COMMON LAW AND STATUTORY BUSINESS CONSPIRACY - WHAT THEY ARE AND AREN'T

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I. PLEADING CIVIL AND STATUTORY CONSPIRACY

A. Historical Bases For Claims of Civil and Statutory Conspiracy

1. Virginia recognizes two tort claims for civil conspiracy – one under the common law and the second under Virginia Code §§ 18.2-499 *et seq.*

2. As early as 1888, in the case of *Crump v. Commonwealth*, the Supreme Court of Virginia recognized the viability of a claim for a conspiracy to injure a person in his trade or occupation.[1] In *Crump*, members of a union attempted to compel a mercantile business to unionize. In upholding the criminal convictions of the union members, the Court recognized that "a conspiracy or combination to injure a person in his trade or occupation is indictable."[2]

3. In 1933, the Supreme Court of Virginia in *Werth v. Fire Companies' Adjustment Bureau*[3] acknowledged the ability for a plaintiff to sue at common law for civil conspiracy in noting that:

> A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of any unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or actionable conspiracy, are, in my opinion, the same, though to sustain an action special damages must be proved.

4. In 1964, the General Assembly enacted Virginia's business conspiracy statute.[4] Surprisingly, no legislative history exists for the statute.[5] Due to the year of its enactment and its similarity to statutes passed in other states around the same time, many refer to it as the "Anti-Sit-In" Act.[6] The business conspiracy statute is found in sections 18.2-499 and 18.2-500 of the Virginia Code – the criminal chapter of the Virginia Code – due to the fact that the violation of § 18.2-499 is a class 1 misdemeanor. [7]

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[1] 84 Va. 927, 934, 6 S.E. 620, 624 (1888) (affirming conviction for conspiracy to boycott a business).
[2] *Id.*
[3] 160 Va. 845, 854, 171 S.E. 255, 258-59, *cert. denied*, 260 U.S. 659 (1933) (citations omitted).
[4] Joseph E. Ulrich & Killis T. Howard, *Injuries to Business under the Virginia Conspiracy Statute: A Sleeping Giant*, 38 WASH. & LEE L. REV. 377 (1981).
[5] *Id.*
[6] *Id.* at 378.
[7] *See generally*, Sexton, J. Scott, *What's in a Word? The Tortured Life of the Virginia Conspiracy Statute Va. Code §§ 18.2-499 and -500*, VSB LITIGATION NEWS (Spring 2004) (providing an excellent discussion of statutory business conspiracy claims in Virginia).

a. Under section 18.2-500, "[a]ny person who [is] injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499" may seek relief in a civil court. In turn, Virginia Code section 18.499 imposes liability on: "[a]ny two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act . . ."

b. The statute specifically allows for the recovery of treble damages and "the costs of suit, including a reasonable fee to plaintiff's counsel."[8] The statute also provides for damages if a plaintiff proves an attempted business conspiracy.[9]

B. Stating a Claim for Common Law Conspiracy Under Virginia Law

1. Under Virginia law, a plaintiff must prove four elements to state a *prima facie* cause of action for common law conspiracy:

   a. A combination of two or more persons;

   b. To accomplish, by some concerted action;

   c. Some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means; and

   d. Resultant damage caused by the defendant's acts committed in furtherance of the conspiracy.[10]

2. As the Supreme Court recently commented: "The gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use an unlawful means."[11]

3. A plaintiff cannot maintain for common law conspiracy when the unlawful act underlying the claim does not allow for an award of damages.[12]

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[8] Va. Code § 18.2-500(A).

[9] Va. Code Ann. § 18.2-499(B); *see also Waytec Elecs. Corp. v. Rohm & Haas Elec. Materials, LLC*, 459 F. Supp. 2d 480, 492 (W.D. Va. 2006) (concluding that "to prove attempted business conspiracy, a plaintiff must prove that a person attempted to procure participation or cooperation of another to enter into a business conspiracy").

[10] *Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc.*, 249 Va. 39, 48, 453 S.E.2d 261, 267 (1995); *Glass v. Glass*, 228 Va. 39, 47, 321 S.E.2d 69, 74 (1984).

[11] *Almy v. Grisham*, 273 Va. 68, 81, 639 S.E.2d 182, 189 (2007); *Commercial Bus. Sys.*, 249 Va. at 48, 453 S.E.2d at 267 (stating that "[t]he foundation of a civil action of conspiracy is the damage caused by the acts in furtherance of the conspiracy") (citations omitted).

[12] *See Efessiou v. Efessiou*, 41 Va. Cir. 142, 146 (Fairfax County 1996) (sustaining demurrer to conspiracy claim for alleged combination to effect a fraudulent conveyance).

4. Ordinarily, the issue of whether a conspiracy caused damage is one for the jury's decision.[13]

C. Stating a Claim for Statutory Business Conspiracy Under Virginia Law

1. Under Virginia law, a plaintiff must prove three elements to state a *prima facie* cause of action under Virginia's business conspiracy statute:

   a. A combination of two or more persons;

   b. For the purpose of willfully or maliciously inuring a plaintiff in reputation, trade, business, or profession; and

   c. Resulting in damage to the plaintiff.[14]

2. To prove attempted business conspiracy, a plaintiff must prove that a person attempted to procure the participation or cooperation of another to enter into a business conspiracy[15] and resulting damage to the plaintiff.[16]

D. Pleading Standards for Conspiracy Claims

1. The Virginia state and federal courts appear to have differing standards for pleading common law and statutory business conspiracy claims.

2. The Supreme Court of Virginia has held that "traditional notice pleading and demurrer standards apply in reviewing conspiracy claims."[17] This notice pleading standard applies to claims of both civil and statutory conspiracy. To survive an attack by a dispositive motion, however, a plaintiff must allege the existence of the elements of the claim in more

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[13] *Commercial Bus. Sys.*, 249 Va. at 48, 453 S.E.2d at 267 (citing *Middlesboro Coca-Cola v. Campbell*, 179 Va. 693, 702, 20 S.E.2d 479, 482 (1942)).

[14] *CaterCorp., Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 28, 431 S.E.2d 277 (1993); *see also Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984) ("To recover in an action for conspiracy to harm a business, the plaintiff must prove (1) a combination of two or more persons for the purpose of willfully and maliciously injuring plaintiff in his business, and (2) resulting damage to plaintiff."); *see also Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 144 F. Supp. 2d 558, 601 (W.D. Va. 2001), *aff'd sub nom. Virginia Vermiculite Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277 (4th Cir. 2002) ("The elements of a statutory conspiracy claim under the Virginia Conspiracy Act are: (1) concerted action (2) legal malice; and (3) causally-related injury."); *accord Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 526 (4th Cir. 1997) ("CQC was liable for statutory conspiracy if clear and convincing evidence showed that: (1) CQC attempted to conspire with one or more of the other defendants to harm Adelphia; (2) CQC acted with legal malice towards Adelphia; and (3) the conspiratorial actions of CQC and one or more of the other defendants caused Adelphia to suffer damages."); *see also T.G. Slater & Son v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836, 845 (4th Cir. 2004) ("A claim for statutory civil conspiracy under Virginia law must allege (1) two or more persons combined, associated, agreed, or mutually undertook together to (2) willfully and maliciously injure another in his reputation, trade, business, or profession."); *Virginia Model Jury Instructions – Civil*, No. 40-300 (2008).

