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Michael F. Urbanski

Woods, Rogers & Hazlegrove, P.L.C.

James R. Creekmore

Woods, Rogers & Hazlegrove, P.L.C.

Ellen S. Moore

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ANTITRUST AND TRADE REGULATION LAW

Michael F. Urbanski *

James R. Creekmore **

Ellen S. Moore ***

I. INTRODUCTION

Over the course of the past two years, the United States Court of Appeals for the Fourth Circuit and the federal and state courts of Virginia have dealt with myriad antitrust and trade regulation issues. For the most part, courts in Virginia have continued their long-standing hostility toward such claims, whether brought under the cloak of the antitrust laws or common law business torts affecting competition. For example, in *Continental Airlines, Inc. v. United Airlines, Inc.*,¹ the Fourth Circuit vacated the district court's application of the quick-look analysis to determine whether baggage templates at Washington Dulles International Airport constituted restraints on trade, remanding the case with instructions to apply a more rigorous modified quick-look analysis

* Principal, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia. B.A., 1978, College of William and Mary; J.D., 1981, University of Virginia School of Law. Mr. Urbanski is the Chairman of the Litigation Section at Woods, Rogers & Hazlegrove, P.L.C., and is a former chair of the Antitrust, Franchising and Trade Regulation section of the Virginia State Bar.

** Principal, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia. B.A., 1990, University of Virginia; J.D., 1993, College of William and Mary, Marshall-Wythe School of Law. Mr. Creekmore practices antitrust, telecommunications, and commercial litigation at Woods, Rogers & Hazlegrove, P.L.C., and is a former chair of the Antitrust, Franchising and Trade Regulation section of the Virginia State Bar.

*** Associate, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia. B.A., 1988, College of William and Mary; J.D., 1994, University of Virginia School of Law. Ms. Moore practices antitrust and commercial litigation at Woods, Rogers & Hazlegrove, P.L.C., and is an Assistant Newsletter Editor for the Antitrust, Franchise and Trade Regulation section of the Virginia State Bar.

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1. 277 F.3d 499 (4th Cir. 2002).

or a rule of reason analysis.² Likewise, in *Titan America, LLC v. Riverton Investment Corp.*,³ the Supreme Court of Virginia dismissed the plaintiff's allegations of tortious interference with existing and potential economic relationships as barred by the *No-err-Pennington* doctrine.⁴ In the context of Internet commerce, however, the United States District Court for the Eastern District of Virginia found the existence of an anticompetitive purpose in *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*.⁵

This article discusses antitrust and trade regulation by the United States Court of Appeals for the Fourth Circuit and federal and state courts of Virginia over the past two years, as well as new legislative developments in these fields.

II. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. *Sherman and Telecommunications Acts: Two Parallel But Independent Actions*

In *Cavalier Telephone, L.L.C. v. Verizon Virginia, Inc.*,⁶ the Fourth Circuit held that the special relationship between the Telecommunications Act of 1996 and the Sherman Act prevents a complainant from using the Sherman Act to enforce the duties imposed by the Telecommunications Act.⁷ The Telecommunications Act requires incumbent telecommunications carriers ("ILECs") to assist competitors in entering the market through interconnection agreements, resale of service, and use of facilities.⁸ Pursuant to the Telecommunications Act, Verizon Virginia and Cavalier Telephone entered into an interconnection agreement that made Verizon's lines and facilities available for use by Cavalier.⁹ After experiencing difficulty implementing the agreement, Cavalier filed a claim against Verizon alleging that Verizon erected obstacles to Cavalier's interconnection by blocking calls,

2. *Id.* See *infra* Part II.E for a full discussion of this case.

3. 264 Va. 292, 569 S.E.2d 57 (2002).

4. *Id.* See *infra* Part IV.A for a full discussion of this case.

5. 213 F. Supp. 2d 612, 627 (E.D. Va. 2001). See *infra* Part III.A.1 for a full discussion of this case.

6. 330 F.3d 176 (4th Cir. 2003).

7. *Id.* at 188.

8. Telecommunications Act of 1996, 47 U.S.C. § 251 (2000); see also *Cavalier Tel.*, 330 F.3d at 179.

9. *Cavalier Tel.*, 330 F.3d at 179.

using overly complex and expensive systems, and delaying competitive entry.¹⁰ Cavalier contended that Verizon created the complications to monopolize the relevant telecommunications market, thereby violating section 2 of the Sherman Act.¹¹

The district court granted Verizon's motion to dismiss, finding the complaint merely asserted violations of Verizon's duties under the Telecommunications Act and did not assert violations of the Sherman Act.¹² On appeal, the Fourth Circuit assessed the scope of both acts and their interrelation, concluding "that the special, indeed idiosyncratic, relationship between the Telecommunications Act and the Sherman Act prevents the Sherman Act from taking on the role of enforcing duties imposed for the first time by the Telecommunications Act."¹³ The Telecommunications Act was intended to preserve the roles of the antitrust laws as they stood at the time of its ratification.¹⁴ Thus, although the Sherman and Telecommunications Acts operate in tandem, they feature distinct, independent schemes to promote the general goal of competition.¹⁵ The Fourth Circuit therefore affirmed the ruling of the district court, concluding that the conduct alleged by Cavalier could not violate the Sherman Act independently of the Telecommunications Act.¹⁶

B. *Sherman Act: Lack of Concerted Action*

The Fourth Circuit held that receiving a gift of land with restrictive covenants did not violate either the Sherman Act or the Virginia Civil Conspiracy Act in *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*¹⁷ A dispute arose after W.R. Grace & Company, owner of vermiculite-laden land in Louisa County, Virginia, and mining company, Virginia Vermiculite, could not agree to terms of sale for the land.¹⁸ After negotiations failed, W.R. Grace donated the land to Historic Green Springs, Inc. ("HGSI"), a non-profit organization dedicated to preserving the Green

10. *Id.* at 180–81.

11. *Id.* at 181.

12. *Id.* at 181–82.

13. *Id.* at 188.

14. *Id.* at 189.

15. *Id.*

16. *Id.* at 190.

17. 307 F.3d 277, 283–84 (4th Cir. 2002).

18. *See id.* at 279–80.

Springs National Historic Landmark District in Louisa County.¹⁹ Restrictive covenants on the land grant prohibited its use for mining or transporting vermiculite.²⁰ Virginia Vermiculite accused HGSI and W.R. Grace of conspiring to restrain the trade of Louisa County mining rights, violating section 1 of the Sherman Act, as well as the Virginia Civil Conspiracy Act.²¹ Reviewing the district court's grant of summary judgment in favor of HGSI *de novo*,²² the Fourth Circuit affirmed the ruling on different grounds.²³

The essence of prohibited conduct under section 1 of the Sherman Act is concerted action.²⁴ To succeed in such a claim, the plaintiff must prove that two or more parties "entered into an *illegal*, conspiratorial agreement."²⁵ The Supreme Court of the United States has defined concerted efforts, in light of the Sherman Act, to be actions which "deprive[] the marketplace of the independent centers of decision making that competition assumes and demands [It] reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. [It involves a] merging of resources."²⁶ In the context of gifts, the giving must be genuine; specifically, the giving of the gift can "in no way reflect[] a merging of the parties' resources, rights, or economic power."²⁷ Parties cannot attempt to disguise the merging of power through gifts.²⁸

In this case, the court found no evidence that the gift offered by W.R. Grace to HGSI was not genuine.²⁹ Additionally, Virginia Vermiculite had no proof that HGSI combined efforts with W.R.

