

In The
United States Court of Appeals
For The Fourth Circuit

**AMERICAN CHIROPRACTIC ASSOCIATION,
INCORPORATED, a non-profit corporation, et al.,**

Plaintiffs - Appellants,

v.

TRIGON HEALTHCARE, INCORPORATED, et al.,

Defendants - Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ABINGDON**

BRIEF OF APPELLANTS

**George P. McAndrews
Steven J. Hampton
Patrick J. Arnold, Jr.
Peter J. McAndrews
Ronald A. Dicerbo
McANDREWS, HELD
& MALLOY, LTD.
500 West Madison Street
Suite 3400
Chicago, IL 60661
(312) 775-8000**

Counsel for Appellants

**William G. Shields
THORSEN & SCHER
3810 Augusta Avenue
Richmond, VA 23230
(804) 359-3000**

Counsel for Appellants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS	7
I. Background of the Continuing Conspiracy.....	7
A. Blue Shield Plans’ Participation in Prior Conspiratorial Activity.....	12
B. The Superiority of Chiropractic Education, Training and Effectiveness	15
1. Education and Training	15
2. Effectiveness of Chiropractic Care.....	17
C. The 1994 AHCPR Study.....	20
D. Trigon’s Economic Motivation.....	23
II. The 1994 AHCPR Guidelines Induced a Major Overt Act of the Conspiracy.....	24
A. The Economic Importance of the AHCPR Guidelines.....	24
B. Trigon Conspired With Outside, Independent Medical Societies	25
III. Additional Overt Acts of the Conspiracy.....	27

SUMMARY OF THE ARGUMENT	28
ARGUMENT	30
I. The Applicable Standard of Review of Summary Judgment.....	30
II. Evidence that Trigon Engaged in an Illegal Conspiracy Precludes Summary Judgment	30
A. Appellants Presented Direct Evidence of Conspiracy	31
B. The District Court Erred in Finding That the Intracorporate Immunity Doctrine Precludes Conspiracy between Trigon and Individuals.....	33
1. Intracorporate Immunity Is a Narrow Doctrine.....	34
2. The District Court Erred in Holding That Nonemployee Individuals on the Managed Care Advisory Panel Were Within the Scope of Intracorporate Immunity.....	35
C. The Low Back Problem Guideline Distributed by Trigon is False and Misleading to the Benefit of Medical Doctors and Detriment of Chiropractors and Patients	37
D. Trigon’s and Medical Societies’ Development and Distribution of the Rewritten Guideline Is an Unreasonable Restraint of Trade	41
E. Appellants’ State Law Conspiracy Claims Are Supported by the Same Evidence	43
III. Appellants’ Tortious Interference Claim Should Also Have Survived Summary Judgment	44

IV.	The District Court Abused Its Discretion by Failing to Allow Discovery Appropriate For This Conspiracy Case	46
A.	Appellants Should Have Been Allowed Discovery For the Period 1988 to 1996	47
1.	Pre-1996 Activities	48
2.	Relevance of Discovery Prior to the Limitations Period	49
3.	Discovery May Not Be Denied If it Prevents the Pursuit of an Entire Theory	50
B.	Appellants Were Prejudiced Due to the Eleventh Hour Disclosure of the Guidelines	50
C.	Additional Unreasonable Discovery Limitations Were Placed on Appellants.....	53
V.	THE DISTRICT COURT IMPROPERLY DISMISSED APPELLANTS’ CLAIM FOR VIOLATION OF THE CIVIL RICO ACT	56
A.	The McCarran-Ferguson Act Does Not Preclude Appellants’ Rico Claim.....	57
1.	As Applied to Trigon’s Acts that Harm Chiropractors, Va. Code Ann. § 38.2-200 Is Not A Law Enacted For The Purpose Of Regulating The Business Of Insurance	59
B.	The Application Of RICO Would Not Invalidate, Impair, Or Supersede The Virginia Insurance Code Chapters At Issue And Would Not Frustrate Any State Or Administrative Policy	61
VI.	The District Court Also Erred By Ruling That There Was No Private Cause of Action to Enforce Virginia’s Statutory Insurance Equality Laws	63

