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Annual Survey of Virginia Law: Antitrust and Trade Regulation Law

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ARTICLES

ANTITRUST AND TRADE REGULATION LAW

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I. INTRODUCTION

This year witnessed the advance of a wide variety of antitrust and trade regulation theories, most of which met with little success. Of the antitrust cases, Continental Airlines waged a successful battle to eliminate carry-on baggage restrictions at Dulles Airport.¹ Additionally, Maryland's price-setting scheme for liquor was not accorded state action immunity.² On the other side of the ledger, another antitrust litigant failed to overcome the requirement that efforts to petition the government must be objectively

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1. See *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 136 F. Supp. 2d 542 (E.D. Va. 2001), discussed *infra* Part II.D.

2. See *TFWS, Inc. v. Schaefer*, 242 F.3d 198 (4th Cir. 2001), discussed *infra* Part II.B.

baseless in order to meet the sham exception to the Noerr-Pennington doctrine.³ Difficulties in proving an antitrust injury and the intent element of a section 2 conspiracy to monopolize claim⁴ ended another long-pitched battle over limited vermiculite resources.⁵ The Fourth Circuit treated an exclusive supply case with the same sort of back-of-the-hand treatment accorded most vertical restraint cases over the past ten years.⁶ Likewise, regardless of the statutory or regulatory scheme, dealership and franchise termination cases met with little success.⁷ Finally, while the malice requirement in the Virginia Business Conspiracy Act (the "Act")⁸ has become ingrained in Virginia jurisprudence as the legal malice standard, courts are finding other ways to dispose of these claims.⁹ In doing so, courts have enunciated a clear and convincing evidence standard for cases under the Act.

This article addresses antitrust and other trade regulation decisions of Virginia's state and federal courts over the past year as well as enforcement efforts and legislative developments in this field of law.

II. ANTITRUST DECISIONS

A. *Sherman Act: Noerr-Pennington Sham Claim Rejected*

In *Baltimore Scrap Corp. v. David J. Joseph Co.*,¹⁰ the plaintiff sued under the Sherman Act¹¹ and Maryland Antitrust Statutes,¹² alleging that the defendant's conduct was designed to preclude

3. See *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001), discussed *infra* Part II.A.

4. 15 U.S.C. § 2 (1994).

5. See *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558 (W.D. Va. 2001), discussed *infra* Parts II.E., III.B.2.

6. See *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, No. 00-2262, 2001 U.S. App. LEXIS 11576 (4th Cir. June 4, 2001), discussed *infra* Part II.C.

7. See, e.g., *John Deere Constr. Equip. Co. v. Wright Equip. Co.*, 118 F. Supp. 2d 689 (W.D. Va. 2000), discussed *infra* Part III.F.

8. VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 2001).

9. See, e.g., *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001), discussed *infra* Part III.B.1.

10. 237 F.3d 394 (4th Cir. 2001).

11. 15 U.S.C. §§ 1-7 (1994 & Supp. V 1999).

12. MD. CODE ANN., [COM. LAW II] §§ 11-201 to -213 (2000).

Baltimore Scrap's entry into the relevant market.¹³ When Baltimore Scrap sought to build and use a new metal shredder, the defendant-competitor secretly funded litigation designed to undermine Baltimore Scrap's attempt to obtain zoning approval for the new shredder.¹⁴ The district court found, and the Fourth Circuit affirmed, that under the Noerr-Pennington doctrine,¹⁵ the defendant's wrongful conduct was protected.¹⁶

The court held that the zoning litigation did not fall under the "sham litigation" exception to the Noerr-Pennington¹⁷ doctrine because the litigation was not "objectively baseless."¹⁸ In support of this conclusion, the court reasoned that "an objective litigant could reasonably expect to achieve success on the merits."¹⁹ Furthermore, the source of funding for the litigation belied its predatory nature, and Baltimore Scrap's failure to offer sufficient evidence that would prove otherwise did not affect the legitimacy of the claims.²⁰ The court also rejected the plaintiff's argument that the litigation was fraudulent and thus fell under another exception to Noerr-Pennington protection.²¹ Finally, the court found that "[t]he replay of state law zoning disputes is not normally the proper function of antitrust litigation, especially when the alleged

13. *Baltimore Scrap*, 237 F.3d at 396.

14. *See id.* at 396-98.

15. In general, an effort to influence the exercise of government power, even for the purpose of gaining an anticompetitive advantage, does not create liability under the antitrust laws. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Supreme Court held immune from antitrust liability an association of rail freight interests that were formed to pass legislation that would grant the members of the association a competitive advantage over truckers. *Id.* at 145. The Supreme Court has read *Noerr* broadly: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

16. *Baltimore Scrap*, 237 F.3d at 396.

17. *Id.* at 399. The Noerr-Pennington doctrine does not protect litigation from suit under the antitrust laws if the litigation is a "sham." *Id.* In *Noerr*, the Supreme Court recognized that if an action, "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor [then] the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144.

18. *Baltimore Scrap*, 237 F.3d at 399. In *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), the Court adopted an objectively baseless standard for Noerr-Pennington sham cases, effectively limiting their reach. *Id.* at 380-81.

19. *Baltimore Scrap*, 237 F.3d. at 400.

20. *Id.* at 401.

21. *Id.* at 402.

fraud did not deprive the litigation of its underlying legitimacy and when the lawsuit is not objectively meritless."²²

B. *Sherman Act: State Action Immunity Rejected*

In *TFWS, Inc. v. Schaefer*,²³ the Fourth Circuit held that Maryland's liquor regulatory scheme violated the Sherman Act²⁴ and that state action immunity would not protect Maryland.²⁵ The owner and operator of a large retail liquor store sued Maryland's State Comptroller "seeking a declaration that Maryland's regulatory scheme, which (1) requires liquor wholesalers to post prices and adhere to them and (2) prohibits volume discounts, is a violation of § 1 of the Sherman Act."²⁶ Maryland argued that the state action doctrine protected its pricing regulations and that the Twenty-first Amendment²⁷ of the United States Constitution overrides a Sherman Act challenge to the regulations.²⁸

The Fourth Circuit ruled that Maryland's laws governing a post-and-hold pricing system, mandated by the state's Alcoholic Beverages Code and implemented by the State Comptroller, were not protected by the state action doctrine.²⁹ Rather, the court noted that the post-and-hold system was a hybrid restraint.³⁰ The prohibition of volume discounts was an element of the hybrid restraint "because it reinforce[d] the post-and-hold system by mak-

22. *Id.* at 404.

23. 242 F.3d 198 (4th Cir. 2001).

24. 15 U.S.C. §§ 1-7 (1994 & Supp. V 1999).

25. *TFWS*, 242 F.3d at 213. The doctrine of state action immunity was first enunciated by the Supreme Court of the United States in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. *Id.* at 351. The Court later explained that "[a]lthough *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985).

26. *TFWS*, 242 F.3d at 201-02.

27. Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

28. *See TFWS*, 242 F.3d at 203.

29. *Id.* at 210.

30. *Id.* at 208.

ing it even more inflexible."³¹ Therefore, the court concluded that the Maryland system was classic per se horizontal price fixing.³²

The court vacated the order of dismissal and remanded the state's Twenty-first Amendment defense for further proceedings, reasoning that both sides should have the opportunity to offer evidence on the issue.³³ The court provided the district court with a step-by-step balancing test to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail."³⁴

C. *Sherman Act: Claim that Exclusive Supply Agreement Violated Sherman Act Fails for Lack of Proof of Injury in Fact*

In *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*,³⁵ the plaintiff, Microbix, brought an action against Biowhittaker alleging violations of the Sherman Act³⁶ and tortious interference with economic relations.³⁷ The federal district court in Baltimore, Maryland, ruled that the defendant was entitled to summary judgment on the claims, and the Fourth Circuit affirmed.³⁸

Microbix acquired small quantities of cells from Biowhittaker for use in an experimental program.³⁹ After forming an exclusive supply agreement with another laboratory, however, Biowhittaker informed Microbix that it would no longer supply Microbix with cells.⁴⁰ Microbix filed suit claiming the exclusive supply agreement violated the Sherman Act.⁴¹ Finding that Microbix

31. *Id.* at 209.

32. *Id.* at 213.

33. *Id.* at 202.

34. *Id.* at 212-213 (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 347 (1987)).

35. No. 00-2262, 2001 U.S. App. LEXIS 11576 (4th Cir. June 4, 2001).

36. Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994 & Supp. V 1999). Section 2 of the Sherman Act makes it unlawful for any person to "combine or conspire . . . to monopolize any part of the trade or commerce among the several States." *Id.* § 2 (1994).

37. *Microbix*, 2001 U.S. App. LEXIS 11576, at *1-2.

38. *Id.* at *6.

39. *See id.* at *2-3.

40. *See id.* at *3-4.

41. *See id.* at *1.

“failed to present [sufficient] evidence [demonstrating] that the exclusive supply agreement . . . was a material cause of Microbix’s ‘alleged injury’ and that Microbix’s claims for loss of future profits was ‘too speculative,’” the district court rejected the anti-trust claims.⁴² Furthermore, the district court concluded that the state law claim for tortious interference with economic relations possessed “the same defects as those of the antitrust claims.”⁴³ Therefore, the Fourth Circuit held that the district court properly granted summary judgment to Biowhittaker.⁴⁴

D. *Sherman Act: Airline Carry-on Baggage Template an Antitrust Conspiracy*

An agreement between defendants United Air Lines (“United”) and Dulles Airport Airline Management Council (“AMC”), an association of air carriers serving Washington Dulles International Airport (“Dulles”), to restrict the size of carry-on bags at Dulles resulted in another antitrust conspiracy case this past year.⁴⁵ AMC’s members included United and Continental Airlines (“Continental”).⁴⁶ In April 2000, United and AMC agreed, over Continental’s objections, to install baggage “templates” to prevent bags larger than a certain size from passing through the x-ray machines at Dulles’ two main security checkpoints.⁴⁷ Because all passengers departing from Dulles must pass through one of these two checkpoints, the defendants’ agreement effectively imposed the carry-on bag size restriction on all Dulles carriers, including Continental.⁴⁸

After spending a considerable amount of money to increase its aircrafts’ carry-on storage capacity and to relax its carry-on baggage policy, Continental vigorously opposed the installation of

42. *Id.* at *5.

43. *Id.*

44. *Id.* at *6.

45. *Cont’l Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 559 (E.D. Va. 2000) [hereinafter *Continental I*], *summary judgment granted in part*, 126 F. Supp. 2d 962 (E.D. Va. 2001) [hereinafter *Continental II*], *judgment entered*, 136 F. Supp. 2d 542 (E.D. Va. 2001) [hereinafter *Continental III*].

46. *Continental I*, 120 F. Supp. 2d at 560.

47. *Id.*

48. *See id.*

carry-on baggage templates.⁴⁹ After the templates were installed, Continental, among other things, employed personnel to lift the templates for their customers at the Dulles baggage screening checkpoints in order to avoid the carry-on restrictions imposed by the defendants.⁵⁰ Immediately after the installation of the templates, Continental filed suit against the defendants

(i) for violation of the Sherman Act, 15 U.S.C. § 1, (Count I) and its Virginia counterpart, Va. Code § 59.1-9.5 (Count II); (ii) for intentional interference with contractual relations (Count III) and with prospective economic advantage (Count IV); and (iii) for violation of the Virginia Business Conspiracy Statute, Va. Code § 18.2-499 (Count V).⁵¹

The United States District Court for the Eastern District of Virginia issued three opinions in connection with this case.⁵² In *Continental I*, the court first denied the defendants' motion to dismiss Continental's federal antitrust claim.⁵³ The court's analysis relied upon the "Rule of Reason," which requires a court to analyze a restraint's impact on competition in a relevant market.⁵⁴ The court concluded that defendants' motion must fail "because 'it is not inconceivable' that Continental 'could prove a set of facts supporting the relevant market definition alleged in its complaint.'"⁵⁵ However, the court dismissed Continental's state law claims in counts two through five as preempted by the Airline Deregulation Act ("ADA").⁵⁶ Even though the claims sought to promote fair competition, they conflicted with the ADA's purpose of preventing state regulation of air carriers' rates, routes, and services and, as a result, were preempted.⁵⁷

In *Continental II*, the court tackled the parties' cross-motions

49. *Id.* at 560-61.

50. *Id.* at 561 n.4.

51. *Id.* at 559.

52. *See supra* note 45.

53. *Continental I*, 120 F. Supp. 2d at 568.