19. *Id.*

20. *Id.* at 280.

21. *Id.*

22. The district court initially dismissed Virginia Vermiculite's section 1 claim against W.R. Grace and all claims against HGSI, but on appeal the Fourth Circuit reversed and remanded. *Id.* On remand, the district court granted summary judgment to HGSI and W.R. Grace on all antitrust claims brought against them except for the conspiracy to monopolize. *Id.* After W.R. Grace settled and removed itself from the action, the district court ruled in favor of HGSI on all claims. *Id.*

23. *Id.* at 279.

24. *Id.* at 280.

25. *Id.*

26. *Id.* at 281 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (Burger, C.J.)) (second and third alterations in original).

27. *Id.* at 282.

28. *Id.*

29. *Id.*

Grace to achieve an outcome otherwise impossible due to the two entities' naturally competing interests.³⁰ Therefore, section 1 of the Sherman Act was not violated.³¹ Because there was no anti-trust violation, Virginia Vermiculite could not recover under the Virginia Civil Conspiracy Act.³²

C. *Foreign Price-Fixing and Its Impact on American Commerce*

Two American companies accused nine Southeast Asian rubber thread manufacturers of price-fixing in *Dee-K Enterprises v. Heveafil Sendirian Berhad*.³³ The plaintiffs claimed that the Asian companies forced them to pay "artificially high and non-competitive prices' for rubber thread," depriving them "of free and open competition in the market[place]."³⁴ A jury found that, although there was evidence of a price-fixing conspiracy, the conspiracy had no "substantial effect" on this country's commerce.³⁵ On appeal, the Fourth Circuit reviewed the use of the substantial effect standard. Plaintiffs asserted that the standard was used inappropriately, arguing that it only applies when dealing with wholly "foreign conduct," and the conspiracy among the nine Asian manufacturers involved elements of both domestic and foreign activity.³⁶ However, the Fourth Circuit found that this case dealt primarily with foreign conduct, because the majority of the conduct alleged in the complaint occurred abroad.³⁷ Hence, the Fourth Circuit held that the district court did not abuse its discretion in applying the substantial effect test.³⁸

D. *Noerr-Pennington Immunity for Lobbying Efforts*

*A Fisherman's Best Inc. v. Recreational Fishing Alliance*³⁹ arose out of a dispute in Charleston, South Carolina, over longline fishing and access to a newly built Maritime Center.⁴⁰ When the

30. *Id.* at 283.

31. *Id.*

32. *Id.* at 284; see also VA.CODE ANN. § 18.2-499 (Repl. Vol. 1996 & Cum. Supp. 2003).

33. 299 F.3d 281, 283 (4th Cir. 2002).

34. *Id.* at 284.

35. *Id.* at 285.

36. *Id.* at 286.

37. *Id.* at 285, 295.

38. *Id.* at 283.

39. 310 F.3d 183 (4th Cir. 2002).

40. *Id.* at 187. Longlining involves the use of a floating main line several miles long,

Charleston Parks and Recreation Commission selected A Fisherman's Best ("AFB") group to operate the new center, public controversy broke out regarding use of the center by longline commercial fishing vessels.⁴¹ The Recreational Fishing Alliance ("RFA"), a non-profit organization dedicated to rebuilding and preserving fisheries in the United States, sent representatives to Charleston to raise public awareness and lead rallies against the selection of AFB.⁴² After the mayor held a meeting with RFA to discuss the controversy, the City of Charleston terminated the selection of AFB and sought a declaratory action for the recently adopted resolution barring service to longline vessels at the Maritime Center.⁴³ AFB filed a complaint alleging conspiracy, restraint of trade, and interference with competition in violation of section 1 of the Sherman Act.⁴⁴

At trial, neither party questioned the existence of antitrust violations; instead, the litigation focused on whether RFA was exempt from antitrust litigation under the *Noerr-Pennington* doctrine.⁴⁵ After examining the various exceptions to the *Noerr-Pennington* exemption, the Fourth Circuit upheld the district court's ruling that RFA was exempt from antitrust litigation.⁴⁶ The court also dismissed the claims of interference with competition and conspiracy because RFA's primary purpose was to exercise its First Amendment rights to petition against longliners, and no other evidence indicated improper purpose.⁴⁷

with short lines and baited hooks attached at intervals. It is a highly regulated form of commercial fishing used to harvest migratory species such as swordfish and sharks. *Id.* at 187 n.1.

41. *Id.* at 187. AFB proposed serving longline fishing vessels in addition to other commercial fishing vessels. *Id.*

42. *Id.*

43. *Id.*; see *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155 (4th Cir. 2002).

44. *A Fisherman's Best*, 310 F.3d at 188.

45. *Id.* at 189. The *Noerr-Pennington* "doctrine states that horizontal competitors may join together to lobby [the] government because antitrust violations cannot be predicated on attempts to influence the passage or enforcement of laws." *Id.* The First Amendment shields lobbyists from antitrust liability, even if a successful lobby might eliminate or exclude competitors. *Id.* See generally *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

46. See *A Fisherman's Best*, 310 F.3d at 196.

47. See *id.*

E. *Sherman Act: Carry-On Baggage Templates Not Necessarily Antitrust Violation*

In *Continental Airlines, Inc. v. United Airlines, Inc.*,⁴⁸ the Fourth Circuit vacated and remanded a district court finding that baggage template programs at Washington Dulles International Airport restrained output in violation of section 1 of the Sherman Act.⁴⁹ The Fourth Circuit challenged the district court's use of a "quick-look analysis" in determining whether the Sherman Act had been violated.⁵⁰ The court held that a more exhaustive examination of the factual record is necessary when dealing with the unique architecture of Dulles Airport and the competitive effects of baggage templates.⁵¹

Many airlines, like United, have adopted baggage templates⁵² to limit problems associated with carry-on luggage.⁵³ After experimenting with templates, Continental decided to take the opposite route and expand airplane overhead bins to make room for the increased demand to carry on luggage.⁵⁴ The airline's liberal carry-on policy was a great success.⁵⁵

This suit arose after the Dulles Airport Management Council Association voted to allow United, Dulles's primary air carrier, to install baggage templates at the east security checkpoint.⁵⁶ Dulles's landscape is unique; instead of having a security checkpoint for one or two common airlines, like most major airports in the country, Dulles has only two security checkpoints for use by pas-

48. 277 F.3d 499 (4th Cir. 2002).

49. *See id.* at 503.

50. *See id.* at 508–09, 511. In determining violations of the Sherman Act "[s]ection 1, the Supreme Court [of the United States] has authorized three methods of analysis: (1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those with some procompetitive justification, and (3) the full 'rule of reason' [analysis] for restraints whose net impact on competition is particularly difficult to determine." *Id.* at 508–09.

51. *See id.* at 513.

52. "Baggage templates are pieces of plastic or stainless steel, mounted on hinges, that cover the mouths of x-ray baggage screening machines" at security checkpoints and limit the size of luggage that can be carried on to airplanes. *Id.* at 504.

53. *Id.* at 504–05. Problems include delays, inconvenience to late-boarding passengers from full overhead bins, conflicts between the airline staff and passengers, and reduced safety if carry-on baggage cannot be properly stored. *See id.*

54. *Id.* at 505.