CONCLUSION.....68

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>A & E Supply Co., Inc. v. Nationwide Mutual Fire Ins. Co.</i> , 798 F.2d 669 (4th Cir. 1986)	63, 64, 67
<i>Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.</i> , 891 F. Supp. 1153 (E.D. Va. 1995), <i>aff'd</i> , 95 F.3d 41 (4th Cir. 1996)	58
<i>Ardrey et al. v. United Parcel Service</i> , 798 F.2d 679 (4th Cir. 1986)	50
<i>Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters</i> , 459 U.S. 519, 103 S. Ct. 897 (1983)	42
<i>BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.</i> , 194 F.3d 1089 (10th Cir. 1999)	63
<i>Blue Cross of Va. v. Comm. Ex rel. State Corp. Commission</i> , 218 Va. 589 (Va. 1977)	66, 67
<i>Cal. Dental Ass'n v. Federal Trade Com'n</i> , 526 U.S. 756, 119 S. Ct. 1604 (1999)	41
<i>Chinnici v. Central DuPage Hosp. Ass'n</i> , 1990 U.S. Dist. LEXIS 8164 (N.D. Ill.)	57
<i>Continental Airlines, Inc. v. United Airlines, Inc.</i> , 277 F.3d 499 (4th Cir. 2002)	30
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752, 104 S. Ct. 2731 (1984)	34, 35
<i>Dickson v. Microsoft Corp.</i> , 309 F.3d 193 (4th Cir. 2002)	30

<i>Duggin v. Adams</i> , 234 Va. 221 (Va. 1987)	45
<i>Edell & Associates, P.C. v. Law Offices of Angelos</i> , 264 F.3d 424 (4th Cir. 2001)	30, 41
<i>Hawkspere Shipping Co. v. Intamex, S.A.</i> , 330 F.3d 225 (4th Cir. 2003)	30
<i>Humana Inc. v. Forsyth</i> , 525 U.S. 299, 119 S. Ct. 710 (1999)	60, 61, 62, 63
<i>Magnuson v. Peak Technical Services, Inc.</i> , 808 F. Supp. 500 (E.D. Va. 1992)	45
<i>Maxey v. American Cas. Co.</i> , 180 Va. 285 (Va. 1942)	64
<i>Maximus, Inc. v. Lockheed Info. Management Systems Co., Inc.</i> , 254 Va. 408 (Va. 1997)	44
<i>Monsanto Co. v. Spray-Rite Service Corp.</i> , 465 U.S. 752, 104 S. Ct. 1464 (1984)	31
<i>N.C.A.A. v. Bd. Of Regents of Univ. Okl.</i> , 468 U.S. 85, 104 S. Ct. 2948 (1984)	43
<i>Newton v. Employers Liability Assur. Corp.</i> , 107 F.2d 164 (4th Cir. 1939)	64
<i>Oksanen v. Page Mem'l Hosp.</i> , 945 F.2d 696 (4th Cir. 1991) (en banc)	<i>passim</i>
<i>One Stop Deli, Inc. v. Franco's Inc.</i> , 1993 WL 513298 (W.D. Va. 1993)	54
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340, 985 S. Ct. 2380 (1978)	49

<i>Ostrzenski v. Seigel</i> , 177 F.3d 245 (4 th Cir. 1999)	56, 57
<i>Peterson v. Cooley</i> , 142 F.3d 181 (4th Cir. 1998)	44, 45
<i>Reynolds Metals Co. v. Smith</i> , 218 Va. 881 (Va. 1978)	65
<i>Richter v. Capp Care, Inc.</i> , 868 F. Supp. 163 (E.D. Va. 1994), <i>aff'd</i> , 77 F.3d 470 (4th Cir. 1996)	65
<i>Rogers v. Nationwide Mutual Insurance Company</i> , 222 Va. 345 (Va. 1981)	64
<i>Rossi v. Standard Roofing, Inc.</i> , 156 F.3d 452 (3rd Cir. 1998)	54
<i>Sanders v. Shell Oil Co.</i> , 678 F.2d 614 (5th Cir. 1982)	50
<i>SEC v. National Securities, Inc.</i> , 393 U.S. 453, 89 S. Ct. 564 (1969)	58, 59, 60
<i>Spriggs v. Diamond Auto Glass</i> , 242 F.3d 179 (4th Cir. 2001)	30
<i>U.S. Dep't of Treasury v. Fabe</i> , 508 U.S. 491, 113 S. Ct. 2202 (1993)	<i>passim</i>
<i>U.S. v. Griffith</i> , 334 U.S. 100, 68 S. Ct. 941 (1948)	42
<i>Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia</i> , 624 F.2d 476 (4th Cir. 1980)	14
<i>Virginia Vermiculite v. Historic Green Springs</i> , 307 F.3d 277 (4th Cir. 2002)	31

<i>Wilk et al. v. AMA et al.</i> , 895 F.2d 352 (7th Cir. 1990)	<i>passim</i>
<i>WLR Foods, Incorp. v. Tyson Foods, Incorp.</i> , 65 F.3d 1172 (4th Cir. 1995)	46

Statutes

15 U.S.C. § 15	1
15 U.S.C. § 26	1
15 U.S.C. § 1012(b)	58
18 U.S.C. § 1962(a)	57
18 U.S.C. § 1964	1
28 U.S.C. § 1331	1
28 U.S.C. § 1337	1
28 U.S.C. § 1367	1
28 U.S.C. § 1291	1
28 U.S.C. § 1294(1)	1
Va. Code Ann. § 18.2-499	28
Va. Code Ann. § 18.2-500(a)	62
Va. Code Ann. § 38.2-200	59, 60, 61, 63
Va. Code Ann. § 38.2-2200 <i>et seq.</i>	64
Va. Code Ann. § 38.2-2201	64
Va. Code Ann. § 38.2-2203	63, 64