[15] Va. Code § 18.2-499(B).

[16] *Id.* § 18.2-500.

[17] VIRGINIA CIVIL PROCEDURE § 2.26 (4th ed. 2003) (quoting *Luckett v. Jennings*, 246 Va. 303, 307, 435 S.E.2d 400, 402 (stating that "the trial court is required to consider as true all material facts that are properly alleged, facts which are impliedly alleged, facts which may be fairly and justly inferred from the facts alleged").

than "mere conclusory language."[18] A plaintiff must allege "concerted action, legal malice, and casually related injury . . . set[ting] forth core facts to support the claim."[19]

a. Moreover, for statutory business conspiracy claims, "it is not enough for [a] plaintiff merely to track the language of the conspiracy statute without alleging the fact that the alleged co-conspirators did, in fact, agree to do something the statute forbids."[20] Ordinarily, a complaint should contain factual details of the time and place and the alleged effect of the conspiracy in order to withstand a demurrer or motion to dismiss.[21]

3. From the federal court's perspective, a statutory business conspiracy requires a heightened pleading under Fed. R. Civ. P. 9(b) to prevent "every business dispute over unfair competition [from] becoming a business conspiracy claim.'"[22] Similarly, although evidently not subject to the pleading standard articulated in Rule 9(b), a civil conspiracy claim in

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[18] *Gov't Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 706 (E.D. Va. 2004); *see also* Casola, Francis H., VIRGINIA BUSINESS TORTS, Chapter 8, Conspiracy to Injure a Business (VaCLE 2006); *Bay Tobacco, LLC v. Bell Quality Tobacco Prods.*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) (noting that a claim for conspiracy asserted in mere conclusory language "is based on inferences that are not fairly or justly drawn from the facts alleged").

[19] *Kayes v. Keyser*, 72 Va. Cir. 549, 552 (City of Charlottesville 2007) (quoting *Atlantic Futon v. Tempur-Pedic, Inc.*, 67 Va. Cir. 269, 271 (City of Charlottesville 2005)); *see also M-Cam v. D'Agostino*, Civil Action No. 3:05cv6, 2005 U.S. Dist. LEXIS 45289, at **7-8 (W.D. Va. Sept. 1, 2005) (observing that a plaintiff's allegation that the defendants combined together to effect a "preconceived plan and unity of design and purpose, for the common design is the essence of the conspiracy").

[20] *Kayes*, 72 Va. Cir. at 552 (quoting *Johnson v. Kaugers*, 14 Va. Cir. 172, 177 (City of Richmond 1988)); *see also Corinthian Mort. Corp. v. Choicepoint Precision Mkt, LLC*, Civil Action No. 1:07cv832, 2008 U.S. Dist. LEXIS 28129, at **18-19 (E.D. Va. April 4, 2008) (requiring a plaintiff asserting a statutory business conspiracy claim to allege that defendant intentionally and purposefully injured plaintiff's business).

[21] *Kayes*, 72 Va. Cir. at 552; *Firestone v. Wiley*, 485 F. Supp. 2d 694, 703 (E.D. Va. 2007) (stating a claimant must allege "some details of time and place and the alleged effect of the conspiracy"); *Harper Hardware Co. v. Power Fasteners, Inc.*, Civil Action No. 3:05cv799, 2006 U.S. Dist. LEXIS 3821 (E.D. Va. Jan. 19, 2006) (finding a plaintiff's conclusory allegations that did not detail the facts relating to the "method of the alleged conspiracy or how it was carried out" to be insufficient); *Woody v. Carter*, Case No. CL08-3192, 2008 Va. Cir. LEXIS 154 (Montgomery Co. Oct. 13, 2008) (Plaintiff alleged that defendant used a blog as a conduit for false and misleading complaints. The court sustained defendants' demurrers to plaintiff's claims for conspiracy to harm complainant's business where plaintiff failed to allege specifically what harm the complainant suffered to his reputation.)

[22] *Schlegel*, 505 F. Supp. 2d at 325-26 (quoting *Gov't Employees. Ins. Co.*, 330 F. Supp. 2d at 706 (E.D. Va. 2004)); *see also First Hand Communications, LLC v. Schwalbach*, Civil Action No. 1:05cv1281, 2006 U.S. Dist. LEXIS 87844, *15 (E.D. Va. 2006) (an allegation that the parties were "working together in a scheme" is not enough to survive a motion to dismiss); *but see Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 414-15, 634 S.E.2d 745, 752 (2006) (rejecting defendant's argument that plaintiff was merely dressing up a violation of the Wine Franchise Act in reversing trial court's decision that the Act preempted common law or statutory business conspiracy claims); *Government Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 706 (E.D. Va. 2004) ("Business conspiracy, like fraud, must be pleaded with particularity, and with more than mere conclusory language. The heightened pleading standard prevents every business dispute over unfair competition becoming a business conspiracy claim.") (citation omitted); *Scharpenberg v. Carrington*, 686 F. Supp. 2d 655, 662 (E.D. Va. 2010) (noting pleading requirement under Rule 9(b)).

Virginia must be pled with some degree of specificity and include "some details of time and place and the alleged effect of the conspiracy."[23]

4. The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,[24] also appears to be having an impact on the necessary pleading standards for civil conspiracy claims in federal court. *Twombly*, which involved an allegation of antitrust conspiracy, held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to state a "plausible" claim of conspiracy.[25] Thus, certain federal courts appear to be developing a more stringent "plausibility" jurisprudence with respect to the particular types of claims that were at issue in *Twombly*, *i.e.*, conspiracy claims.[26]

5. Claims of civil and statutory conspiracy must be proven by "clear and convincing evidence."[27]

II. PROVING CIVIL AND STATUTORY CONSPIRACY

A. A Combination of Two or More Persons To Accomplish, by Some Concerted Action – Necessary Elements for Common Law and Statutory Business Conspiracy Claims

1. Both the common law and statute require a combination of two separate actors in a concerted action.[28]

2. The "two or more persons" requirement, however, is not satisfied by proof that a principal conspired with one of its agents that acted within the scope

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[23] *Firestone v. Wiley*, 485 F.Supp.2d 694, 703-04 (E.D. Va. 2007).

[24] 550 U.S. 544 (2007)

[25] *Id.* at 556-57.

[26] *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2008 U.S. Dist. LEXIS 107882, at *81 (E.D.N.Y. Sept. 26, 2008) ("[T]he plaintiffs allege that there were 'meetings,' 'secret meetings,' 'communications,' or 'joint agreements.' Sometimes they alleged that these 'secret meetings' and 'communications' were entered into by defendants' representative 'at the highest levels' in 'various venues including Europe, the United States, and Africa' or 'Europe, the United States, South America and Asia.' These allegations are so broad and so vague that they fail to stand for anything, much less raise a plausible inference of an agreement."); *Solomon v. Blue Cross & Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008) ("The *Twombly* decision . . . adds new bite to the RICO requirement that the Plaintiffs describe the agreement to conspire in the complaint."); *but see Starr v. Sony BMG Music Entm't*, 2010 U.S. App. LEXIS 768, at *24 (2d Cir. Jan. 13, 2010) ("plaintiffs need only enough factual matter (taken as true) to suggest that an agreement was made").