55. *Id.*

56. *Id.* at 515.

sengers of its twenty-nine commercial airlines.⁵⁷ Continental claimed the installation of baggage templates unreasonably restrained trade in violation of section 1 of the Sherman Act.⁵⁸

The Fourth Circuit held that the district court fundamentally erred in failing to recognize that the parties genuinely disputed whether a restraint on trade even existed.⁵⁹ Hence, it vacated the district court holding and remanded the case with instructions to consider the alleged restraint using a modified quick-look analysis or a rule of reason analysis.⁶⁰

F. *Sherman Act: Conspiracy Theory Rejected by Failure to Show Market Power*

In *Dickson v. Microsoft Corp.*,⁶¹ the plaintiffs appealed a federal district court decision dismissing claims against Microsoft and three original equipment manufacturers ("OEMs").⁶² The plaintiffs claimed that Microsoft and the OEMs maintained a "hub-and-spoke conspiracy" that restrained trade and violated sections 1 and 2 of the Sherman Act.⁶³ The Fourth Circuit rejected the hub-and-spoke conspiracy theory, and instead found the existence of multiple vertical conspiracies.⁶⁴ Applying the "full" rule of reason analysis" to the alleged vertical restraints, the court found that there was no proof of an unreasonable restraint on trade.⁶⁵ The plaintiffs failed to show the extent to which Compaq and Dell held market power, making it impossible to prove that they had influenced the relevant software markets in an anticompetitive way through licensing agreements with Microsoft.⁶⁶ The plaintiffs also failed to show that the licensing agreement between Microsoft and each OEM was the material cause of the alleged anticompetitive effects in violation of section 1 of the Sherman Act.⁶⁷ Similarly, without allegations regarding Dell or Compaq's market

57. *Id.* at 505.

58. *Id.* at 507.

59. *Id.* at 515.

60. *Id.* at 517.

61. 309 F.3d 193 (4th Cir. 2002).

62. *Id.* at 198.

63. *Id.* at 198-99.

64. *Id.* at 205.

65. *Id.* at 205-12.

66. *Id.* at 210.

67. *Id.* at 210-11.

power, the plaintiffs were unable to prove a conspiracy to monopolize under section 2 of the Sherman Act.⁶⁸

III. FEDERAL DISTRICT COURTS IN THE COMMONWEALTH OF VIRGINIA

A. *United States District Court for the Eastern District of Virginia*

1. Lanham Act and Anticybersquatting Consumer Protection Act

In *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*,⁶⁹ the United States District Court for the Eastern District of Virginia granted summary judgment awarding an Internet domain name to the defendant, Cosmos European Travels Aktiengesellschaft (“Cosmos”).⁷⁰ Plaintiff Eurotech had sought declaratory relief with respect to the domain name *cosmos.com*.⁷¹ Defendant Cosmos asserted counterclaims of trademark infringement and unfair competition in violation of the Lanham Act, common law unfair competition, and cybersquatting in violation of the Anticybersquatting Consumer Protection Act (“ACPA”).⁷²

Cosmos was a Lichtenstein corporation that had long used and promoted the trademarks “Cosmos” and “Cosmos Tourama,”⁷³ and had registered each in the United States, United Kingdom, Canada, and Australia for the business of selling and “conducting travel tours.”⁷⁴ Eurotech purchased the domain name *cosmos.com* in 1998, but failed to perform a trademark search to determine whether the “Cosmos” mark was used in connection with another trademark or trade name.⁷⁵ Eurotech and its affiliate and co-plaintiff Eurotech Data Systems Hellas, Ltd. (“Hellas”) “provide[d] consumer and business exchange information and tech-

68. *Id.* at 211.

69. 213 F. Supp. 2d 612 (E.D. Va. 2002).

70. *Id.* at 626–27.

71. *Id.* at 618.

72. *Id.*

73. *Id.* at 615.

74. *Id.* at 615 n.3.

75. *Id.* at 614–15.

nology services via the Internet to various businesses.”⁷⁶ In March 2003, Eurotech changed its name to “CosmoTravels.com, Inc.”⁷⁷

Subsequently, Cosmos filed a complaint with the World Intellectual Property Organization (“WIPO”) on July 20, 2001, under the Uniform Domain Name Dispute Resolution Policy, asserting a claim of trademark infringement and seeking an order transferring ownership of *cosmos.com* to it.⁷⁸ The WIPO arbitrator ordered the transfer of the *cosmos.com* domain name to Cosmos, finding that *cosmos.com* was “identical or confusingly similar” to Cosmos’s long-standing registered trademarks “Cosmos” and “Cosmos Tourama”; the evidence suggested that Hellas was commonly known as *cosmos.com*; and the “use of the *cosmos.com* domain name was not legitimate or fair.”⁷⁹ To avoid the transfer, Eurotech and Hellas filed suit against Cosmos.⁸⁰ The issues before the district court for summary judgment arose from this prior litigation.

The court upheld Cosmos’s claim that Eurotech’s use of the term “Cosmos” in connection with the *cosmos.com* domain name was an infringement of Cosmos’s trademarks in violation of the Lanham Act.⁸¹ In short, the court found that Cosmos possessed a protectible trademark; Eurotech used the trademark; Eurotech used the trademark “in ‘commerce’”; Eurotech used the trademark “in connection with the sale, offering for sale, distribution, or advertising’ of goods or services”; and Eurotech “used the mark in a manner likely to confuse consumers.”⁸² The court likewise found that Eurotech’s unauthorized use of the terms “Cosmos” and “Cosmos Tourama” created a likelihood of confusion to consumers and held that Cosmos had established all the elements necessary for a valid unfair competition and trademark infringement claim under 15 U.S.C. §§ 1114 and 1125(a).⁸³ The court

76. *Id.* at 614.

77. *Id.* at 615.

78. *Id.* at 617.

79. *Id.* at 617–18. For the district court’s opinion on this case, see *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385 (E.D. Va. 2002).

80. *Eurotech*, 213 F. Supp. 2d at 618.

81. *Id.* at 626–27.

82. *Id.* at 619–23 (citations omitted). These factors are set forth in 15 U.S.C. §§ 1114, 1125(a) (2000) and *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 364 (4th Cir. 2001).

83. *Eurotech*, 213 F. Supp. 2d at 623.

lastly agreed that Cosmos had shown that Eurotech's use of *cosmos.com* and other related domain names constituted either trademark infringement or trademark dilution and that Eurotech acted in bad faith by intending to profit from use of the "Cosmos" or "Cosmos Tourama" trademarks in violation of the in personam provisions of the ACPA.⁸⁴ Upon these findings, the court ordered the transfer of the *cosmos.com* domain name to Cosmos and the issuance of an injunction against Eurotech's use of the domain name *cosmos.com* and other related domain names in United States commerce.⁸⁵

2. Trade Secrets and Noncompete Agreements

In *MicroStrategy, Inc. v. Business Objects, S.A.*,⁸⁶ the United States District Court for the Eastern District of Virginia granted the defendants' motion for partial summary judgment on a tortious interference claim.⁸⁷ The court held that the non-solicitation clause of MicroStrategy's employment agreement was invalid under Virginia law but that the remainder of the agreement could be enforced.⁸⁸

MicroStrategy alleged that the defendants interfered with its employment agreement and recruited its employees ("Business Objects Recruits") in order to gain access to confidential corporate information.⁸⁹ MicroStrategy further alleged that the Business Objects Recruits violated a section of their employment agreements which stated: "I agree that, for the period of one (1) year after termination of my employment with MicroStrategy for any reason, I will not, directly or indirectly, seek to influence any em-

84. *Id.* at 626. The ACPA imposes civil liability on a person if he or she exhibits a bad faith intent to profit from the use of a registered trademark and registers, traffics in, or uses a domain name that:

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36.