Va. Code Ann. § 38.2-2204	64
Va. Code Ann. § 38.2-3400 <i>et seq.</i>	64
Va. Code Ann. § 38.2-3405	64
Va. Code Ann. § 32.2-3407	65
Va. Code Ann. § 38.2-3407(B).....	65
Va. Code Ann. § 38.2-3407.15(E).....	65
Va. Code Ann. § 38.2-3408	63, 65
Va. Code Ann. § 38.2-4200 <i>et seq.</i>	66
Va. Code Ann. § 38.2-4221	63, 66
Va. Code Ann. § 38.2-4221(D).....	66
Va. Code Ann. § 38.2-4228	66
Va. Code Ann. § 38.2-4300 <i>et seq.</i>	66
Va. Code Ann. § 38.2-4312	66
Va. Code Ann. § 38.2-4312(E).....	63
Va. Code Ann. § 38.2-4312.1	66

Rules

Fed. R. Civ. P. 12(b)(6).....	1, 5, 57
Fed. R. Civ. P. 26.....	53

Other

3A P. Areeda & H. Hovenkamp,
 Antitrust Law 2nd Edition, § 782d (2002) 41

6 Moore’s Federal Practice, § 26.41[12] (Matthew Bender 3d ed.).....49

McCarran-Ferguson Act *passim*

McCarran-Ferguson Act, § 2(b).....63

Sherman Act, § 1 *passim*

JURISDICTIONAL STATEMENT

1. The statutory bases for jurisdiction of the district court over this action were 15 U.S.C. §§ 15 and 26; 18 U.S.C. § 1964; and 28 U.S.C. §§ 1331, 1337, and 1367.

2. This is an appeal from the district court's entry of summary judgment on six counts of appellants' complaint, the district court's dismissal of two counts pursuant to Rule 12(b)(6) Fed. R. Civ. P., and the district court's entries of various discovery orders prior to the entry of summary judgment. The statutory bases for jurisdiction of this Court over Appeal No. 03-1675 are 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF ISSUES

1. Did the district court err by failing to consider in the light most favorable to appellants the direct evidence of a conspiracy to deter referrals to chiropractors and lower insurance reimbursements to chiropractors, including but not limited to the meeting minutes of the Managed Care Advisory Panel that memorialized the concerted action between Trigon and several legally distinct medical societies of Virginia?
2. Did the district court err by failing to consider in the light most favorable to appellants the direct evidence of the unreasonable restraint of trade caused by the conspirators, including but not limited to the testimony of Dr. Haldeman (a highly qualified medical doctor) that Trigon's false and misleading guidelines were harmful to chiropractors?
3. Did the district court err in finding that the intracorporate immunity doctrine bars appellants' allegations of conspiracy between Trigon and individuals on the Managed Care Advisory Panel?
4. Did the district court err by holding that appellants did not present sufficient evidence of Trigon's tortious interference to avoid summary judgment?
5. Did the district court abuse its discretion by limiting discovery of the alleged conspiracy?

6. Did the district court err in holding that the McCarran-Ferguson Act precludes appellants' RICO claim?
7. Did the district court err in holding that there is no private cause of action to enforce Virginia's insurance equality laws?

STATEMENT OF THE CASE

Appellants, the American Chiropractic Association, the Virginia Chiropractic Association, individual chiropractors, and individual patients of chiropractors, brought this action against Trigon Health, Inc. and subsidiaries that do business as Trigon Blue Cross Blue Shield (now Anthem S.E.) for violation of the antitrust laws, tortious interference, conspiracy to harm chiropractors' practices, RICO, breach of contract and violation of the Virginia equality laws. The district court dismissed the claims under RICO and the Virginia insurance equality laws pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted summary judgment in favor of Trigon on the antitrust, tortious interference, conspiracy, and breach of contract claims.

The case involves allegations of conspiracy and other illegal actions by Trigon and competitive medical physicians and societies to injure the appellant chiropractors and their patients. The expert economic testimony is that damages to the Virginia chiropractors, in toto, were \$101,000,000, with \$2,400,000 of that attributable to the eleven chiropractor appellants and the appellant patients.