[27] *Multi-Channel TV Cable Co.*, 108 F.3d at 526; *Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001); *Tazewell Oil Co., Inc. v. United Va. Bank*, 243 Va. 94, 413 S.E.2d 611, 619 (1992).

[28] *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499 (E.D. Va. 2003) ("the plaintiff must first allege that the defendants combined together to effect a 'preconceived plan and unity of design and purpose, for the common design in the essence of the conspiracy'"); *Hecht v. Am. Bankers Ins. Co.*, No. 3:04cv00098, 2005 U.S. Dist. LEXIS 25883 (W.D. Va. Oct. 21, 2005) (concluding that "there is no evidence that Griffin suggested ABIC withdraw from the seminar, let alone agreed or concerted in that action. Indeed, it is clear from the facts that any conspiracy claim against Griffin himself would fail. Hence, there is no evidence that a conspiracy existed, and plaintiff's claim necessarily fails on this point").

of his agency.[29] Under such a circumstance, a conspiracy is a "legal impossibility" because a principal and an agent are not separate persons for purposes of the conspiracy statute, a rule commonly referred to as the "intracorporate immunity doctrine."[30]

3. The intracorporate immunity doctrine holds that where the agents or employees of a corporation are acting within the scope of their employment, "then only one entity exists" – the corporation – and "[b]y definition, a single entity cannot conspire with itself."[31] To the contrary, an agent or employee acting outside the scope of his employment or agency can be liable for a civil conspiracy to injure a person's business.[32]

    a. The question of what is within the scope of employment is not always clear, but "[b]oth the Fourth Circuit and the state courts of Virginia take a 'fairly broad view of the scope of employment.'"[33]

        i. "Generally, an act is within the scope of employment if it is 'naturally incident to [the master's] business . . . done while the servant was engaged upon the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.'"[34] When an employee is acting in accordance with the official policy of his employer, he is acting within the scope of his employment.[35]

        ii. An act may be prohibited by the employer, tortious, or even criminal to be done yet fall within the scope of employment. The test "is not whether the tortious act itself is a transaction within the ordinary course of business of the [employer], or within the scope of the [employee's] authority, but whether the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority."[36]

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[29] *Charles E. Brauer Co. v. Nationsbank*, 251 Va. 28, 30, 466 S.E.2d 382, 386-87 (1996) (finding that a bank and its agent were considered one person).

[30] *Id; see also SecureInfo Corp. v. Telos Corp.*, 387 F. Supp. 2d 593, 617 (E.D. Va. 2005) (granting defendant's demurrer on business conspiracy count because "an agent may not conspire with its principal under the intracorporate immunity doctrine").

[31] *E.g.*, *Fox v. Deese*, 234 Va. 412, 428, 362 S.E.2d 699, 708 (1987).

[32] *Meeko Corp. v. Chesterfield Commerce Ctr.*, 14 Va. Cir. 149, 152-53 (Chesterfield County 1988).

[33] *United States v. Domestic Indus., Inc.*, 32 F. Supp. 2d 855, 861 (E.D. Va. 1999) (quoting *Gutierrez de Martinez v. United States Drug Enforcement Admin.*, 111 F.3d 1148 (4th Cir. 1997), *cert. denied*, 522 U.S. 931 (1997)).

[34] *Domestic Indus.*, 32 F. Supp. 2d at 861 (quoting *Jamison v. Wiley*, 14 F.3d 222, 237 (4th Cir. 1994)).

[35] *See, e.g.*, *Landmark Communications, Inc.*, 246 Va. at 151-52, 431 S.E.2d at 309 (1993); *Gutierrez de Martinez v. DEA*, 111 F.3d 1148, 1157 n.7 (4th Cir. 1997) ("Lamagno claims that DEA policy required that female agents be accompanied while traveling at night and that he was carrying out this duty by escorting Bermann to her hotel. It is this policy that places Lamagno's actions within the scope of his employment.").

[36] *Martin v. Cavalier Hotel Corp.* 48 F.3d 1343, 1351 (4th Cir. 1995) (quoting *Commercial Business Sys. v. Bellsouth Servs.*, 249 Va. 39, 45, 453 S.E.2d 261, 265 (1995)). In *Bellsouth Servs.*, the Supreme Court of Virginia

b. It has also generally been held that a conspiracy between a parent corporation and its wholly-owned subsidiary is precluded by the intracorporate immunity doctrine.

i. In the antitrust context, the United States Supreme Court squarely has held that "a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other."[37] As the Court explained, "although a parent corporation and its wholly owned subsidiary are 'separate' for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power."[38] "They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."[39]

1. Courts have generally based this *per se* principle on the following rationale: "It is the very nature of their relationship that the subsidiary acts for the benefit of the parent. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests. Rather, the parent's control over its subsidiary, whether or not actually manifested, ensures their unity. The mere coordinated activity of a parent and its wholly owned subsidiary is completely unilateral, never susceptible of the 'conspiracy' label."[40]

2. For identical reasons, courts have held that "two subsidiaries wholly owned by the same parent

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held that the evidence presented a jury issue on whether acts were within the scope of employment where the "conduct was outrageous and violative of [the] employer's rules" and the employee's "motive was personal," but the "willful and malicious acts were committed while [the employee] was performing his duties ... and in the execution of the services for which he was employer." 249 Va. at 46, 453 S.E.2d at 266; s*ee also Doe v. United States*, 912 F. Supp. 193, 195 (E.D. Va. 1995) (denying summary judgment on the grounds that whether sex abuse by a psychiatrist during therapy sessions was within the scope of his employment was a jury issue).

[37] *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2211 (2010) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).

[38] *Id.*

[39] *Copperweld*, 467 U.S. at 771-72.

[40] *In re Ray Dobbins Lincoln-Mercury, Inc.*, 604 F. Supp. 203, 205 (W.D. Va. 1984) (citing *Copperweld*, 467 U.S. at 771-72).

corporation are legally incapable of conspiring with one another."[41]

3. Moreover, the legal inability of a parent corporation and a wholly-owned subsidiary to conspire in the antitrust context extends to the employees of such corporations.[42]

ii. Outside of the antitrust context, the federal courts in Virginia have uniformly held in the context of statutory conspiracy claims that wholly-owned subsidiaries are *per se* incapable of conspiring, whether with each other or with their parent corporation.[43]

1. Additionally, the lone Virginia state court to directly consider the issue of whether a corporation and its wholly-owned subsidiary are capable of conspiring under the business conspiracy statute held that such a conspiracy was a legal impossibility.[44]

2. The sole dissenting opinion under Virginia law was issued in *Glasson v. Children's Surgical Specialty Group, Inc.*,[45] where, in the context of a claim for tortious interference (not common law or statutory civil conspiracy), the court held as follows: "As an artificial person, a corporation can only act through its employees, natural persons. There is no such practical necessity that requires a corporation to act

[41] *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *accord Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987) ("*Copperweld* precludes a finding that two wholly-owned sibling corporations can combine" in violation of § 1); *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984) (if two siblings cannot conspire with their parent in violation of § 1, they cannot conspire with each other).

[42] *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1174 (E.D. Va. 1995) ("It is well-settled that a corporation cannot conspire with its wholly-owned subsidiary or with its officers and directors.").

