]

Romano v. Virgin Islands Government Hospitals & Health Facilities Corp.[254] provides one final example of a court's basing its analysis of the third element on logic. In that case, in considering an action for a bill of discovery, the court held with respect to the first element that allowing such a bill was supported by dicta in a decision from the Appellate Division of the District Court, even though it had not otherwise been addressed.[255] With respect to the second element, the court held that a majority of jurisdictions had held similarly to the district court, but that "practical application of a bill of discovery is particular to each jurisdiction."[256] In considering the third element, the court held that, in the context of a medical malpractice action in which a party does not have a remedy at law, allowing a bill of discovery is "'in accordance with the broad principles of right and justice in cases where the restrictive technicalities of the law prevent the giving of relief.'"[257] In this case, all three elements seem to have contributed equally to the court's analysis, as the court held that all three factors weighed favorably in support of the adoption of a pure bill of discovery.

D. Cases in Which No Factor Predominated

There are certainly plenty of cases in which none of the three *Banks* factors is overtly dominant. *Matthew v. Herman*[258] is an example of a case in which all three *Banks* elements point in the same direction, such that no one element seems to control the outcome. In that case, the Court considered the existence of a cause of action for the so-called "amatory torts" of alienation of

252. *Id.* at 157 (internal citation omitted).
253. *Id.* at 158.
254. 60 V.I. 168 (V.I. Super. Ct. 2014).
255. *Id*. at 176–77.
256. *Id.* at 177.
257. *Id.* at 178 (quoting Adventist Health Sys./Sunbelt, Inc. v. Hegwood, 569 So. 2d 1295, 1298 (Fla. 5th Dist. Ct. App. 1990)).
258. 56 V.I. 674 (V.I. 2012).

affection and criminal conversation.[259] In deciding not to follow the Restatement (First) and Restatement (Second) of Torts on this point, the Court found, in analyzing the first element, that these torts had never been cited to or used by any Virgin Islands court.[260] In considering the second element, the Court found that these torts had been abolished in the vast majority of American jurisdictions.[261] In analyzing the third element, the Court noted that these torts (1) were founded on the outdated idea that wives were the property of their husbands, (2) are destructive to marriage, and (3) do not adequately value or address the harms caused by adulterous behavior.[262] This case is notable for the way in which each factor is analyzed fully and independently, even though all ultimately support the same result.

E. Cases in Which the *Banks* Analysis Was Incomplete

Sometimes, a court omits one or more elements from its *Banks* analysis. For example, in *Joseph v. Daily News Publishing Co., Inc.*,[263] when the Court was considering the basic elements of a defamation claim, it gave an independent analysis of only the first factor. The Court noted a 2011 Supreme Court case, *Kendall v. Daily News Publishing Co.*,[264] which had addressed this issue; thus, the Court used the existence of that case, which followed the Restatement (Second) of Torts, to establish the third element.[265] The second element was not addressed. *Jung v. Ruiz*[266] and *Slack v. Slack*[267] are two additional cases in which the second element was not addressed.

X. CONCLUSION

Because the Restatements remain influential in the Virgin Islands in ways that generally mirror the influence that they have had elsewhere in the United States, it is important to follow

259. *Id.* at 682.
260. *Id.*
261. *Id.*
262. *Id.* at 683.
263. 57 V.I. 566 (V.I. 2012).
264. 55 V.I. 781 (V.I. 2011).
265. *Joseph*, 57 V.I. at 587–90.
266. 59 V.I. 1050, 1058 n.4 (V.I. 2013).
267. 62 V.I. 366 (V.I. Super. Ct. 2015).

the Virgin Islands Supreme Court's guidance with respect to how the Restatements are to be used in the post-*Banks* era, so that the analysis is not muddied. Specifically, the continued post-*Banks* utility and influence of the Restatements as persuasive authority must not be confused with the force of law they had, prior to *Banks*, in matters of first impression. It is also important that litigants and courts applying Virgin Islands law differentiate among the ALI's various products in ways that reflect their differing missions and purposes.