This appeal claims overriding error on the part of the district court in:

- a. entering summary judgment against appellants on a record replete with factual issues;
- b. failing to view all of the evidence in a light most favorable to the appellants, as required by law;
- c. wrongly concluding that an intra-corporate decision-making process existed when the evidence of an extra-corporate conspiracy is compelling;
- d. misinterpreting several statutes and well established precedents;
- e. wrongly dismissing claims for relief on Rule 12(b)(6) motions;
- f. precluding discovery in this public and private interest lawsuit of the scope, context, and history of the conspiratorial actions of Trigon and the competitive Virginia medical societies in restraining competition with chiropractors; and
- g. treating this case as though it involved “cultural bias” rather than raw economic power disseminated through a conspiracy. The district court stated:

But that sounds to me like a cultural discrimination, rather than an economic one. And I understand your point that the medical profession has not sufficiently at all, in your view, recognized the superior advantages of chiropractic, but it, I guess -- again, my question, it sounds more like a cultural or educational deficiency.

(A2054).

No other court has treated the antitrust laws like substitute civil rights cases. There was clearly no need for the conspiracy and the proven overt actions in furtherance thereof if merely the laws of nature or the law of survival of the fittest were benignly allowed to take place.

STATEMENT OF FACTS

I. Background of the Continuing Conspiracy

This case is a by-product and a continuation of the 100-year history of competitive hostility by one segment of the healing arts and sciences – medicine – against another segment – chiropractic. This case, like *Wilk v. AMA, infra*, involved a direct attempt by Trigon and the Virginia state medical societies and schools to retard, deter or inhibit referrals by MDs to chiropractors and an effort to prevent slippage of the insurance monies that were going to MDs, from going to chiropractors or their patients. The district court refused to allow discovery to link the remnants of the enjoined nationwide conspiracy (outlined in *Wilk v. AMA*) to the conspiracy alleged in this case. (A1131-1138, 4433). The district court limited discovery to the 4-year statute of limitations period. *Id.*

In 1962, Robert Throckmorton, of the Iowa Medical Society, later General Counsel of the AMA, demanded that the entire medical community “undertake a positive program of ‘containment’” to prevent chiropractors from obtaining insurance coverage:

If this program is successfully pursued, it is entirely likely that chiropractic as a profession will “wither on the vine” and the chiropractic menace will die a natural but somewhat undramatic death. This policy of “containment” might well be pursued along the following lines... Oppose chiropractic inroads in health insurance.

(A5303-04) (emphasis added). In 1963, Robert Youngerman of the AMA stated: “It would seem from certain declarations of the House of Delegates and the Judicial Council, that the ultimate objective of the AMA theoretically is the complete elimination of the chiropractic ‘profession.’” (A5307).

The United States Court of Appeals for the Seventh Circuit, in affirming a nationwide injunction against the American Medical Association, characterized the 28-year national campaign by medical organizations and their members to destroy chiropractic as “lengthy, systematic, successful, and unlawful” *Wilk et al. v. AMA et al.*, 895 F.2d 352, 371 (7th Cir. 1990). The boycott was orchestrated by a full time multi-employee, medical physician directed Committee of the AMA Board of Trustees.

The nature of the boycott is shown in the *Wilk* decision reported at 671 F. Supp. 1465 (N.D. Ill. 1987):

Thus, the *Wilk* Court [7th Circuit] held: ... “even without coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of Sec. 1 participated in an agreement to engage in an illegal refusal to deal.”

Id. at 1470.

The purpose of the boycott was to contain and eliminate the chiropractic profession. This conduct constituted a conspiracy among the AMA and its members and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

Id. at 1471.

The defendants which knowingly joined in the conspiracy were ACR [American College of Radiology] and AAOS. [The American Academy of Orthopedic Surgeons]...

Id. at 1471.

In 1967, the AMA Judicial Council issued an opinion under Principle 3 specifically holding that it was unethical for a physician to associate professionally with chiropractors. (Tr. 2939.) “Associating professionally” would include making referrals of patients to chiropractors This opinion... was widely circulated to members of the AMA. (Holman Dep.) The opinion on chiropractic was also sent by the AMA to 56 medical specialty boards and associations. (PX 550, 550A.)

Id. at 1473-74 (emphasis added).

As noted by the Court of Appeals, some medical physicians (such as orthopedic surgeons, internists, and general practitioners) are in direct competition with chiropractors in this market. Medical physicians and chiropractors are interchangeable for the same purposes. (Tr. 423-26, 429-30, 433-34, 1259, 1953, 2108, 7140, 1449.) Consumers seek both medical physicians and chiropractors for the same complaints, principally back pain and other neuromusculoskeletal problems, and both groups render services for the treatment of those complaints. (Tr. 1104-36; PX 7247, 1055, 1529 at 46, 7208.) Competition between medical physicians and chiropractors was recognized by Dr. Joseph A. Sabatier, a member of the Committee on Quackery and a former defendant in this case, as early as 1964. At one point, Dr. Sabatier stated, “it would be well to get across that the doctor of chiropractic is stealing [the young medical physician’s] money.” (PX 322; see also, PX 172 at 8, 241.)

Id. at 1478 (emphasis added).

A majority of the Provider Policy Committee, a committee of Trigon’s Board of Directors, are members of the Medical Society of Virginia, including Dr.

