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Michael F. Urbanski

James R. Creekmore

ARTICLES

ANTITRUST AND TRADE REGULATION LAW

*Michael F. Urbanski**
*James R. Creekmore***

I. INTRODUCTION

During the past year, this country has devoted much attention, with good reason, to the *Microsoft* trial and appeal.[1] Not since the breakup of Ma Bell's stronghold on the telecommunications industry in the early 1980s has a single legal battle posed so significant a change for both an industry and its consumers. In fact, given the far-reaching effects of this decision on other related industries and consumers, it likely will be years before its ultimate impact can be assessed.

As media, industry and legal pundits alike debate the particulars of the remedy phase of the *Microsoft* trial and Judge Thomas Penfield Jackson's ruling dividing the company, all of which may seem extreme, attorneys in the trenches recognize this aggressive posture as fairly typical of efforts by federal, state, and local offi-

* Principal, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia. A.B., 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 Chairman of the Antitrust, Franchising and Trade Regulation section of the Virginia State Bar.

** Associate, 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 is a member of the Business Litigation Practice Group at Woods, Rogers & Hazlegrove, P.L.C., and is both the Newsletter Editor and Secretary of the Board of Governors for the Antitrust, Franchising and Trade Regulation section of the Virginia State Bar.

1. *See* United States v. Microsoft, 97 F. Supp. 2d 59 (D.D.C. 2000); United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000).

cials to enforce antitrust laws. In 1999, the federal and state courts in the Commonwealth of Virginia and throughout this federal judicial circuit considered antitrust allegations in a wide range of contexts, including those involving the pharmaceutical, electronics, finance, health care, trucking, distribution, Internet, and chemical industries. As shown below, the resulting court battles often produced mixed results and confusing signals for counsel who assume the role of guiding their clients through this minefield.

In addition, Virginia's state courts have seen an increasing number of suits alleging violations of the Virginia Business Conspiracy Act,[2] a broad statute prohibiting conspiracies to harm another person in his or her trade, business, or profession.[3] Recent court decisions include one concerning a group of accountants who chose to leave their former firm, and another involving the unauthorized use, for competitive purposes, of confidential information obtained during the course of discussions regarding a contemplated corporate acquisition. These and other cases highlight the increasing use of this Act's powerful legal remedies.

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

II. FOURTH CIRCUIT COURT OF APPEALS

A. *Sherman Act: Group Boycott*

In *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*,[4] the State of Maryland awarded a contract to Medco to manage a prescription drug benefits program for State employees and retirees.[5] Under the terms of the agreement, Medco was required to form a network of pharmacies across the state to fill prescription drug orders for Plan participants at steep discounts.[6] At the outset of

2. VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 2000).
3. *Id.*
4. No. 98-2847, 1999 U.S. App. LEXIS 21487 (4th Cir. Sept. 7, 1999).
5. *Id.* at *2-3.
6. *Id.*

Plan negotiations, Medco predicted that it could successfully enroll over 800 pharmacies in its network.[7] When Medco was unable to establish the network, the State rebid the contract and awarded it to Rite Aid, one of Medco's competitors.[8] Medco thereafter filed an action against Rite Aid and others whom it alleged jointly agreed to sabotage Medco's Plan by boycotting Medco's network in violation of section 1 of the Sherman Act and the Maryland Antitrust Act.[9]

On cross motions for summary judgment, the district court, in an eighty-three page opinion, granted Rite Aid's motion for summary judgment, finding that Medco's evidence did not exclude the possibility of independent conduct on behalf of the defendants.[10] Medco appealed, however, asserting that numerous actions by the defendants constituted a conspiracy.[11] Medco offered testimony that included an advertisement by defendants in two prominent newspapers and conference calls, as well as other communications between the more than 450 allegedly conspiring pharmacies within the three month period preceding the termination of Medco's Plan by the state.[12]

Recognizing that Medco must establish that at least two persons acted in concert, and that the restraint complained of constituted an unreasonable restraint on trade or commerce,[13] the Fourth Circuit Court of Appeals noted the heightened burden on an antitrust plaintiff in this regard.[14] The court stated that "'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inferenced of antitrust conspiracy.'"[15]

Turning first to the "unreasonable restraint of trade" element of Medco's case, the court agreed with Medco's characterization of

7. *Id.* at *6.

8. *Id.* at *3.

9. *Id.* at *7; *see generally* 15 U.S.C. § 1 (West 1997); MD. CODE ANN., COM. LAW II § 11-201 to -213 (1999).

10. *Medco,* 1999 U.S. App. LEXIS 21487, at *7.

11. *Id.*

12. *Id.* at *7-8.

13. *Id.* at *12.

14. *Id.*

15. *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

defendants' conduct as a per se violation of section 1, thereby obviating a rule-of-reason analysis of the defendants' alleged anticompetitive conduct.[16] The court then directed its focus to the remaining inquiry—whether Medco had, in fact, established a conspiracy by the defendants.[17]

Referring to the *Matsushita* standard, the court observed that, "to withstand a motion for summary judgment, 'a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged competitors acted independently.'"[18] Medco attempted to argue, however, that it need not produce evidence that tends to exclude the possibility of independent conduct by defendants[19] based on the Supreme Court's more recent decision in *Eastman Kodak v. Image Technical Services.*[20] The court of appeals, however, dismissed this argument as too sweeping a reading of *Eastman Kodak,*[21] specifically noting that there was no section 1 conspiracy at issue in *Eastman,* as in *Matsushita* and *Monsanto Co. v. Spray-Rite Service Corp.,*[22] the two conspiracy cases from which the standard emerged.[23]

Addressing Medco's factual arguments in support of its conspiracy theory, the court noted that an agreement to boycott may be inferred from a pattern of business conduct or practices of the parties referred to as "conscious parallelism"—the defendants' behavior was parallel and the defendants' awareness of this parallelism was an element of their decision-making process.[24] In order to sustain this theory, the court found that Medco was also required to demonstrate what it referred to as "plus factors," such as motive to conspire, opportunity to conspire, a high level of in-

16. *Id.* at *13 & n.1. The court noted that most horizontal boycotts have been considered per se violations, and that the conduct alleged by defendants fell squarely within that ambit given the necessarily adverse affect on competition that would have resulted if the defendants had committed the alleged conduct. The court further noted that only those boycotts having valid business justifications and procompetitive effects may be considered under a rule of reason analysis. *Id.* at *13 n.1.

17. *Id.* at *13.

18. *Id.* at *15 (quoting *Matsushita,* 475 U.S. at 588).

19. *Id.* at *17-21.

20. 504 U.S. 451 (1992).

21. *Medco,* 1999 U.S. App. LEXIS 21487, at *21.

22. 465 U.S. 752 (1984).

23. *Medco,* 1999 U.S. App. LEXIS 21487, at *21.

24. *Id.* at *25.

ter-firm communications, irrational acts, or acts contrary to the defendants' economic interest, as well as a departure from normal business practices.[25] Although the court found that Medco sustained its burden of demonstrating motive and opportunity to conspire and a high level of inter-firm contacts, the court found that the refusal of the pharmacies to participate in Medco's Plan was not a departure from normal business practices or contrary to their economic interests.[26] Nevertheless, Medco's establishment of two "plus factors" required Rite Aid to rebut the resulting inference of conspiracy, which, on the evidence presented, the court found it had done.[27]

Finally, the court of appeals found that Medco failed to meet its burden of producing evidence tending to exclude the possibility of independent action by the defendant pharmacies, thereby falling short of its ultimate summary judgment burden of creating a reasonable inference of conspiracy.[28] The court thus affirmed the judgment of the district court dismissing Medco's group boycott claim.[29]

B. *Robinson-Patman Act: Price Discrimination*

In *Hoover Color Corp. v. Bayer Corp.*,[30] the Fourth Circuit Court of Appeals reversed and remanded the District Court for the Western District of Virginia's grant of summary judgment in a case arising under the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act.[31] Plaintiff Hoover Color Corporation is a buyer and distributor of Bayferrox, a synthetic iron-oxide used as a pigment in color paints, plastics, and building and concrete products.[32] Hoover alleged that its supplier, Bayer Corporation, discriminated against Hoover in favor of larger distributors by implementing a volume incentive-based discount-pricing scheme.[33] The district court granted summary

25. *Id.* at *26.
26. *Id.* at *27-31.
27. *Id.* at *35.
28. *Id.* at *42.
29. *Id.* at *44.
30. 199 F.3d 160 (4th Cir. 1999).
31. *Id.* at 161; 15 U.S.C. § 813-13(b), 21(a) (1994).
32. 199 F.3d at 161.
33. *Id.*

judgment in favor of Bayer, accepting its defense that its pricing scheme was justified as "meeting competition" in the marketplace by offering lower prices on high-volume orders.[34]