Effective advocacy in the post-*Banks* era begins with the parties fully briefing the issues and identifying issues of first impression. It also requires the courts and the parties to have a firm grasp of what constitutes binding authority, so as to be certain whether the matter requires a *Banks* analysis. When a *Banks* analysis is indicated, lower courts should go ahead and perform the analysis rather than waiting for the Supreme Court to do so.

In determining whether a *Banks* analysis is needed, courts and litigants should distinguish between matters controlled by statute, those controlled by common law, and those controlled by a statute based on common law. Courts need not follow the *Banks* analysis of another court at the same level, pre-*Banks* Supreme Court opinions, or decisions that do not constitute binding authority. Prior use of one section of a Restatement cannot, without further analysis, justify application of another section. Although a *Banks* analysis is not always conducted with respect to matters deemed well-established by law, the better practice is to do so, since neither *Banks* nor its progeny have established an exception along these lines.

With respect to the analysis itself, *Banks* is sufficiently multifaceted—as are the cases decided under *Banks*—that no single factor should control the outcome in every case. In considering the third factor, although the *Connor* case seems to provide support for the "mathematical" approach as well as for an independent analysis of the third factor, I would argue in favor of the independent approach. Taking into consideration the particular historical and economic circumstances as well as the most logical result allows a court to fashion a decision that truly is "the best rule for the Virgin Islands."

I believe there is no question that *Banks* has improved the jurisprudence of the Virgin Islands and that the first five years of

Banks jurisprudence have borne this impression out. The next five years should bring more clarity and consistency in the caselaw now that the *Banks* decision can be considered to have reached maturity, and its meaning and significance have become clear.

APPENDIX A

Cases in which a Restatement rule was considered, but rejected

Case	Restatement Rejected
Virgin Islands Superior Court	
Sickler v. Mandahl Bay Holding Inc., ST-10-CV-331, 2014 WL 3107449 (V.I. Super. Ct. July 7, 2014)	Restatement (Second) of Torts
Virgin Islands Supreme Court	
Cacciamani and Rover Corp. v. Banco Pop. De Puerto Rico, 61 V.I. 247 (V.I. 2014)	Restatement (Third) of Restitution and Unjust Enrichment
Machado v. Yacht Haven U.S.V.I., LLC, 61 V.I. 373 (V.I. 2014)	Restatement (Second) of Torts
Matthew v. Herman, 56 V.I. 674 (V.I. 2012)	Restatement (Second) of Torts
Thomas v. Virgin Islands Bd. of Land Use Appeals, 60 V.I. 579 (V.I. 2014)	Restatement (Third) of Property: Servitudes
Walters v. Walters, 60 V.I. 768 (V.I. 2014)	Restatement (Third) of Restitution and Unjust Enrichment

APPENDIX B

Cases in which a Restatement rule was clearly accepted

Case	Restatement Accepted
District Court of the Virgin Islands	
Baptiste v. Rohn, CV 2013-0104, 2016 WL 1261072 (D.V.I. Mar. 29, 2016)	Restatement (Third) of the Law Governing Lawyers
Bd. of Directors of Sapphire Bay Condominiums W. v. Simpson, CV 04-62, 2014 WL 4067175 (D.V.I. Aug. 13, 2014) *aff'd sub nom.* Bd. of Directors of Sapphire Bay Condominiums W. v. Simpson, 14-3922, 2015 WL 9267712 (3d Cir. Dec. 21, 2015)	Restatement (Third) of Unfair Competition
Illaraza v. HOVENSA LLC, 73 F. Supp. 3d 588 (D.V.I. 2014)	Restatement (Second) of Agency
In re Prosser, 06-30009 (JFK), 2013 WL 5422881 (D.V.I. Sept. 27, 2013)	Restatement (Second) of Conflict of Laws
MRL Dev. I, LLC v. Whitecap Inv. Corp., CV 2013-48, 2014 WL 793132 (D.V.I. Feb. 26, 2014)	Restatement (Second) of Contracts
Smith v. Katz, CV 2010-39, 2013 WL 1182074 (D.V.I. Mar. 22, 2013)	Restatement (Third) of Torts
Thomas v. Roberson, CV 2008-075, 2013 WL 2402946 (D.V.I. June 3, 2013)	Restatement (Third) of Agency
Virgin Islands Superior Court	
Abdallah v. Abdel-Rahman, No. ST-13-CV-227, slip op. (V.I. Super. Ct. Mar. 4, 2015)	Restatement (Second) of Contracts
Alleyne v. Diageo USVI, Inc., SX-13-CV-143, 2015 WL 5511688 (V.I. Super. Ct. Sept. 17, 2015)	Restatement (Second) of Torts
Banco Popular de Puerto Rico v. Palms Court Harborview, No. ST-11-CV-375, slip op. (V.I. Super. Ct. June 27, 2014)	Restatement (Second) of Torts
Bank of Nova Scotia v. Herman, ST-10-CV-270, 2016 WL 3007489 (V.I. Super. Ct. May 13, 2016)	Restatement (Second) of Contracts