Blanchard, its president. He became a member of the Committee in 1997 because of his “connections with the Medical Society of Virginia.” (A6018-19). He specifically “concurred” that a Trigon contract should be delayed “in an attempt to reach as much mutual agreement as possible” with medical doctors. (A6334).

Provider Policy Committee

- | | | |
|----|-------------------------------|------------------------|
| 1. | William P. Bracciodieta, M.D. | |
| 2. | Richardson Grinnan, M.D. | Numbers 1 |
| 3. | Dorothy L. Williamson, M.D. | through 3 are |
| 4. | Larry D. Blanchard, III, M.D. | officers of Trigon, |
| 5. | Donald B. Nolan, M.D. | and numbers 2 and |
| 6. | John Cole, Jr., M.D. | 4 through 9 are |
| 7. | Jethro H. Piland, Jr., M.D. | representatives of |
| 8. | John M. Daniel, III, M.D. | the Medical Society of |
| 9. | James M. Wells, Jr., M.D. | Virginia. |

(A656-57).

The Managed Care Advisory Panel collusively assembled and distributed scientifically distorted “back pain guidelines” to more than 90% of the medical physicians in Virginia (A5994, 6162-63):

Managed Care Advisory Panel

Dr. Richardson Grinnan, Trigon BCBS Chief Healthcare Officer
Dr. Larry Colley, Trigon BCBS V/P Medical Policy
Dr. Michael Hattwick, Va. Society of Internal Medicine
Dr. Robert Williams, Dept. of FP, MCV
Dr. Geoffrey Viol, American College of Physicians
Dr. Verdain Barnes, Dept. of IM, EVMS
Dr. Willett LeHew, Va. Chapter of ACOG
Dr. Latane Ware, Medical Society of Virginia
Dr. Stuart Solan, Va. Chapter of AAFP
Dr. Peter Nord, Peninsula Health Care
Dr. Tony Pelonero, Trigon Mental Health
Dr. James Carney, Trigon BCBS
Ms. Pat Maddox, Trigon BCBS
Ms. Pamela Roberts, Trigon BCBS
Dr. Tom Massaro, UVA

(A5828).

[Each and every outside society that “appointed” an agent to the panels of an economic engine, Trigon, is an organization of competitors of chiropractors].

Some of the anti-competitive effects acknowledged by Mr. Lynk [the AMA’s PhD economist] include the following: it is anti-competitive and it raises costs to interfere with the consumer’s free choice to take the product of his liking; it is anti-competitive to prevent medical physicians from referring patients to a chiropractor; (Lynk 1427-28). . . .

Id. at 1478 (emphasis added).

The Court of appeals in *Wilk*, which reviewed substantially the same boycott evidence, concluded:

“Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in: patient treatment, because referrals were inhibited by defendants’ activities;...

Referrals from medical doctors were reduced. Public demand for chiropractic services was negatively affected.”

Id. at 1479 (emphasis added).

There also was some evidence before the Committee that chiropractic was effective – more effective than the medical profession in treating certain kinds of problems such as workmen’s back injuries. (E.g., PX 241, 1476, 1471-72, 184, 192-94; Ballantine Dep. 137-39.)

The Committee did not follow up on any of these studies or opinions. (*Id.*) Basically the Committee members were doctors who, because of their firm belief that chiropractic had to be stopped and eliminated, volunteered for service on the committee.

Id. at 1481.

The former president of the Virginia Medical Society, Dr. Hotchkiss, was appointed to the Committee because of his Society’s active anti-chiropractic programs.

A. Blue Shield Plans’ Participation in Prior Conspiratorial Activity

In 1969, Blue Shield, at the behest of the AMA, began to counter state insurance equality laws by disallowing insurance payments to chiropractors:

We have filed and may use in 6 states an exclusion deleting manipulative services and subluxations for the purpose of relieving nerve interference. Basically, the exclusion extends to services of a chiropractor by definition. ... We are proceeding to file this exclusion in all states for basic and Major Medical contracts.

(A5314). Then, in 1973, Blue Shield admitted:

SURVEY OF BLUE SHIELD PLAN PAYMENT POLICIES REGARDING NON M.D. PROVIDERS... NATIONAL ASSOCIATION OF BLUE SHIELD PLANS Marketing Division, February, 1973.

Resistance to chiropractic payment may be indicated by the fact that fewer Plans make payment than the laws require.

(A5316, 5318) (emphasis added).

In 1979, the federal government recognized that Blue Shield, known as the “house of medicine,” was dominated by medical physicians who decide “whether and how much [Blue Shield] plans will pay for the services of non-physicians.”

(A5340, 5341).