[43] *See, e.g., In re Ray Dobbins Lincoln-Mercury, Inc.*, 604 F. Supp. at 205 (conspiracy under Va. Code § 18.2-500); *Derthick v. Bassett-Walker Inc.*, 904 F. Supp. 510, 525 (W.D. Va. 1995) ("Plaintiffs . . . incorporate a claim for violation of the Virginia conspiracy statute, Va. Code § 18.2-499(a) . . . . [T]he conspiracy between Bassett-Walker and its parent, VF Corporation, must fail under the intracorporate conspiracy doctrine."); *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 651-52 (E.D. Va. 2005), *rev'd on other grounds*, 562 F.3d 295 (4th Cir. 2009) ("Every defendant named in the complaint in addition to Custer Battles itself is an employee of Custer Battles, a related entity or subsidiary described in the complaint as a related 'shell company,' or an employee of one of those related entities. Thus a conspiracy among the defendants is a 'legal impossibility.' Accordingly, because the realtors cannot establish a valid conspiracy, their [False Claims Act] conspiracy claim under § 3729(a)(3) must be dismissed."); *Saliba v. Exxon Corp.*, 865 F. Supp. 306, 313 (W.D. Va. 1994) (holding that "a corporation cannot conspire with its wholly owned subsidiary" relative to a claim of statutory conspiracy under Virginia law); *see also Advanced Health-Care Servs., Inc.*, 910 F.2d at 146 (rejecting such a claim in the context of an alleged antitrust conspiracy).

[44] *Zimpel v. LVI Energy Recovery Corp.*, 23 Va. Cir. 423, 423-24 (Fairfax County 1991) (emphasis added).

[45] 73 Va. Cir. 480 (Norfolk 2007)

through a parent or subsidiary. Other than piercing the corporate veil, I am not aware of any circumstance under which the Supreme Court of Virginia has ignored the separate existence of a corporation. The incorporators of the three corporations involved here chose for some reason to create separate entities. They believed there was some advantage in the arrangement. They ought not be allowed to ask the court to ignore what they have created when it suits their convenience."[46]

c. The intracorporate immunity doctrine has a potential exception: if an employee, officer, or agent has an "independent personal stake" in the conspiracy, a conspiracy with the corporation may be found.[47]

i. This exception, however, has yet to be accepted by any Virginia state court.[48] Indeed, the Supreme Court of Virginia has repeatedly reaffirmed the proposition that a conspiracy between a principal and an agent is a legal impossibility and has never recognized such an exception.[49]

ii. The independent personal stake exception has been embraced, at least in certain contexts, by the Virginia federal district courts and the Fourth Circuit. For instance, in *Greenville Publishing Company v. Daily Reflector, Inc.*,[50] the Fourth Circuit observed that an exception to the intracorporate immunity doctrine "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective."[51]

1. However, courts have held that the exception was meant to apply only to circumstances in which the "conspirator gained a *direct personal* benefit from the conspiracy, a benefit *wholly separable* from the more general and indirect corporate benefit always

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[46] *Id.* at 481.
[47] *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir. 1997).
[48] *See, e.g.*, *Little Professor Book Co. v. Reston N. Point Village Ltd. Pshp.*, 41 Va. Cir. 73, 79 (Fairfax County 1996) (the personal stake exception "has not been adopted by the Virginia Supreme Court and therefore does not apply to the instant action"); *White v. Potocska*, 589 F. Supp. 2d 631, 660 (E.D. Va. 2008) ("Virginia has not recognized the so-called 'personal stake' exception to [the] general rule when the conspiring agent has an independent personal stake in achieving the conspiracy's illegal objective."); *Phoenix Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 429 (E.D. Va. 2006) ("[T]he personal stake exception is unavailable under Virginia law.").
[49] *See Charles E. Brauer Co.*, 251 Va. at 466, 466 S.E.2d at 382.
[50] 496 F.2d 391 (4th Cir. 1974).
[51] *Id*. at 399.

present under the circumstances surrounding virtually any alleged corporate conspiracy."[52]

2. Moreover, to provide an exception to the intracorporate immunity doctrine, the independent personal stake alleged must not be overly attenuated. In *Iglesias v. Wolford*,[53] the court dismissed the conspiracy claim on the basis that the defendant's "alleged personal stake is too attenuated for the exception to apply. Here, the defendants were not allegedly conspiring to take money from Iglesias, the alleged victim of the civil conspiracy, for themselves. Rather, Iglesias at most alleges that the defendants conspired to intimidate her and terminate her employment so as to enable Wolford to cover up his alleged pre-conspiracy embezzlement from the Fund. This 'indirect,' enabling objective is not the sort of independent personal financial stake that the carefully-circumscribed independent personal stake exception covers."[54]

d. In sum, courts have held that a conspiracy cannot form in the following situations: (1) a single entity cannot conspire with itself;[55] (2) a corporation cannot conspire with its wholly-owned subsidiary;[56] (3) partners cannot conspire when they are acting within the scope of their partnership;[57] (4) if the conspiracy involves the breach of a contract, one of the conspirators must be a third party to that contract.[58]

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[52] *Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225 (W.D. Va. 1988) (emphases added).

[53] 539 F. Supp. 2d 831 (E.D.N.C. 2008)

[54] *Id.* at 837; *see also Oksanen*, 945 F.2d at 705 ("[The alleged conspirators] could conceivably have attained some benefits in the long-run if their critic, Oksanen, was no longer practicing at Page Memorial. We doubt, however, that these indirect economic interests justify a personal stake exception.").

[55] *Fox v. Deese*, 234 Va. 412, 428, 362 S.E.2d 699, 708 (1987) ("If the defendants were acting within the scope of their employment and, therefore, were agents of the City, then only one entity exists — the City. By definition a single entity cannot conspire with itself."); *Perk v. Vector Res. Group*, 253 Va. 310, 485 S.E.2d 140 (1997) (ruling that demurrer properly sustained since defendants are not separate entities but rather agents of each other).

[56] *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139 (4th Cir. 1990) (Two wholly owned subsidiaries by the same parent corporation are legally incapable of conspiring with one another for purposes of antitrust law.).

[57] *Saliba v. Exxon Corp.*, 865 F. Supp. 306, 313 (W.D. Va. 1994) (holding that "where the alleged co-conspirators are the two general partners in a partnership, acting within the scope of partnership affairs, only one entity exists--the Partnership"), *aff'd*, 52 F.3d 322 (4th Cir. 1995).

[58] *Stauffer v. Fredericksburg Ramada, Inc.*, 411 F. Supp. 1136, 1139 (E.D. Va. 1976) (citing and discussing *Worrie v. Boze*, 198 Va. 533, 95 S.E.2d 192 (1956)); *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985) (recognizing interference with a contract as a basis for civil liability under § 18.2-500); *Gulledge v. Dyncorp. Inc.*, 24 Va. Cir. 538, 540-41 (Fairfax County 1989) (noting that "[a]lthough a party to a contract may conspire with a

4. "Concerted action" reflects the statutory requirement that a plaintiff ultimately prove that someone "combined, associated, agreed, mutually undertook, or concerted together" with someone else in the conduct at issue.[59]

   a. A plaintiff must prove then, to be successful in his or her claim, that the defendants "combined together to effect a preconceived plan and unity of design and purpose."[60]

   b. A conspiracy claim only requires proof of a "tacit understanding" – an express agreement is not a necessary component of the claim.[61]

B. Criminal or Unlawful Purpose or Some Lawful Purpose by a Criminal or Unlawful Means – A Necessary Element for Civil Conspiracy Claims

1. The key and essential element for a common law conspiracy is the criminal or unlawful nature of the underlying conduct.[62] Accordingly, a complaint will be deficient unless sufficient facts alleging an unlawful act or unlawful purpose are present.[63]

   a. In determining whether allegations, on their face, state a cause of action for civil conspiracy, a court must ask whether the plaintiff has "alleged an unlawful act or unlawful means to perform a lawful act as a conspiratorial goal supporting a claim of civil conspiracy as a cause of action under Virginia law."[64] On this issue, a few points of law have been made clear.

      i. Virginia courts have consistently held that the underlying conduct must be legally "actionable" to form the basis for a civil conspiracy claim, *i.e.*, a civil conspiracy must embody an underlying wrong which would be actionable in the absence of a conspiracy.[65]

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third party to interfere with its own contract, a party to a contract acting alone cannot interfere with its own contract").