54. *Id.* at 563. The Rule of Reason approach is used "where the economic impact of certain practices is not immediately obvious." *Id.* (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986)). For further discussion of the Rule of Reason, see also *Continental II*, 126 F. Supp. 2d 962, 970-71 (E.D. Va. 2001).

55. *Continental I*, 120 F. Supp. 2d at 568 (quoting *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 977 (7th Cir. 1995)).

56. *Id.* at 573. The ADA can be found at 49 U.S.C. §§ 40101-50105 (1994 & Supp. V 1999).

57. *Continental I*, 120 F. Supp. 2d at 573.

for summary judgment on Continental's federal antitrust claim (count I in *Continental I*).⁵⁸ Under an abbreviated application of the Rule of Reason, the court concluded that the defendants' agreement was an unreasonable restraint of trade that caused the plaintiff's antitrust injury.⁵⁹ According to the court, the "defendants . . . failed to identify any valid, competition-enhancing effects of their agreement to restrict carry-on baggage size at Dulles."⁶⁰ The court further stated that the defendants' agreement did not promote competition itself, "but rather only helps individual carriers in competition with other carriers by relieving them of the competitive pressure to offer better products and services with respect to carry-on baggage."⁶¹

The court also rejected the defendants' claim that Continental had not suffered an antitrust injury under section 4 of the Clayton Act.⁶² The court opined that the restriction constituted an unreasonable restraint of trade, which caused the plaintiff's antitrust injury.⁶³ Absent defendants' restrictive agreement, Continental would have been able to attract more low-yield passengers from other airlines.⁶⁴ The court concluded that because Continental could have gained market share in that particular consumer group, it had suffered injury to its business and property in the form of lost profits.⁶⁵ The court also noted that Continental had suffered damages in the form of the costs of mitigating the competitive injury caused by defendants' restriction.⁶⁶

Following yet another hearing, the United States District Court for the Eastern District of Virginia issued its ruling on damages.⁶⁷ The court first concluded that a damage award based

58. *Continental II*, 126 F. Supp. 2d at 964.

59. *Id.* at 968. For a discussion of the abbreviated Rule of Reason, see *id.* at 972-74. This abbreviated application "skips the inquiry into anticompetitive effects because those effects are manifest from the nature of the restraint," focusing instead on "the procompetitive justifications offered in support of the restraint." *Id.* at 972-73 (referencing *California Dental Assoc. v. FTC*, 526 U.S. 756, 769-71 (1999); *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998)).

60. *Id.* at 979.

61. *Id.* at 980.

62. *Id.* at 982. The Clayton Act can be found at 15 U.S.C. §§ 12-27a (1994 & Supp. V 1999).

63. *Continental II*, 126 F. Supp. 2d at 986.

64. *Id.* at 983.

65. *Id.*

66. *Id.*

67. See *Continental III*, 136 F. Supp. 2d 542 (E.D. Va. 2001).

on Continental's lost revenues or profits would be speculative and therefore inappropriate.⁶⁸ However, the court allowed Continental to recover treble damages based on the costs of mitigating the injury it sustained as a result of the unlawful agreement.⁶⁹ The court also enjoined United and AMC "from employing or agreeing to employ any baggage sizing template or device at Dulles security checkpoints, or at any common location through which Continental passengers may pass."⁷⁰

E. *Conspiracy to Monopolize Claim Falls Short on Intent and Injury Grounds*

In *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*,⁷¹ the United States District Court for the Western District of Virginia considered two issues: (1) whether Historic Green Springs, Inc. ("HGSI") conspired to injure Virginia Vermiculite, Ltd. ("VVL") by monopolizing the vermiculite industry in violation of section 2 of the Sherman Act⁷² and the Virginia Antitrust Act;⁷³ and (2) whether "HGSI conspired to injure VVL in reputation, trade, business, or profession, in violation of the Virginia Conspiracy Act."⁷⁴ VVL brought action against W.R. Grace & Co. ("Grace") and HGSI alleging that Grace and HGSI conspired to prevent VVL from conducting business in Virginia by joining in donation transactions and incorporating restrictive covenants which prevented deeds of gift and lease assignments.⁷⁵ VVL claimed that Grace and HGSI conspired with the specific intent to, among other things, injure VVL's reputation and to allow Grace to obtain a monopoly in the vermiculite industry.⁷⁶

Grace, a vermiculite mining, processing and distribution busi-

68. *Id.* at 546.

69. *Id.* at 548.

70. *Id.* at 552.

71. 144 F. Supp. 2d 558 (W.D. Va. 2001).

72. 15 U.S.C. § 2 (1994 & Supp. V 1999).

73. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 2001). The Virginia Antitrust Act prohibits "[e]very conspiracy . . . or attempt to monopolize . . . trade or commerce of this Commonwealth." VA. CODE ANN. § 59.1-9.6 (Repl. Vol. 2001).

74. *Virginia Vermiculite*, 144 F. Supp. 2d at 561. The Virginia Business Conspiracy Act can be found at VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 2001).

75. *Virginia Vermiculite*, 144 F. Supp. 2d at 589.

76. *Id.*

ness,⁷⁷ purchased more than one-thousand acres of land for vermiculite mining in Louisa County, Virginia.⁷⁸ Grace did not mine the land but instead retained it for twenty years, despite significant cost, to prevent competitor VVL from accessing the vermiculite reserves.⁷⁹ Initially, Grace considered selling the land to VVL and participated in sales negotiations with VVL over a five-month period.⁸⁰ Grace later opted to donate the land to HGSI with the goal of putting VVL out of business.⁸¹ The donation would include restrictive covenants forbidding any future mining on the donated land.⁸²

In its analysis of the evidence presented by both VVL and HGSI,⁸³ the court concluded that neither Grace's nor HGSI's primary motive was to create a monopoly.⁸⁴ Furthermore, the court rejected VVL's contention that Grace's and HGSI's concerted efforts caused it to suffer an antitrust injury in the form of transportation damages.⁸⁵ VVL failed to prove that the unlawful donation of property to HGSI was a "but-for" cause of alleged additional transportation costs.⁸⁶ In finding that HGSI was not liable for conspiracy to monopolize under either the Sherman Act or the Virginia Antitrust Act, the Court stated that although HGSI may have conspired with Grace to injure VVL, such intent to injure is not sufficient to establish an intent to create a monopoly.⁸⁷

III. TRADE SECRET AND BUSINESS CONSPIRACY DECISIONS

A. *Virginia Uniform Trade Secrets Act*

In *Motion Control Systems, Inc. v. East*,⁸⁸ the plaintiff appealed

77. *Id.* at 561.

78. *See id.* at 563–67.

79. *See id.* at 566–67.

80. *See id.* at 568–71.

81. *See id.* at 573–82.

82. *See id.* at 579–82.

83. Grace settled with VVL immediately before the trial. *Id.* at 561.

84. *Id.* at 593.

85. *See id.* at 600.

86. *Id.* at 599–600.

87. *Id.* at 610.

88. 262 Va. 33, 546 S.E.2d 424 (2001).

a decision of the Pulaski Circuit Court “holding that a covenant not to compete executed by its former employee, Gregory C. East, was overbroad and therefore unenforceable.”⁸⁹ While the Supreme Court of Virginia agreed with the circuit court’s ruling of unenforceability, the court reversed the circuit court’s judgment upon another issue, finding that the evidence was insufficient to impose an injunction against East.⁹⁰

Motion Control Systems (“MCS”), a designer and manufacturer of high performance drive systems including brushless motors, requested its employees to sign a “Confidentiality and Noncompetition Agreement” (“Agreement”).⁹¹ The final sentence of paragraph 3(b) of the Agreement stated: “The term ‘business similar to the type of business conducted by the Company’ includes, but is not limited to any business that designs, manufactures, sells or distributes motors, motor drives or motor controls.”⁹² East proposed changing this sentence by deleting “but is not limited to” and adding “currently.”⁹³ MCS accepted the changes, and East signed the Agreement.⁹⁴ East later resigned from MCS and began working for Litton Systems, a manufacturing operation that makes brushless motors.⁹⁵

The trial court found that MCS and Litton Systems made similar products and that MCS had reasonable fears of Litton Systems putting MCS out of business.⁹⁶ However, the trial court held that the Agreement was unenforceable because the final sentence of Paragraph 3(b) “imposed additional restraints which are far greater than reasonably necessary to protect [MCS] in [its] legitimate business enterprise.”⁹⁷ Nevertheless, the trial court did enjoin East from disclosing any of MCS’s confidential or trade secret information.⁹⁸ MCS appealed the decision, and East assigned

89. *Id.* at 35, 546 S.E.2d at 424.

90. *Id.*

91. *Id.* at 35, 546 S.E.2d at 425.

92. *Id.* at 36, 546 S.E.2d at 425.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

as cross-error the injunction under the Virginia Uniform Trade Secrets Act ("VUTSA").⁹⁹

The Supreme Court of Virginia began its analysis by duly noting that "covenants not to compete are restraints on trade and accordingly are not favored."¹⁰⁰ The court then focused on whether the language of Paragraph 3(b) was overbroad.¹⁰¹ The court concluded that the prohibition in the Agreement reached beyond business similar to the employer's business by prohibiting employment in any business that sells motors regardless of whether they are the specialized types MCS sells.¹⁰² Even though East altered the range of prohibited employment under the Agreement, these changes did not sufficiently restrict the prohibited employment to businesses engaging in similar activities to MCS.¹⁰³ As a result, the supreme court affirmed the trial court's holding that the Agreement was overbroad and unenforceable.¹⁰⁴

The court, however, reversed the trial court's injunction against East.¹⁰⁵ Although East had knowledge of MCS's trade secrets, the court held that mere knowledge would not support an injunction under the VUTSA, which requires "actual or threatened misappropriation."¹⁰⁶ This opinion renders meaningless the protection afforded by the VUTSA for "threatened" misappropriation and effectively leaves Virginia business exposed to clandestine theft.

In *Newport News Industrial v. Dynamic Testing, Inc.*,¹⁰⁷ the operating division of Newport News Shipbuilding sued a former employee and his new employer, Dynamic Testing, Inc. ("DTI"), for several business torts arising out of the employee's alleged misappropriation of the plaintiff's trade secrets.¹⁰⁸ In one claim, Newport News Industrial ("NNI") sought to hold DTI liable for

99. *Id.* at 36, 546 S.E.2d at 424. The Virginia Uniform Trade Secrets Act can be found at VA. CODE ANN. §§ 59.1-336 to -343 (Repl. Vol. 2001).

100. *Motion Control*, 262 Va. at 37, 546 S.E.2d at 425.

101. *Id.* at 37, 546 S.E.2d at 426.

102. *Id.* at 37-38, 546 S.E.2d at 426.

103. *Id.* at 38, 546 S.E.2d at 426.

104. *Id.*

105. *Id.* at 38-39, 546 S.E.2d at 426.

106. *Id.* The Virginia Code provides the requirements for injunctive relief under the Virginia Uniform Trade Secrets Act. *See* VA. CODE ANN. § 59.1-337 (Repl. Vol. 2001).

107. 130 F. Supp. 2d 745 (E.D. Va. 2001).

108. *See id.* at 746-48.

the employee's alleged violation of the VUTSA.¹⁰⁹ DTI moved to dismiss that claim on the grounds that the VUTSA does not allow for the imposition of liability under the theory of respondeat superior.¹¹⁰ DTI argued that the VUTSA imposed liability only if one knew or had reason to know of the misappropriation.¹¹¹

The District Court for the Eastern District of Virginia denied DTI's motion for partial judgment on the pleadings,¹¹² noting that nothing in VUTSA rejects the concept of vicarious liability.¹¹³ The VUTSA's definition of "misappropriation" requires some form of misconduct or bad faith by the misappropriator.¹¹⁴ Nothing in the statute, however, bars liability for the employer due to the employee's misconduct or bad faith conducted for the benefit of the employer.¹¹⁵ The court held that "[t]he employer reaps the benefit of the employee's misconduct and therefore should be liable for the harm that conduct causes."¹¹⁶

B. *Virginia Business Conspiracy Act*

1. Supreme Court of Virginia: Rigorous Conspiracy Standard Applied

In *Simmons v. Miller*,¹¹⁷ Simmons, a shareholder of Las Palmas Tobacco, Ltd. ("Las Palmas"), sued the director and the attorney of the corporation on several theories including conspiracy to injure Las Palmas under the Virginia Business Conspiracy Act.¹¹⁸

109. *Id.* at 748.