In 1980, the Fourth Circuit condemned Virginia Blue Cross Blue Shield’s (Trigon’s direct predecessor) plan for trying to freeze out competitive providers:

The issue is more than one of professional pride. State law recognizes the psychologist as an independent economic entity as it does the physician. The Blue Shield policy forces the two independent economic entities to act as one, with the necessary result of diminished competition in the health care field. The subscriber who has a need for psychotherapy must choose a psychologist who will work as an employee of a physician; a psychologist who maintains his economic independence may well lose his patient. In either case, the psychologist ceases to be a competitor.

Forewarned by the decision the *National Society of Professional Engineers, supra*, that it is not the function of a group of professionals to decide that competition is not beneficial to their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of “good medical practice.”

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 485 (4th Cir. 1980).

The economic expert testimony in the *Wilk* case was that 30% of all people with back complaints visit chiropractors and 29% of all professional services for back-related complaints are generated principally by doctors of chiropractic. (A9307). Any slippage of the remaining 70% would be harmful to the medical doctors competing with the chiropractors and would force Trigon to look elsewhere to find the bonanza promised to its medical physician members in a Trigon publication:

With the completion of the RBRVS implementation, most Trigon allowances will be proportional to Federal Relative Values. For a small minority of services [i.e., chiropractors], market conditions will have dictated exceptions to RBRVS.

...

Trigon is optimistic that 1997 fee schedule changes can be much more favorable for network physicians. The performance-based reimbursement program described in the July issue of the *Medical Forum* creates new opportunities for physicians to increase their compensation while decreasing total health care costs for the next several years.

(A6397) (emphasis added).

B. The Superiority of Chiropractic Education, Training and Effectiveness

From at least 1967 to the present, numerous studies by the responsible medical world have concluded that chiropractic education, training, and effectiveness with respect to the treatment of neuromusculoskeletal conditions is far superior to that of medical doctors.

1. Education and Training

For example, in 1967, Dr. Wilson, Chairman of the American Medical Association's Section on Orthopedic Surgery, reported on the complete inadequacy of the medical training in this area:

The teaching in our medical schools of the etiology, natural history, and treatment of low back pain is inconsistent and less than minimal. The student may or may not have heard a lecture on the subject, he may have been instructed solely by a neurosurgeon, or the curriculum committee may have decided that clinical lectures are "out" and more basic sciences "in." The orthopedic surgeon, to his distress, often sees his hours in the curriculum pared to the barest minimum.

* * *

At the postgraduate level, symposia and courses concerning the cause and treatment of low back and sciatic pain are often ineffective because of prejudices and controversy.

* * *

Even the abundant and significant advances resulting from the medical profession's emphasis upon research have failed dismally to relieve modern man of one of his most common and bothersome afflictions—low back pain.

(A5354, 5355, 5360).

In 1979, the Royal Commission of Inquiry on Chiropractic in New Zealand, after an 18 month study, *inter alia*, concluded:

The Commission accepts the evidence of Dr. Haldeman, and holds, that in order to acquire a degree of diagnostic and manual skill sufficient to match chiropractic standards, a medical graduate would require up to 12 months' full-time training, while a physiotherapist would require longer than that.

(A5362).

In 1980, John McMillan Mennell, M.D., a prominent medical educator, swore under oath as follows:

Q: The musculoskeletal system comprises what portion of the body?

A: As a system, about 60% of the body.

A: I think my testimony was that if you ask a bunch of new residents who come into a hospital for the first time how long they spent in studying the problems of the musculoskeletal system, they would, for the most part reply, "Zero to about four hours." I think that was my testimony.

(A5399, 5400).

In 1998, the Journal of Bone and Joint Surgery reported as follows:

“Second only to upper respiratory illness, musculoskeletal symptoms are the most common reason that patients seek medical attention, accounting for approximately 20 percent of both primary-care and emergency-room visits. Musculoskeletal problems were reported as the reason for 525 (23 percent) of 2285 visits by patients to a family physician, and musculoskeletal injuries accounted for 1539 (20 percent) of 7840 visits to the emergency room. The delivery of musculoskeletal care is spread across a spectrum of practitioners, including not only orthopaedic surgeons but also internists, family physicians, and pediatricians, among others. Moreover, under the so-called gatekeeper model that is prevalent in managed-care systems, physicians other than orthopaedic surgeons will provide an expanding share of this musculoskeletal care. Mastery of the basic issues in musculoskeletal medicine is therefore essential for all medical school graduates.

* * *

Nevertheless, seventy (82 percent) of eighty-five medical school graduates from thirty-seven different schools failed to demonstrate such competency on a validated examination of fundamental concepts.”

(A4977, 4982) (emphasis added). This conclusion was reaffirmed by the same medical journal in 2002. Please note that the journal does not even mention their principal competitors, the chiropractors.

2. Effectiveness of Chiropractic Care

Studies by the responsible medical world have shown, and continue to show, the fundamental efficiency and effectiveness of chiropractic care. For example, in 1972, Rolland A. Martin, M.D., Director of Oregon’s Workmen’s Compensation

Program, conducted a “retrospective study of comparable workmen’s industrial injuries in Oregon” and concluded that chiropractic care was more effective than medical care by a factor of 2 to 1:

Examining the forms of conservative therapy the majority received, it is interesting to note the results of those treated by chiropractic physicians.