15 U.S.C. § 1125(d)(1)(A)(ii) (2000).

85. *Eurotech*, 213 F. Supp. 2d at 627.

86. 233 F. Supp. 2d 789 (E.D. Va. 2002).

87. *Id.* at 796.

88. *Id.* at 795-96.

89. *Id.* at 791.

ployees, agents, contractors or customers of MicroStrategy to terminate or modify their relationship with MicroStrategy.”⁹⁰ Business Objects argued that the clause was unenforceable because it was ambiguous and overbroad.⁹¹ While the court agreed with the plaintiff that the clause was not unduly restrictive regarding duration, it nevertheless found the non-solicitation clause invalid because it could restrict a former employee from obtaining any type of job in the industry due to fear that it might change that employer’s relationship with MicroStrategy.⁹² Acknowledging the importance of protecting MicroStrategy’s confidential information, however, the court found that the remainder of the employment agreement was enforceable under the agreement’s savings clause.⁹³

In *Mona Electric Group, Inc. v. Truland Service Corp.*,⁹⁴ a former employee of Mona Electric Group (“Mona”) was hired by Truland Service Corporation (“Truland”), a competing electrical service contracting business.⁹⁵ Mona brought suit against Truland alleging breach of a non-compete agreement, tortious interference of contract, and misappropriation of trade secrets.⁹⁶ The district court, predicting that the Supreme Court of Virginia would hold the same way,⁹⁷ held “that the mere continuation of employment does not furnish consideration for a non-competition agreement.”⁹⁸ Further, the court held that sheer speculation that the former employee had utilized Mona’s trade secrets in making new bids was insufficient to survive Truland’s motion for summary judgment.⁹⁹

Under Virginia law, a claim for tortious interference of contract must satisfy four elements: (1) a valid contract must exist; (2) the

90. *Id.* at 794.

91. *Id.*

92. *Id.* at 796.

93. *Id.*

94. 193 F. Supp. 2d 874 (E.D. Va. 2002).

95. *Id.* at 874–75.

96. *Id.* at 875.

97. Despite this prediction, *Mona Electric Group* stands in stark contrast to the Supreme Court of Virginia’s opinion in *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989), where the court held that continued employment for at-will employees constituted sufficient consideration for a noncompete agreement. *Id.* at 176, 380 S.E.2d at 926. The *Mona Electric Group* opinion does not cite *Paramount Termite*.

98. *Mona Electric*, 193 F. Supp. 2d at 876.

99. *Id.* at 877.

interferer must have knowledge of the contract; (3) the interference inducing the breach of contract must be intentional; and (4) the breach must have damaged the disrupted party.¹⁰⁰ To satisfy the first element, existence of a valid contract, the court had to decide if the contract was supported by adequate consideration.¹⁰¹ In this case, the only consideration put forth by the former employee was his continued employment, which the court found to be insufficient, thus making the agreement void.¹⁰² In reaching this decision, the court found it significant that the former employee had not been informed of any consequences that would result if he failed to sign the non-solicitation agreement.¹⁰³ The court qualified its holding by stating that “under the facts of this case” the former employee’s continued employment was inadequate consideration.¹⁰⁴ It remains to be seen whether this holding will survive beyond these facts, particularly given the holding in *Paramount Termite*.¹⁰⁵

The court went on to find that even if the agreement had been valid, the former employee did not violate it.¹⁰⁶ In his position at Truland, the former employee was responsible, in part, for preparing estimates and handling customer solicitation calls.¹⁰⁷ However, rather than the former employee seeking out customers to solicit, he was instead responding to calls that came to Truland for bids.¹⁰⁸ As such, this action was not in violation of the non-solicitation agreement, which would only have been violated had the former employee actively sought out Mona’s customers.¹⁰⁹

Lastly, the court addressed Mona’s claim that Truland misappropriated trade secrets.¹¹⁰ Mona’s only support for this claim was

100. *Id.* at 875.

101. *Id.*

102. *Id.* at 876. In reaching this decision, the court examined a case decided by the Supreme Court of West Virginia where that court applied Virginia law to a contract case. *Id.* (citing *Pemco Corp. v. Rose*, 257 S.E.2d 885, 889 (1979)).

103. *Id.*

104. *Id.*; see also Thomas M. Winn, III, *Annual Survey of Virginia Law: Labor and Employment Law*, 37 U. RICH. L. REV. 241, 258 (2002) (citing the *Mona Electric Group* decision as “[p]erhaps the most controversial decision of the past year in [the] area of [labor and employment law]”).

105. See *supra* note 97.

106. *Mona Electric Group*, 193 F. Supp. 2d at 876.

107. *Id.* at 877.

108. *Id.*

109. *Id.*

110. *Id.*

that the former employee knew Mona's data prior to accepting the position at Truland, and therefore, must have used that information in making and securing new bids at Truland.¹¹¹ The court found this "mere speculation" insufficient to survive Truland's motion for summary judgment.¹¹²

B. *United States District Court for the Western District of Virginia*

1. The Western District Considers Two Cases Involving the Virginia Consumer Protection Act

In *McCaulley v. Purdue Pharma*,¹¹³ plaintiffs attempted to add a new defendant, Physician Access, Inc. ("PAI"), to their case, alleging violations of the Virginia Consumer Protection Act ("VCPA"), products liability for failure to warn, products liability for manufacturing defect, breach of warranty, false advertising, and six other claims related to the promotion and marketing of OxyContin.¹¹⁴ This addition, if allowed, would have destroyed diversity.¹¹⁵ The clerk of court declined to file the amended complaint without an order of the court.¹¹⁶

The court found that the timing of the amendment, as it occurred before any discovery was taken, raised a red flag that the plaintiffs may have been forum shopping.¹¹⁷ In determining whether to allow the amendment, the court noted that the plaintiffs' claims against the new defendant likely were pointless.¹¹⁸ The plaintiffs easily could have learned of PAI's existence earlier if they had simply reviewed McCaulley's medical records,¹¹⁹ and the plaintiffs would not suffer injury if the amendment was denied

111. *Id.*

112. *Id.*

113. 172 F. Supp. 2d 803 (W.D. Va. 2001).

114. *Id.* at 805.

115. *Id.* at 806.

116. *Id.*

117. *Id.*

118. *Id.* at 807-08; see also VA. CODE ANN. § 59.1-198 (Repl. Vol. 2001 & Cum. Supp. 2003) (defining a "supplier" as "a seller, lessor or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor who advertises and sells, leases or licenses goods or services to be resold, leased or sublicensed by other persons in consumer transactions").

119. *McCaulley*, 172 F. Supp. 2d at 809.

because the defendant was insolvent.¹²⁰ The court thus denied plaintiffs' motion to amend.¹²¹

The United States District Court for the Western District of Virginia addressed the VCPA again in *Pitchford v. Oakwood Mobile Homes*,¹²² and denied the plaintiff's motion for an award of attorneys' fees and expenses.¹²³ In that case, Kimberly R. Pitchford contracted to purchase a mobile home, but following its receipt, alleged that it had major defects and structural problems.¹²⁴ In an effort to cancel the purchase contract and recover monetary damages, Pitchford initiated an action to recover for alleged breaches of warranties, violations of the VCPA, violations of the Magnuson-Moss Act, and fraud.¹²⁵

The parties later reached a settlement, but failed to resolve the issues of expenses and attorneys' fees.¹²⁶ They agreed to a settlement conference before a magistrate judge who recommended that Pitchford be awarded attorneys' fees and costs in excess of \$50,000.¹²⁷ The defendants objected.¹²⁸

The district court first ruled that Pitchford was not a prevailing party and therefore was not entitled to attorneys' fees under the Magnuson-Moss Act.¹²⁹ Citing *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*,¹³⁰ the court found that Pitchford was not a prevailing party because the case was settled and dismissed without a final judgment on the merits.¹³¹ Further, Pitchford did not obtain pre-

120. *Id.*

121. *Id.* at 810.