Reversing the district court, the court of appeals noted at the outset that "Congress enacted the Robinson-Patman Act to prevent a large buyer from 'securing a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability.'"[35] The court held that if a buyer makes a prima facie case of price discrimination under the Robinson-Patman Act, a seller can overcome the allegation by demonstrating that it has set its prices in a "good faith attempt to 'meet an equally low price of a competitor.'"[36] Nevertheless, despite Bayer's largely undisputed evidence that: (1) the market was competitive with other suppliers giving volume discounts; (2) large buyers demanded lower volume prices to match competing bids; and (3) such buyers gave statements that they would not purchase from Bayer unless they offered volume discounts,[37] the court of appeals ruled that Bayer's evidence did not rise to the level of that presented in *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*,[38] in which summary judgment for the seller on the meeting competition defense was upheld.[39] Because the court determined that Hoover had also presented sufficient evidence of alternative motives for Bayer's pricing, thereby creating issues of fact, the case was reversed and remanded for trial.[40]

Although Bayer petitioned the United States Supreme Court for *certiorari*, the Supreme Court declined the manufacturer's request for review.[41]

C. *Robinson-Patman Act: Commercial Bribe*

In *Patterson v. Ford Motor Credit Co.*,[42] the Fourth Circuit

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34. Hoover Color Corp. v. Baylor Corp., 24 F. Supp. 2d 571, 585 (W.D. Va. 1998), *rev'd*, 199 F.3d 160 (4th Cir. 1999).
35. *Hoover*, 199 F.3d at 162 (quoting FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948)).
36. *Id.* at 163 (quoting 15 U.S.C. § 13(b) (1994)).
37. *Id.* at 166.
38. 971 F.2d 37 (7th Cir. 1992).
39. *Hoover*, 199 F.3d at 166-67.
40. *Id.* at 167.
41. Bayer Corp. v. Hoover Color Corp., 120 S. Ct. 2198 (2000).
42. No. 98-2774, 2000 U.S. App. LEXIS 1303 (4th Cir. Feb. 2, 2000).

Court of Appeals affirmed a decision of the District Court for the Southern District of West Virginia granting summary judgment to defendants in a Robinson-Patman Act case.[43] The plaintiffs, purchasers of a sports-utility vehicle from a dealer, alleged that the dealer offered plaintiffs an installment agreement at an interest rate above that which the dealer knew defendant, Ford Motor Credit Company ("FMCC"), would extend on the same contract.[44] Plaintiffs alleged that after securing the installment contract at the higher interest rate, the dealer assigned the contract to FMCC, and in return received the difference between the higher rate and the lower rate FMCC would extend as a "discount" or "dealer's participation" fee.[45] Plaintiffs thereafter sued, contending that the discount amounted to an unlawful commercial bribe from FMCC to the dealer, whom plaintiffs alleged occupied the role of their agent, in violation of section 2(c) of the Robinson-Patman Act.[46]

Consistent with the holdings in a series of prior cases,[47] the district court dismissed plaintiffs' claim, holding that the Robinson-Patman Act bars price discrimination only on the sale of tangible assets, and the assignment of the contract to and payment of the fee by FMCC did not involve a tangible good.[48] Plaintiffs argued that the "dominant nature" of the transaction was the sale of a tangible good, and that the subsequent sale of the contract arose from the original vehicle sale, such that the Act should apply.[49] The court of appeals rejected plaintiffs' argument that the two transactions should be viewed as one transaction, given that FMCC was clearly not a party to the vehicle sale, and the subsequent sale of the financing agreement did not involve a tangible asset.[50]

Even assuming that the two-part transaction could be viewed as a single transaction, the court noted that plaintiffs' claim must

43. *Id.* at *12-13.

44. *Id.* at *3.

45. *Id.*

46. *Id.* at *4.

47. Harris v. Duty Free Shoppers Ltd. P'ship, 940 F.2d 1272, 1274 (9th Cir. 1991); Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 140-41 (5th Cir. 1987); Freeman v. Chicago Title & Trust Co., 505 F.2d 527, 529-31 (7th Cir. 1974) (per curiam).

48. *Patterson,* 2000 U.S. App. LEXIS 1303, at *7-8.

49. *Id.* at *12.

50. *Id.* at *10-11.

fail because the alleged bribe would not traverse the "seller-buyer" line, which is an essential element for a commercial bribery claim.[51] The court rejected plaintiffs' position that the dealer could be adverse to plaintiffs on the sale while simultaneously acting as agent of the plaintiffs for financing purposes.[52] Thus, the court concluded the FMCC transaction simply was not a covered transaction under the Robinson-Patman Act and affirmed the district court's judgment.[53]

D. *Sherman Act, Clayton Act: Price Fixing*

In *Audio Visual Associates, Inc. v. Sharp Electronics Corp.*,[54] the Fourth Circuit Court of Appeals affirmed a grant of summary judgment for the defendant in a price-fixing case.[55] Plaintiff, a retailer of electronic products, including those of defendant Sharp Electronics, contracted to sell Sharp calculators to a "disadvantaged small business concern" that, in turn, had contracted to sell such products to the United States Navy.[56] Sharp quoted plaintiff a price of thirty-one dollars per unit before ultimately rescinding the quote and referring plaintiff to another of its distributors to purchase the units.[57] That distributor initially quoted plaintiff a price of twenty-nine dollars and ninety-five cents per calculator, but rescinded that quote and informed plaintiff that the price would be thirty-one dollars because "Sharp says $31.00 is the fixed price."[58] Plaintiff purchased the units at the thirty-one dollar price and sued Sharp for price-fixing, among other claims.[59]

As to plaintiff's price-fixing claims, the court of appeals noted that the totality of plaintiff's antitrust allegation consisted of the claim that "based upon Sharp's intervention with the [distributor] the price was changed to $31.00 per unit."[60] Citing *Monsanto Co. v. Spray-Rite Service Corp.*[61] and *United States v. Colgate & Co.*,[62]

51. *Id.* at *11.
52. *Id.* at *12.
53. *Id.* at *12-13.
54. 210 F.3d 254 (4th Cir. 2000).
55. *Id.* at 262.
56. *Id.* at 256.
57. *Id.* at 257.
58. *Id.*
59. *Id.*
60. *Id.* at 262.
61. 465 U.S. 752, 764 n.9 (1984). In *Monsanto*, the court held that

[T]he concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conthe court of appeals found that these allegations were insufficient to allege an illegal price-fixing arrangement.[63] Accordingly, the court affirmed the district court's dismissal of plaintiff's complaint.[64]

E. *Virginia Business Conspiracy Act*

In *Wuchenich v. Shenandoah Memorial Hospital*,[65] plaintiff, an anesthesiologist, appealed from an order of the United States District Court for the Western District of Virginia dismissing his complaint against the defendant hospital and individual doctors, in which plaintiff alleged, among other claims, that the hospital and physicians had conspired to procure the revocation of plaintiff's medical staff privileges at defendant hospital in violation of the Virginia Business Conspiracy Act[66] and the common law.[67] The Court of Appeals for the Fourth Circuit reviewed plaintiff's conspiracy allegations—that two of defendant anesthesiologists failed to assign plaintiff a fair share of the patient load; that one other defendant physician instigated peer review of two of plaintiff's cases without just cause; and that defendant hospital suspended plaintiff's privileges without just cause—and noted that the intracorporate immunity bar clearly applied given that all three individual physicians were acting within their agency authority from the hospital.[68]

The issue therefore turned on whether plaintiff established

> formed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Id.

62. 250 U.S. 300, 307 (1919) (holding that the Sherman Act does not restrict a manufacturer's right to "announce in advance the circumstances under which he will refuse to sell").

63. *Audio Visual*, 210 F.3d at 262.

64. *Id.*

65. No. 99-1273, 2000 U.S. App. LEXIS 11557 (4th Cir. Jan. 28, 2000) (per curiam).

66. VA. CODE ANN. § 18.2-499 to -501 (Repl. Vol. 1996). Virginia's conspiracy statute provides, in relevant part, that "[a]ny two or more 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" shall be liable civilly for treble damages. *Id.* § 18.2-499 (Repl. Vol. 1996). A plaintiff must prove that defendant acted "intentionally, purposefully and without lawful justification" to establish liability under the Act. Commercial Bus. Sys., Inc. v. BellSouth Serv. Inc., 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995). For a more extensive discussion of the Act and recent cases decided thereunder, see Michael F. Urbanski, *Antitrust and Trade Regulation Law*, 33 U. RICH. L. REV. 769 (1999).