A total of twenty-nine claimants were treated by no other physician than a chiropractor. 82% of these workmen resumed work after one week of time loss. Their claims were closed without a disability award.

Examining claims treated by the M.D., in which the diagnosis seems comparable to the type of injury suffered by the workmen treated by the chiropractor, 41% of these workmen resumed work after one week of time loss.

(A5405).

Then, in 1975, Richard C. Wolf, M.D., independently confirmed this 2 to 1 effectiveness ratio in a study entitled “A retrospective study of 629 workmen’s compensation cases in California”:

The significant differences between the two groups appear to be as follows:

Average lost time per employee -- 32 days in the M.D.-treated group, 15.6 days in the chiropractor-treated group.

Employees reporting no lost time – 21% in the M.D.-treated group, 47.9% in the chiropractor-treated group.

Employees reporting lost time in excess of 60 days -- 13.2% in the M.D.-treated group, 6.7% in the chiropractor-treated group.

Employees reporting complete recovery – 34.8% in the M.D.-treated group, 51% in the chiropractor-treated group.

(A5411).

Similarly, a 1988 Florida Worker’s Compensation Study concluded that “[t]he following findings and related conclusions warrant attention”:

1. Patients treated by chiropractors, compared to those treated by osteopaths or medical doctors, showed the lowest rate of incurring a compensable injury.

* * *

2. Of the patients who incurred compensable injuries those treated by chiropractors were less likely to be hospitalized for treatment.

* * *

3. Finally, and most importantly, considering the average number of services (procedures) and the average cost per service, chiropractic care for back injury represents a relatively cost-effective approach to the management of work-related injuries.

(A5431-5433).

In 1990, the British Medical Journal published an abstract of a study entitled “Low Back Pain of Mechanical Origin: Randomised Comparison of Chiropractic and Hospital Outpatient Treatment,” conducted by the MRC Epidemiology and Medical Care Unit, Northwick Park Hospital, Harrow Middlesex, which stated:

Results -- Chiropractic treatment was more effective than hospital outpatient management, mainly for patients with chronic or severe back pain. A benefit of about 7 percent points on the Oswestry scale was seen at two years. The benefit of chiropractic treatment became more evident throughout the follow up period. Secondary outcome measures also showed that chiropractic was more beneficial. Conclusions -- For patients with low back pain in whom manipulation was not contraindicated chiropractic almost certainly confers worthwhile, long term benefit in comparison with hospital outpatient management. The benefit is seen mainly in those with chronic or severe pain. Introducing chiropractic into NHS practice should be considered.

(A5451). Surprisingly, Trigon's Chief Medical Doctor testified that the quality of health care given was of no concern to Trigon:

Q. Does Trigon in any way try to evaluate the effects of its insurance coverages or lack of coverages on the healthcare provided to those that are insured by Trigon policies?

A. No. Again, that's not the business that we're in.

(A4889). But Trigon and its co-conspirators are in that business when it comes to chiropractors and their patients. Unfortunately for the patients, the concern is not for the patients but for the competitive medical doctors.

C. The 1994 AHCPR Study

In 1994, the Agency for Health Care Policy and Research (AHCPR), of the U.S. Department of Health and Human Services, issued a 170-page study entitled "Acute Low Back Pain in Adults," along with an accompanying 30-page "Quick Reference Guide for Clinicians" entitled "Acute Low Back Problems in Adults:

Assessment and Treatment.” (A5460-5638 and A5639-5669, respectively). The study was conducted by a multidisciplinary panel comprised of 12 medical physician experts, and other healthcare professionals and consumer representatives, who were brought together by the Agency for Health Care Policy and Research to perform an evidence-based analysis of all research trials on all treatment approaches to acute low back pain in adults. (A5470-71). Abstracts of over 10,000 research papers were reviewed, and almost 4,000 articles were retrieved. (A5483).

The study took nearly two years to complete. (A5670, 5681).

The findings and recommendations included in the Clinical Practice Guideline define a paradigm shift away from focusing care exclusively on the pain and toward helping patients improve activity tolerance.

(A5643).

A series of recommendations was given and included in Table 2 of the Quick Reference Guide for Clinicians. Recommendations were for acetaminophen and:

“Prescribed pharmaceutical methods”: “Other NSAIDs”

* * *

“Prescribed physical methods”: “Manipulation (in place of medication or a shorter trial if combined with NSAIDs)”

(A5653).

Importantly, the AHCPR study specifically defined spinal manipulation as the type of manipulation used by all chiropractors.