110. *Id.* at 749.

111. *Id.* at 750.

112. *Id.*

113. *Id.* at 751.

114. VA. CODE ANN. § 59.1-336 (Repl. Vol. 2001).

115. *Newport News Indus.*, 130 F. Supp. 2d at 751.

116. *Id.* at 754.

117. 261 Va. 561, 544 S.E.2d 666 (2001).

118. *Id.* at 570-71, 544 S.E.2d at 672-73. The Virginia Business Conspiracy Act subjects to criminal liability any two persons who "combine, associate, agree, mutually undertake or concert together for the purpose of . . . willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever." VA. CODE ANN. § 18.2-499 (Repl. Vol. 1996 & Cum. Supp. 2001). Any person injured by reason of a violation of Virginia Code section 18.2-499 may file a civil action and recover treble damages pursuant to Virginia Code section 18.2-500(a) and injunctive relief pursuant to Virginia Code section 18.2-500(b). VA. CODE ANN. § 18.2-500 (Repl. Vol. 1996 & Cum. Supp. 2001).

Simmons alleged that Miller, the director, and Kear, the attorney, secretly replaced Las Palmas with a different corporation.¹¹⁹ After Miller unsuccessfully attempted to buy out Simmons' minority interest, Miller told the corporation's attorney to file articles of organization for a new company, Las Palmas Tobacco International, L.L.C. ("International"), in which Simmons would have no interest.¹²⁰ International took over the assets and business opportunities of Las Palmas.¹²¹ As a result, Simmons brought action against Miller and Kear in the Fairfax Circuit Court.¹²² Both Simmons and Miller sought review of the rulings after a jury rendered a verdict in favor of Simmons on twelve of his sixteen claims.¹²³

The trial court set aside the jury's verdict on Simmons' individual claim of statutory conspiracy under the Virginia Business Conspiracy Act ("VBCA"), holding that a derivative action is the sole means of redress for injury to the corporation.¹²⁴ The Supreme Court of Virginia did not reach that issue, instead holding that the evidence of conspiracy was insufficient to support the verdict on a claim for statutory conspiracy, whether brought individually or derivatively.¹²⁵

Retreating a bit from the expansive interpretation accorded this statute in recent years, the supreme court applied a clear and convincing standard to establish legal malice.¹²⁶ This should help stem the tide on the cases brought under the VBCA in recent years since *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*¹²⁷ overruled the then-prevailing *Greenspan v. Osheroff*¹²⁸ primary and overriding purpose standard.¹²⁹ While finding

119. *Simmons*, 261 Va. at 570, 544 S.E.2d at 672.

120. *See id.* at 566-70, 544 S.E.2d at 669-72.

121. *Id.*

122. *See id.* at 570-71, 544 S.E.2d at 672-73.

123. *See id.* at 571-72, 544 S.E.2d at 673-74.

124. *Id.* at 577-78, 544 S.E.2d at 676.

125. *Id.*

126. *Id.* at 578, 544 S.E.2d at 677.

127. 249 Va. 39, 453 S.E.2d 261 (1995).

128. 232 Va. 388, 351 S.E.2d 28 (1986).

129. *Id.* at 398, 351 S.E.2d at 35. *Commercial Business Systems* overruled *Greenspan*, finding that the VBCA did not "require proof that a conspirator's primary and overriding purpose [was] to injure another in his trade or business." *Commercial Bus. Sys.*, 249 Va. at 47, 453 S.E.2d at 267.

that clear and convincing evidence of legal malice¹³⁰ existed, the court repudiated the conspiracy claim, finding insufficient evidence of concerted action.¹³¹

Because Simmons had to prove that Kear “combined, associated, agreed, mutually undertook, or concerted together with Miller in such conduct,”¹³² the court found that the contacts between the alleged co-conspirators were insufficient, focusing principally on one conspirator’s lack of knowledge of the other’s conduct.¹³³ Upon reviewing the evidence, the court concluded that Simmons failed to establish that Kear knew of Miller’s actions concerning the assets of Las Palmas.¹³⁴ Perhaps more remarkable than the court’s opinion rejecting the jury’s finding of conspiracy was footnote four of the opinion.¹³⁵ In this footnote, the court noted that the two conspirators had an attorney-client relationship but did not reach the issue whether they could conspire as such because the existence of that relationship was not argued.¹³⁶ In the end, the court held that, due to the lack of evidence, the trial court did not err in striking the derivative and individual claims for statutory conspiracy.¹³⁷

2. Western District of Virginia: Otherwise Actionable Business Conspiracy Fails for Lack of Causation

The *Virginia Vermiculite*¹³⁸ case also involved the Virginia Business Conspiracy Act. The court focused on the element of legal malice, which required VVL to prove that Grace and HGSI undertook a concerted action to injure VVL “intentionally, pur-

130. Legal malice is defined as action taken “intentionally, purposefully, and without lawful justification.” *Simmons* 261 Va. at 578, 544 S.E.2d at 677 (citing *Feddeman & Co. v. Langan Assoc.*, 260 Va. 35, 44, 530 S.E.2d 668, 673 (2000); *Tazewell Oil Co. v. United Va. Bank*, 243 Va. 94, 108, 413 S.E.2d 611, 619 (1992)).

131. *Id.* at 579, 544 S.E.2d at 677.

132. *Id.* at 571, 544 S.E.2d at 677; see VA. CODE ANN. § 18.2-499(A) (Repl. Vol. 1996 & Cum. Supp. 2001).

133. *Simmons*, 261 Va. at 579, 544 S.E.2d at 677.

134. *Id.*

135. See *id.* at 578 n.4, 544 S.E.2d at 676 n.4.

136. *Id.*

137. *Id.* at 579, 544 S.E.2d at 677.

138. *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 144 F. Supp. 2d 558 (W.D. Va. 2001). See *supra* notes 71–87 and accompanying text for further discussion of *Virginia Vermiculite*.

posefully, and without lawful justification.”¹³⁹ The court concluded that, according to the evidence, Grace and HGSI purposefully and intentionally acted in concert to cause VVL to go out of business by preventing VVL from replenishing its diminishing vermiculite reserves.¹⁴⁰ The court held that this shared purpose sufficiently established the intent element required by the Virginia Business Conspiracy Act.¹⁴¹

The Virginia Business Conspiracy Act, the court noted, requires VVL to prove that “at least one of the co-conspirators acted either with an unlawful purpose or by unlawful means.”¹⁴² The evidence established that “Grace donated its properties to HGSI by unlawful means, namely, by breaching its contractual duty of good faith and fair dealing toward” the original property owners, the Peerses.¹⁴³ The Peerses sold their property with the expectation of receiving royalties from Grace’s mining royalties.¹⁴⁴ According to the court, “Grace intentionally disregarded the Peerses’ financial interest when it donated the Peerses’ property to HGSI.”¹⁴⁵

Finally, in order for VVL to be entitled to damages or injunctive relief, the court assessed the requirement that the concerted action cause injury to VVL.¹⁴⁶ The court concluded that VVL failed to prove that HGSI’s and Grace’s concerted action “caused, threatened to cause, or will cause VVL to suffer any injury.”¹⁴⁷ VVL lacked sufficient evidence to prove that Grace would have sold or even leased its properties to VVL or that Grace would have allowed VVL to mine the properties in absence of both the covenants and donations.¹⁴⁸ Thus, despite finding that defendant combined and conspired with the requisite level of legal malice

139. *Virginia Vermiculite*, 144 F. Supp. 2d. at 601 (quoting *Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001)). The court noted that “the statute requires that one party, acting with legal malice, conspire with another party to injure the plaintiff.” *Id.* (quoting *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1997)).

140. *See id.* at 601–05.

141. *Id.* at 605.

142. *Id.*

143. *Id.*

144. *Id.* at 606.

145. *Id.* at 607.

146. *Id.* at 609.

147. *Id.* at 610.

148. *Id.* at 599.

through unlawful means, the court rejected the claim on causation grounds.¹⁴⁹

C. Lanham Act: False Advertising Claims Upheld

In *JTH Tax, Inc. v. H&R Block Eastern Tax Services, Inc.*,¹⁵⁰ the plaintiff and thirteen Liberty Tax Service franchises (collectively "JTH") sued H&R Block for violating the Lanham Act¹⁵¹ by engaging in false and misleading advertising by offering "no additional charge refund anticipation loan[s]" during the 2000 tax season.¹⁵² The court's analysis relied upon the interpretation of a false statement under the Lanham Act as either "(1) literally false as a factual matter or by necessary implication, or (2) literally true or ambiguous but implicitly convey[s] a false impression, misleading in context, or likely to deceive consumers."¹⁵³

The United States District Court for the Eastern District of Virginia found that H&R Block's "Spend more quality time with your refund" advertisement was literally false without the disclaimer, but literally true yet misleading with the disclaimer.¹⁵⁴ The court then examined H&R Block's other print and television advertisements, concluding that they also were literally true but misleading.¹⁵⁵ The court noted that, under the Lanham Act, a plaintiff must demonstrate that literally true but misleading advertisements deceived at least twenty percent of the consumers.¹⁵⁶ The court was satisfied with JTH's evidence establishing that the false advertising campaign was intentional and H&R Block acted in bad faith.¹⁵⁷ JTH's evidence also established that H&R Block's false advertisements were material to consumers' purchasing de-

149. *See id.* at 609–10.

150. 128 F. Supp. 2d 926 (E.D. Va. 2001).

151. The Lanham Act can be found at 15 U.S.C. §§ 1051–1129 (1994 & Supp. V 1999).

152. *JTH Tax*, 128 F. Supp. 2d at 929.

153. *Id.* at 934 (citing *C.B. Fleet Co. v. SmithKline Beecham Consumer Healthcare*, 131 F.3d 430, 434 (4th Cir. 1997); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1138 (4th Cir. 1993)).

154. *Id.* at 935.

155. *See id.* at 936–37.

156. *Id.* at 937.

157. *Id.* at 938.

cisions by demonstrating "that consumers prefer a refund over any loan product."¹⁵⁸

Of particular note was the court's thorough discussion of the plaintiff's remedies.¹⁵⁹ Constrained by the Lanham Act's requirement that any award must be compensatory, not punitive, in nature, the court refused to award plaintiff "all or even most" of H&R Block's profits.¹⁶⁰ Instead, the court found a basis in the record for awarding a percentage of H&R Block's profits for the 2000 tax season, plus a share of its profits from future business generated through repeat customers.¹⁶¹ The court also awarded JTH its costs, attorneys' fees, and narrow injunctive relief.¹⁶²

In a second case arising under the Lanham Act, *Cornwell v. Sachs*,¹⁶³ the court granted plaintiff's motion for a preliminary injunction upon finding that that defendant used the plaintiff's name without authorization and also issued false and misleading advertising regarding the plaintiff.¹⁶⁴ Author Leslie Raymond Sachs began writing a series of increasingly threatening letters to fellow author Patricia Cornwell and her agents after reading an advertisement for Cornwell's forthcoming novel.¹⁶⁵ The letters suggested that Cornwell had used Sachs' ideas in her book.¹⁶⁶ Thereafter, his letter-writing campaign developed into an endeavor to fabricate a scandal surrounding Cornwell's book.¹⁶⁷ Sachs then announced his intention to use the fabricated scandal and Cornwell's name in his efforts to market his own novel.¹⁶⁸

Cornwell ultimately sued Sachs, asserting claims for defamation and violations of the Lanham Act and Virginia's privacy statute.¹⁶⁹ Cornwell simultaneously moved for a preliminary injunction enjoining Sachs from using her name for advertising

158. *Id.* at 940.

159. *See id.* at 943-52.

160. *Id.* at 944.

161. *Id.* at 944-45.

162. *See id.* at 947, 952.

163. 99 F. Supp. 2d 695 (E.D. Va. 2000).

164. *Id.* at 696, 714.

165. *See id.* at 697-99.

166. *See id.*

167. *See id.* at 700.

168. *See id.* at 700-01.

