

Civil Conspiracy: An Analysis of Common Law and Statutory Business Conspiracy Claims Under Virginia Law

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Virginia recognizes two tort claims for civil conspiracy—one under the common law and the second under Virginia Code §§ 18.2-499 to -500. This article discusses these two causes of action which are often the subjects of the business litigation.

BACKGROUND

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 become a union office and employ members of the union. When the mercantile business refused, the union members attempted to destroy its business through boycotts and threatening patrons. 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

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."

In 1964, the General Assembly enacted Virginia's business conspiracy statute. The statute is similar to an old Wisconsin statute, but its remedies are stricter.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.⁷ 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 . . .

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

STATING A CLAIM FOR COMMON LAW CONSPIRACY UNDER VIRGINIA LAW

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

1. A combination of two or more persons;
2. To accomplish, by some concerted action;
3. Some criminal or unlawful purpose or some lawful purpose by a criminal or unlawful means; and
4. Resultant damage caused by the defendant's acts committed in furtherance of the conspiracy.¹⁰

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 A plaintiff cannot maintain an action for common law conspiracy when the unlawful act underlying the claim does not allow for an award of damages.¹² Ordinarily, the issue of whether a conspiracy caused the alleged damage is one for the jury's decision.¹³

STATING A CLAIM FOR STATUTORY BUSINESS CONSPIRACY UNDER VIRGINIA LAW

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

1. A combination of two or more persons;
2. For the purpose of willfully or maliciously inuring a plaintiff in reputation, trade, business, or profession; and
3. Resulting in damage to the plaintiff.¹⁴

Similarly, 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 conspiracy¹⁵ and resulting damage to the plaintiff.¹⁶ Proof of a civil conspiracy must be shown by clear and convincing evidence.¹⁷

PROVING CIVIL CONSPIRACY CLAIMS

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

Both the common law and statute require a combination of two separate actors in a concerted action.¹⁸ "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.¹⁹ 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."²⁰ After all, this "common design is the essence of the conspiracy."²¹ A successful common law conspiracy claim only requires proof of a "tacit understanding" - an express agreement is not a necessary component of the claim.²²

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 of his agency.²³ Under such a circumstance, a conspiracy is a legal impossibility because a principal and an agent are not separate persons for

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purposes of the conspiracy statute, a rule commonly referred to as the intracorporate immunity doctrine.²⁴ 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."²⁵ 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.²⁶

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.'"²⁷ "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."²⁸ 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."²⁹

Further, employees are not the only agents who fall under the doctrine as both Virginia federal and state courts have applied the intracorporate immunity doctrine to corporate directors.³⁰ Federal courts do apply an exception to this rule where an officer or director has a stake or a purpose "independent of his interest in the corporation's success."³¹ For instance, in *Greenville Publishing Company v. Daily Reflector, Inc.*,³² 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."³³ A Virginia circuit court has said that this federal personal stake exception is different from the scope of employment test and explained that the personal stake exception "applies primarily in antitrust actions, such as where a corporate director with a personal stake in another business conspires to use the corporation to eliminate competitors for that personal business interest, thus, hijacking the corporation for his own personal, illegal, ends."³⁴ In fact, 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 present under the circumstances surrounding virtually any alleged corporate conspiracy." The Supreme Court of Virginia has not adopted the personal stake exception.

In sum, the courts repeatedly have held that a conspiracy cannot form in the following situations:

- A single entity cannot conspire with itself.³⁷
- A corporation cannot conspire with its wholly-owned subsidiary;³⁸
- Partners cannot conspire when they are acting within the scope of their partnership.³⁹
- If the conspiracy involves the breach of a contract, one of the conspirators must be a third party to that contract.⁴⁰

II. Some Criminal or Unlawful Purpose or Some Lawful Purpose by a Criminal or Unlawful Means — a Necessary Element for Civil Conspiracy Claims

The key and essential element for a common law conspiracy is the criminal or unlawful nature of the underlying conduct.⁴¹ Accordingly, a complaint will be deficient unless sufficient facts alleging an unlawful act or unlawful purpose are present.⁴² Typically, courts 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.⁴³ Courts have held that the following instances are not unlawful acts or unlawful purposes for purposes of establishing this element:

- Truthful business competition;⁴⁴ and
- The enticement of a competitor's employee to leave his employment

so long as no unlawful means are used and the employee's employment is terminable at will.⁴⁵

Where the unlawful act or unlawful purpose is the commission of a tort, the Supreme Court recently emphasized that a plaintiff must establish that the underlying tort was committed in order to recover for a common law claim of civil conspiracy.⁴⁶ In other words, "where 'there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.'" ⁴⁷

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

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.⁴⁸ Beginning in 1986 with the case of *Greenspan v. Osheroff*,⁴⁹ 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.