67. *Wuchenich*, 2000 U.S. App. LEXIS 11557, at *19-21.

68. *Id.* at *40.

that the physicians had "an independent personal stake in achieving the corporation's illegal objective" in order to overcome the intracorporate immunity bar.[69] Based on the authority and parallel facts of *Oksanen v. Page Memorial Hospital*,[70] the court summarily found that the personal stake exception did not apply to plaintiff's claims that were premised on the decision to suspend his medical privileges or one doctor's instigation of peer review of two of plaintiff's cases, given the fact that the hospital Board retained decision-making authority with regard to staff privileges, and review was disbursed among various committees that did not include the defendant physicians.[71] The court found, however, that the personal stake exception may apply to plaintiff's allegation that two other defendant physicians refused to allot plaintiff a fair patient load, by which it could be argued that those defendant physicians were attempting to reduce direct competition by plaintiff.[72] The court of appeals therefore vacated the district court's order in this regard, remanding the case for further proceedings.[73]

With respect to plaintiff's common law conspiracy allegations, whereby plaintiff alleged that defendants collectively conspired to breach the hospital's duty to abide by its bylaws in suspending medical staff privileges,[74] the court of appeals affirmed the ruling of the district court.[75] Noting that plaintiff had failed to allege any conduct by the individual physician defendants taken in concert with the hospital, or with each other, that reasonably could have been viewed as supporting a claim for conspiracy to cause the hospital to breach the obligations of its bylaws, the court affirmed the district court's dismissal of plaintiff's common law conspiracy claim.[76]

69. Greenville Publ'g Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974).
70. 945 F.2d 696 (4th Cir. 1991) (en banc).
71. *Wuchenich*, 2000 U.S. App. LEXIS 11557, at *41.
72. *Id.*
73. *Id.* at *42.
74. The court of appeals, reversing the district court, found that plaintiff had stated a viable claim alleging that defendant hospital breached its contractual obligations to abide by its bylaws in suspending plaintiff's medical staff privileges. *Id.* at *30-31.
75. *Id.* at *44.
76. *Id.* at *43-44.

F. *Franchising Case*

In *Tom Hughes Marine, Inc. v. Honda Motor Co.*,[77] the Fourth Circuit Court of Appeals affirmed the district court's grant of summary judgment in a case where a dealer of Honda outboard motors near Columbia, South Carolina, claimed that Honda had verbally promised him an exclusive geographic territory of unlimited duration.[78] When Honda placed a new dealer nearby, the plaintiff sued in tort on theories of fraudulent and negligent misrepresentation, in an apparent attempt to circumvent the fact that the integrated dealer agreement contained no exclusivity provision.[79] Noting that the plaintiff was a "sophisticated businessman" who was "reckless" in failing to read the dealer agreement before signing it, the court of appeals held that dismissal of the claims was proper.[80] The court found that Honda's alleged verbal commitments constituted "promises" of future actions that could support a breach of contract action in the appropriate case but were not representations of existing fact that could support the tort claims alleged.[81]

III. VIRGINIA FEDERAL DISTRICT COURTS

A. *Virginia Business Conspiracy Act*

In *Lilly v. Sisk*,[82] plaintiffs were owners of two well-established trucking companies that transport paper products for approximately 80 to 100 customers.[83] For several years, plaintiffs insured their trucks through an insurance company that employed defendants Mark Sisk and Jeff Sisk.[84] In June 1998, plaintiffs began negotiations with Mark Sisk for the sale of their trucking business.[85] During the negotiations, the parties signed a letter of intent that prohibited Sisk from using information about the plain-

77. 219 F.3d 321 (4th Cir. 2000).
78. *Id.* at 322.
79. *Id.*
80. *Id.*
81. *Id.* at 325-26.
82. No. 99-0023-C, 1999 U.S. Dist. LEXIS 8263 (W.D. Va. Apr. 9, 1999).
83. *Id.* at *3.
84. *Id.*
85. *Id.* at *4.

tiffs' businesses for any purpose other than evaluating those companies.[86] The letter of intent also required Sisk to return all documents he received from plaintiffs during their negotiations.[87]

Prior to his involvement with plaintiffs, Sisk had no experience in the specialty trucking business.[88] Since the negotiations were ongoing, Mark Sisk had participated in various aspects of plaintiffs' trucking businesses in an effort to become more familiar with the plaintiffs' business.[89] Sisk became a contract hauler for plaintiffs and purchased at least one tractor-trailer marked with plaintiff's name.[90] Plaintiffs also introduced Sisk to numerous customers, demonstrated methods of contracting with customers, provided dispatch software and sample forms, and permitted Sisk to accompany them at least once on interviews with prospective drivers.[91]

In March 1999, plaintiffs became concerned that defendants were soliciting business using customer lists and contact information obtained both during the negotiations with Mark Sisk and during their employment with the plaintiffs' insurance company.[92] Plaintiffs discovered that defendants had started a new company called "Willie Trucking," and had contracted with some of plaintiffs' customers.[93] Plaintiffs immediately filed suit against defendants and their new company alleging claims for breach of contract, tortious interference with their business, and conspiracy to injure the plaintiffs in their trade or business in violation of the Virginia Business Conspiracy Act.[94] Plaintiffs then sought a preliminary injunction to prevent defendants from soliciting business from any more of plaintiffs' regular customers.[95]

Applying the test articulated in *Blackwelder Furniture Co. v. Seilig Manufacturing. Co.*,[96] the district court had little difficulty finding that the granting of a preliminary injunction was war-

86. *Id.*
87. *Id.* at *5.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at *5-6.
93. *Id.*
94. *Id.* at *1; VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996).
95. *Lilly,* 1999 U.S. Dist. LEXIS 8263, at *3.
96. 550 F.2d 189 (4th Cir. 1977).

ranted.[97] The court found that defendants had doctored brochures and other business documents used by plaintiffs, and had used plaintiffs' price schedules and contract terms to structure relations with some of plaintiffs' customers and to undercut plaintiffs' prices.[98] For these reasons, the court enjoined defendants from soliciting business from any of plaintiffs' customers and ordered defendants to cease from using plaintiffs' information or documents and ordered them to return all such materials to plaintiffs.[99]

B. *Trade Regulation: Cybersquatting Remedies*

In *Dorer v. Arel*,[100] plaintiff Dorer sued Arel for trademark infringement for, among other things, using plaintiff's trademark in an Internet domain name registered by defendant with Network Solutions, Inc. ("NSI"), a Virginia-based domain name registry.[101] Defendant failed to respond to the suit, and the magistrate recommended an award of $5,000 in damages and ordered that defendant be permanently enjoined from future use of plaintiff's trademark, a recommendation which was adopted by the District Court for the Eastern District of Virginia.[102]

Plaintiff then sought to execute upon defendant's infringing domain name in partial satisfaction of the judgment they had obtained.[103] Plaintiff argued that the domain name was intangible personal property of the defendant, and therefore subject to the writ of *fieri facias* under Virginia law, just as are bonds, notes and stocks.[104] Acknowledging the issue as one of first impression, the district court explored the nature of the writ and its application to intellectual property, such as domain names.[105]

Referring to trademark law by analogy, the court found that because the trademark owner does not own the words used in the mark, a judgment creditor cannot levy upon and sell such marks

97. *See Lilly*, 1999 U.S. Dist. LEXIS 8263, at *21.
98. *Id.* at *6-7.
99. *Id.* at *21.
100. 60 F. Supp. 2d 558 (E.D. Va. 1999).
101. *Id.* at 558-59.
102. *Id.*
103. *Id.*
104. *Id.* at 559.
105. *Id.*

of a judgment debtor.[106] Similarly, the court found that some domain names were little more than addresses, with no independent value, and manifest nothing of a tangible nature upon which an executing official could seize, in contrast to a stock or a bond that is represented by a tangible certificate.[107] On the other hand, the court recognized that other domain names were valuable commercial assets in and of themselves, given that they could be transferred apart from their content and, for various reasons depending upon the actual words used, could have great commercial appeal.[108] The court also examined patent law for guidance, but rejected its application, even by analogy, given the fact that a patent did have an intrinsic value—the right to exclude all others from making, using, or selling an invention covered thereby.[109]