Bell v. Radcliffe, ST-13-CV-392, 2015 WL 5773561 (V.I. Super. Ct. Apr. 30, 2015)	Restatement (Second) of Torts
Berry v. Performance Constr., No. ST-13-CV-524, slip op. (V.I. Super. Ct. Mar. 4, 2015)	Restatement (Second) of Contracts
Bertrand v. Cordiner Enter., Inc., CV ST-08-CV-457, 2013 WL 6122388 (V.I. Super. Ct. Nov. 15, 2013) *rev'd sub nom.* Bertrand v. Mystic Granite & Marble, Inc., S.CT.CIV. 2013-0130, 2015 WL 6470866 (V.I. Oct. 27, 2015)	Restatement (Second) and Restatement (Third) of Torts
Carlos Warehouse v. Thomas, SX-13-SM-448, 2016 WL 2865948 (V.I. Super. Ct. May 12, 2016)	Restatement (First) of Restitution
Christopher v. Skinner, ST-13-CV-575, slip op. (V.I. Super. Ct. Sept. 26, 2014)	Restatement (First) of Property
Cintron v. Polston, 62 V.I. 144 (V.I. Super. Ct. 2015)	Restatement (Second) of Agency
Creative Minds, LLC v. Reef Broad., Inc., ST-11-CV-131, 2014 WL 4908588 (V.I. Super. Ct. Sept. 24, 2014)	Restatement (Second) of Contracts
Davis v. Hovensa, LLC, SX-02-CV-333, 2015 WL 6769095 (V.I. Super. Ct. Oct. 28, 2015)	Restatement (Third) of Torts
Edwards v. Marriott Hotel Mgmt. Co. (Virgin Islands), Inc., ST-14-CV-222, 2015 WL 476216 (V.I. Super. Ct. Jan. 29, 2015)	Restatement (Second) of Torts
Faulknor v. Virgin Islands, 60 V.I. 65 (V.I. Super. Ct. 2014)	Restatement (Second) of Torts
FirstBank Puerto Rico v. Webster, ST-12-CV-239, 2014 WL 985144 (V.I. Super. Ct. Mar. 7, 2014) *reconsideration granted, order vacated in part,* ST-12-CV-239, 2014 WL 3592093 (V.I. Super. Ct. July 16, 2014)	Restatement (Second) of Contracts
Freund v. Liburd, ST-11-CV-730, 2016 WL 3752986 (V.I. Super. Ct. July 7, 2016)	Restatement (Third) of Suretyship and Guaranty
Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P., ST-2014-CV-513, 2015 WL 9031220 (V.I. Super. Ct. Nov. 10, 2015)	Restatement (Second) of Contracts