Six years later, in the case of *Tazewell Oil Co. v. United Virginia Bank*,⁵⁰ 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."⁵¹ Surprisingly, the majority opinion in *Tazewell* made no mention of the "primary overriding purpose" standard set forth in *Osheroff*.⁵² In his dissenting

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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.⁵³

Three years later, the Supreme Court once again addressed whether the conspiracy statute required proof of actual malice in *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*⁵⁴ 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.⁵⁵ Distinguishing *Osheroff*, the Court explained that its statement about a conspirator's "primary and overriding purpose" was made where the conspirator had both legitimate and illegitimate motives for his actions and ruled that:⁵⁶

[I]n 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 injure another in his trade or business. The statutes do not so provide, and such a requirement would place an unreasonable burden on a plaintiff.⁵⁷

Courts consistently have followed the legal malice standard set forth in *Commercial Business Systems*.⁵⁸ 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."⁵⁹

An additional requirement for this second element is proving that the injury was to "reputation, trade, business, or profession." The Supreme Court has held that §§ 18.2-499 & 500 "apply to business and property interests, not to personal or employment interests."⁶⁰ Federal courts have also made the business / personal distinction.⁶¹

IV. Resulting in Damage to the Plaintiff — a Necessary Element for Common Law and Statutory Business Conspiracy Claims

A. Actual, Treble and Punitive Damages

As with any other claim, the plaintiff must prove that it sustained damages from the alleged interference.⁶² Business conspiracy claims have been a favorite claim for lawyers because section 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 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."⁶³ The Supreme Court of Virginia, in *Advanced Marine Enterprises, Inc. v. PRC, Inc.*, 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."⁶⁵ Importantly, courts consistently have held that damage to one's personal employment interest is not actionable under the statute.⁶⁶

B. Injunctive Relief and Attorneys' Fees and Costs

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.⁶⁷ Further, the conspiracy statute allows for "reasonable counsel fees to complainants' and defendants' counsel."⁶⁸ One court has held that a defendant is entitled to its attorneys' fees even when the case is dismissed pursuant to its demurrer.⁶⁹ Of course, a party seeking to recover its attorneys' fees must prove that the fees were reasonable and necessary.⁷⁰

PLEADING CIVIL CONSPIRACY CLAIMS

Virginia state and federal courts appear to have differing standards for pleading common law and statutory business conspiracy claims. The Supreme Court of Virginia has held that "traditional notice pleading and demurrer standards apply in reviewing conspiracy claims."⁷¹ To survive an attack by a dispositive motion, a plaintiff must allege the existence of the elements of the claim in more than "mere conclusory language."⁷² A plaintiff must allege "concerted action, legal malice, and causally related injury . . . set[ting] forth core facts to support the claim."⁷³ 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."⁷⁴ 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.⁷⁵ From the federal court's perspective, a statutory business conspiracy requires a heightened pleading to prevent "every business dispute over unfair competition [from] becoming a business conspiracy claim."⁷⁶

DEFENSES TO A CIVIL CONSPIRACY CLAIMS

I. Statute of Limitations

One point is clear: a conspiracy cause of action accrues when damage is first sustained by the plaintiff.⁷⁷ 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.⁷⁸ Virginia federal courts deciding the issue have held that the five year period for injury to property applies to statutory business claims.⁷⁹ Virginia circuit courts have gone different ways.⁸⁰ The majority of cases appear to find a five year statute of limitations, and the confirmation in *Andrews v. Ring* that the conspiracy statutes focus on injuries to business and property interests, not personal interests, suggests that the federal courts have the better reasoned side of the argument. On the other hand, cases applying a two-year period harmonize the statutory conspiracy limitations period with that for common law conspiracy,⁸¹ a result that may be attractive given that the absence of a clear statutory prescription of a longer period.

II. Intracorporate Immunity Doctrine

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."⁸² 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.⁸³ 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.⁸⁴

CONCLUSION

Common law and statutory business conspiracy claims represent an important piece of the landscape of Virginia business litigation. Claims brought under Virginia's business conspiracy statute will remain a favorite among trial lawyers because, if successful, they allow for the recovery of treble damages and attorneys' fees. Nonetheless, attorneys should not blindly allege civil conspiracy claims, whether under the common law or Virginia Code §§ 18.2-499 and -500, for the mere hope of obtaining enhanced remedies. Instead, as with any claim, counsel should ensure that necessary facts exist to allege these claims. Virginia lawyers, however, can expect to see many more cases brought under Virginia's business conspiracy statute because of the evolution of the malice standard from actual to legal as set forth in the Courts' decisions in *Greenspan, Tazewell Oil Co.* and *Commercial Business Systems, Inc.* The ruling that a plaintiff must merely prove legal malice instead of actual has lowered the evidentiary burden of proving a claim under the statute, which together with the broader categories of potentially recoverable damages, likely will generate more civil conspiracy claims.

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