Ultimately, however, the court avoided the "knotty issue of whether a domain name is personal property subject to the lien of fieri facias"[110] by suggesting that plaintiff seek to have the domain name registration transferred to her by NSI pursuant to NSI's own policies, apparently developed in expectation of such intellectual property disputes.[111] The court expressed its opinion that the judgment entered in plaintiff's favor was sufficient evidence of her rights in the domain name under the trademark laws, and that the service of process requirements of the Federal Rules of Civil Procedure should satisfy NSI's notice requirement.[112] The court therefore deferred ruling on plaintiff's motion to compel transfer of the domain name "pending plaintiff's recourse to the self-help method suggested in this opinion."[113]

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

In *Crews v. Altavista Motors, Inc.*,[114] plaintiffs William and Shelby Crews agreed to buy a truck from defendant Altavista Motors ("the Dealer") and agreed to finance their purchase via a Re-

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106. *Id.* at 561 (construing 30 AM. JUR. 2D *Executions and Enforcement of Judgements* § 160 (1994)).
107. *Id.* at 561 n.8.
108. *Id.*
109. *Id.* at 561 n.9.
110. *Id.* at 561.
111. *Id.* at 562.
112. *Id.*
113. *Id.*
114. 65 F. Supp. 2d 388 (W.D. Va. 1999).

tail Installment Sales Contract ("RISC").[115] The Dealer made several changes to the terms of the deal both before and after the plaintiffs had signed the RISC, changes which plaintiffs alleged constituted violations of both the Truth in Lending Act[116] and the Virginia Consumer Protection Act,[117] and gave rise to a claim for fraud.[118] Plaintiffs later joined as a defendant the First National Bank of Altavista ("the Bank"), the current holder of the note on the vehicle purchased by the plaintiffs, and sought to hold the Bank liable for all of the Dealer's violations except those involving the Truth in Lending Act.[119] Plaintiffs also sought actual, statutory, and punitive damages from both the Dealer and the Bank.[120] The Bank immediately filed a motion to dismiss.[121]

The court began its analysis by noting that the RISC between plaintiffs and the Dealer contained what is commonly known as the FTC Holder Rule ("Holder Rule"):

> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.[122]

The court pointed out that this provision, which is mandated by the FTC to be included in all RISCs, acts as a shield for consumers, protecting them from creditors by allowing non-payment when a seller has defrauded the consumer in some way.[123] The court also noted that the Holder Rule can sometimes be used by consumers as a sword.[124] The court decided that the issue in the instant case was whether the plaintiffs could use the Holder Rule against the Bank.[125]

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115. *Id.* at 389.
116. 15 U.S.C. § 1601 (1994 & Supp. IV 1998).
117. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 1998).
118. *Crews*, 65 F. Supp. 2d at 388.
119. *Id.* at 390.
120. *Id.*
121. *Id.*
122. *Id.* (quoting 16 C.F.R. § 433.2 (2000)).
123. *Id.*
124. *Id.*
125. *Id.*

The court ultimately ruled that plaintiffs could not use the Holder Rule to make a claim against the Bank under the facts pleaded.[126] Although the Holder Rule provides relief against a creditor where the seller's breach is so substantial that rescission and restitution are justified, the court found that plaintiff's allegations in the instant case did not rise to that level.[127] Moreover, the court noted that, in any event, plaintiffs were not seeking rescission of the contract.[128] In fact, the court found that plaintiffs had kept the vehicle they purchased from the Dealer and continued to use it.[129] Finally, the court agreed that the Holder Rule "was not designed to act as a weapon to exact statutory and punitive damages against otherwise innocent creditors" like the Bank.[130]

D. *Lanham Act: False Advertising*

In *Maday v. Toll Bros., Inc.*,[131] plaintiff Maday contracted to purchase from defendants what plaintiff believed was a stucco house.[132] When it turned out that the home's facade was not stucco, but rather a synthetic substitute, Maday filed suit against the defendants for, among other allegations, a violation of the federal prohibition of false advertising found in the Lanham Act.[133]

Defendants moved to dismiss plaintiff's lawsuit for lack of subject matter jurisdiction, asserting that section 1125(a) of the Lanham Act provides a remedy for commercial injuries only.[134]

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126. *Id.* at 391.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. 72 F. Supp. 2d 599 (E.D. Va. 1999).
132. *Id.* at 600.
133. *Id.*; 60 Stat. 427 (codified as amended in scattered sections of 15 U.S.C.).
134. *Maday*, 72 F. Supp. 2d at 601. Section 1125(a) states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— . . . (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Defendants argued that plaintiff had no standing to assert a cause of action under the Lanham Act.[135] The district court agreed, noting that every circuit that had confronted the issue had reached the same conclusion, namely that standing to bring a Lanham Act claim is restricted to commercial injury.[136] While recognizing that the specific language of section 1125 alone may not be clear on the issue, the court insisted that the section "must be construed, and its scope determined, by reference to Congress' purpose in enacting the Act as a whole."[137] The court noted that "§ 1127 makes clear [that] § 1125 is a remedy only for commercial injuries," and not for injuries to consumers such as Maday.[138]

E. *Trade Regulation: Anti-Cybersquatting Consumer Protection Act*

In *Virtual Works, Inc. v. Network Solutions, Inc.*,[139] plaintiff's registered Internet domain name was "VW.NET."[140] Plaintiff filed suit against Network Solutions, Inc. ("NSI"), an Internet domain name registration firm in Herndon, Virginia, Volkswagen of America, and Volkswagen AG ("Volkswagen") for tortiously interfering with its rights in its domain name.[141] Volkswagen responded with "a counterclaim against Virtual Works for Cyberpiracy, Trademark Dilution, and Trademark Infringement" under the Anti-Cybersquatting Consumer Protection Act ("ACPA").[142] Both parties filed cross motions for summary judgment.[143]

Reviewing the many factors set forth in the ACPA, the District Court for the Eastern District of Virginia granted summary judgment in favor of Volkswagen, holding that: (1) "Volkswagen [was] the only entity [of the two] with any intellectual property rights in the trademark 'VW;' (2) that Virtual Works' use of the domain name . . . 'created a likelihood of confusion'" among consumers, and (3) that plaintiff had used the mark to disparage

15 U.S.C. § 1125(a) (1994 & Supp. 2000).

135. *Maday*, 72 F. Supp. 2d at 601.

136. *Id.*

137. *Id.* at 602.

138. *Id.*

139. 106 F. Supp. 2d 845 (E.D. Va. 2000).

140. *Id.* at 846.

141. *Id.*

142. *Id.*; 15 U.S.C. § 1125 (a), (c) (2000).

143. *Virtual Works*, 106 F. Supp. 2d at 846.

Volkswagen.[144] Based on these findings, the district court concluded that Virtual Works had violated the ACPA.[145] Moreover, these findings, plus evidence of actual confusion, led the court to conclude that Virtual Works' use of the domain name also infringed upon Volkswagen's trademark.[146] Finally, agreeing that Internet cyber-piracy constitutes per se trademark dilution, the court found that Volkswagen had suffered "economic harm as a result of not being able to use VW.NET" and as a result of the dilution of its trademark.[147]

In *Caesars World, Inc. v. Caesars-Palace.com,*[148] the District Court for the Eastern District of Virginia rejected various constitutional challenges to the in rem provisions of the ACPA.[149] The court first addressed the argument that "in rem jurisdiction is only constitutional in those circumstances where the res provides minimum contacts sufficient for in personam jurisdiction."[150] Citing *Shaffer v. Heitner*,[151] the court ruled that there must be minimum contacts to support personal jurisdiction "only in those *in rem* proceedings where the underlying cause of action is unrelated to the property that is located in the forum state."[152] The court noted that because the domain name at issue in the case is "not only related to the cause of action but is its entire subject matter," the assertion of minimum contacts necessary to meet personal jurisdiction standards is unnecessary.[153] The court then pointed out that those contacts required in this situation were supplied by the fact of domain name registration with Network Solutions, Inc., a company located in Virginia.[154]

The court also rejected the argument that "a domain name registration is not a proper kind of thing to serve as a res."[155] Noting that "[t]here is no prohibition on a legislative body making something property[, the court concluded that] [e]ven if a domain name is no more than data, Congress was within its authority to

144. *Id.* at 847-48.
145. *Id.* at 848.
146. *Id.*
147. *Id.*
148. 54 U.S.P.Q.2d (BNA) 1121 (E.D. Va. 2000).
149. *Id.*
150. *Id.* at 1122.
151. 433 U.S. 186 (1977).
152. *Caesars*, 54 U.S.P.Q.2d (BNA) at 1122.
153. *Id.*
154. *Id.* at 1123.
155. *Id.*

make data property and assign its place of registration as its situs."[156]