122. 212 F. Supp. 2d 613 (W.D. Va. 2002).

123. *Id.* at 621.

124. *Id.* at 614–15.

125. *Id.* at 615. Parties are usually responsible for their own litigation expenses. However, there are exceptions under which Congress has awarded attorneys' fees to the prevailing party. One such exception applies to a consumer who "finally prevails" under the Magnuson-Moss Act. 15 U.S.C. § 2310(d)(2) (2000). The Act provides for payment of costs and expenses, including attorneys' fees that the court determines "to have been reasonably incurred by the plaintiff for or in connection with commencement and prosecution of" the case. *Id.*

126. *Pitchford*, 212 F. Supp. 2d at 615.

127. *Id.*

128. *Id.*

129. *See id.* at 616–18.

130. 532 U.S. 598 (2001).

131. *Pitchford*, 212 F. Supp. 2d at 615–19.

vailing party status through reaching a private settlement with Oakwood, because “[a] party may not prevail for purposes of a fee shifting provision by virtue of a private settlement agreement alone.”¹³² The court noted that Pitchford may have been successful if terms of the settlement agreement had been made part of an enforceable court order.¹³³

The court also found that Pitchford was not entitled to attorneys’ fees under the VCPA.¹³⁴ Using an analysis similar to the analysis in *Buckhannon*, the court ruled that the VCPA allows for recovery of attorneys’ fees only by a plaintiff who has finally prevailed on the merits of a VCPA claim and has been “awarded” damages.¹³⁵ The district court found that the use of the term “award” should be interpreted so that a judgment on the merits must be determined before attorneys’ fees can be awarded.¹³⁶

2. Conspiracy Against Chiropractors Rejected Again

The largest managed healthcare company in Virginia successfully defended itself against claims of anticompetitive activity in *American Chiropractic Ass’n v. Trigon Healthcare, Inc.*¹³⁷ The district court granted summary judgment for Trigon, finding that no issues of material fact existed as to claims that the healthcare company conspired to restrict their insureds’ access to chiropractors.¹³⁸ After naming medical doctors on Trigon’s Managed Care Advisory Panel as primary co-conspirators, the plaintiffs failed to show proof of a concerted action as required for a claim under section 1 of the Sherman Act.¹³⁹ The intracorporate immunity doctrine bars claims of conspiracy between a corporation and its employees or agents, absent any independent personal stake in achieving the corporation’s illegal objective.¹⁴⁰ In this case, Trigon

132. *Id.* at 618; see also *Buckhannon*, 532 U.S. at 605 (“A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the charge.”).

133. *Pitchford*, 212 F. Supp. 2d at 619–20.

134. *Id.* at 621.

135. *Id.*; see also VA. CODE ANN. § 59.1-204(B) (Repl. Vol. 2001 & Cum. Supp. 2003).

136. *Pitchford*, 212 F. Supp. 2d at 621.

137. 258 F. Supp. 2d 461 (W.D. Va. 2003).

138. *Id.* at 463.

139. *Id.* at 464, 465.

140. The doctrine of intracorporate immunity holds that “a corporation cannot conspire with itself.” *Id.* at 464 (quoting *Am. Chiropractic Ass’n Inc. v. Trigon Healthcare, Inc.*, 151

board members and employees were not engaged in the private practice of medicine, always acted in the company's best interest, and obtained no personal benefit from Trigon's decisions regarding chiropractors.¹⁴¹ Furthermore, there was no evidence to show that panel members competed with chiropractors and thus would gain any economic benefit from anticompetitive activity.¹⁴² Nor was there any evidence that any of the defendants fell within the independent personal stake exception.¹⁴³ The Managed Care Advisory Panel has no decision-making authority, but merely acts as an advisory board to Trigon.¹⁴⁴ Thus, the Sherman Act section 1 claim of conspiracy between Trigon and its panel was barred by the intracorporate immunity doctrine.¹⁴⁵

All other claims of conspiracy failed due to lack of evidence.¹⁴⁶ The court reasoned that any restraint on utilization of chiropractors by subscribers would not make economic sense.¹⁴⁷ Plaintiffs asserted that chiropractors provide cheaper and more effective remedies to neuromuscular disorders.¹⁴⁸ As a profit-seeking entity, it would be economically advantageous for Trigon to encourage use of chiropractors.¹⁴⁹ Furthermore, statistics indicate an increased use of chiropractic by Trigon subscribers, such that from 1996 to 2001 the number of chiropractors in Trigon's provider networks doubled, the number of insureds receiving chiropractic manipulations nearly tripled, and chiropractors' share of Trigon's total payments to health care providers increased by fourteen percent.¹⁵⁰

F. Supp. 2d 723, 731 (W.D. Va. 2001)). "A corporation cannot conspire with its employees or agents because 'the officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.'" *Id.* at 464-65 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

141. *Id.* at 465.

142. *Id.*

143. *Id.* See *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 705 (4th Cir. 1991) and *Greenville Publ'g Co. v. The Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974) for an explanation of the independent state exception.

144. *Am. Chiropractic Ass'n*, 258 F. Supp. 2d at 465.

145. *See id.* at 464.

146. *Id.* at 466 n.8.

147. *Id.* at 466.

148. *Id.* at 466-67.

149. *Id.* at 466.

150. *Id.* at 468.

Similarly, a lack of evidence of concerted action prevented a conspiracy to monopolize claim against Trigon under section 2 of the Sherman Act.¹⁵¹ As regards attempted monopolization, plaintiffs must prove specific intent to monopolize a relevant market through predatory or anticompetitive acts, with a dangerous probability of success in achieving monopolization.¹⁵² Following *White v. Rockingham Radiologists, Ltd.*,¹⁵³ the court likewise rejected the attempted monopolization claim, finding that "Trigon and chiropractors do not compete in the same market."¹⁵⁴

IV. COURTS OF THE COMMONWEALTH OF VIRGINIA

A. *Supreme Court of Virginia: Liberal Protection Afforded Under the Noerr-Pennington Doctrine*

The Supreme Court of Virginia more clearly articulated the parameters of the *Noerr-Pennington* doctrine in *Titan America, L.L.C. v. Riverton Investment Corp.*¹⁵⁵ Titan initiated a lawsuit against Riverton alleging tortious interference with existing and potential economic relationships.¹⁵⁶ Titan, a cement company, sought to secure land in Warren County, Virginia, for use as a warehousing and distributing center.¹⁵⁷ Riverton, which also produces cement, placed various roadblocks in Titan's path in an attempt to thwart Titan's acquisition of the property: Riverton appeared before the local board of zoning appeals and the planning commission, brought suit in circuit court, and funded litigation efforts against Titan brought by residents of Warren County.¹⁵⁸ Nevertheless, Titan eventually succeeded in purchasing the controversial property.¹⁵⁹

Riverton asserted that Titan's claims were barred by the *Noerr-Pennington* doctrine.¹⁶⁰ The trial court concurred, holding that, al-

151. *Id.*

152. *Id.*

153. 820 F.2d 98 (4th Cir. 1987).