[59] *Schlegel v. Bank of America, N.A.*, 505 F. Supp. 2d 321, 325 (W.D. Va. 2007) (citing Va. Code § 18.2-499).

[60] *Bay Tobacco*, 261 F. Supp. 2d at 499 (internal quotation marks omitted).

[61] *Tysons Toyota, Inc. v. Globe Life Ins. Co.*, 45 F.3d 428 (4th Cir. 1994) (unpublished).

[62] *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985).

[63] *Id.*

[64] *Citizens for Fauquier County v. SPR Corp.*, 37 Va. Cir. 44, 48 (Fauquier County 1995).

[65] *Id.*; *accord Kieft v. Becker*, 58 Va. Cir. 171, 176-77 (Fairfax County 2002); *Skillstorm, Inc. v. Elec. Data Sys., LLC*, 2009 U.S. Dist. LEXIS 95056 (E.D. Va. Oct. 9, 2009) (Plaintiff alleged that defendants conspired to remove plaintiff from a government contract while at the same time soliciting plaintiff's personnel. The court also found that the common law and statutory conspiracy claims were insufficiently pled because the conduct complained of was allowed under the purchase orders and was therefore not unlawful.).

ii. Moreover, the violation of a statute or the commission of an *intentional tort* can give rise to a claim for civil conspiracy.[66]

b. Notwithstanding these general principles, however, "[t]he Supreme Court of Virginia has not set a standard setting forth the requirements for the underlying alleged wrong in a case of civil conspiracy."[67] Other jurisdictions, however, have weighed in on the issue.

i. For the majority of jurisdictions to consider the issue, it appears that the underlying wrong in a civil conspiracy action must be an intentional tort or a crime.[68]

c. This "intentionality" requirement is persuasive in light of the fact that civil liability for conspiracy originated in criminal law and carried over the requirement that the action agreed upon be either a criminal act or an intentional tort.[69] Given the lack of any holding to this effect in Virginia, however, the issue remains unsettled.

2. Nonetheless, courts typically do not struggle with whether a plaintiff has made sufficient factual allegations of an unlawful act or unlawful purpose as such facts either are present in the complaint or not. The Supreme Court of Virginia has held that allegations accusing employees of forming a combination to breach their contractual, employment, fiduciary and other duties to their employer, including the supposed unlawful conversion by them of their employer's confidential and proprietary information, stated sufficient unlawful purposes.[70]

3. Courts have held that the following instances are not unlawful acts or unlawful purposes for purposes of establishing this element:

a. Truthful business competition;[71] and

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[66] *See Worrie v. Boze*, 198 Va. 533, 540-41, 95 S.E.2d 192, 198-99 (permitting a claim of civil conspiracy for inducing a breach of contract because the "great weight of authority supports the rule that an action in tort will lie against those who conspire to induce the breach of a contract"); *Country Vinter, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 412-15, 634 S.E.2d, 751-52 (2006) (conspiracy for violation of Wine Franchise Act).

[67] *SPR Corp.*, 37 Va. Cir. at 48.

[68] *Advanced Power Systems v. Hi-Tech Systems*, 801 F. Supp. 1450, 1458 (E.D. Pa. 1992); *see also Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981) ("There is no such thing as a conspiracy to commit negligence or, more precisely, to fail to exercise due care."); *Tri v. J.T.T.*, 162 S.W.3d 552, 557 (Tex. 2005) ("there cannot be a civil conspiracy to be negligent."); *Commonwealth v. Adams*, 97 Pa. Super. 510, 527 (1929) ("There is no such thing as an inadvertent and negligent conspiracy."); *but see Vance v. Chandler*, 597 N.E.2d 233, 235 (Ill. App. 1992) ("Therefore, we hold that an alleged overt or unlawful act need not be tortious or otherwise actionable in tort to support a cause of action for civil conspiracy.").

[69] *See* Prosser, HANDBOOK OF THE LAW OF TORTS, § 46, at 291-93.

[70] *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 26, 431 S.E.2d 277, 281 (1993); *accord Int'l Paper Co. v. Gilliam*, 63 Va. Cir. 485, 493 (City of Roanoke 2003) (citing *CaterCorp*).

[71] *Hechler Chevrolet*, 230 Va. at 402, 337 S.E.2d at 748.

b. The enticement of a competitor's employee to leave his employment so long as no means are used and the employee's employment is terminable at will.[72]

C. For the Purpose of Willfully or Maliciously Injuring a Plaintiff in Reputation, Trade, Business, or Profession – A Necessary Element for Business Conspiracy Claims

1. In a series of three cases involving the business conspiracy statute, the Supreme Court of Virginia has altered the malice standard applicable to business conspiracy claims from an actual malice standard to a legal malice standard.[73]

a. Beginning in 1986 with the case of *Greenspan v. Osheroff,*[74] the Court adopted a "primary overriding purpose" standard, holding that: "[W]hen the fact-finder is satisfied from the evidence that the defendant's primary and overriding purpose is to injure his victim in reputation, trade, business or profession, motivated by hatred, spite, or ill-will, the element of malice required by Code § 18.2-499 is established, notwithstanding any additional motives entertained by the defendant to benefit himself or persons other than the victim."

b. Six years later, in the case of *Tazewell Oil Co. v. United Virginia Bank,*[75] the Supreme Court of Virginia appeared to move away from the primary and overriding purpose standard set forth in *Osheroff*. In a 4-3 decision, the Court held that sufficient evidence of a conspiracy existed because, among other things, the bank's action "exhibited a willful disregard for Tazewell's rights."[76] Surprisingly, the majority opinion in *Tazewell* made no mention of the "primary overriding purpose" standard set forth in *Osheroff*. In his dissenting opinion, Judge Whiting chided the majority for ignoring *Osheroff*, stating that the "primary and overriding purpose" test should have been applied to determine whether the defendants had acted with actual malice.[77]

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[72] *Id.*

[73] Urbanski, Michael F., *Expanding the Reach of Virginia's Business Conspiracy Act*, VSB LITIGATION NEWS at **4-6 (Winter 1998-99) ["Urbanski"].

[74] 232 Va. 388, 398-99, 351 S.E.2d 28, 35-36 (1986); *see also Conway v. Peace*, 28 Va. Cir. 226, 227 (Chesterfield County 1992) (granting motion to strike due, in part, to plaintiff's failure to establish that defendant's primary and overriding purpose was to injure plaintiff); *Gerald A. Schultz & Assoc., P.C. v. LaLonde*, 17 Va. Cir. 387, 389 (City of Richmond 1989) (applying the "primary and overriding purpose" standard).