169. *Id.* at 701. Virginia's privacy statute can be found at VA. CODE ANN. § 8.01-40 (Repl. Vol. 2000).

and/or promotional purposes and making false statements to deceive the public.¹⁷⁰ Finding that Cornwell was “virtually certain of success on the merits of her claim,”¹⁷¹ the court granted her motion and preliminarily enjoined Sachs from using Cornwell’s name in any fashion for purposes of advertising his book.¹⁷² The court also ordered Sachs to take affirmative steps to remove all references to Cornwell from his website and from copies of his books for sale.¹⁷³

D. *Lanham Act: Unfair Competition Preliminary Injunction Denied*

In *Yellow Cab Co. v. Rocha*,¹⁷⁴ the United States District Court for the Western District of Virginia denied the plaintiff’s motion for preliminary injunction.¹⁷⁵ Yellow Cab filed a motion for preliminary injunction against Rocha alleging a violation of the Lanham Act’s prohibition of unfair competition, common law and statutory unfair competition, common law trade dress infringement, and common law trade name and service mark infringement.¹⁷⁶ The injunction sought to bar Rocha, the owner of a competing taxi company, from using the Yellow Cab service mark or trade name, using any telephone number associated with that service mark, painting any of its cabs yellow, or “committing any other act that constitutes unfair competition against the plaintiff.”¹⁷⁷

In applying the balancing test standard for awarding a preliminary injunction, the court examined four factors.¹⁷⁸ First, the

170. *Cornwell*, 99 F. Supp. 2d at 702.

171. *Id.* at 709.

172. *Id.* at 714.

173. *Id.*

174. No. 3:00CV00013, 2000 U.S. Dist. LEXIS 11597 (W.D. Va. July 5, 2000).

175. *Yellow Cab*, 2000 U.S. Dist. LEXIS 11597, at *26.

176. *Id.* at *1.

177. *Id.* at *6.

178. *Id.* at *9–10. The determination of whether to grant a preliminary injunction must be made after consideration of the factors presented in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977): (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is not granted; (2) the likelihood of harm to the defendant if the preliminary injunction is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *See id.* at 195–97. The Fourth Circuit advises that the most important consideration under this standard is the balance-of-

court looked for but found no evidence that Yellow Cab would be irreparably injured by a loss of good will or diversion of customers to Rocha's cab company.¹⁷⁹ The court arrived at this conclusion by noting that: (1) Rocha agreed to voluntarily refer customers who mistakenly called his company to Yellow Cab's business; (2) Rocha allegedly occupied a slightly different niche in the market than Yellow Cab; and (3) Rocha and his company did not appear to be harming the Yellow Cab's reputation.¹⁸⁰ Second, the court examined the potential injury to the defendant cab company, finding that the injury was likely to be substantial if Rocha was forced to adopt a new trade name and telephone numbers pursuant to an injunction.¹⁸¹ Third, the court found that the record did not "support a substantial likelihood of success on the merits,"¹⁸² noting that Yellow Cab "bears the burden of proving that Y[ellow] C[ab] and the yellow trade dress are not generic."¹⁸³ The court concluded that Yellow Cab failed to prove the necessary requirements to obtain a preliminary injunction.¹⁸⁴ Finally, the court held that the public interest did not appear to be at risk by denying Yellow Cab's request for injunction.¹⁸⁵ The court thus found that Yellow Cab did not succeed in proving its case under the balancing test, and denied the company's preliminary injunction request.¹⁸⁶

E. *Trade Regulation: Truth in Lending, Virginia Consumer Protection Act*

In *Compton v. Altavista Motors, Inc.*,¹⁸⁷ the United States District Court for the Western District of Virginia examined the claims surrounding plaintiff Compton's purchase of a used motor vehicle from Altavista.¹⁸⁸ During the transaction, Altavista presented Compton with various documents, including a down pay-

hardships to the plaintiff and the defendant. *Id.* at 196.

179. *Yellow Cab*, 2000 U.S. Dist. LEXIS 11597, at *13.

180. *Id.* at *11-12.

181. *Id.* at *15.

182. *Id.* at *24.

183. *Id.* at *19-20.

184. *Id.* at *24.

185. *Id.* at *25.

186. *Id.* at *26.

187. 121 F. Supp. 2d 932 (W.D. Va. 2000).

188. *Id.* at 933.

ment agreement, buyer's order, and a credit contract.¹⁸⁹ Compton brought suit against Altavista asserting that they had violated the Truth in Lending Act ("TILA"),¹⁹⁰ the Virginia Consumer Protection Act ("VCPA"),¹⁹¹ Virginia usury law,¹⁹² and that they had committed federal and Virginia odometer fraud.¹⁹³ The court considered Compton's motion for summary judgment and Altavista's cross-motion for summary judgment, granting and denying both in part.¹⁹⁴

The court found that Altavista had violated TILA with regard to the credit contract it drafted for Compton's signature.¹⁹⁵ The credit contract failed to disclose the amount paid by Altavista to an insurance company on Compton's behalf.¹⁹⁶ The court held that, with regard to the credit contract, Compton was entitled to recovery for Altavista's disclosure violations.¹⁹⁷ Although a particular transaction may violate TILA in a variety of ways, the court noted that "a plaintiff is only entitled to one recovery per credit transaction."¹⁹⁸ Therefore, the court did not address all of Compton's credit contract claims.¹⁹⁹

The court rejected Compton's argument regarding Altavista's alleged failure to make disclosures under its down payment agreement.²⁰⁰ The court found that TILA did not require separate disclosures for the down payment agreement where "there was no finance charge and because the balance of the down payment was payable prior to the due date of the second payment under the credit contract."²⁰¹ The court therefore denied Compton's motion

189. *Id.* at 933-34.

190. 12 U.S.C. §§ 2601, 4008 (1994 & Supp. V 1999); 15 U.S.C. §§ 1601-1691c-1 (1994 & Supp. V 1999).

191. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 2001).

192. *Id.* § 6.1-330.77 (Repl. Vol. 1999).

193. *Compton*, 121 F. Supp. 2d at 933. The federal and Virginia odometer fraud statutes can be located respectively at 49 U.S.C. § 32705 (1994 & Supp. V 1999) and VA. CODE ANN. § 46.2-1532 (Repl. Vol. 1998 & Cum. Supp. 2001).

194. *Compton*, 121 F. Supp. 2d at 933.

195. *Id.* at 936.

196. *Id.*

197. *Id.* at 935.

198. *Id.* (citing 15 U.S.C. § 16.04(g) (Supp. V 1999); Carney Worthmore Furniture, Inc., 561 F.2d 1100, 1103 (4th Cir. 1977)).

199. *Id.*

200. *Id.* at 937.

201. *Id.* at 938.

for summary judgment and granted Altavista's cross-motion with regard to the down payment agreement.²⁰²

The court denied Compton's motion for summary judgment with regard to her claims under the VCPA.²⁰³ Compton alleged that Altavista had committed consumer fraud in connection with the issuance of her thirty-day tags and with her purchase of liability insurance.²⁰⁴ The court found the "current record too sparse to support an award of summary judgment" and reserved those issues for trial.²⁰⁵

The court also denied both parties' motions for summary judgment on the usury claim.²⁰⁶ Compton argued that the allegedly requisite insurance payments were unlawful additional finance charges under Virginia Code section 6.1-330.77.²⁰⁷ Finding that a genuine issue of material fact existed concerning the voluntariness of Compton's insurance purchases, the court held that summary judgment was not proper.²⁰⁸

The court also rejected Compton's claim that Altavista committed odometer fraud under the Federal Odometer Act.²⁰⁹ Compton did not assert that the mileage on the odometer of the car she was purchasing was inaccurate, rather she asserted that Altavista violated the Federal Odometer Act by disclosing the mileage on the odometer disclosure statement instead of on the title.²¹⁰ Finding that Compton could not show that Altavista committed the violation with an intent to defraud, the court granted Altavista's

202. *Id.* at 938-39.

203. *Id.* at 940.

204. *Id.* at 939-40.

205. *Id.* at 940.

206. *Id.*

207. *Id.* The Virginia Code prohibits additional finance charges beyond those "agreed upon by the seller and the purchaser." See VA. CODE ANN. § 6.1-330.77 (Repl. Vol. 1999).

208. *Compton*, 121 F. Supp. 2d at 940.

209. *Id.* The Federal Odometer Act requires that the transferor of a vehicle provide the transferee with a written disclosure either "of the cumulative mileage registered by the odometer," or "that the mileage is unknown if the transferor knows that the mileage registered by the odometer is incorrect." 49 U.S.C. § 32705(a)(1) (Supp. V 1999). The statute also states that a transferred vehicle may not be licensed in a state unless the transferee submits the transferor's title, which must contain a signed and dated mileage disclosure made by the transferor, along with an application for a new title. *Id.* § 32705(b) (1994 & Supp. V 1999). Moreover, the regulations state that "[i]n connection with the transfer of ownership of a motor vehicle, each transferor shall disclose the mileage to the transferee in writing on the title." 49 C.F.R. § 580.5(c) (2000).

210. *Compton*, 121 F. Supp. 2d at 941.

cross-motion for summary judgment on that claim.²¹¹ Furthermore, because the Virginia Odometer Disclosure Statute²¹² does not contain a civil component,²¹³ the court also granted Altavista's motion for summary judgment as to Compton's claim that Altavista violated the statute.²¹⁴

F. *Trade Regulation: Termination of Dealer Contracts*

In *John Deere Construction Equipment Co. v. Wright Equipment Co.*,²¹⁵ the United States District Court for the Western District of Virginia conducted a choice-of-law analysis to determine whether Maryland law applied to the dealer contracts at issue²¹⁶ and held that, under Maryland law,²¹⁷ a manufacturer can terminate contracts with its authorized dealer upon the death of the dealer's major shareholder.²¹⁸

In 1984, the plaintiff, John Deere Construction Equipment Company ("John Deere") signed two dealer contracts in Maryland with Wright Equipment Company ("Wright"), authorizing Wright to be its local dealer in utility and forestry equipment for Virginia.²¹⁹ Over sixteen years later, the president, founder and major shareholder of Wright, Harold Wright, died.²²⁰ In January 2000, John Deere notified the trustees of Wright's estate of its intention to terminate both contracts 180 days following the date of that notice.²²¹ The notifications proffered four reasons for termination of the authorized dealership: (1) the death of Wright; (2) John Deere's contention that it "no longer offers agreements of

211. *Id.* at 942.

212. VA. CODE ANN. § 46.2-1532 (Repl. Vol. 1998 & Cum. Supp. 2001) (stating that all motor vehicle dealers "shall comply with all requirements of the Federal Odometer Act" and Virginia odometer law "by completing the appropriate odometer mileage statement form for each vehicle purchased, sold or transferred, or in any other way acquired or disposed of").

213. *Id.* Virginia Code section 46.2-1532 states that a "person found guilty of violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor." *Id.*

214. *Compton*, 121 F. Supp. 2d at 942.

215. 118 F. Supp. 2d 689 (W.D. Va. 2000).

216. *Id.* at 691-93.

217. MD. CODE ANN., [COM. LAW] § 19-302(7) (2000).

218. *John Deere*, 118 F. Supp. 2d at 693.

219. *Id.* at 690.

220. *Id.*

221. *Id.*

this type"; (3) insufficient sales by Wright; and (4) contractual provisions in the dealership agreements providing for termination without cause.²²² John Deere brought this declaratory judgment action to adjudicate its right to terminate the contracts.²²³

The court noted that if Virginia law applied, the Virginia Heavy Equipment Dealer Act ("Virginia Act")²²⁴ required John Deere to have good cause other than the death of Harold Wright in order to terminate the dealer contracts.²²⁵ The court then examined three Virginia choice-of-law principles²²⁶ to determine whether Virginia or Maryland law controlled the resolution of the dispute.²²⁷ First, the court cited the general rule that the "nature, validity, and interpretation of a contract is governed by the law of the place where it was made, unless there is an express intention to the contrary."²²⁸ Second, the court examined Wright's contention that an older Virginia case governed, which held that "where a contract is to be performed in a state other than the one in which it was made, it will be presumed that the parties intended the law of the place of performance to govern."²²⁹ The court rejected Wright's argument, noting that the case cited by Wright, while not overruled, had not been supported by more recent cases decided by the Supreme Court of Virginia.²³⁰ Third, the court cited another traditional rule that "matters of contract performance are to be considered under the law of the place of performance."²³¹ In analyzing whether the first or the third rule would

222. *Id.* at 691.

223. *Id.* at 690.

224. VA. CODE ANN. §§ 59.1-353 to -363 (Repl. Vol. 2001).

225. *John Deere*, 118 F. Supp. 2d at 692. The Virginia Act states that "[n]otwithstanding the terms, provisions or conditions of any agreement, no supplier shall unilaterally amend, cancel, terminate or refuse to continue to renew any agreement, unless . . . good cause exists for amendment, termination, cancellation, nonrenewal, [or] noncontinuance." VA. CODE ANN. § 59.1-354(A) (Repl. Vol. 2001). The Virginia Act limits "good cause" to the "withdrawal . . . of the sale of its products in Virginia," or "dealer performance deficiencies." *Id.*

226. The court recognized that Virginia followed "'traditional' contract choice of law principles." *John Deere*, 118 F. Supp. 2d at 692 (citing *Fuisz v. Selective Ins. Co. of Am.*, 61 F.3d 238, 241 (4th Cir. 1995)).