154. *Am. Chiropractic Ass'n*, 258 F. Supp. 2d at 468.

155. 264 Va. 292, 569 S.E.2d 57 (2002).

156. *Id.* at 296, 569 S.E.2d at 59.

157. *Id.* at 296, 569 S.E.2d at 58.

158. *Id.* at 296, 569 S.E.2d at 59.

159. *Id.*

160. *Id.* at 300, 569 S.E.2d at 61.

though Riverton employed the use of straw persons, such usage did not amount to sham litigation; thus, Riverton's actions did not fall within the doctrine's exception.¹⁶¹ The trial court dismissed Titan's claims against Riverton.¹⁶²

On appeal, the Supreme Court of Virginia rejected Titan's contention that the *Noerr-Pennington* doctrine did not apply to its claims, holding that causes of action for tortious interference with business expectancy and conspiracy "fall[] squarely within the constitutional protections recognized by the *Noerr-Pennington* doctrine."¹⁶³ Moreover, the supreme court held that the trial court applied the proper test, as announced in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,¹⁶⁴ in determining whether Riverton's litigation was a mere sham.¹⁶⁵ *Professional Real Estate Investors* necessitates a two-part inquiry.¹⁶⁶ First, the reviewing court must ascertain whether the litigation is objectively baseless.¹⁶⁷ If so, the court then makes a subjective inquiry to determine whether there exists an anticompetitive purpose behind the lawsuit.¹⁶⁸ As the trial court concluded that the claims were not objectively baseless, it did not conduct the second inquiry.¹⁶⁹ The supreme court affirmed the trial court's application of the two-prong test set forth in *Professional Real Estate Investors*.¹⁷⁰

The supreme court also rejected Titan's argument that Riverton did not have standing to invoke the doctrine's protection because only those who are parties to the underlying litigation are entitled to its protection.¹⁷¹ Citing the United States Court of Appeals for the Fourth Circuit's decision in *Baltimore Scrap Corp. v.*

161. *Id.*

162. *Id.* at 296, 569 S.E.2d at 59.

163. *Id.* at 302, 569 S.E.2d at 62.

164. 508 U.S. 49, 60-61 (1993).

165. *Titan America, L.L.C.*, 264 Va. at 302-03, 569 S.E.2d at 62-63.

166. *Professional Real Estate Investors*, 508 U.S. at 60-61.

167. *Id.* Under this inquiry, a claim is objectively baseless if he who asserted the claim did not have probable cause to initiate an unsuccessful suit, probable cause being "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Id.* at 62-63 (quoting *Hubbard v. Beatty & Hyde, Inc.*, 178 N.E.2d 485, 488 (1961)) (alterations in original).

168. *Id.*

169. *Titan America L.L.C.*, 264 Va. at 302, 569 S.E.2d at 62.

170. *Id.* at 303, 569 S.E.2d at 63.

171. *Id.* at 303-05, 569 S.E.2d at 63-64.

David J. Joseph Co.,¹⁷² which held that the doctrine's protection will be afforded to a non-party who funded litigation,¹⁷³ the supreme court concluded that Riverton's financing of litigation did not serve as a bar to the doctrine's application.¹⁷⁴

B. *Franchising: A Hotbed of Legal Activity*

In *Yamaha Motor Corp., U.S.A. v. Quillian*,¹⁷⁵ the Supreme Court of Virginia accepted the certification of questions of law from the United States District Court for the Eastern District of Virginia.¹⁷⁶ The district court sought the supreme court's interpretation of a portion of the Motor Vehicle Code, Virginia Code section 46.2-1993.67(5), in order to adjudicate Yamaha's claim that the Commissioner of the Department of Motor Vehicle's interpretation and enforcement of the section violated the Dormant Commerce Clause of the United States Constitution.¹⁷⁷

Yamaha sought to establish a new franchise with a dealer in Rosedale, Virginia, who also sold Suzuki-brand motorcycles.¹⁷⁸ Pursuant to the Motor Vehicle Code, Yamaha notified all of the existing Yamaha dealers in the Commonwealth, including Atlas, another motorcycle dealer, of its proposed new dealership.¹⁷⁹ Atlas protested the establishment to the Commissioner.¹⁸⁰ Yamaha claimed that Atlas lacked standing to protest because it was located outside of the "market area" referred to in the code provision.¹⁸¹

172. 237 F.3d 394 (4th Cir. 2001).

173. *Id.* at 401.

174. *Titan America, L.L.C.*, 264 Va. at 304–05, 569 S.E.2d at 64.

175. 264 Va. 656, 571 S.E.2d 122 (2002). For additional discussion of *Yamaha Motor Corp., U.S.A.*, see James R. Kibler, Jr., *Annual Survey of Virginia Law: Administrative Law*, 38 U. RICH. L. REV. 39, 53 (2003).

176. *Yamaha Motor Corp., U.S.A.*, 264 Va. at 659–60, 571 S.E.2d at 123–24.

177. *Id.* Yamaha contended that the Commissioner's actions "unduly interfere[] with [its] rights to engage in interstate commerce, restrain[] the establishment of new businesses and employment opportunities in Virginia, and deprive[] Virginia consumers of the benefits of lawful intrabrand competition." *Id.* at 659, 571 S.E.2d at 123 (second alteration in original).

178. *Id.* at 661, 571 S.E.2d at 124.

179. *Id.* at 661–62, 571 S.E.2d at 125.

180. *Id.* at 662, 571 S.E.2d at 125.

181. *Id.*

The supreme court inquired as to the General Assembly's intent in promulgating the specific provision.¹⁸² The statute was found not to be sufficiently explicit as to whether any existing dealer of motorcycles within the Commonwealth may protest the establishment of another dealership.¹⁸³ The court found that the purpose of the provision was to provide additional protection to motorcycle dealers located anywhere within the Commonwealth.¹⁸⁴ Thus, Atlas had standing to protest Yamaha's establishment of a new dealership.¹⁸⁵

Moreover, the court held that the Commissioner accurately interpreted the provision to afford evidentiary hearings only to those existing dealers who show they are representing the same brand of motorcycles in the county, city, or town of the proposed new dealership.¹⁸⁶ Finally, the court determined that, under the provision, the manufacturer need not prove inadequate representation throughout Virginia, and that proof should not be limited to the county, city, or town in which the proposed dealership would be located.¹⁸⁷

The Fairfax County Circuit Court addressed franchising issues in *Kirin Brewery of America, L.L.C. v. Virginia Imports, Ltd.*¹⁸⁸ The Virginia Beer Franchising Act¹⁸⁹ ("Act") governed a distributorship agreement between Kirin and Virginia Imports.¹⁹⁰

On August 3, 1999, Kirin notified Virginia Imports of its intent to terminate the franchise under the terms of the Act.¹⁹¹ Virginia Imports responded to Kirin's notification with a letter stating its intent to cure the deficiencies of which Kirin complained.¹⁹² However, Virginia Imports did not forward the letter to the Virginia Alcoholic Beverage Control Board, as required by section 4.1-506 of the Act, nor did they request a hearing before the Board on

182. *Id.* at 665, 571 S.E.2d at 127.

183. *See id.* at 665-66, 571 S.E.2d at 127.

184. *Id.*

185. *See id.* at 667, 571 S.E. 2d at 127.