[75] 243 Va. 94, 413 S.E.2d 611 (1992).

[76] Id.

[77] *Osheroff*, 243 Va. at 116, 413 S.E.2d at 623. Some imprecise drafting of the *Osheroff* opinion may have led to the confusion. In *Osheroff*, the Court merely noted that the chancellor found that intent to injure was at the forefront of the proffered conspiracy.

c. Three years later, the Supreme Court of Virginia once again addressed whether the conspiracy statute required proof of actual malice in *Commercial Business Systems, Inc. v. BellSouth Services, Inc*.[78] Rejecting once and for all any contention that the conspiracy statute requires proof of actual malice, the Court concluded that only proof of legal malice was necessary, *i.e.*, that defendant acted intentionally, purposely, and without lawful justification.[79] Distinguishing *Osheroff*, the Court explained that its statement about a conspirator's "primary and overriding purpose" was made in the context where the conspirator had both legitimate and illegitimate motives for his actions and ruled that: in any event, we do not think that, as a general proposition, the conspiracy statutes require proof that a conspirator's primary and overriding purpose is to injury another in his trade or business. The statutes do not so provide, and such a requirement would place an unreasonable burden on a plaintiff.[80]

d. Courts consistently have followed the legal malice standard set forth in *Commercial Business Systems*.[81] Further, in pleading a claim for business and common law conspiracy, keep in mind that a plaintiff must allege an unlawful act or unlawful purpose because "there can be no conspiracy to do an act the law allows."[82]

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[78] 249 Va. 39, 47, 453 S.E.2d 261, 266-67 (1995).

[79] *Id.* at 47, 453 S.E.2d at 267.

[80] *Id.*

[81] *See Simmons v. Miller*, 261 Va. 561, 578, 544 S.E.2d 666, 677 (2001) (holding that the statute does not require the plaintiff to prove that "a conspirator's primary and overriding purpose is to injure another in his trade or business"); *Advanced Marine Enters., Inc. v. PRC, Inc*., 256 Va. 106, 117, 501 S.E.2d 148, 154-55 (1998) (holding that "Code §§ 18.2-499 and -500 do not require a plaintiff to prove that "a conspirator's primary and overriding purpose is to injure another in his trade or business"); *Galaxy Computer Servs., Inc. v. Baker*, 325 B.R. 544, 555-56 (E.D. Va. 2005) (holding that statutes merely require proof of legal malice); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 108 F.3d 522, 526-27 (4th Cir. 1997) (holding that Adelphia cable only need to prove that Charlottesville Quality Cable Operating company acted with legal malice when it interfered with Adelphia's distribution rights); *Williams v. Dominion Tech. Partners*, 265 Va. 280, 576 S.E.2d 752 (2003) (holding that employee did not breach his fiduciary duty of loyalty to his employer when he accepted employment with a competitor; and, thus did not act with legal malice); *Xtreme 4x4 Ctr., Inc .v. Howery*, 65 Va. Cir. 469 (City of Roanoke 2004) (holding that alleged defamatory statements were merely matters of opinion, therefore, legal malice standard was not met); *Feddeman & Co. v. Langan Assoc.*, 260 Va. 35, 530 S.E.2d 668 (2000) (where court held that "the failure of legal justification 'may include a breach of [one's] fiduciary duty or assisting someone to breach their fiduciary duty.'"); *Int'l Paper Co. v. Brooks*, 63 Va. Cir. 494, 496-97 (City of Roanoke 2003) (holding that 'for IPC's business conspiracy claims to survive, they must provide enough core facts to support the inference that Mr. Brooks acted with the requisite legal malice"); *Atlas Partners II v. Brumberg, Mackey & Wall, PLC*, No. 4:05cv0001, 2006 U.S. Dist. LEXIS 983 (W.D. Va. Jan. 6, 2006) (stating "that damaging plaintiffs may not have been their primary purpose is immaterial under Virginia law.").

[82] *R & D 2001, L.L.C. v. Collins*, CL-2005-7021, 2006 Va. Cir. LEXIS 131, at *8-9 (Fairfax County 2006) (quoting *Hechler Chevrolet v. General Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744 (1985)); *Commercial Roofing & Sheet Metal Co. v. Gardner Eng's, Inc.*, 60 Va. Cir. 384, 386 (Fairfax County 2002) (sustaining defendant's demurrer to statutory conspiracy claim because plaintiff failed to allege an unlawful act or an unlawful purpose); *Station #2, LLC v. Lynch*, Case No. CL06-6106, 2008 Va. Cir. LEXIS 41, at *14 (City of Norfolk April 30, 2008) (sustaining demurrer to § 18.2-499 count as plaintiff did not make allegations suggesting that defendant used any illegal means), *aff'd* 280 Va. 166, 695 S.E.2d 537 (2010).

2. The malice requirement, as applied to co-conspirators, never has been squarely resolved by the Supreme Court of Virginia. At least one federal court, however, has held that the conspiracy statute "does not require that the co-conspirator act with legal malice. Rather, the statute simply requires that one party, acting with legal malice, conspire with another party to injure the plaintiff."[83]

3. An additional requirement for this second element is proving that the injury was to "reputation, trade, business, or profession." The Supreme Court of Virginia has held that §§ 18.2-499 and 500 "apply to business and property interests, not to personal or employment interests."[84] Federal courts have also recognized the business / personal distinction.[85]

D. Resulting in Damage to the Plaintiff – A Necessary Element for Common Law and Statutory Business Conspiracy Claims

1. Actual, Treble and Punitive Damages:

a. As with any other claim, the plaintiff must prove that it sustained damages from the alleged interference.[86] Business conspiracy claims have been a favorite claim for lawyers because § 18.2-500 allows for the recovery of treble damages. Section 18.2-500 provides that one who is "injured in his reputation, trade, business

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[83] *Va. Vermiculite Ltd. v. W..R. Grace & Co.-Conn.*, 144 F. Supp. 2d 558, 601 (W.D. Va. 2001).

[84] *Andrews v. Ring*, 266 Va. 311, 319, 585 S.E.2d 780, 784 (2003) (a case where a former school board member filed a civil conspiracy charge against the local prosecutor and county building inspector after the latter two sought criminal charges against him). The Court did so based on the origin of those sections in the antitrust statutes and based on principles of statutory construction, which it applied to construe "reputation" in light of "trade, business or profession." *Id.*