227. *See id.* at 691-93.

228. *Id.* at 692 (citing *Lexie v. State Farm Mut. Auto. Ins. Co.*, 251 Va. 390, 394, 469 S.E.2d 61, 63 (1996); *C.I.T. Corp. v. Guy*, 170 Va. 16, 22, 195 S.E. 659, 661 (1938)).

229. *Id.* (citing *Poole v. Perkins*, 126 Va. 331, 101 S.E. 240, 242 (1919)).

230. *Id.* at 693 (citing *Tate v. Hain*, 181 Va. 402, 25 S.E.2d 321 (1943)).

231. *Id.* (citing *Arkla Lumber & Mfg. Co. v. West Virginia Timber Co.*, 146 Va. 641, 650, 132 S.E. 840, 842 (1926); RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 353 (1934)).

apply, the court reasoned that the question before them was one of validity of the termination provisions, not performance of the contracts; therefore, the first general rule applied and dictated the application of Maryland law.²³²

The Maryland Equipment Dealer Contract Act ("Maryland Act")²³³ generally prohibits a manufacturer from terminating a dealer contract without cause.²³⁴ However, in contrast to the Virginia Act, the Maryland Act has exceptions to the good cause requirement where, for instance, the individual proprietor or major shareholder withdraws from the dealership "without the prior written consent of the supplier."²³⁵ The Maryland Act thus permits the termination of dealer contracts where, as in this case, the major shareholder dies.²³⁶ The Maryland Act requires that the manufacturer give 180 days notice of such termination,²³⁷ which John Deere supplied Wright's trustees.²³⁸ The court thus granted John Deere's motion for summary judgment and entered a declaratory judgment that the contracts were validly terminated.²³⁹

G. *Virginia Petroleum Products Franchise Act: Hearsay Provides No Exception to Divorcement Clause*

In *Frank Shop, Inc. v. Crown Central Petroleum Corp.*,²⁴⁰ a service station owner, Frank Shop, brought suit against Crown Central Petroleum Corporation ("Crown") regarding Crown's construction of a service station within one and one-half miles of Shop's service station.²⁴¹ The "divorcement clause"²⁴² of the Virginia Petroleum Products Franchise Act ("VPPFA")²⁴³ "prohibits a producer or refiner of petroleum products from operating a retail

232. *Id.*

233. MD. CODE ANN., [COM. LAW] §§ 19-101 to -505 (2000).

234. *Id.* § 19-301(c)(2) (2000).

235. *John Deere*, 118 F. Supp. 2d at 693 (quoting MD. CODE ANN., [COM. LAW] § 19-302(7) (2000)).

236. *Id.*

237. MD. CODE ANN., [COM. LAW] § 19-304 (2000).

238. *John Deere*, 118 F. Supp. 2d at 690.

239. *Id.* at 693-94.

240. 261 Va. 169, 540 S.E.2d 897 (2001).

241. *Id.* at 172, 540 S.E.2d at 899.

242. VA. CODE ANN. § 59.1-21.16:2(A) (Repl. Vol. 2001).

243. *Id.* §§ 59.1-21.8 to -21.18 (Repl. Vol. 2001).

gasoline outlet within one and one-half miles of a retail outlet operated by a franchised dealer."²⁴⁴ Crown argued that the "grandfather clause"²⁴⁵ under the VPPFA provided an exception to the divorcement clause for outlets operated by a producer or refiner as of July 1, 1979.²⁴⁶ Frank Shop claimed that the term "operated" in the grandfather clause should be interpreted by employing the language of another section of the VPPFA, which defines "operation of a retail outlet" as "the ownership or option to buy a properly zoned parcel of property for which a permit to build a retail outlet has been granted."²⁴⁷

The Supreme Court of Virginia reversed the trial court's finding in favor of Crown on the basis that Crown's evidence proving its entitlement to the grandfather exception should not have been admitted by the Henrico Circuit Court.²⁴⁸ That evidence consisted primarily of a form filed with the Virginia Department of Agriculture and Consumer Services in 1979 by a former owner of the property that stated that such owner was the "Producer/Refiner Operator" of the retail outlet on the property.²⁴⁹ The Supreme Court of Virginia held that this document was hearsay and did not qualify under the government records exception²⁵⁰ because it was neither prepared by nor reflected facts within the knowledge or observation of a public official.²⁵¹ Further, the court ruled that the document did not qualify under the "business records" exception²⁵² to hearsay because it was not a business record of the gov-

244. *Frank Shop*, 261 Va. at 173, 540 S.E.2d at 899 (quoting *Beach Robo, Inc. v. Crown Cent. Petroleum Corp.*, 236 Va. 131, 132, 372 S.E.2d 144, 145 (1988)).

245. VA. CODE ANN. § 59.1-21.16:2(E) (Repl. Vol. 2001).

246. *Frank Shop*, 261 Va. at 173, 540 S.E.2d at 899-900.

247. *Id.* at 173, 540 S.E.2d at 899 (quoting VA. CODE ANN. § 59.1-21.10 (Repl. Vol. 2001)).

248. *Id.* at 177, 540 S.E.2d at 901-02.

249. *Id.* at 172, 540 S.E.2d at 899.

250. The government records exception to the hearsay rule is alluded to in Virginia Code section 8.01-390(A). See VA. CODE ANN. § 8.01-390(A) (Repl. Vol. 2000 & Cum. Supp. 2001).

251. *Frank Shop*, 261 Va. at 173, 540 S.E. 2d at 899-900.

252. The court noted:

"Under the modern Shopbook Rule, adopted in Virginia, verified regular entries may be admitted into evidence without requiring proof from the regular observers or record keepers, generally limiting admission of such evidence to facts or events within the personal knowledge of the recorder. However this principle does not necessarily exclude all entries made by persons without personal knowledge of the facts recorded; in many cases, practical necessity requires the admission of written factual evidence that has a circumstantial

ernment agency that certified it to be a true and correct copy of the document.²⁵³

Accordingly, with the only evidence supporting the grandfather exception deemed inadmissible as hearsay, the court ruled that Crown had failed to prove its entitlement to the grandfather exception.²⁵⁴ The case was remanded to the circuit court for a determination of Frank Shop's proper remedy under the VPPFA.²⁵⁵

H. *Virginia Wine Franchise Act: Termination Upheld for Contract Violation*

In *The Country Vintner, Inc. v. Rosemount Estates, Inc.*,²⁵⁶ a wine wholesaler filed a complaint with the Virginia Alcoholic Beverage Control Board ("ABC Board") alleging that a wine producer did not have good cause to terminate the exclusive distributorship required by the Virginia Wine Franchise Act.²⁵⁷ The Court of Appeals of Virginia affirmed the decision of the Richmond Circuit Court and the ABC Board's determination that good cause did exist to justify the termination of the distribution agreement.²⁵⁸

The exclusive distribution agreement between the parties required the wholesaler, Country Vintner, to "contact all on-premises/off-premises retail licensees within [Virginia] at reasonable intervals and to use its best efforts to sell to them [Rosemount wines] in an aggressive, effective and diligent manner."²⁵⁹ Country Vintner successfully marketed Rosemount's wine products to restaurants, specialty wine shops and large retailers but deliberately chose not to distribute the wine to large retail gro-

guarantee of trustworthiness."

Id. at 175, 540 S.E.2d at 901 (quoting *Kettler & Scott, Inc. v. Earth Tech. Cos.*, 248 Va. 450, 457, 449 S.E.2d 782, 785-86 (1994)).

253. *Id.* at 176, 540 S.E.2d at 901.

254. *Id.* at 177, 540 S.E.2d at 901.

255. *Id.* at 177, 540 S.E.2d at 902.

256. 35 Va. App. 56, 542 S.E.2d 797 (Ct. App. 2001).

257. *Id.* at 59, 542 S.E.2d at 798. The Virginia Wine Franchise Act can be found at VA. CODE ANN. §§ 4.1-400 to -418 (Repl. Vol. 1999 & Cum. Supp. 2001). The pertinent termination provision can be found at VA. CODE ANN. § 4.1-406 (Repl. Vol. 1999 & Cum. Supp. 2001).

258. *Country Vintner*, 35 Va. App. at 60, 542 S.E.2d at 799.

259. *Id.* (alteration in original).

cery stores in Northern Virginia despite being verbally requested to do so by Rosemount on several occasions.²⁶⁰

Rejecting Country Vintner's contention that the contract interpretation imposed an unreasonable requirement, the court noted that the distributor sold to grocery chains in southern Virginia and had previously sold Rosemount wines to grocery stores in Northern Virginia through a sub-contracted distributor.²⁶¹ The court of appeals held that such a choice, particularly given Rosemount's express requests, was in violation of the parties' agreement to market to all outlets in Virginia.²⁶² The court commented that nothing in the agreement allowed Country Vintner to limit its distribution efforts to certain retailers.²⁶³

I. *Virginia Consumer Protection Act: Alternative Theories Rejected*

In *Bay Point Condominium Ass'n v. RML Corp.*,²⁶⁴ the Norfolk Circuit Court examined multiple causes of action raised by the plaintiffs for alleged structural defects, in the form of wood rot and decay, resulting from the failure of synthetic stucco, manufactured by Dryvit Systems, Inc. ("Dryvit"), to prevent water intrusion into the walls of a condominium.²⁶⁵ In addition to tort and contract causes of action, Bay Point Condominium Association ("Bay Point") also alleged civil conspiracy, violation of the Virginia Consumer Protection Act ("VCPA")²⁶⁶ and violation of Virginia's deceptive advertising statute.²⁶⁷ Dryvit filed demurrers to each of the claims, which the court sustained in part and overruled in part.²⁶⁸

Relying on the decision of the Supreme Court of Virginia in *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*,²⁶⁹ the

260. *Id.* at 60-61, 542 S.E.2d at 799.

261. *Id.* at 64-66, 542 S.E.2d at 801.

262. *Id.* at 66, 542 S.E.2d at 802.

263. *Id.* at 67, 542 S.E.2d at 802.

264. 52 Va. Cir. 432 (Cir. Ct. 2000) (Norfolk City).

265. *Id.* at 433.

266. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 2001).

267. *Bay Point*, 52 Va. Cir. at 433. Virginia's deceptive advertising statute can be found at VA. CODE ANN. § 18.2-216 (Repl. Vol. 1996 & Cum. Supp. 2001).

268. *Bay Point*, 52 Va. Cir. at 433, 453-54.

269. 236 Va. 419, 374 S.E.2d 55 (1988).

court reviewed and rejected Bay Point's negligence cause of action, finding that the injury claimed was a purely economic loss and "not an injury to person or property for which the law of torts offers redress."²⁷⁰ Moreover, Bay Point could not support their negligence per se cause of action by asserting a breach of Virginia's Uniform Statewide Building Code²⁷¹ because the code does not prescribe regulations governing the manufacturing or sale of synthetic stucco.²⁷²

The court, in its analysis of the breach of implied warranty claims, found that, absent privity of contract with the manufacturer, Dryvit, Bay Point could assert a claim only for direct damages under Virginia Code section 8.2-714(2), but not for consequential damages.²⁷³ The direct damages would constitute the difference between the value of the product as accepted and the value it would have had if it had been as warranted.²⁷⁴

The court sustained Dryvit's demurrers to the plaintiffs' claims for actual and constructive fraud and negligent misrepresentation.²⁷⁵ With regard to the fraud claims, the court found that Bay Point failed to allege particular facts to support its claims of reliance on Dryvit's alleged misrepresentations.²⁷⁶ The court noted that Bay Point's contract was with RML Corporation ("RML"), and it did not appear that Bay Point relied on any misrepresentations by Dryvit when entering into its contract with RML or that it was involved with RML's decision to install the synthetic stucco on the condominium.²⁷⁷ Furthermore, the court observed that Virginia has not recognized a separate cause of action for negligent misrepresentation.²⁷⁸

The court also rejected Bay Point's claims of civil conspiracy

270. *Bay Point*, 52 Va. Cir. at 437.

271. VA. CODE ANN. §§ 36-97 to -119 (Repl. Vol. 1996 & Cum. Supp. 2001).

272. *Bay Point*, 52 Va. Cir. at 437.