The court next addressed the argument that, under the ACPA, a "plaintiff must have first filed an action against a person [as opposed to a domain name], attempted personal service, and served the action by publication if personal service was not possible."[157] Additionally, the defendant argued that a "plaintiff [must] seek permission from the court . . . and . . . establish that the challenged domain name violates the rights of the plaintiff before filing an *in rem* [action]."[158] Pointing out that requiring a plaintiff to leap through these preliminary hoops would "stand the Act on its head," the court rejected both arguments with little comment.[159]

In a third case arising under the ACPA, *Lucent Technologies, Inc. v. Lucentsucks.com*,[160] Russell Johnson registered the domain name "lucentsucks.com" with Network Solutions, Inc. ("NSI").[161] Sometime in the following year, counsel for Lucent Technologies, Inc. ("Lucent"), the owner of the registered trademark "LUCENT," learned of Johnson's use of the Lucent name in his registered domain name.[162] On November 11, 1999, Lucent's in-house counsel sent a cease and desist letter to Johnson via Federal Express to the address Johnson had listed with NSI.[163] That letter was returned as undeliverable.[164]

On December 8, 1999, Lucent's in-house counsel sent another letter and an e-mail to the addresses Johnson listed with NSI, again requesting that he cease and desist from using the Lucent name and trademarks.[165] Eight days later, Lucent filed an in rem action against the domain name under the ACPA, asserting claims of trademark infringement and trademark dilution.[166] Lucent asked the court to direct NSI to transfer registration of "lu-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. 95 F. Supp. 2d 528 (E.D. Va. 2000).
161. *Id.* at 529.
162. *See id.* at 530.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 529, 531.

centsucks.com" to Lucent.[167]

In response, defendant filed a motion to dismiss for failure to satisfy the in rem jurisdictional requirements of the ACPA, stating that Lucent had filed its lawsuit too soon after sending its cease and desist notice.[168] After reviewing the jurisdictional requirements of the ACPA and the history of the dispute prior to Lucent's filing of the lawsuit, the District Court for the Eastern District of Virginia granted the defendant's motion and dismissed the case without prejudice.[169]

The district court first noted that the in rem provisions of the newly enacted ACPA were intended by Congress to "alleviate the problem of anonymous cybersquatters, by allowing a mark owner to file an action against the domain name itself, provided the plaintiff could satisfy the court that it had exercised due diligence in trying to locate the owner of the domain name but could not do so."[170] Specifically, the ACPA allows a plaintiff to proceed with an in rem action against a domain name only after "*sending notice* of the alleged violation and intent to proceed under [the ACPA] to the registrant of the domain name at the postal and e-mail addresses provided by the registrant to the registrar."[171]

The district court recognized that the ACPA does not require a plaintiff to wait any specific amount of time after it mails and e-mails its notice before filing an in rem action against the domain name.[172] Nevertheless, the court ruled that filing suit only eight days after serving notice was not sufficient to invoke the ACPA's in rem jurisdiction.[173] The court held that the notice aspect of procedural due process set out in *Mullane v. Central Hanover Bank & Trust Co.*,[174] requires some period of time greater than eight days.[175] Although the court did not establish the minimum amount of time a plaintiff must wait to file suit after giving notice, the court pointed out that other federal statutes that specify

167. *Id.* at 529.
168. *See id.* at 532.
169. *See id.* at 536.
170. *Id.* at 530.
171. *Id.* at 532 (quoting 15 U.S.C.A. § 1125(d)(2)(A)(ii)(II) (Supp. 1999)).
172. *Id.*
173. *Id.*
174. 339 U.S. 306 (1950).
175. *Lucent*, 95 F. Supp. 2d at 533.

a "waiting period" never specify one shorter than ten days.[176]

F. *Virginia Retail Franchising Act*

In *Crewe Auto Parts Co. v. Genuine Parts Co.*,[177] the defendant licensed independent auto parts store operators, or "jobbers," to sell NAPA brand auto parts under NAPA signs and trade dress, but had no written contracts with its jobbers defining their relationship.[178] Genuine Parts sold parts to jobbers at wholesale prices, who then resold to wholesale or retail accounts.[179] Genuine Parts charged its jobbers fees beyond the cost of parts, fees for participation in NAPA's local and national advertising, and fees for use of the NAPA on-line system for ordering parts.[180] Participation in the advertising funds and use of the on-line system was encouraged but not mandatory.[181] Genuine Parts terminated the plaintiff jobber for several reasons, including non-payment of his account and failure to penetrate the local market sufficiently.[182] The jobber sued Genuine Parts for violation of the Virginia Retail Franchising Act section 13.1-564, which prohibits a franchiser's cancellation of a franchise without reasonable cause.[183] The jobber sought preliminary and permanent injunctions to prohibit termination.[184] Genuine Parts filed a motion to dismiss the complaint.[185]

Following an evidentiary hearing, the District Court for the Eastern District of Virginia denied the jobber's motion for preliminary injunction, finding that the relationship was not a franchise under the Act.[186] First, the court found that there was no written agreement between the parties, which is a necessary ele-

176. *Id.*

177. No. 3:00CV292, slip op. (E.D. Va. June 2, 2000).

178. *Id.* at 2-4.

179. Genuine Parts Company's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 3, Crewe Auto Parts Co. v. Genuine Parts Co., No. 3:00CV292, slip op. (E.D. Va. June 2, 2000).

180. *Id.* at 2.

181. *Id.* at 3.

182. *Crewe*, No. 3:00CV292, slip. op. at 5.

183. Petition for Temporary Restraining Order & Temporary & Permanent Injunction at ¶ 13, Crewe Auto Parts Co. v. Genuine Parts Co., No. 3:00CV292, slip op. (E.D. Va. June 2, 2000).

184. *Crewe*, No. 3:00CV292, slip. op. at 3.

185. *Id.*

186. *Id.* at 4.

ment of a "franchise" under section 13.1-559(b) of the Act.[187] Second, the jobber had paid no franchise fee to Genuine Parts, also a necessary element of a "franchise" under the same section of the Act.[188] The district court went on to find that even if the relationship were a franchise, it was terminated for reasonable cause as a matter of law (the jobber did not contest the accuracy of the facts supplying the reasons for termination).[189] Moreover, the court found that even if it were a franchise and the relationship were terminated without reasonable cause, the Act provided only a damage remedy to the terminated franchisee.[190] Therefore, the jobber had an adequate remedy at law had he been unlawfully terminated and would not have been entitled to injunctive relief. Given the court's conclusion that the jobber would have "zero" chance of recovery on the merits at trial for a permanent injunction, the court proceeded to grant Genuine Parts' motion to dismiss.[191]

IV. VIRGINIA STATE COURT DECISIONS

A. *Virginia Business Conspiracy Act*

In *Diamond Assembly Service of Martinsville v. Guthrie*,[192] the plaintiff "contracted with retail stores, such as Wal-Mart and Home Depot, to assemble charcoal grills, bicycles and other consumer goods" sold at the stores.[193] Diamond had its employees sign non-competition agreements by which they agreed that, for a period of six months following their employment with Diamond, they would not work in a directly competing business.[194] Defendants violated their non-competition agreements by working for one of Diamond's competitors.[195] Diamond sued for, and obtained, injunctive relief enforcing their non-competition agreements.[196]

187. *Id.*
188. *Id.*
189. *Id.* at 5.
190. *Id.*
191. *Id.*
192. 50 Va. Cir. 536 (Cir. Ct. 1999) (Roanoke City).
193. *Id.* at 536.
194. *Id.*
195. *Id.*
196. *Id.*

Pursuant to the Virginia Business Conspiracy Act,[197] Diamond pursued its claim for damages for breach of the non-competition agreements, attorneys' fees, and damages.[198]

Judge Doherty, in his opinion for the Circuit Court for the City of Roanoke, noted that in order to recover damages pursuant to the Act, Diamond must show: (i) proof of a civil conspiracy by clear and convincing evidence; (ii) that the conduct of defendants in breaching their agreement was aimed at damaging Diamond's business; and (iii) that Diamond's business was damaged as a result of the conspiracy.[199] The circuit court found that Diamond failed to sustain its burden of proof on these issues, finding instead that defendants individually and independently left their employment with Diamond and sought comparable employment for personal financial reasons, with no intent to harm Diamond's business.[200] For this reason, the court granted judgment to defendants on Diamond's statutory business conspiracy claims.[201]

B. *Virginia Antitrust Act*

In *Reid v. Boyle*,[202] the Supreme Court of Virginia considered an appeal from a chancellor's judgment finding no violation of the Virginia Antitrust Act[203] by several defendants involved in the entertainment industry in Tidewater.[204] Sorting through the lengthy and complex facts developed from the evidence taken ore tenus by the chancellor below, the supreme court reviewed the following facts relevant to plaintiff's antitrust claim. The plaintiff, formerly president of Cellar Door Productions, was a concert and events promoter in the Hampton Roads area.[205] Reid and Cellar Door's sole shareholder, defendant Boyle, previously had been in busi-

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197. VA. CODE ANN. §§ 18.2-499 to -501 (Repl. Vol. 1996).

