WHEN IS RAIDING A COMPETITOR'S EMPLOYEES ILLEGAL?

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Gaining a competitive advantage by hiring key employees away from a competitor used to be an every-day occurrence. The practice has rapidly fallen into disfavor as almost every jurisdiction in the United States, including Virginia, has adopted and routinely enforces a cause of action for tortious interference with contractual relationships and business expectancies. Application of this legal theory has become more prevalent in recent years as the high-tech industry increasingly relies upon the creative efforts and innovations of individual employees and contractors -- individuals who are in high demand and often find lucrative financial offers from competitors irresistible. This article is intended to help companies understand and protect their legal rights when key employees are raided. It is also designed to alert the raiding competitor and individual employee or contractor to potential risks and consequences which may arise from a switch in allegiance. Lastly, this article addresses the arguably

unsettled issue of how Virginia law defines the protectible “business expectancies” with which you may not interfere.

Consider the following factual scenario: Company X competes with Company Y in the development of software for telecommunications firms. Both companies produce software which provides for the most efficient use of transmission lines. However, Company X learns that Company Y is getting close to solving a problem which has plagued both companies. Once solved, Company Y's software will have a significant edge in the marketplace. Instead of trying to resolve the issue on its own, Company X decides to take a shortcut. It approaches a number of Company Y's key software engineers and hires them away with lucrative stock options. Did Company X properly compete for the engineers’ services or has it violated the law related to intentional tortious interference with contracts?[i]

The answer requires examination of whether: (1) Company Y had a valid contractual relationship with the engineers; (2) Company X knew the engineers were under contract with Company Y; (3) Company X intentionally approached the engineers and caused them to breach their contracts; (4) Company Y was damaged by the interference and breach; (5) the engineers were hired for a fixed duration, no duration or could otherwise terminate their contracts at-will; and (6) Company X used "improper methods to lure the engineers away.

Regardless of whether the engineers were hired as employees or independent contractors, Company X certainly had knowledge that they were contractually bound to Company Y. Company X also approached the engineers for the purpose of hiring them away, thereby causing breach of their contracts to provide services to Company Y. If Company Y can establish that it was injured by these actions, it may recover damages for tortious interference with contractual relationships.

However, if Company Y's engineers were hired by contracts which were terminable at the will of either party, Company Y would also have to establish that Company X used "improper methods: to get them to breach their agreements. While "improper methods" has been defined by Virginia law to include all acts which are illegal or independently tortious, they also include violation of an established standard of trade or profession, unethical conduct, sharp dealing, overreaching or unfair competition.[ii] Company X may not have used illegal means to get the engineers to breach their contracts, such as defaming Company Y, but arguably it did so in a manner which could be deemed by a judge or jury to be unethical, sharp dealing or overreaching. These types of “improper methods” have not been elaborated upon by the Virginia courts, but they do indicate a willingness to define the term expansively.

Finally, having established that tortious interference occurred, the proper measure of damages is the present value of lost profit.[iii]

Consider a different scenario: Company X and Company Y have already completed their software renovations and begun marketing to the telecommunications industry. Both companies attend a major tradeshow in McLean, Virginia to tout the superiority of their products. While listening to a presentation given by Company X, Company Y is astounded to hear that Company X's software incorporates unique features which are substantially identical to the Company Y software. Believing that Company X must have pirated the ideas, Company Y confronts Company X at its booth in front of five attendees of the tradeshow and charges Company X with misappropriation of its trade secrets. This scenario creates a more complex issue (separate and apart from whether any misappropriation or defamation occurred), i.e. whether the attendees of the tradeshow constitute a protectible *business expectancy* of Company X.

In Virginia, "the extent of permissible third-party interference increases as the degree of enforceability of a business relationship decreases."[iv] Consequently, the elements of an action for intentional interference with a prospective business expectancy are more stringent and demanding than those required where there is an existing contract. Thus, Company X is required to

establish: "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff."[v]

Virginia law does not contemplate recovery for interference with general, unidentified business expectancies which may or may not have arisen or been consummated. There must be a specific expectancy which was known to Company Y and was reasonably certain to have been realized absent Company Y's intentional interference by improper methods. Company X cannot simply claim that it would have sold the software to some percentage of the tradeshow attendees absent Company Y's accusations. "Continuing to do business is `not the type of expectancy protected by Virginia law,' because, `[t]he expectancy of remaining in business is too general to support a tortious interference claim . . .. Instead, there must be a particular expectancy which it is reasonably certain will be realized."[vi] In other words, Company X would have to prove, at the least, that it had conducted some negotiations with and was close to making a sale to a particular attendee about which Company Y was aware.

In summary, all parties should be aware of their rights and potential liability when interference with contracts and business expectancies could

occur. Before taking any action, the raiding company must first determine whether its action would adversely affect the third party's protectible contract rights or business expectancies, and analyze whether its actions are justifiable or "improper". The company with the contract right or expectancy should carefully evaluate whether the raiding company has knowingly caused the breach of an existing contract or eliminated the company's ability to recognize a reasonably certain future economic benefit. Finally, the individual employee or independent contractor must carefully read his/her employment contract and ask the same questions as the raiding company. While the line between legitimate competition and actionable interference may not always be well-defined, it is important to know the guidelines in order to conduct a meaningful cost/benefit analysis. Conduct that interferes with existing contracts or prospective business expectancies is a risky undertaking and may be much more costly than it is worth.

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[i] This article does not address other possible causes of action between the parties, including breach of contract against the engineers. Company Y should have detailed, written Employment Agreements with the engineers which contain, at a minimum, nondisclosure and noncompete provisions which may be used to recover damages from the engineers and/or enjoin them from disclosing confidential information to or working for Company X. Moreover, while the engineers cannot tortiously interfere with their own contracts (*Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987)), they can be held liable for conspiring to do so.

[ii] *Duggin*, 234 Va. at 228.

[iii] *Multi-Channel T.V. Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1124-25 (4th Cir. 1995); Restatement (Second) of Torts, Section 774A(1).

[iv] *Duggin*, 234 Va. at 226.

[v] *Glass v. Glass*, 228 Va. 39, 51-52, 321 S.E.2d 69, 76-77 (1984) (citation omitted). The court in *Duggin*, 234 Va. at 227, appears to equate "improper methods" with the "intentional misconduct" required by *Glass*. Thus, Company X has to prove that Company Y accomplished the intentional interference with business expectancies by "improper methods".

[vi] *Levine v. McCleskey*, 881 F.Supp. 1030, 1057 (E.D.Va. 1995) (citing *American Tel. & Tel. Co. v. Eastern Pay Phones, Inc.*, 767 F.Supp. 1335 (E.D.Va. 1991); *Glass*, supra). *See also CACI Int'l, Inc. v. Pentagen Technologies Int'l, Inc.*, 70 F.3d 111, 1995 W.L. 679952 (4th Cir. 1995) (unpublished opinion); *Mid-Atlantic Telecom, Inc. v. Long Distance Serv., Inc.*, 32 Va. Cir. 75 (1993).