273. *Id.* at 440. The Supreme Court of Virginia has held that privity of contract is required for recovery of consequential economic loss damages in a claim for breach of warranty. *Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 245, 491 S.E.2d 731, 734 (1997).

274. *Bay Point*, 52 Va. Cir. at 440.

275. *Id.* at 453.

276. *See id.* at 445.

277. *Id.* at 442.

278. *Id.* at 443.

and violation of the VCPA.²⁷⁹ In the civil conspiracy claim, the court found that the plaintiffs had failed to specify the persons or entities with whom Dryvit allegedly conspired.²⁸⁰ Moreover, the court deemed the “sale of building materials from a manufacturer to a general contractor for use in the construction of a home” to be a “commercial transaction,” and therefore it “did not fall within the [VCPA’s] definition of a ‘consumer transaction.’”²⁸¹

Finally, the court overruled Dryvit’s demurrer to the alleged violation of Virginia’s deceptive advertising statute.²⁸² The court rejected Dryvit’s argument that the plaintiffs must assert a criminal conviction under the deceptive advertising statute to claim damages under Virginia Code section 59.1-68.3.²⁸³ Instead, the court found that plaintiffs were required only to assert a violation of the deceptive advertising provision, not a conviction, in order to claim damages under Virginia Code section 59.1-68.3.²⁸⁴

The court also repudiated Dryvit’s attempt to categorize the plaintiffs’ deceptive advertising claim as a fraud claim in order to assert that plaintiffs failed to allege facts with sufficient particularity to support their claim.²⁸⁵ The court found no such common requirement between a deceptive advertising claim and a fraud claim.²⁸⁶ The court reserved judgment on the issue of whether Bay Point’s claim was barred by the statute of limitations until the date of the plaintiffs’ purchase of the synthetic stucco was established.²⁸⁷

In *Davis v. Relocation Properties Management, L.L.C.*,²⁸⁸ the Spotsylvania Circuit Court rejected the plaintiffs’ claims against the seller arising out of plaintiffs’ purchase of a residential prop-

279. *Id.* at 453.

280. *Id.* at 444.

281. *Id.* at 446. The VCPA’s definition of consumer transaction can be found at VA. CODE ANN. § 59.1-198 (Repl. Vol. 2001).

282. *Bay Point*, 52 Va. Cir. at 448.

283. *Id.* at 448–49. The Virginia Code allows no action for damages for violations of VA. CODE ANN. §§ 18.2-214 to -246 (Repl. Vol. 1996 & Cum. Supp. 2001) (relating to deceptive advertising) and VA. CODE ANN. §§ 59.1-21.1 to -21.7:1 (Cum. Supp. 2001) (relating to housing sales). See VA. CODE ANN. § 59.1-68.3 (Repl. Vol. 2001).

284. *Bay Point*, 52 Va. Cir. at 448–49.

285. *Id.* at 448.

286. *Id.*

287. *Id.* at 449, 453–54.

288. 53 Va. Cir. 215 (Cir. Ct. 2000) (Spotsylvania County).

erty that was later revealed to be infested with termites.²⁸⁹ Applying general contract law principles, the court found that a handwritten addition to the parties' contract providing that the residence was sold "as is" overrode the contract's conflicting pre-printed warranty for termite infestation.²⁹⁰ Therefore, the seller, Relocation Properties Management ("RPM") had not breached the terms of the contract by failing to pay the cost of extermination and repairs.²⁹¹

The court also held that RPM had not violated the Residential Property Disclosure Act²⁹² because RPM made the proper disclaimer in its contract and provided Davis with a report of a pest control expert, thereby satisfying the "letter and spirit of the Act."²⁹³ Finally, because the court found no misbehavior under the two causes of action described above, the defendant was not liable under the VCPA for any "fraudulent acts or practices' in connection with consumer transactions."²⁹⁴ The court thus sustained the defendant's demurrers, with leave for plaintiffs to file amended pleadings.²⁹⁵

IV. TRADE REGULATION DECISIONS

A. *Petroleum Marketing Practices Act—No Independent Basis for Subject Matter Jurisdiction*

*Interstate Petroleum Corp. v. Morgan*²⁹⁶ involved a dispute between a petroleum franchiser and franchisee relating to the operation of a service station.²⁹⁷ This decision followed an earlier decision of the Fourth Circuit that was vacated when a rehearing en banc was granted.²⁹⁸ On appeal, the issue was whether the district court lacked subject matter jurisdiction.²⁹⁹ The court noted

289. *See id.* at 219.

290. *Id.* at 217.

291. *Id.* at 219.

292. VA. CODE ANN. §§ 55-517 to -525 (Repl. Vol 1995 & Cum. Supp. 2001).

293. *Davis*, 53 Va. Cir. at 218.

294. *Id.* at 218-19.

295. *Id.* at 219.

296. 249 F.3d 215 (4th Cir. 2001) (en banc), *vacating* 228 F.3d 331 (4th Cir. 2000).

297. *See id.* at 217.

298. *See Interstate Petroleum Corp. v. Morgan*, 228 F.3d 331, 336 (4th Cir. 2000).

299. *Interstate Petroleum*, 249 F.3d at 217.

that it had a "special obligation" to resolve the question of subject matter jurisdiction any time the issue is raised, even *sua sponte*.³⁰⁰

Interstate Petroleum ("Interstate") and the Morgans "entered [into] a franchise agreement whereby Interstate, as franchiser, agreed to sell British Petroleum ("BP") brand gasoline and petroleum products to the Morgans, as franchisees."³⁰¹ After the Morgans failed to comply with a letter agreement, Interstate brought suit in federal court for breach of contract.³⁰² Interstate's complaint alleged federal question jurisdiction under the Petroleum Marketing Practices Act ("PMPA")³⁰³ and 28 U.S.C. § 1331.³⁰⁴ Interstate argued that because the PMPA provides for suits by a franchisee against a franchiser,³⁰⁵ it implicitly authorizes a franchiser to bring action against a franchisee.³⁰⁶

Acknowledging that the district courts are divided on the effect of the PMPA on similar suits, the Fourth Circuit followed the decisions denying subject matter jurisdiction.³⁰⁷ The court noted that it would not make a difference whether the franchiser was seeking declaratory relief, as the Declaratory Judgment Act³⁰⁸ neither creates nor expands jurisdiction of a federal court.³⁰⁹ The court reasoned that the case involved a breach of contract under state law, but did not involve a federal question.³¹⁰ Therefore, the court found that the "PMPA did not create Interstate's cause of action, nor was there a disputed question of federal law that was a necessary element of Interstate's claim."³¹¹ Accordingly, the case

300. *Id.* at 219.

301. *Id.* at 217-18.

302. *Id.* at 218.

303. 15 U.S.C. §§ 2801-2841 (1994).

304. *Interstate Petroleum*, 249 F.3d at 218.

305. The PMPA states that "[i]f a franchisor fails to comply with the requirements of [Section 2802 or 2803 of this title], the franchisee may maintain a civil action against such franchisor." 15 U.S.C. § 2805(a) (1994).

306. *Interstate Petroleum*, 249 F.3d at 218-19.

307. *Id.* at 220.

308. 28 U.S.C. § 2201 (1994 & Supp. V 1999).

309. *Interstate Petroleum*, 249 F.3d at 221 & n.7.

310. *Id.* at 221.

311. *Id.* at 222.

was vacated and remanded, with instructions to dismiss without prejudice for lack of subject matter jurisdiction.³¹²

B. *Anticybersquatting Consumer Protection Act*

In *America Online, Inc. v. Huang*,³¹³ plaintiff America Online (“AOL”) filed suit against various foreign defendants including eAsia, Inc., a California corporation with its principal place of business in Taipei, Taiwan.³¹⁴ In the suit, AOL alleged, among other things, violations of the Anticybersquatting Consumer Protection Act (“ACPA”)³¹⁵ and unfair competition.³¹⁶ eAsia, the only defendant AOL was able to serve, develops Internet-related software primarily directed toward Chinese-speaking regions of Asia.³¹⁷ eAsia offers a communications protocol, “ICQ,” the same name that AOL uses for one of its instant communications services.³¹⁸

eAsia moved to dismiss the case for lack of personal jurisdiction.³¹⁹ AOL argued that jurisdiction was proper because eAsia had used the Internet to register the domain name “ICQ” with the registrar company Network Solutions, Inc. (“NSI”), which is located in Herndon, Virginia.³²⁰ For this claim, AOL relied on Virginia Code section 8.01-328.1(A)(1), which subjects a nonresident defendant to personal jurisdiction for any cause of action arising from that defendant’s transaction of business in Virginia.³²¹

The court noted that the only cause of action arising from eAsia’s registration was the ACPA claim.³²² The court also determined that with regard to domain name disputes based on federal

312. *Id.*

313. 106 F. Supp. 2d 848 (E.D. Va. 2000).

314. *Id.* at 849.

315. 15 U.S.C. § 1125(d) (Supp. V 1999).

316. *America Online*, 106 F. Supp. 2d at 850.

317. *Id.*

318. *See id.*

319. *Id.*

320. *Id.*

321. *Id.* The Virginia Code outlines when personal jurisdiction may be exercised. *See* VA. CODE ANN. § 8.01-328.1(A)(1) (Cum. Supp. 2001).

322. *America Online*, 106 F. Supp. 2d at 854.

trademark infringement, the use, not the registration, of the domain name is the relevant tortious act.³²³ In a thorough and informative opinion from the District Court for the Eastern District of Virginia, Judge Ellis reasoned that it was “difficult to view the act of registering a domain name over the Internet as ‘transacting business’ in the registrar’s state of residence.”³²⁴

The court proceeded directly to the due process analysis,³²⁵ finding that the domain name agreements with NSI did not constitute sufficient contacts with Virginia.³²⁶ The court concluded that the registration agreements were not substantially related to Virginia, and “eAsia’s limited Internet contacts with NSI [did] not . . . form the basis for personal jurisdiction.”³²⁷ The court also rejected AOL’s argument that “eAsia purposefully directed its activities at Virginia” by infringing the trademarks of two corporations located in Virginia.³²⁸ The court granted eAsia’s motion,³²⁹ holding that the “mere registration” of a similar or identical domain name “or the operation of a passive Web site using the allegedly infringing domain name” did not satisfy the requirements for personal jurisdiction in the trademark owner’s state of residence.³³⁰

In *Heathmount A.E. Corp. v. Technodome.com*,³³¹ the court described “the nature of a plaintiff’s burden to prove the ‘absence’ of personal jurisdiction” over the registrant of the allegedly infringing mark before the plaintiff may proceed in rem against the allegedly infringing mark itself.³³² Recognizing that the burden set out in subpart (I) of the in rem statute³³³—that is, the inability to obtain personal jurisdiction over the registrant of the infringing domain name—is “difficult to apply,”³³⁴ the court held that a

323. *Id.*

324. *Id.* at 855.

325. *See id.* at 853.

326. *Id.* at 857.

327. *Id.* at 858.

328. *Id.* at 859.

329. *Id.* at 860.

330. *Id.* at 859.

331. 106 F. Supp. 2d 860 (E.D. Va. 2000).

332. *Id.* at 861.

333. 15 U.S.C. § 1125(d)(2)(A)(i)(I) (Supp. V 1999).

334. *Heathmount*, 106 F. Supp. 2d at 862.

plaintiff need only “demonstrate some indicia of due diligence in trying to establish personal jurisdiction over [a] . . . potential defendant.”³³⁵

Heathmount A.E. Corporation (“Heathmount”), an entertainment company, alleged that Elliott Salmons registered the defendant domain names *technodome.com* and *destinationtechnodome.com* despite Heathmount’s usage of these terms in its advertising.³³⁶ In support of in rem jurisdiction, Heathmount asserted that Salmons was a Canadian resident, that “[his] only contact with the United States was his registration of the defendant domain names with NSI”³³⁷ in Herndon, Virginia,³³⁸ and that he had “denied being subject to personal jurisdiction in Virginia” in a related Internet Corporation for Assigned Names and Numbers (“ICANN”) proceeding.³³⁹ These factors led the court to find that Heathmount had exercised sufficient due diligence to meet the requirement of subpart (I) of the in rem statute.³⁴⁰

The court then examined “whether, under Virginia law, the registration of a domain name [could] satisfy the requirements of due process and . . . [confer] personal jurisdiction over Salmons.”³⁴¹ The court noted its concerns regarding whether the registration of a domain name constituted “transacting business” but instead elected to focus on the due process requirements, finding that “the ‘transacting business’ requirement [could not] exceed the limits of due process.”³⁴² The court followed the reasoning in *America Online*³⁴³ and concluded that, under the Virginia Code,³⁴⁴ the court lacked personal jurisdiction over Salmons.³⁴⁵

The Eastern District of Virginia also addressed the ACPA in

335. *Id.* at 863.