Guardian Ins. Co. v. Est. of Knight-David, No. ST-08-CV-189, slip op. (V.I. Super. Ct. Mar. 4, 2015)	Restatement (Second) of Torts
Hodge v. V.I. Tel. Corp., 60 V.I. 105 (V.I. Super. Ct. 2014)	Restatement (Second) of Torts
Huggins v. Chungani, ST-14-CV-115, 2014 WL 4662323 (V.I. Super. Ct. Sept. 18, 2014)	Restatement (Second) of Torts
Isaac v. Crichlow, SX-12-CV-065, 2015 WL 10568556 (V.I. Super. Ct. Feb. 10, 2015)	Restatement (Second) of Torts
Jacobs v. Roberts, ST-14-CV-193, 2015 WL 3406561 (V.I. Super. Ct. May 21, 2015)	Restatement (Third) of Torts
Joseph v. Sugar Bay Club & Resort Corp., ST-13-CV-491, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2014) *rev'd in part,* S.CT.CIV. 2014-0048, 2015 WL 682117 (V.I. Feb. 17, 2015)	Restatement (Second) of Torts
Lembach v. Antilles Sch., Inc., ST-12-CV-613, 2015 WL 920631 (V.I. Super. Ct. Feb. 25, 2015)	Restatement (Second) of Torts
Marian v. Fraser, ST-13-CV-549, 2014 WL 1239492 (V.I. Super. Ct. Mar. 17, 2014)	Restatement (Second) of Torts
Nicholas v. Damian-Rojas, 62 V.I. 123 (V.I. Super. Ct. 2015)	Restatement (Second) of Agency
Paul v. Abramson Enterprises, Inc., SX-05-CV-0000132, 2016 WL 3105037 (V.I. Super. Ct. June 1, 2016).	Restatement (Second) of Agency
Pickering v. Arcos Dorados Puerto Rico, Inc., ST-2015-CV-313, 2015 WL 6957082 (V.I. Super. Ct. Nov. 9, 2015)	Restatement (Second) of Torts
Police Benevolent Assoc. v. Brooks, No. ST-12-CV-123, slip op. (V.I. Super. Ct. Mar. 4, 2015)	Restatement (Second) of Torts
Powell v. Chi-Co's Distrib., Inc., ST-13-TOR-14, 2014 WL 1394183 (V.I. Super. Ct. Apr. 3, 2014)	Restatement (Second) of Torts
Robbins v. Port of $ale, Inc., 62 V.I. 151 (V.I. Super. Ct. 2015)	Restatement (Second) and Restatement (Third) of Torts

Roebuck v. V.I. Hous. Auth., 60 V.I. 137 (V.I. Super. Ct. 2014)	Restatement (Second) of Contracts
Tutein v. Ford Motor Co., SX-10-CV-18, 2016 WL 3186481 (V.I. Super. Ct. Mar. 18, 2016)	Restatement (Third) of Torts
VI 4D, LLLP v. Crucians in Focus, Inc., No. ST-12-CV-376, slip op. (V.I. Super. Ct. July 25, 2014)	Restatement (Second) of Torts
V.I. Port Auth. v. Callwood, ST-11-CV-305, 2014 WL 905816 (V.I. Super. Ct. Feb. 28, 2014)	Restatement (Second) of Torts
V.I. Taxi Ass'n. v. V.I. Port Auth., CV ST-97-CV-117, 2013 WL 4027454 (V.I. Super. Ct. Aug. 1, 2013)	Restatement (Second) of Contracts
Walker v. V.I. Waste Mgmt. Auth., 62 V.I. 53 (V.I. Super. Ct. 2014)	Restatement (Second) of Agency
Virgin Islands Supreme Court	
Burd v. Antilles Yachting Servs., Inc., 57 V.I. 354 (V.I. 2012)	Restatement (Second) of Contracts
Chapman v. Cornwall, 58 V.I. 431 (V.I. 2013)	Restatement (Second) of Contracts
Coastal Air Transport v. Royer, 64 V.I. 645 (V.I. 2016)	Restatement (Second) of Torts
Joseph v. Daily News Publ'g Co., Inc., 57 V.I. 566 (V.I. 2012)	Restatement (Second) of Torts
Maso v. Morales, 57 V.I. 672 (V.I. 2012)	Restatement (Second) of Torts
Palisoc v. Poblete, 60 V.I. 607 (V.I. 2014)	Restatement (Second) of Torts
Pollara v. Chateau St. Croix, LLC, 58 V.I. 455 (V.I. 2013)	Restatement (Second) of Contracts
Ross v. Hodge, 58 V.I. 292 (V.I. 2013)	Restatement (Second) of Contracts
Simon v. Joseph, 59 V.I. 611 (V.I. 2013)	Restatement (Third) of the Law Governing Lawyers