198. *Diamond*, 50 Va. Cir. at 536.

199. *Id.* at 537 (citing Multi-Channel T.V. Cable Co. v. Charlottesville Quality Cable Operating Co., 108 F.3d 522, 526 (4th Cir. 1997); Peterson v. Cooley, 142 F.3d 181, 186 (4th Cir. 1986); Allen Realty Corp. v. Holbert, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984)).

200. *Id.*

201. *Id.* The court did, however, grant Diamond recovery of its attorneys' fees and costs in connection with its successful recovery of injunctive relief. *Id.* at 538.

202. 259 Va. 356, 527 S.E.2d 137 (2000).

203. VA. CODE ANN. §§ 59.1-9.1 to -9.18 (Repl. Vol. 1998).

204. *Reid*, 259 Va. at 361, 527 S.E.2d at 140.

205. *Id.*

ness together on several different ventures, including development and construction of the GTE Virginia Beach Amphitheater.[206] A falling out between Reid and Boyle and the crumbling of their business association, most of which involved undocumented agreements and arrangements on profit-sharing, precipitated this litigation.[207]

Reid contended that following his termination from Cellar Door, Boyle, Cellar Door, and various other defendants conspired to prevent Reid and his new company from booking concerts at two publicly owned concert venues—The Boathouse in Norfolk and the GTE Virginia Beach Amphitheater—in violation of the Virginia Antitrust Act.[208] Reid presented evidence that the ability to rent The Boathouse and the Amphitheater was essential to a Virginia Beach concert promoter, given the demand by large concert bands for these venues.[209] Reid also produced evidence that the defendants controlled the large amphitheaters in both Virginia and North Carolina.[210] Lastly, Reid presented evidence of how his attempts to rent the two specified concert venues were thwarted by various defendants.[211]

The chancellor dismissed Reid's antitrust claims, finding no violation of the Virginia Antitrust Act, and the Supreme Court of Virginia affirmed that decision.[212] Briefly reviewing the relevant sections of the Act, the court found that Reid simply failed to produce evidence that would support a finding of "any contract or conspiracy in restraint of trade or commerce, . . . [or] a conspiracy, combination, or attempt by the defendants to monopolize trade or commerce in the Commonwealth."[213] Interestingly, the court spent no additional time analyzing the facts or evidence presented by Reid or those presented in opposition to such claims by the defendants. Instead, in a rather terse holding as compared to the lengthy examination of Reid's other claims, the court merely found the record to be devoid of facts necessary to support Reid's antitrust claim.[214]

206. *Id.* at 363, 527 S.E.2d at 141.
207. *Id.* at 361-66, 527 S.E.2d at 140-43.
208. *Id.* at 374, 527 S.E.2d at 147.
209. *Id.* at 375, 527 S.E.2d at 148.
210. *Id.*
211. *Id.* at 374, 527 S.E.2d at 147.
212. *Id.* at 375, 527 S.E.2d at 148.
213. *Id.* at 375-76, 527 S.E.2d at 148.
214. *Id.* at 375, 527 S.E.2d at 148.

C. *Virginia Business Conspiracy Act*

Finally, in the recent decision of *Feddeman & Co. v. Langan Associates, P.C.*,[215] the Supreme Court of Virginia reviewed and reinstated a $3.3 million jury verdict in favor of plaintiff on its claims of breach of fiduciary duty and statutory business conspiracy against its former employees and a competitor by whom they subsequently were employed.[216] Feddeman is a certified public accounting firm that, in 1997, had thirty-one employees and over three million dollars in annual revenues.[217] Defendant Langan Associates is a rival accounting firm.[218]

In August 1996, Feddeman and Langan began discussing a possible buyout or merger of the two companies.[219] Shortly thereafter, the American Express Company made an offer to purchase both Feddeman and Langan, which was refused.[220] A Buying Group emerged from Feddeman, consisting of several employees and directors of Feddeman, which planned to purchase ownership of Feddeman and then merge Feddeman with Langan.[221] Kent Feddeman, who was a ninety-five percent shareholder and president of Feddeman, was aware of, and did not oppose, the proposed merger process.[222]

While offers were being negotiated and exchanged between the Buying Group and Feddeman, the Buying Group solicited legal advice on any potential liability that might arise if the merger were unsuccessful and the Buying Group resigned and went to work for Langan.[223] The Buying Group's attorney advised that to avoid liability, if they chose to resign, the Buying Group should not: (1) solicit Feddeman clients or employees until after their resignation; (2) use Feddeman resources in the preparation of their resignation; (3) make negative or adverse statements about Feddeman; or (4) remove Feddeman company property.[224] There-

215. 260 Va. 35, 530 S.E.2d 668 (2000).
216. *Id.* at 47, 530 S.E.2d at 675.
217. *Id.* at 37, 530 S.E.2d at 670.
218. *Id.*
219. *Id.* at 38, 530 S.E.2d at 670.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 38-39, 530 S.E.2d at 670.
224. *Id.* at 39, 530 S.E.2d at 670.

after, the Buying Group decided to resign on December 1, 1997 if they had not reached a deal with Feddeman and that the resignations "would be a form of leverage that could be used, in the negotiations."[225] The proposed resignation, in fact, was relayed to senior Feddeman employees with the suggestion that the senior employees would be taken care of in the deal.[226]

Following further negotiations and an announcement by Feddeman on December 1 that another national accounting firm might be interested in purchasing Feddeman, the Buying Group commenced its resignation plan.[227] Once the Buying Group secured the agreement of Langan to hire them, the Buying Group resigned and also had letters of resignation prepared for other senior Feddeman employees.[228] By the morning of December 2, the Buying Group tendered eleven total letters of resignation to Feddeman.[229] That evening, Langan held a reception for those Feddeman employees who had not yet resigned, following which more Feddeman employees resigned.[230] By December 3, a total of twenty-five of the thirty-one Feddeman employees had resigned and had begun working for Langan.[231] All of Feddeman's clients had been solicited, half of whom eventually transferred their business to Langan.[232]

Feddeman thereafter filed a multi-count action against Langan and former Feddeman employees asserting breach of fiduciary duty, usurpation of business opportunity, and statutory business conspiracy, among other claims.[233] Defendants counterclaimed and a seven-day jury trial ensued.[234] With the exception of one former Feddeman director, the jury returned verdicts against all defendants on all claims, including the counterclaims, awarding Feddeman damages of $3.3 million.[235] The trial court granted defendants' motion to strike and to set aside the verdict from which Feddeman appealed.[236]

225. *Id.*
226. *Id.* at 39, 530 S.E.2d at 670-71.
227. *Id.* at 40, 530 S.E.2d at 671.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 40-41, 530 S.E.2d at 671.
233. *Id.* at 41, 530 S.E.2d at 671-72.
234. *Id.* at 41, 530 S.E.2d at 672.
235. *Id.*
236. *Id.*

On appeal, the court noted that, "prior to resignation, these defendants were entitled to make arrangements to resign, including plans to compete with their employer, and that such conduct would not ordinarily result in liability for breach of fiduciary duty."[237] Liability is imposed, however, when "employees or directors misappropriate[] trade secrets, misuse[] confidential information, and solicit[] an employer's clients or other employees prior to termination of employment."[238] The court found that defendants did more than merely prepare to leave their employment and advise others of their plan. Instead, they utilized the planned resignation, which they knew would be harmful to the ongoing business, as leverage during the buyout discussions, and they planned to secure employees and clients of Feddeman for their new employer, Langan.[239] They even provided resignation letters to other Feddeman employees and, within three days after their departure, had solicited all of Feddeman's clients.[240] This evidence supported the jury's verdict that defendants' conduct fell below the standard of good faith and loyalty required of employees and directors.[241]

Based upon these same facts, the court had little difficulty finding a violation of the Virginia Business Conspiracy Act.[242] The court noted that establishing a statutory conspiracy does not require proof that the conspirators' "'primary and overriding purpose is to injure another.'"[243] Instead, the employees' actions simply must be taken "'intentionally, purposefully, and without lawful justification.'"[244]