336. *See id.* at 861–62. Plaintiff used the marks “Technodome” and “Destination:Technodome” in marketing, advertising, and distributing its various goods and services. *Id.* at 861.

337. *Id.* at 863.

338. *Id.* at 861.

339. *Id.* at 863.

340. *Id.*

341. *Id.* at 863–64.

342. *Id.* at 864.

343. 106 F. Supp. 2d 848 (E.D. Va. 2000). *See supra* notes 313–30 and accompanying text.

344. *See* VA. CODE ANN. § 8.01-328.1(A)(1) (Cum. Supp. 2001) (outlining the provisions for exercising personal jurisdiction).

345. *Heathmount*, 106 F. Supp. 2d at 868.

Harrods Ltd. v. Sixty Internet Domain Names,³⁴⁶ where the court examined “whether [a] plaintiff must plead the element of bad faith in an *in rem* proceeding brought under the ACPA.”³⁴⁷ Harrods sought declaratory and injunctive relief pertaining to the “improper registration and use” of sixty internet domain names, such as cyberharrods.com and harrodsamerica.com.³⁴⁸

Harrods argued that “bad faith intent” cannot be an element of the action because it is not mentioned in the subsection of the ACPA creating the *in rem* action.³⁴⁹ Plaintiff also asserted that requiring proof of bad faith undermines the purpose of providing remedies for trademark owners who cannot find the person or entity responsible for registering the offending domain names.³⁵⁰ The court chose to follow the only other federal court to address the issue³⁵¹ by holding “that bad faith intent to profit is a necessary element of an *in rem* action under the ACPA.”³⁵²

In *Banco Inverlat, S.A. v. www.inverlat.com*,³⁵³ the plaintiff, having registered the trademarks “Inverlat” and “Inverweb,”³⁵⁴ brought an *in rem* action against the defendants, “alleging that the defendants registered [inverlat.com and inverweb.com] with the bad faith intent to profit from [the] plaintiff’s . . . trademarks.”³⁵⁵ Banco Inverlat sent defendant Mauricio De La Orta copies of the complaint via overnight mail and e-mail, which resulted in actual notice to the defendants.³⁵⁶ Banco Inverlat then sought an order permitting it to “dispense with an order of publication under the ACPA.”³⁵⁷

The court ruled that the ACPA grants the district courts the discretion “to excuse the ACPA’s requirement in *in rem* actions

346. 110 F. Supp. 2d 420 (E.D. Va. 2000).

347. *Id.* at 423.

348. *Id.* at 422.

349. *Id.* at 424. *In rem* actions under the ACPA are addressed in 15 U.S.C. § 1125(d) (Supp. V 1999).

350. *Harrods*, 110 F. Supp. 2d at 424.

351. *See Broadbridge Media v. Hypercd.com*, 106 F. Supp. 2d 505 (S.D.N.Y. 2000) (concluding that bad faith must be proven for an *in rem* action under the ACPA).

352. *Harrods*, 110 F. Supp. 2d at 425, 427.

353. 112 F. Supp. 2d 521 (E.D. Va. 2000).

354. *Id.* at 521–22.

355. *Id.* at 522.

356. *See id.*

357. *Id.*

for service by publication where service is accomplished by . . . alternative means . . . of service via the [defendant's] postal and e-mail addresses."³⁵⁸ The court noted that requiring a plaintiff to give notice to a defendant by publication would be redundant in cases where the defendant has already received a copy of the relevant pleadings by regular mail and by e-mail.³⁵⁹

At issue in *Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.com*³⁶⁰ was whether the ACPA allows a trademark owner to maintain both an in personam claim against the registrant of an infringing domain name and an in rem claim against the allegedly infringing domain name itself.³⁶¹ After coining the term "Alitalia," plaintiff, Italy's national airline, registered the mark.³⁶² Meanwhile, defendant Technologia JPR ("JPR"), which runs an online gambling company based in the Dominican Republic, registered casinoalitalia.com and used the term "Alitalia" on its Web site.³⁶³

After examining the two remedies for "cyberpiracy" provided in the ACPA,³⁶⁴ the court ruled that the statute's in rem and in personam jurisdictional grants are mutually exclusive.³⁶⁵ Thus, a plaintiff may not concurrently pursue ACPA claims against both the alleged infringer and the allegedly infringing domain name.³⁶⁶

Unlike *America Online* and *Heathmount*, the court focused on Virginia Code section 8.01-328.1(A)(4) of the Virginia long-arm statute,³⁶⁷ concluding that it reached defendant's contacts with

358. *Id.* at 521.

359. *Id.* at 523-24.

360. 128 F. Supp. 2d 340 (E.D. Va. 2001).

361. *Id.* at 341.

362. *Id.*

363. *Id.* at 342.

364. Compare 15 U.S.C. § 1125(d)(1)(A) (Supp. V 1999) ("A person shall be liable in a civil action by the owner of a mark."), with § 1125(d)(2)(A) (Supp. V 1999) ("The owner of a mark may file an in rem action against the domain name.").

365. *Alitalia-Linee*, 128 F. Supp. 2d at 347.

366. *Id.*

367. Compare *America Online*, 106 F. Supp. 2d 848 (E.D. Va. 2000), and *Heathmount*, 106 F. Supp. 2d 860 (E.D. Va. 2000) (analyzing personal jurisdiction by focusing on VA. CODE ANN. § 8.01-328(A)(1) (Cum. Supp. 2001), which provides for personal jurisdiction over a person who "[t]ransact[s] any business in [the] Commonwealth"), with *Alitalia-Linee*, 128 F. Supp. 2d 340 (E.D. Va. 2001) (focusing on VA. CODE ANN. § 8.01-328.1(A)(4) (Cum. Supp. 2001), which provides for personal jurisdiction over a person who "[c]aus[es] tortious injury in [the] Commonwealth by an act or omission outside [the] Commonwealth if he regularly does or solicits business, or engages in any other persistent course of con-

Virginia.³⁶⁸ JPR's trademark infringement met the statute's requirement of a tortious injury in Virginia, the court reasoned, because JPR's use of the domain name was "likely to cause confusion, mistake, and deception of Virginia consumers."³⁶⁹ Moreover, JPR's maintenance of an interactive Web site accessible to Virginia consumers twenty-four hours a day constituted "persistent course of conduct."³⁷⁰ Therefore, "because JPR [was] subject to *in personam* jurisdiction in Virginia, Alitalia, [could not] maintain its ACPA *in rem* cause of action."³⁷¹

In *Hartog & Co. v. SWIX.COM*,³⁷² an action brought under the *in rem* provision of the ACPA,³⁷³ a Norwegian company sought transfer of two Internet domain names from a Swiss registrant.³⁷⁴ Hartog and Company ("Hartog"), whose products include ski waxes and accessories bearing its "SWIX" mark, alleged that the Swiss company's possession of *swix.com* and *swix.net* confused and frustrated its customers.³⁷⁵

The court ultimately found that although the domain names in issue were sufficiently similar to the plaintiff's mark to fall within the ACPA's proscription against bad faith registration, the facts did not support a finding that the registrant of the domain names had acted with bad faith intent.³⁷⁶ Instead, the court found that the registrant was "not a 'cybersquatter' or 'cyberpirate' within either the letter or the spirit of the ACPA . . . [but rather] a legitimate businessman."³⁷⁷ Therefore, the court held that the ACPA did not apply because the registrant failed to act with bad faith intent.³⁷⁸

duct, or derives substantial revenue from goods used or consumed or services rendered, in [the] Commonwealth").

368. *Alitalia-Linee*, 128 F. Supp. 2d at 348.

369. *Id.*

370. *Id.*

371. *Id.* at 351.

372. 136 F. Supp. 2d 531 (E.D. Va. 2001).

373. The ACPA's primary purpose is to eliminate "cybersquatting" or "cyberpiracy" by individuals reserving Internet domain names similar to trademarked names with no intention of using it in commerce. *Id.* at 536.

374. *Id.* at 533.

375. *See id.* at 534-35.

376. *Id.* at 537-38.

377. *Id.* at 542.

378. *Id.*

V. FEDERAL REGULATORY, ADMINISTRATIVE, AND ENFORCEMENT EFFORTS

A. FTC v. Pereira³⁷⁹

“In its 100th law enforcement action targeting deception on the Internet,³⁸⁰ the FTC charged the defendant, a foreign national, with cloning existing Web sites and using these clone sites to direct unsuspecting Internet users to a pornographic Web site.³⁸¹ The defendant’s program then disabled the user’s web browser such that the user could not exit the pornographic site unless the computer was shut down.³⁸² Presumably, the scheme was developed to generate high traffic on the defendant’s Web site so that he could charge higher prices for banner advertisements on his site.³⁸³ The FTC filed the complaint in the United States District Court for the Eastern District of Virginia.³⁸⁴ As the court noted, “this case illustrates both the ease with which scam artists abroad can use the Internet to target consumers in the U.S. and the importance of cooperation between consumer protection agencies in different countries.”³⁸⁵

B. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*

In determining that the public utility of the proposed AOL/Time Warner merger outweighed the public harm, the Federal Communications Commission (“FCC”) approved the merger of the two corporations.³⁸⁶ The FCC identified four major potential

379. [1997–2001 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 24,654 (E.D. Va. 1999).

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. See *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 23 Communications Reg. (P & F) 157, at 250 (Jan. 11, 2001).

problems with the merger and fashioned its order to deal with these problems.³⁸⁷

First, in response to fear that the newly formed company would have the “ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs’ access to Time Warner cable facilities,” the FCC conditioned the approval on conditions relating to contracts and negotiations with unaffiliated Internet service providers.³⁸⁸ Second, the order forbade AOL Time Warner from “entering into contracts with AT&T that would give AOL exclusive carriage or preferential terms, conditions and prices.”³⁸⁹ Third, the order “impose[d] a condition requiring [the new company] . . . to provide interoperability between its NPD-based applications and those of other providers, or to show by clear and convincing evidence that circumstances have changed such that the public interest will no longer be served by an interoperability condition.”³⁹⁰ Finally, in response to fears that the new company would have “the ability and the incentive to discriminate against interactive television services,” the order stated that the terms of the consent agreement should prevent such abuse.³⁹¹

VI. NEW LEGISLATIVE DEVELOPMENTS

A. *Internet Freedom and Broadband Deployment Act of 2001*³⁹²

This bill would amend the Communications Act of 1934³⁹³ to define “high speed data service” as a service capable of transmitting electronic information at a rate “generally not less than 384 kilobits per second in at least one direction.”³⁹⁴ It would prohibit

387. *Id.* at 162.

388. *Id.*

389. *Id.*

390. *Id.* at 162–63.

391. *Id.* at 163.

392. H.R. 1542, 107th Cong. (2001). This bill was sponsored by Representative Billy Tauzin (R-LA) and introduced on April 24, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on Energy and Commerce. 147 CONG. REC. H1554 (daily ed. Apr. 24, 2001). It was placed on the Union Calendar, No. 54, available at <http://thomas.loc.gov/>.

393. 47 U.S.C. §§ 151–615(b) (1994 & Supp. V 1999).

394. *See* H.R. 1542 § 3(a)(3).

the FCC and each state from regulating “the rates, charges, terms, or conditions for . . . any high speed data service . . . or Internet access service.”³⁹⁵ The bill would also prohibit the FCC from requiring an established local exchange carrier to: (1) provide unbundled access to any network elements used in the provision of any high speed data service; or (2) offer for resale at wholesale rates any high speed data service.³⁹⁶

B. *Broadband Competition and Incentives Act of 2001*,³⁹⁷
American Broadband Competition Act of 2001,³⁹⁸ and
*Broadband Antitrust Restoration and Reform Act of 2001*³⁹⁹

These measures, a response to the Internet Freedom and Broadband Deployment Act of 2001,⁴⁰⁰ are designed to ensure the application of the antitrust laws to the telecommunications industry.⁴⁰¹ The Broadband Competition and Incentives Act of 2001 would amend the Clayton Act⁴⁰² to restrict the provision of in-region broadband telecommunications services by Bell operating companies⁴⁰³ and would eliminate discriminatory taxes on broadband service providers.⁴⁰⁴ The American Broadband Competition Act of 2001 also would amend the Clayton Act to make the anti-trust laws applicable to certain violations in the telecommunica-

395. *See id.* § 4(a).