[85] *See Buschi v. Kirven*, 775 F.2d 1240, 1259 (4th Cir. 1985) (agreeing with the federal district courts, which "have consistently held that a right of action is 'afforded [under these statutes] only when malicious conduct is directed at one's business, not one's person,' and that the statute 'focuses upon conduct directed at property, i.e., one's business' and applies only to 'conspiracies resulting in business-related damages.'"); *see also, e.g.*, *Inman v. Klockner-Pentaplast of Am., Inc.*, 467 F. Supp. 2d 642, 654 (W.D. Va. 2006) (holding, in a former employee vs. former employer case, that "Plaintiff's professional reputation and stock ownership in his own company, however, are employment interests, not business interests. A plethora of cases reveal that employment interests are not covered by the Virginia civil conspiracy statutes."); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 267 (W.D. Va. 2001) (also a former employee vs. former employer case, stating that "In order to state a claim under Section 18.2-499, courts have held that the conspiracy must be one to injure the plaintiff 'in his business.'"); *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F. Supp. 858, 863-64 (E.D. Va. 1980) (stating that "[t]he purpose of this statutory action is to provide a remedy for wrongful conduct directed towards one's business, *including injury to one's property interest*.") (emphasis added); *Campbell v. Bd. of Supvrs.*, 553 F. Supp. 644, 645 (E.D. Va. 1982) (limiting claims under Va. Code § 18.2-499 to conduct which limits a "business" and not personal employment interests); *Ward v. Connor*, 495 F. Supp. 434, 439 (E.D. Va. 1980) (ruling that a plaintiff cannot recover under a statutory business claim for harm to his personal reputation and not to any business interest), *rev'd on other grounds*, 657 F.2d 45 (4th Cir. 1981); *Moore v. Allied Chem. Corp.*, 480 F. Supp. 364, 375 (E.D. Va. 1979) (holding that "statutory coverage [under § 18.2-499] is afforded only when malicious conduct is directed at one's Business, not one's Person"); *Loria v. Regelson*, 39 Va. Cir. 536, 541 (City of Richmond 1996) (ruling that "[n]o conspiracy exists under § 18.2-499 of the Code when damage to professional reputation of an individual is alleged").

[86] *Gallop v. Sharp*, 179 Va. 335, 19 S.E.2d 84 (1942); *see also Saks Fifth Avenue, Inc. v. James, Ltd.*, 272 Va. 177, 189-90, 630 S.E.2d (2006) (concluding that the plaintiff failed to carry its burden of proof that the defendants' wrongful conduct proximately caused plaintiff's alleged damages).

or profession by reason of a violation of [section] 18.2-499 may sue therefore and recover three-fold the damages by him sustained . . . and without limiting the generality of the term, 'damages' shall include loss of profits."[87]

b. The Supreme Court of Virginia, in *Advanced Marine Enterprises, Inc. v. PRC, Inc.*,[88] also has held that the recovery of punitive damages and treble damages are allowed in the same action because "awards of punitive and treble damages were based on separate claims involving different legal duties and injuries."[89] Importantly, courts consistently have held that damage to one's personal employment interest is not actionable under the statute.[90]

c. The issue of whether an award of treble damages is discretionary or mandatory upon a finding of liability for statutory conspiracy has yet to be squarely resolved by the Supreme Court of Virginia. The language of the statute itself, through the use of the word "may," appears to indicate that such an award is discretionary. At least one circuit court, however, has "reluctantly" held that trebling under the statute is mandatory.[91]

2. Injunctive Relief and Attorneys' Fees and Costs:

a. In addition to damages, the business conspiracy statute also allows for permanent injunctive relief and injunctive relief during litigation to restrain one from continuing the conspiratorial acts.[92] Injunctive relief is also possible with regard to claims for civil conspiracy.[93]

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[87] Va. Code § 18.2-500(A).

[88] 256 Va. 106, 501 S.E.2d 148 (1998).

[89] *Id.* at 124, 501 S.E.2d at 159; *see also Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 587 S.E.2d 581 (2003) (ruling that court did not err in awarding plaintiff treble and punitive damages).

[90] *Jordan v. Hudson*, 690 F. Supp. 502 (E.D. Va. 1998), *aff'd*, 879 F.2d 98 (4th Cir. 1998) (ruling that postmaster's statutory business claim should be dismissed as a matter of law because he alleged his co-workers conspired to injure him in his trade and reputation, which caused him to be demoted. The section does not apply to employment interests); *Inman v. Klockner-Pentaplast of Am., Inc.*, 467 F. Supp. 2d 642, 654 (W.D. Va. 2006) (ruling that the employee failed to state a claim under the statute because his professional reputation and stock ownership in the company, were employment interests and not business interests); *Warner v. Buck Creek Nursery, Inc.*, 149 F. Supp. 2d 246, 267-68 (W.D. Va. 2001) (holding that to the extent a plaintiff attempts to base his claim for conspiracy to his personal reputation or employment, as opposed to business interests, he fails to state a claim); *Orantes v. Pollo Ranchero, Inc.*, 70 Va. Cir. 277, 281 (Fairfax County 2006) (holding that statute applies only to "conspiracies resulting in business related damages"); *see also Almy v. Grisham*, 273 Va. 68, 639 S.E.2d 182 (2007) (no cause of action for conspiracy to intentionally inflict emotional distress); *but see Fitzgerald v. Farrell*, 63 Va. Cir. 1, 4 (Loudoun County 2003) (concluding that police officer's business conspiracy claim survives a demurrer where his claim that two homebuyers and homeowner conspired to have him indicted because they were unhappy with the work he did on their houses as a private contractor was an injury to his reputation or profession) .

[91] *Maximus, Inc. v. Lockheed Info Mgmt. Sys. Co.*, 47 Va. Cir. 193, 200 (Richmond 1998).

[92] Va. Code § 18.2-500(B).

[93] *See, e.g., Virginia Academy of Fencing, Inc. v. Alexei Sintchinov, et al.*, Case No. CL 2009-1998 (Fairfax County 2009).

b. Further, the business conspiracy statute allows for "reasonable counsel fees to complainants' and defendants' counsel."[94] One court has held that a defendant is entitled to its attorneys' fees even when the case is dismissed pursuant to its demurrer.[95] Of course, a party seeking to recover their attorneys' fees must prove that the fees were reasonable.[96]

III. DEFENSES TO CIVIL AND STATUTORY CONSPIRACY CLAIMS

A. Statute of Limitations

1. One point is clear: a conspiracy cause of action accrues when damage is first sustained by the plaintiff.[97]

2. The length of the limitations period running from the accrual point is unclear, however, and the Supreme Court of Virginia has not decided the issue.[98]

a. Virginia federal courts deciding the issue have held that the five year period for injury to property applies to statutory business claims, as opposed to a two year period of limitations.[99] Virginia circuit courts have gone different ways.[100]

i. However, the majority of cases appear to find a five year statute of limitations, and the confirmation of the Supreme Court of Virginia in *Andrews v. Ring* that the conspiracy statutes focus on injuries to business and property interests,

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[94] Kent Sinclair & Leigh B. Middleditch, Jr., VIRGINIA CIVIL PROCEDURE, § 2.26 (4th ed. 2003).

[95] *Dove v. Dayton Town Council*, 39 Va. Cir. 159, 169 (Rockingham County 1996).

[96] *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).

[97] *See Eshbaugh v. Amoco Oil Co.*, 234 Va. 74, 76-77, 360 S.E.2d 350, 351 (1987) (a cause of action for conspiracy under Code § 18.2-500 accrues when one is "injured in his . . . business."); s*ee also Gallop v. Sharp*, 179 Va. 335, 338, 19 S.E.2d 84, 86 (1942) (cause of action for conspiracy accrues when the acts committed in furtherance of the conspiracy result in damage).

[98] While the Supreme Court of Virginia never has ruled explicitly on the issue, the Court has implied that the statute may be two years. In *Eshbaugh*, the trial court concluded, and the parties agreed, that the applicable statute of limitations was five years from the date the cause of action accrued. 234 Va. at 76-77, 360 S.E.2d at 351. The Supreme Court stated that it "expressed no view as to the correctness of this conclusion," but cited, following the " but see" signal, two cases in which it held that the statute of limitations was the "catch-all" statute, Virginia Code § 8.01-248 (two years). *Id.*, 234 Va. at 76, 360 S.E.2d at 351.