The court found that John Langan and Langan Associates, with knowledge of the Buying Group's attempted buy-out and alternate resignation plan, agreed to and supported the plan as a means to secure the ultimate merger of Feddeman and Langan.[245] The court found that defendants implemented the resignation

237. *Id.* at 42, 530 S.E.2d at 672.
238. *Id.*
239. *Id.* at 43, 530 S.E.2d at 673.
240. *Id.*
241. *Id.* at 44, 530 S.E.2d at 673.
242. VA. CODE ANN. § 18.2-499 to -501 (Repl. Vol. 1996 & Cum. Supp. 2000).
243. *Feddeman*, 260 Va. at 45, 530 S.E.2d at 674 (quoting Advanced Marine Enter. v. PRC Inc., 256 Va. 106, 117, 501 S.E.2d 148, 154 (1998)).
244. *Id.* (quoting *Advanced Marine*, 256 Va. at 117, 501 S.E.2d at 154-55).
245. *Id.*

plan knowing that a resignation en masse of key Feddeman employees would so hurt the company that Feddeman would be compelled to entertain the buy-out and ultimate merger of Feddeman with Langan.[246] Langan facilitated the plan by providing legal services and by agreeing to hire all Feddeman employees who resigned, should the plan be implemented.[247] The totality of these circumstances therefore supported the jury's finding that defendants' conduct was taken intentionally, purposefully, and without lawful justification.[248]

The court therefore reinstated the jury's verdict on all counts but, because the court failed to consider entry of an award in accordance with the Virginia Business Conspiracy Act's trebling provision, the court remanded the case for entry of a judgment consistent with the court's opinion.[249]

V. FTC ENFORCEMENT ACTIONS RELATING TO VIRGINIA ACTIVITIES

A. FTC v. Maher[250]

In *FTC v. Maher*, the defendant was charged with violations of the Federal Trade Commission Act[251] and the FTC's franchise disclosure rules for disseminating false and misleading spam" (unsolicited, commercial e-mail).[252] In the e-mails at issue in the case, the defendant offered to sell potential customers a business opportunity.[253] The defendant guaranteed that the business opportunity would generate a specified level of profits, and guaranteed the customer a full refund if such profits were not realized.[254] In reality, few purchasers of the business opportunity received

246. *Id.*

247. *Id.* at 45-46, 530 S.E.2d at 674.

248. *Id.* at 46, 530 S.E.2d at 675.

249. *Id.* at 47, 530 S.E.2d at 675. The Virginia Business Conspiracy Act provides that a person injured in his business through a violation of Virginia Code section 18.2-499 may recover "three-fold the damages by him sustained," together with costs and attorneys' fees. VA. CODE ANN. § 18.2-500 (Repl. Vol. 1996 & Cum. Supp. 2000).

250. 5 Trade Reg. Rep. (CCH) ¶ 24,397 (D. Md. Mar. 4, 1998), *aff'd sub nom.* FTC v. Reed, 198 F.3d 236 (4th Cir. 1999) (per curiam) (unpublished decision) (full text available in LEXIS, No. 99-1883, 1999 U.S. App. LEXIS 24920).

251. 15 U.S.C. § 45 (1994) (declaring unlawful unfair trade practices).

252. *Maher,* 5 Trade Reg. Rep. (CCH) ¶ 24,397.

253. *Id.*

254. *Id.*

the specified profits, and none received a refund.[255] This action was the first to target fraudulent and misleading spam.[256] The FTC demonstrated that it would enforce its rules against fraudulent e-mail in the same way that it has enforced its rules regarding fraudulent mail in the past.[257]

The district court entered a default judgment in favor of the FTC due to the defendant's failure to answer the complaint or to file any other defensive pleadings.[258] The default judgment was upheld by the Court of Appeals for the Fourth Circuit due to the defendant's failure to file a motion to set aside the default judgment.[259]

B. FTC v. Telebrands Corp.[260]

The FTC's "Mail or Telephone Order Rule" requires companies that take orders by mail, telephone, or computer to ship ordered merchandise within the time stated in its advertising or, if no time is specified, thirty days.[261] If the shipment will not be made on time, the company must notify the customer and provide him with the option to cancel the order and receive a refund.[262] In 1996, Telebrands was charged with violating this rule by failing to notify consumers about delays and failing to cancel orders when the customers did not consent to the delay.[263] In settlement of that charge, Telebrands entered into a consent decree and agreed to pay a $95,000 civil penalty.[264]

Since 1996, Telebrands has repeatedly sent out late delay notices and delayed shipments without its customers' consent.[265] As a result of these continued violations, in *FTC v. Telebrands Corp.*, the District Court for the Western District of Virginia allowed the FTC to modify its 1996 consent decree with Telebrands to require

255. *Id.*
256. *Id.*
257. *Id.*
258. FTC v. Reed, 198 F.3d 236 (4th Cir. 1999) (per curiam) (unpublished table decision) (full text available in LEXIS, No. 99-1883, 1999 U.S. App. LEXIS 24920).
259. *Id.*
260. 5 Trade Reg. Rep. (CCH) ¶ 24,643 (W.D. Va. Sept. 1, 1999).
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*

that the company fulfill enhanced recordkeeping requirements and hire an expert in mail or telephone order fulfillment to monitor its operations.[266]

C. FTC v. Leiss[267]

In *FTC v. Leiss*, the defendant used the Internet and other media to advertise his service of helping consumers obtain new credit histories.[268] His service requested nine-digit employee identification numbers or taxpayer identification numbers to be used by his customers in place of their social security numbers on credit applications.[269] Such a practice enabled the customers to hide their past credit history and begin building a new credit rating.[270] Defendant advertised that this practice was legal when, in fact, it violated federal law.[271]

In settlement of these charges, the defendant must provide redress for consumers harmed by this scam, refrain from undertaking a similar scam in the future, and notify past and current customers that this practice is illegal under federal law.[272]

D. FTC v. Erickson Agency, Inc.[273]

In *FTC v. Erickson Agency, Inc.*, the defendants represented to potential customers that they were highly selective talent management agencies.[274] Their salespeople would approach potential customers in public places (like shopping malls or train stations) and state that the potential customer could become an actor or model, that the agencies had placed many models and actors into high profile jobs, and that the customer could expect to receive substantial income from a modeling or acting job.[275] In order to increase potential customers' confidence in the agencies, the

266. *Id.*
267. 5 Trade Reg. Rep. (CCH) ¶ 24,663 (E.D. Va. Oct. 21, 1999).
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. 5 Trade Reg. Rep. (CCH) ¶ 24,664 (E.D. Va. Oct. 14, 1999).
274. *Id.*
275. *Id.*

agencies' representatives would also inform potential customers that the agencies mainly profited from commissions on models and actors who had been placed in jobs.[276]

In reality, the agencies were not selective at all and paid their salespeople a commission based on the number of actual customers they referred to the agency.[277] Furthermore, the agencies derived most of their income from selling training materials to their customers.[278] Few customers, if any, ever received employment as an actor or model.[279]

The defendants settled these charges with the FTC and agreed to stop assisting in the marketing or sale of modeling training materials and services, and to refrain from deceptive sales practices.[280] The settlement also precluded the defendants from collecting outstanding payments due them and ordered the defendants to provide some refunds.[281]

E. *Consent Order Regarding Dominion Resources, Inc.*[282]

Dominion acquired Consolidated Natural Gas Company ("CNG").[283] The merger raised antitrust concerns in the market for the generation of electric power in southeastern Virginia.[284] Dominion, through its subsidiary Virginia Power, accounts for seventy percent of the electric power generation capacity in Virginia.[285] CNG, through its subsidiary, Virginia Natural Gas, Inc. ("VNG"), supplies natural gas—one of the few fuels used in electricity generation—to southeastern Virginia.[286] Concerns were raised that entry into the power generation market in southeastern Virginia would be deterred due to Dominion's control over a vital supply of fuel for power generation.[287] To resolve these antitrust concerns, Dominion agreed to divest VNG.[288]

276. *Id.*
277. *Id.*
278. *Id.*
279. *See id.*
280. *See id.*
281. *Id.*
282. 5 Trade Reg. Rep. (CCH) ¶ 24,668 (Dec. 9, 1999).
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*

VI. NEW LEGISLATIVE DEVELOPMENTS

A. *Antitrust Technical Corrections and Improvements Act of 1999*[289]

The Antitrust Technical Corrections and Improvement Act[290] would amend section 3 of the Sherman Act to clarify that prohibitions against monopolizing, attempting to monopolize, or combining or conspiring with others to monopolize trade or commerce apply to activities in and among United States territories and the District of Columbia as well as the states.[291] The bill would also redesignate Section 27(a) of the Clayton Act[292] as section 28.[293] The bill would strike a provision in the Panama Canal Act[294] that prohibited persons who were in violation of the Sherman Act from passing through the Panama Canal.[295] Finally the bill would repeal a little used and redundant section of the Wilson Tariff Act[296] and renumber the other sections of the Act accordingly.[297]

B. *Antitrust Technical Corrections Act of 1999*[298]

This bill is similar to the Senate version with the exception that it does not redesignate section 27(a) of the Clayton Act, and

289. S. 1764, 106th Cong. (1999). This bill was sponsored by Senator DeWine and introduced on October 21, 1999, before the Senate, at which time it was referred to the Judiciary Committee. 145 CONG. REC. S13,019 (daily ed. Oct. 21, 1999). On October 28, 1999, the Judiciary Committee ordered the bill to be favorably reported to the Senate. *Id.* at S13,401 (daily ed. Oct. 28, 1999). It was then placed on the Senate Legislative Calendar, No. 352, *available at* http://thomas.loc.gov/.