396. *See id.* § 4(b).

397. H.R. 1697, 107th Cong. (2001). This bill was sponsored by Representative John Conyers (D-MI) and introduced on May 3, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the House Committee on Energy and Commerce. 147 CONG. REC. H1923 (daily ed. May 3, 2001). Hearing held by the House Committee on the Judiciary. *Id.* at D496 (daily ed. June 22, 2001).

398. H.R. 1698, 107th Cong. (2001). This bill was sponsored by Representative Chris Cannon (R-UT) and introduced on May 3, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Energy and Commerce. 147 CONG. REC. H1923 (daily ed. May 3, 2001). Hearing held by House Committee on the Judiciary. *Id.* at D496 (daily ed. June 22, 2001).

399. H.R. 2120, 107th Cong. (2001). This bill was also sponsored by Representative Cannon and introduced on June 12, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Energy and Commerce. 147 CONG. REC. H3066 (daily ed. June 12, 2001). A motion to report the measure failed. *Id.* at D574 (daily ed. June 13, 2001).

400. H.R. 1542.

401. *See* H.R. 1697; H.R. 1698.

402. 15 U.S.C. §§ 12–27 (1994 & Supp. V 1999).

403. H.R. 1697 § 101. A “Bell operating company” is defined under 47 U.S.C. § 153(4)(A) (Supp. V 1999).

404. *Id.* § 201.

tions industry⁴⁰⁵ and would create an alternative process to resolve disputes arising under interconnection agreements.⁴⁰⁶ The final measure amending the Clayton Act, the Broadband Antitrust Restoration and Reform Act, would require Bell operating companies to file an application with the United States Attorney General before providing any in-region Internet services.⁴⁰⁷

C. *Drug Competition Act of 2001*⁴⁰⁸

This bill would enhance the ability of the Department of Justice and the FTC to enforce federal antitrust laws against manufacturers of brand name and generic drugs.⁴⁰⁹ The proposal would require brand name and generic drug makers to file a notice with both agencies within ten days of entering into any agreements regarding the sale or manufacture of the generic drug equivalent to that brand name drug, if the agreement could limit “the research, development, manufacture, marketing, or selling of a generic drug”⁴¹⁰ by another maker.⁴¹¹

D. *Free Market Antitrust Immunity Reform (FAIR) Act of 2001*⁴¹²

This bill would “amend the Shipping Act of 1984⁴¹³ to restore the application of the antitrust laws to certain agreements”⁴¹⁴ in-

405. H.R. 1698 § 2.

406. *Id.* § 3.

407. H.R. 2120 § 2.

408. H.R. 1063, 107th Cong. (2001); S. 754, 107th Cong. (2001). H.R. 1063 was introduced by Representative Robert Andrews (D-NJ) on March 15, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Energy and Commerce. 147 CONG. REC. H953 (daily ed. Mar. 15, 2001). The identical Senate component, S. 754, was introduced by Senator Patrick Leahy (D-VT) on April 6, 2001, before the United States Senate. 147 CONG. REC. S3760 (daily ed. Apr. 6, 2001). It was then referred to the Senate Committee on the Judiciary. *Id.* at S3706 (daily ed. Apr. 6, 2001).

409. H.R. 1063 § 3; S. 754 § 3.

410. H.R. 1063 § 5(2); S. 754 § 5.

411. H.R. 1063 §§ 5–6; S. 754 §§ 5–6.

412. H.R. 1253, 107th Cong. (2001). This bill was sponsored by Representative James Sensenbrenner (R-WI) and introduced on March 27, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Transportation and Infrastructure. 147 CONG. REC. H1189 (daily ed. Mar. 27, 2001).

413. 46 U.S.C. app. §§ 1701–1719 (1994 & Supp. V 1999).

414. H.R. 1253, pmb1.

cluding certain assessment agreements and marine terminal operator agreements.⁴¹⁵

E. Rail Competition Enforcement Act of 2001⁴¹⁶ and Rail Merger Reform and Customer Protection Act⁴¹⁷

If enacted, the Rail Competition Enforcement Act would amend Title 49 of the United States Code by eliminating the exemptions of rail agreements and transactions that are subject to approval by the Surface Transportation Board (STB) from antitrust laws.⁴¹⁸ Meanwhile, legislation was proposed that would not only remove rail carriers' antitrust exemption⁴¹⁹ but would also "strengthen the standards by which the STB reviews railroad mergers."⁴²⁰ Under the provisions of the Rail Merger Reform and Customer Protection Act,⁴²¹ the STB would be authorized to withhold its approval of rail mergers unless it "finds that the transaction: (1) will not reduce competitive rail routes available to current railroad customers; (2) will provide additional rail to rail competition and competitive options for railroad customers; (3) will improve service to customers; and (4) is in conformity with the antitrust laws."⁴²²

F. Airline Merger Moratorium Act⁴²³

Under the proposed measure introduced in the Senate, a two-

415. *Id.* § 2.

416. S. 526, 107th Cong. (2001). This bill was sponsored by Senator Byron Dorgan (R-NM) and introduced on March 13, 2001, before the United States Senate, at which time it was referred to the Senate Committee on Commerce, Science, and Transportation. 147 CONG. REC. S2228 (daily ed. Mar. 13, 2001).

417. H.R. 999, 107th Cong. (2001). This bill was sponsored by Representative Earl Pomeroy (D-ND) and introduced on March 13, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Transportation and Infrastructure. 147 CONG. REC. H876 (daily ed. Mar. 13, 2001).

418. S. 526, pmbi., § 2.

419. *See* H.R. 999.

420. *Id.* at pmbi.

421. *Id.*

422. *Id.* § 2.

423. S. 578, 107th Cong. (2001). This bill was sponsored by Senator Dorgan and introduced on March 20, 2001, before the United States Senate, at which time it was referred to the Committee on Commerce, Science, and Transportation. 147 CONG. REC. S2592 (daily ed. Mar. 20, 2001).

year moratorium would be placed on major airline mergers.⁴²⁴ During this period, the United States Department of Transportation would evaluate the impact that airline industry consolidations and mergers have had on consumers in the areas of pricing, services, and flight availability.⁴²⁵ A similar proposal, calling for a one-year moratorium on airline mergers, was introduced in the United States House of Representatives.⁴²⁶

G. *High Density Airport Competition Act of 2001*⁴²⁷

This bill, “in an effort to increase and maintain competition in the domestic aviation industry,”⁴²⁸ would amend the Clayton Act by imposing limits on the amount of takeoff and landing slots large airlines can own at Washington Reagan National and New York’s LaGuardia Airports.⁴²⁹

H. *Antitrust Technical Corrections Act of 2001*⁴³⁰

This measure passed the House of Representatives on March

424. S. 578 § 2.

425. *Id.* § 7.

426. H.R. 761, 107th Cong. (2001) (the Airline Merger Moratorium Act of 2001). This bill was sponsored by Representative Louise Slaughter (D-NY) and introduced on February 27, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary. 147 CONG. REC. H442 (daily ed. Feb. 27, 2001).

427. S. 520, 107th Cong. (2001). This bill was sponsored by Senator Mike DeWine (R-OH) and introduced on March 13, 2001, before the United States Senate, at which time it was referred to the Senate Committee on the Judiciary. 147 CONG. REC. S2221–S2222 (daily ed. Mar. 13, 2001). The “Subcommittee on Antitrust, Business Rights, and Competition conducted hearings . . . after receiving testimony from Hershel I. Kamen, Continental Airlines, Inc., Washington, D.C.; Kevin P. Healy, AirTran Airways, Inc., Orlando, Florida; and Kevin P. Mitchell, Business Travel Coalition, Lafayette Hill, Pennsylvania.” 147 CONG. REC. D244 (daily ed. Mar. 21, 2001).

428. 147 CONG. REC. S2221 (daily ed. Mar. 13, 2001).

429. S. 520 § 2.

430. H.R. 809, 107th Cong. (2001). This bill was sponsored by Representative Sensenbrenner and introduced on March 1, 2001, before the United States House of Representatives, at which time it was referred to the House Committee on the Judiciary and the Committee on Armed Services. 147 CONG. REC. H621 (daily ed. Mar. 1, 2001). On March 8, the House Committee on the Judiciary reported the bill to the House favorably. *See* H.R. REP. NO. 107-17, pt. 1, at 4 (2001). On March 14, the bill was passed by the House, and on March 15, the bill was received by the United States Senate and referred to the Senate Committee on the Judiciary. 147 CONG. REC. H888–H889 (daily ed. Mar. 14, 2001); 147 CONG. REC. S2387 (daily ed. Mar. 15, 2001).

14, 2001.⁴³¹ If enacted, it would make six separate “technical corrections”⁴³² to the Sherman Act,⁴³³ Clayton Act,⁴³⁴ Federal Trade Commission Act,⁴³⁵ and other laws.⁴³⁶ The bill would repeal the Taking Depositions in Public Act⁴³⁷ and a provision of the Panama Canal Act⁴³⁸ prohibiting antitrust violators from utilizing the Panama Canal.⁴³⁹ Other changes would include amending section 3 of the Sherman Act to clarify that section 2 applies to the District of Columbia and the Territories⁴⁴⁰ and correcting an error in the statutory codification of the Clayton Act.⁴⁴¹

I. “*econsumer.gov*” Pilot Project—Memorandum of Understanding⁴⁴²

In an effort to thwart Internet fraud, the FTC, along with twelve consumer protection agencies from countries such as Australia, Korea, Switzerland, and the United Kingdom, recently signed a memorandum of understanding creating “*econsumer.gov*.”⁴⁴³ Dubbed “a joint effort to gather and share cross-border e-commerce complaints,” *econsumer.gov* aims to enforce consumer protection laws by forwarding complaints received via an online complaint form to the appropriate consumer protection enforcement personnel.⁴⁴⁴ The Web site will also contain consumer protection information for the participating countries.⁴⁴⁵

431. 147 CONG. REC. H888 (daily ed. Mar. 14, 2001).

432. H.R. 809, pmb.

433. 15 U.S.C. §§ 1–7 (1994 & Supp. V 1999).

434. *Id.* §§ 12–27a (1994 & Supp. V 1999).

435. *Id.* §§ 41–77 (1994 & Supp. V 1999).

436. H.R. 809 § 2.

437. 15 U.S.C. § 30 (1994).

438. *Id.* § 31 (1994).

439. *Id.*; H.R. 809 § 2.

440. H.R. 809 § 2b.

441. *Id.* § 2(d)(2)(A).

442. 7 Trade Reg. Rep. (CCH) ¶ 50,178 (May 2, 2001).

443. *Id.*

444. *Id.* The information will be shared using the existing consumer Sentinel network, “an automated database maintained by the [FTC] that stores consumer complaint data and other investigatory information provided by consumers, participating law enforcement agencies, and other contributors about consumer fraud and deception.” *Id.*

445. *Id.* Countries participating in the memorandum of understanding in addition to those named above are Canada, Denmark, Finland, Hungary, New Zealand, Norway, and Sweden. *Id.*

VII. CONCLUSION

As was the case in recent years, antitrust and trade regulation cases are reflecting the growth in the technology and service aspects of our economy, and disputes have increasingly appeared in these areas. Antitrust cases will continue to be brought by groups of competitors that seek to keep others from competing with an enhanced service or price, as the courts continue to recognize such claims this year.

Causation and injury issues continue to plague conspiracy plaintiffs, whether under the Sherman Act or the Virginia Business Conspiracy Act. Litigation inevitably follows the termination of a dealership or franchise regardless of whether the action is brought under the Sherman Act or a Virginia regulatory statute, and care must be taken to avoid unnecessary involvement in such legal claims.

Further, while on the books, both the Virginia Uniform Trade Secrets Act and the Virginia Consumer Protection Statutes are being strictly scrutinized. With regards to the former, a recent decision exposes Virginia businesses to clandestine industrial espionage; and, with regards to the latter, Virginia consumers are left without a real remedy.

Finally, after several years of judicial expansion, it now appears that the courts may be taking a more critical look at Virginia's Business Conspiracy Act. In one recent case, the Supreme Court rejected the jury's finding of conspiracy based on its own review of the evidence.

This year the courts examined a wide variety of antitrust and trade regulation theories. Only a few of these theories had a successful outcome. Whether the courts continue this trend remains to be seen.