[99] *See, e.g.*, *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 543 (4th Cir. 1997) ("The statute of limitations applicable to the conspiracy claim [under Va. Code § 18.2-500] is five years.") (citing Va. Code § 8.01-243); *Federated Graphics Cos. v. Napotnik*, 424 F. Supp. 291, 293-94 (E.D. Va. 1976) (reasoning that § 18.2-500 "provides a remedy for wrongful conduct directed to the business. An injury to one's business is clearly an injury to one's property interest" and applying the five-year injury to property limitations period).

[100] *Compare Cherokee Corp. v. Chicago Title Ins. Corp.*, 35 Va. Cir. 19, 28-29 (Warren County 1994) (relying on the reasoning in *Federated Graphics* and holding that the five year period applies) and *EER Sys. Corp. v. Armfield, Harrison & Thomas, Inc.*, 51 Va. Cir. 84, 96 (Fairfax County 1999) (Roush, J.) (same) *with Orantes v. Pollo Ranchero, Inc.*, 70 Va. Cir. 277, 281 (Fairfax County 2006) (Thacher, J.) (concluding that where the basis for a statutory conspiracy claim was fraud, the two-year fraud limitations period applies).

not personal interests, suggests that the federal courts have the better reasoned side of the argument.

ii. On the other hand, cases applying a two-year period harmonize the statutory conspiracy limitations period with that for common law conspiracy,[101] a result that may be attractive given that the absence of a clear statutory prescription of a longer period.

B. Intracorporate Immunity Doctrine

1. As mentioned above, the intracorporate immunity doctrine states that "there must two persons to comprise a conspiracy, and a corporation, like an individual, cannot conspire with itself."[102]

2. Thus, a plaintiff alleging that a corporation conspired with its agents, acting within the scope of their employment, fails to state a proper claim because the alleged conspiracy would involve only one entity.[103] The intracorporate immunity doctrine does not apply when the agent acts outside the scope of his or her agency relationship at the time of the wrongful conduct.[104]

C. Noerr-Pennington Immunity

1. "[T]he Noerr-Pennington doctrine provides that persons petitioning the government cannot be charged with violations of the Sherman Antitrust Act for attempts to influence legislative or executive action."[105] "The Noerr-Pennington doctrine was developed as a protection for entities petitioning the government in relation to legislative or policy matters."[106]

2. In *Titan America, LLC v. Riverton Investment Corp.*, the Supreme Court of Virginia affirmed the trial court's dismissal of a case on Noerr-Pennington grounds, holding that "the protection of First Amendment rights provided by application of the Noerr-Pennington doctrine should be available to a defendant in causes of action for tortious interference with a business expectancy and conspiracy."[107] In *Titan*, the plaintiff filed suit against the defendant for opposing its plans to acquire land in Warren

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[101] *See, e.g.*, *EER Sys. Corp.*, 51 Va. Cir. at 97 (common law conspiracy governed either by the personal injury period or the catch-all period, both of which are now two years); *but see Hurst v. State Farm Mut. Auto. Ins. Co.*, Civil Action No. 7:05cv776, 2007 U.S. Dist. LEXIS 21172, at **16-17 (W.D. Va. March 23, 2007) (concluding that the applicable statute of limitations for a claim of conspiracy tracks the statute of limitations for the underlying tort).

[102] *Bowman v. State Bank of Keysville*, 229 Va. 534, 541, 331 S.E.2d 797, 801 (1985).

[103] *Simmons v. Miller*, 261 Va. 561, 578-79, 544 S.E.2d 666, 676-77 (2001).

[104] *Grayson Fin. Am., Inc. v. Arch Specialty Ins. Co.*, Civil Action No. 2:05cv461, 2006 U.S. Dist. LEXIS 7302 (E.D. Va. Feb. 6, 2006); s*ee also Phoenix Redevelopment Corp. v. Rodriguez*, 403 F. Supp. 2d 510, 517 (E.D. Va. 2005) (finding the intracorporate immunity doctrine inapplicable when the defendant was not an employee and agent at the time of the wrongful conduct).

[105] *Lockheed Information Management Systems Co. v. Maximus, Inc.*, 259 Va. 92, 105, 524 S.E. 420, 427 (2000).

[106] *Id.*

[107] 264 Va. 292, 302, 569 S.E. 2d 57, 62 (2002).

County "by appearing before the local governing bodies . . . initiating litigation in circuit court, and funding litigation undertaken by various Warren County residents."[108]

3. In *Titan*, the Court recognized a potential exception to the protection of the Noerr-Pennington doctrine for "sham litigation." Under that exception, "a court first determines whether the challenged litigation was objectively baseless. A case is objectively baseless if the proponent of the litigation lacked probable cause to institute the unsuccessful lawsuit. Probable cause in this context means a reasonable belief that there is a chance that [a] claim may be held valid upon adjudication. If such litigation is objectively baseless, the court then makes a subjective inquiry into whether the litigation was filed with an anti-competitive purpose. If the litigation was not objectively baseless, the second inquiry is not necessary."[109] The Court, however, found that the exception was not applicable, and that this issue was appropriately resolved o demurrer because a court could take judicial notice of the proceedings in the underlying actions.[110]

IV. CIVIL AND STATUTORY CONSPIRACY – A BRIEF COMPARISON

A. Actors

1. Both civil and statutory conspiracy claims require the existence of two or more "persons" seeking to accomplish the conspiratorial end by concerted action.

2. The intracorporate immunity doctrine applies to claims for both common law and statutory conspiracy.

B. Means

1. Civil conspiracy requires proof of some criminal or unlawful purpose or of some lawful purpose carried out by a criminal or unlawful means.

2. Statutory conspiracy requires that the parties act for the purpose of willfully or maliciously inuring a plaintiff in reputation, trade, business, or profession.

3. Both statutory and civil conspiracy require proof of such conduct by clear and convincing evidence.

[108] *Id.* at 296, 569 S.E. 2d at 59.
[109] *Id.* at 302-03, 569 S.E. 2d at 62.
[110] *Id.*

C. Damages

1. Both civil and statutory conspiracy permit the recovery of both compensatory and punitive damages.

2. Both civil and statutory conspiracy permit injunctive relief.

3. Statutory conspiracy permits treble damages and reasonable attorney's fees.

D. Pleading Standards

1. In Virginia state court, "traditional notice pleading and demurrer standards apply in reviewing conspiracy claims." But, "mere conclusory language" is insufficient.

2. In federal court, a statutory business conspiracy requires a heightened pleading under Fed. R. Civ. P. 9(b). Similarly, a civil conspiracy claim must include "some details of time and place and the alleged effect of the conspiracy."

E. Limitations Period

1. Claims for civil conspiracy appear to be subject to a two-year period of limitation, which accrues when damage is first sustained by the plaintiff.

2. Virginia federal courts deciding the issue have held that the five year period for injury to property applies to statutory business claims. Virginia circuit courts have gone different ways. The majority of cases, however, appear to find a five year statute of limitations applicable to claims for statutory conspiracy, as opposed to a two year period of limitation.