186. *See id.* at 666, 571 S.E. 2d at 127.

187. *Id.*

188. 60 Va. Cir. 151 (Cir. Ct. 2002) (Fairfax County). For additional discussion of *Kirin*, see Kibler, *supra* note 175, at 55.

189. VA. CODE ANN. §§ 4.1-500 to -517 (Repl. Vol. 1999 & Cum. Supp. 2003).

190. *Kirin Brewery*, 60 Va. Cir. at 152.

191. *Id.*

192. *Id.*

Kirin's reasonable cause to terminate the agreement.¹⁹³ Consequently, on February 9, 2000, the Secretary of the Board informed Kirin that the agreement had terminated under the terms of the Act, due to Virginia Imports' inaction.¹⁹⁴ Kirin then designated a new Virginia distributor, Anheuser-Busch, Inc.¹⁹⁵

Upon Virginia Imports' protest, the Secretary ordered a hearing on the matter.¹⁹⁶ The hearing panel concluded that Kirin had acted in bad faith and that, as a result, there could not be good cause to terminate the distributorship agreement.¹⁹⁷ In its Final Order, the Board held that Kirin lacked the good cause necessary to terminate the agreement and, therefore, the agreement remained viable.¹⁹⁸

Kirin appealed the Board's order,¹⁹⁹ and the circuit court set out to determine whether the Board possessed the authority to render that decision, as Virginia Imports neglected both to notify the Board of its intent to rectify its defective performance and to request a hearing as to the legitimacy of Kirin's good cause.²⁰⁰ The circuit court held that Kirin's reliance on the Secretary's letter was reasonable and did not constitute bad faith, that the Board did not have the authority to review the matter, that the distributorship agreement did terminate by the terms of the Act, and, finally, that Kirin would have had good cause to terminate the agreement, if necessary.²⁰¹

C. *Fiduciary Duty and Non-Competition Issues in Virginia*

In *Williams v. Dominion Technology Partners, L.L.C.*,²⁰² the Supreme Court of Virginia considered whether the trial court erred in entering judgment on the verdict in favor of an employer against a former at-will employee for an alleged breach of fiduci-

193. *Id.* at 152-53.

194. *Id.* at 153.

195. *Id.*

196. *Id.*

197. *See id.*

198. *Id.* at 154.

199. *See id.* at 157.

200. *Id.*

201. *Id.* at 157-58.

202. 265 Va. 280, 576 S.E.2d 752 (2003).

ary duty, tortious interference with a business relationship, and business conspiracy.²⁰³

Dominion recruited Williams as an at-will employee to fill a computer consultant position at Stihl, Inc., a power tool manufacturing company.²⁰⁴ ACSYS Information Technology, Inc. ("ACSYS") entered into an agreement with Stihl to employ Williams, and subsequently entered into another contract with Dominion for Williams's services.²⁰⁵ The latter contract did not prohibit ACSYS from recruiting or directly employing Dominion's employees.²⁰⁶ Per the two contracts, ACSYS received \$165 for each hour Williams worked, and Dominion charged ACSYS \$115 an hour. Williams then received eighty dollars an hour from Dominion.²⁰⁷ Upon learning of this payment system, Williams opted to terminate his at-will employment with Dominion in favor of working for Stihl directly through ACSYS.²⁰⁸ He eventually contracted with ACSYS to receive \$115 per hour.²⁰⁹

The court noted that the common law imposes a fiduciary duty of loyalty on behalf of employees, including employees-at-will, towards their employers.²¹⁰ This duty also forbids employees from competing with their employers during the course of employment.²¹¹ However, an employee may arrange to compete with his employer after resigning, barring any contractual restrictions relating to the duty of loyalty.²¹² The court advised that "the law will not provide relief to every 'disgruntled player in the rough-and-tumble world comprising the competitive marketplace,' especially where, through more prudent business practices, the harm complained of could easily have been avoided."²¹³

The court determined that Williams's effort to safeguard his own interests did not amount to disloyalty or unfairness so far as

203. *Id.* at 283, 576 S.E.2d at 753.

204. *Id.* at 283-84, 576 S.E.2d at 753.

205. *Id.* at 284, 576 S.E.2d at 754.

206. *Id.*

207. *Id.* at 285, 576 S.E.2d at 754.

208. *Id.* at 285-87, 576 S.E.2d at 754-55.

209. *Id.* at 287, 576 S.E.2d at 756.

210. *Id.* at 289, 576 S.E.2d at 757.

211. *Id.*

212. *Id.*

213. *Id.* at 290-91, 576 S.E.2d at 758 (quoting *ITT Hartford Group, Inc. v. Va. Fin. Assocs., Inc.*, 258 Va. 193, 204, 520 S.E.2d 355, 361 (1999)).

Dominion was concerned.²¹⁴ Likewise, Williams's conduct did not rob Dominion of business opportunity or expectancy.²¹⁵ Thus, the court held that Williams's conduct did not constitute a breach of fiduciary duty.²¹⁶ As the other allegations were predicated upon this determination, the court reversed the trial court's judgment for Dominion and entered final judgment in favor of Williams.²¹⁷

In *Modern Environments, Inc. v. Stinnett*,²¹⁸ the Supreme Court of Virginia continued its recent trend of refusing to enforce restrictive covenants within employment agreements.²¹⁹ Stinnett worked for Modern Environments for five years and then signed an employment agreement that contained a one-year non-competition clause.²²⁰ Within one year of her departure from the company, she accepted employment with a competitor.²²¹ Modern Environments threatened legal action against Stinnett, who, in turn, sought declaratory judgment that the noncompete provisions were unenforceable on the grounds that they were overbroad and contrary to public policy.²²²

The court noted that the noncompete clause at issue did not allow the former employee to "directly or indirectly, own, manage, operate, control, be employed by, participate in or be associated in any manner" with a competing business.²²³ This language prevented the employee from working in any capacity for a competitor. The court found this language to be overbroad because Modern Environments offered no evidence that the restriction was "reasonable and no greater than necessary to protect Modern's legitimate business interests."²²⁴

214. *Id.* at 292, 576 S.E.2d at 758.

215. *Id.*

216. *Id.* at 292, 576 S.E.2d at 759.

217. *Id.*

218. 263 Va. 491, 561 S.E.2d 694 (2002).

219. *Id.* at 493, 561 S.E.2d at 695 (stating that "covenants in restraint of trade are not favored, will be strictly construed, and, in the event of ambiguity, will be construed in favor of the employee"); see, e.g., *Motion Control Sys., Inc. v. East*, 262 Va. 33, 546 S.E.2d 424 (2001); *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001).

220. *Modern Env'ts, Inc.*, 263 Va. at 492-93, 561 S.E.2d at 694.

221. *Id.* at 493, 561 S.E.2d at 694.

222. *Id.* at 493, 561 S.E.2d at 695.

223. *Id.* 493-94, 561 S.E.2d at 695 (emphasis removed).

224. *Id.* at 495, 561 S.E.2d at 696 (quoting Modern's brief).