290. 15 U.S.C. §§ 1–7 (1994).

291. S. 1764 § 2(b).

292. 15 U.S.C. §§ 12–27 (1994 & Supp. 1998).

293. S. 1764 § 2(d).

294. Pub. L. No. 96-70, 93 Stat. 452 (codified as amended in scattered sections of 5 U.S.C., 8 U.S.C., 22 U.S.C., 29 U.S.C., 39 U.S.C., and 50 U.S.C) (1994).

295. S. 1764 § 2(a).

296. 15 U.S.C. §§ 8–11 (1994).

297. S. 1764 § 2(c).

298. H.R. 1801, 106th Cong. (1999). This bill was sponsored by Representative Hyde and introduced on May 13, 1999, before the House of Representatives, at which time it was referred to the House Judiciary Committee. 145 CONG. REC. H 3170 (daily ed. May 13, 1999). On October 25, 1999, the bill was reported to the House by the House Judiciary Committee and placed on the Union Calendar, No. 237. *Id.* at H10,769. On November 2, 1999, the bill was passed by the House and on November 3, the bill was received by the Senate. *Id.* at H11,318 (daily ed. Nov. 2, 1999); *id.* at S13,794 (daily ed. Nov. 3, 1999). On November 19, 1999, the bill was placed on the Senate Legislative Calendar, No. 420. *Id.* at S15,087 (daily ed. Nov. 19, 1999).

it would repeal the Act of March 3, 1913, which requires depositions taken in Sherman Act equity cases brought by the government to be conducted in public.[299]

C. *Antitrust Merger Review Act*[300]

This bill would amend section 7A of the Clayton Act[301] to place time limitations on the FCC's review of telecommunications mergers.[302] When a license transfer application is filed, the FCC would have thirty days to decide whether to make a "second request."[303] If a second request is made, the FCC would then have 180 days after receiving the additional material to make a decision.[304] The bill does not, however, change the scope of the FCC's review of such mergers.[305]

D. *Hart-Scott-Rodino Antitrust Improvements Act of 1999*[306]

This bill would amend section 7A of the Clayton Act[307] to raise the size-of-transaction threshold in 7A(a)(3)(B) to $35,000,000 and adjust that amount in the future to roughly correspond with inflation.[308] The bill would also make certain adjustments to the filing fees under the Clayton Act[309] and place certain limitations on the scope of second requests by the Department of Justice and FTC (and allow for review of such requests by a magistrate judge).[310]

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299. Antitrust Corrections Act of 1999, H.R. 1801, 106th Cong. (1999).

300. S. 467, 106th Cong. (1999). This bill was sponsored by Senator DeWine and introduced on February 25, 1999 before the Senate, at which time it was referred to the Senate Judiciary Committee. 145 CONG. REC. S2007 (daily ed. Feb. 25, 1999). On July 1, 1999, the Senate Judiciary Committee reported the bill to the Senate favorably, with an amendment in the nature of a substitute and was then placed on the Senate Legislative Calendar, No. 192. *Id.* at S8084 (daily ed. July 1, 1999).

301. 15 U.S.C. §§ 12–27 (1994 & Supp. 1998).

302. S. 467 § 2(b)(1).

303. *Id.* § 2(e)(f).

304. *Id.* § 2(k)(4).

305. *Id.* § 2(k)(7).

306. S. 1854, 106th Cong. (1999). This bill was sponsored by Senator Hatch and introduced on November 4, 1999, before the Senate, at which time it was referred to the Senate Judiciary Committee. *See* 145 CONG. REC. S13,972 (daily ed. Nov. 4, 1999). On May 25, 2000, the Senate Judiciary Committee reported the bill to the Senate favorably with an amendment in the nature of a substitute. *See* 146 CONG. REC. S4459 (daily ed. May 25, 2000). It was then placed on the Senate Legislative Calendar, No. 576 (not yet published).

307. 15 U.S.C. §§ 12–27 (1994 & Supp. 1998).

308. *Id.* § 2(b).

309. *Id.* § 3.

310. *Id.* § 3.

E. *The Small Business Franchise Act of 1999*[311]

The Small Business Franchise Act would federally regulate the relationship between parties to a franchise agreement.[312] It proposes changes to franchise contracts primarily in the areas of termination,[313] succession,[314] sourcing (supplies)[315] and encroachment (locating a second franchise unit in close proximity to an existing unit).[316] It creates several new federal private rights of action and would impose new obligations on franchisers.[317]

The bill has been referred to the House Judiciary Commercial and Administrative Law Subcommittee, which is the same subcommittee that conducted an oversight hearing on the franchise relationship issue in June 1999.[318]

F. *Small Business Merger Fee Reduction Act of 2000*[319]

The Small Business Merger Fee Reduction Act[320] bill would amend section 7A of the Clayton Act to raise the size-of-transaction threshold in 7A(a)(3)(B) to $50,000,000.[321] The bill would also make certain adjustments to the filing fees.[322]

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311. H.R. 3308, 106th Cong. (1999). This bill was introduced by Representative Howard Coble on November 10, 1999, and has attracted forty-seven bi-partisan co-sponsors. *See* 145 CONG. REC. H11,953 (daily ed. Nov. 10, 1999). Interest in federal franchise legislation has increased somewhat as similar legislation in the last Congress only attracted twelve co-sponsors.

312. *See* H.R. 3308.

313. *Id.* § 4.

314. *Id.* §§ 5, 8, 9.

315. *Id.* § 10.

316. *Id.* § 11.

317. *Id.* § 12.

318. 145 CONG. REC. H11,953 (daily ed. Nov. 10, 1999).

319. H.R. 4194, 106th Cong. (2000). This bill was sponsored by Representative Rogan and introduced on April 5, 2000 before the House of Representatives, at which time it was referred to the House Judiciary Committee. *See* 146 CONG. REC. H1851 (daily ed. Apr. 5, 2000).

320. 15 U.S.C. §§ 12–27 (1994 & Supp. 1998).

321. H.R. 4194 § 2.

322. *Id.* § 3.

G. *Antitrust Enforcement Improvement Act of 2000*[323]

This bill would amend the Sherman Act,[324] the Clayton Act,[325] and the Packers and Stockyards Act of 1921[326] to regulate competition among wholesale purchasers and establish a commission to review large agriculture mergers, market concentrations, and market power.[327] The bill would also make certain adjustments to the filing fees under the Clayton Act and increase fines on corporations under Sections 1 and 3 of the Sherman Act.[328]

VII. CONCLUSION

Unlike in the national arena, pure antitrust disputes have played a diminished role in recent Virginia jurisprudence. Assuming an increasingly significant role in commercial disputes, both in state and federal court, is the powerful Virginia Business Conspiracy Act, which contains the same remedies as the Sherman Act, but does not require the impact on competition that is needed for an antitrust violation. Another emerging trend in trade regulation evident from the recent Microsoft and Napster cases is the Internet's dominant role on the economy. As its economic and business impact grows, so too will efforts to apply intellectual property, antitrust, and trade regulation laws to that burgeoning arena.

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323. H.R. 4321, 106th Cong. (2000). This bill was sponsored by Representative Minge and introduced on April 13, 2000, before the House of Representatives, at which time it was referred to the House Judiciary Committee and the House Agriculture Committee. 146 CONG. REC. H2338 (daily ed. Apr. 13, 2000).

324. 15 U.S.C. §§ 1–7 (1994).

325. 15 U.S.C. §§ 12–27 (1994 & Supp. 1998).

326. 7 U.S.C. §§ 181–231 (1994 & Supp. 1997).

327. H.R. 4321.

328. *Id.*

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