V. NEW LEGISLATIVE DEVELOPMENTS

A. *Need-Based Educational Aid Act of 2001*²²⁵

The Need-Based Educational Aid Act of 2001 amended the Improving America's Schools Act of 1994.²²⁶ The Improving America's Schools Act granted private universities only a temporary exemption from antitrust laws,²²⁷ and allowed them to use common principles and agree in the awarding of need-based financial aid to students admitted to more than one member of the group.²²⁸ It allowed agreements to provide aid on the basis of need only, to use common principles of need analysis, to use a common financial aid application form, and to allow the exchange of the students' financial information through a third party.²²⁹ The Need-Based Educational Aid Act of 2001 extends this exemption under antitrust laws through 2008 for the award of need-based educational aid.²³⁰

B. *Medical Malpractice Insurance Antitrust Act of 2003*²³¹

The Medical Malpractice Insurance Antitrust Act of 2003 modifies the McCarran-Ferguson Act²³² with respect to medical malpractice insurance.²³³ The Act prohibits commercial insurers from engaging in price-fixing, bid rigging, or market allocations to the detriment of competition and consumers.²³⁴ The goal of the bill is to limit the broad exemption to federal antitrust law and promote competition in the insurance industry.²³⁵

225. Pub. L. No. 107-72, 115 Stat. 648.

226. 15 U.S.C. § 1 (1994).

227. *Id.*

228. 147 CONG. REC. H7731 (daily ed. Nov. 6, 2001) (statement of Rep. Sensenbrenner).

229. *Id.*; see also 147 CONG. REC. H1360-62 (daily ed. Apr. 3, 2001) (statement of Rep. Sensenbrenner).

230. Pub. L. No. 107-72, § 2, 115 Stat. 648.

231. S. 352, 108th Cong. (2003). Introduced to the United States Senate on February 11, 2003, this bill was referred to the Senate Committee on the Judiciary. See 149 CONG. REC. S2187 (daily ed. Feb. 11, 2003). For further discussion of the current malpractice insurance issues in Virginia, see Kathleen M. McCauley, *Annual Survey of Virginia Law: Health Care Law*, 38 U. RICH. L. REV. 137, 157 (2003).

232. 15 U.S.C. §§ 1011-1015 (1945).

233. 144 CONG. REC. S2210-11 (daily ed. Feb. 11, 2003) (statement of Sen. Leahy).

234. *Id.*

235. *Id.*

C. *Health Care Antitrust Improvements Act of 2003*²³⁶

The Health Care Antitrust Improvements Act of 2003 seeks to clarify the application of antitrust laws to negotiations between health care professionals, health plans, and health care insurance providers.²³⁷ It requires application of the rule of reason standard to negotiations between a health plan and two or more physicians,²³⁸ and awards attorneys' fees to a prevailing plaintiff in certain actions when the defendant's conduct was unreasonable or in bad faith.²³⁹ It prohibits tying arrangements between a health plan and health care professionals, except as specified.²⁴⁰ Negotiations or agreements between health care professionals and health plans dealing with benefits under federal programs (e.g., Medicare, Medicaid, etc.) are excluded from this Act.²⁴¹

D. *Drug Competition Act of 2003*²⁴²

The purpose of the Drug Competition Act of 2003 is to enhance competition for prescription drugs by increasing the ability of the Department of Justice and Federal Trade Commission to enforce existing antitrust laws regarding brand name drugs and generic drugs.²⁴³ This bill sets filing requirements for agreements made before a drug enters the market between generic drug applicants that have submitted an Abbreviated New Drug Application and brand name drug companies.²⁴⁴ These agreements must be filed with the assistant attorney general and the Federal Trade Commission.²⁴⁵ However, agreements that solely concern purchase or-

236. H.R. 1120, 108th Cong. (2003). Introduced into the United States House of Representatives on March 6, 2003, this bill was referred to the House Committee on the Judiciary. See 149 CONG. REC. H1679 (daily ed. Mar. 6, 2003). For a more thorough discussion of health care law in Virginia, see McCauley, *supra*, note 231, at 137.

237. H.R. 1120, 108th Cong. (2003).

238. *Id.* at § 2.

239. *Id.* at § 3.

240. *Id.* at § 5.

241. *Id.* at § 6.

242. S. 946, 108th Cong. (2003). Introduced to the United States Senate on April 29, 2003, this bill was referred to the Senate Committee on the Judiciary. See 149 CONG. REC. S5493 (daily ed. Apr. 29, 2003).

243. S. 946, 108th Cong. (2003).

244. *Id.* at § 5(b).

245. *Id.*

ders for raw materials, equipment and facility contracts, or employment contracts are excepted from these regulations.²⁴⁶

E. *Medical Liability Insurance Crisis Response Act of 2003*²⁴⁷

The Medical Liability Insurance Crisis Response Act of 2003 aims:

to modify the antitrust exemption applicable to the business of medical malpractice insurance, to address current issues for health care providers, to reform medical malpractice litigation by making available alternative dispute resolution methods, requiring plaintiffs to submit affidavits of merit before proceeding, and enabling judgments to be satisfied through periodic payments, [and] to reform the medical malpractice insurance market.²⁴⁸

This bill would amend the McCarran-Ferguson Act by exempting from antitrust laws conduct that consists of making an agreement for a certain purpose pertaining to the provision of medical malpractice insurance.²⁴⁹ It would also amend the Public Health Service Act,²⁵⁰ the Employee Retirement Income Security Act of 1974,²⁵¹ and the Internal Revenue Code to provide for the prompt payment of claims.²⁵²

F. *Antitrust Improvement Acts of 2003*²⁵³

The Antitrust Improvement Act of 2003 would update the criminal penalties applicable to antitrust criminal violations and repeal Title VIII of the Antidumping Act of 1916.²⁵⁴ In addition, it

246. *Id.* at § 5(b)(1).

247. H.R. 1158, 108th Cong. (2003). This bill was introduced into the United States House of Representatives on March 6, 2003. *See* 149 CONG. REC. H1680 (daily ed. Mar. 6, 2003).

248. 149 CONG. REC. H1680 (daily ed. Mar. 6, 2003); *see also* H.R. 1158, 108th Cong. (2003).

249. H.R. 1158, 108th Cong. § 103 (2003).

250. *Id.* at § 201(a)(1).

251. *Id.* at § 201(a)(2).

252. *Id.* at § 291(a)(3).

253. S. 1080, 108th Cong. (2003). This bill was introduced to the United States Senate on May 19, 2003, and referred to the Committee on the Judiciary. *See* 149 CONG. REC. S6624 (daily ed. May 19, 2003).

254. 149 CONG. REC. S6631 (daily ed. May 19, 2003) (statement of Sen. Hatch).

seeks to raise the maximum punishment for an individual to ten years imprisonment.²⁵⁵ The proposal also raises the maximum fines applicable to corporations and other legal entities from ten million dollars to one hundred million dollars per violation.²⁵⁶ All criminal fines would be paid into a victims fund, to be administered by the Justice Department, and ultimately disbursed to support victims advocacy groups.²⁵⁷ Criminals who have assets would first pay restitution to any identifiable victims to compensate them.²⁵⁸

VI. CONCLUSION

Although the United States Court of Appeals for the Fourth Circuit and the federal and state courts of Virginia have considered a number of antitrust and trade regulation cases over the past two years, none has significantly changed the landscape of antitrust law in Virginia. It remains a daunting challenge to be an antitrust plaintiff in the Commonwealth. Further, as evidenced by the string of decisions striking down noncompete clauses, the mindset of the Supreme Court of Virginia towards litigation involving businesses and their former employees as new competitors has taken a decidedly chilly tone, as reflected in *Dominion Technology Partners*, where the court expressed its preference for the “rough-and-tumble world” of free market economics over the courtroom.²⁵⁹

255. *Id.*

256. *Id.*

257. *Id.* at S6631–32.

258. *Id.* at S6632.

259. *See supra* notes 202–17 and accompanying text.