Spinal manipulation includes many different techniques. For this guideline, manipulation is defined as manual therapy in which loads are applied to the spine using short and long lever methods. The selected joint is moved to its end range of voluntary motion, followed by application of an impulse loading. The therapeutic objectives of manipulation include symptomatic relief and functional improvement.

(A5507, 5508) (emphasis added). This “functional improvement” is what gets patients back to work faster and at less expense. The Rand Corporation concluded that chiropractors offer 90% of the manipulation services in the U.S. (A5265, 5271). The pharmaceuticals address only the symptoms.

The Associated Press and major newspapers throughout the country immediately recognized that the AHCPR study, which was published on December 8, 1994, was a boon to chiropractors and a setback for medical doctors. For example only, see the announcements in the Washington Post, Chicago Tribune, Chicago Sun-Times, and Los Angeles Times (A5733-5737, 4781).

The *Annals of Internal Medicine*, July 1998, published jointly by the American College of Physicians and the American Society of Internal Medicine, stated:

The Agency for Health Care Policy and Research (AHCPR) recently made history when it concluded that spinal manipulative therapy is the most effective and cost-effective treatment for acute low back pain ... Perhaps most significantly, the guidelines state that unlike nonsurgical interventions, spinal manipulation offers both pain relief and functional improvement.

(A4984).

D. Trigon's Economic Motivation

Trigon argued below that it had no economic motivation to harm chiropractors or steer patients to medical doctors and away from chiropractors. (A1247-48). Trigon acknowledges that its largest cost category is payments to healthcare providers. (A1245). Trigon elected to pay chiropractors 40% less than MDs for the identical service notwithstanding chiropractors' superior skills in these areas. Chiropractors were the only one of five physician groups recognized by Trigon that suffered this unjustified reduction. (A6295-96).

If Trigon were motivated only by economic concerns, it would not pay medical doctors more to provide inferior care than it pays chiropractors who provide preferred care. That Trigon pays medical doctors more demonstrates that Trigon is not making an independent economic judgment. It is making a collusive judgment in combination with medical doctors. The collusion is shown in what follows.

II. The 1994 AHCPR Guidelines Induced a Major Overt Act of the Conspiracy

A. The Economic Importance of the AHCPR Guidelines

Although the federal government's "Clinical Guidelines" were freely available (A5634), Trigon and its co-conspirator medical doctors and medical associations rewrote the federal guidelines to create "provincial" guidelines, that specifically omitted the recommendation of chiropractic manipulation, in an attempt to prevent more referrals to chiropractors. Trigon's Managed Care Advisory Panel voted that the rewritten guidelines were "referral" guidelines. (A5832-33). See Argument Section II.A.

Because manipulation referral could only be to chiropractors and a handful of osteopaths, the conspirators had to change the AHCPR guidelines to avoid replacement of medical physician treatment by more efficient and effective chiropractic treatment and consequent transfer of Trigon insurance payments from medical doctors to chiropractors. It also gave the competitive medical doctors a shield against malpractice claims arising from a failure to refer. The economic importance of this "transfer" is based on back pain being the second leading cause of visits to medical physicians; the leading cause of disability of those under age 45; and costing an estimated 20 to 50 billion dollars per year nationally. (A4977, 5474, 5478).

Professor Schiffrin, appellants' economic expert, estimated that unhindered referrals would have resulted in a transfer of more than sixty million dollars from Trigon's medical physician network to doctors of chiropractic, without any significant increase in cost to Trigon, with improved health and less time off work for Trigon insureds. *See Mandated Health Insurance Coverage for Chiropractic Treatment: An Economic Assessment, With Implications for the Commonwealth of Virginia*, Schiffrin, January 1992: "The one percent impact of chiropractic services on insurance costs in Virginia thus is likely to be their gross effect, with a net effect that is smaller, perhaps zero, and conceivably even negative." (A5758).

B. Trigon Conspired With Outside, Independent Medical Societies

As a threshold matter, Trigon contended that the medical doctors who consulted with Trigon and approved Trigon's provincial guidelines were allegedly acting only as agents of Trigon, who cannot legally conspire with Trigon, because "the Managed Care Advisory Panel was chaired by an officer of Trigon and Trigon appointed medical doctors to this committee for the purpose of obtaining their input, advice, and expertise..." (A1234). The clear documentary evidence was directly to the contrary:

Thank you for your letter of April 15, 1996, regarding Trigon's back pain algorithm. ...Rather, Trigon sought to cast the Agency for Health Care Policy and Research (AHCPR) guidelines into a user-friendly format. ...

* * *

Trigon's internal review process included consultation with, and approval by representatives **appointed by** the Virginia chapter of the American Academy of Pediatrics, the Virginia chapter of the American Academy of Family Physicians, the Virginia Society of Internal Medicine, the Virginia chapter of the American College of Physicians, the Virginia chapter of the American College of Surgeons, the Virginia Obstetrical and Gynecological Society, the Medical Society of Virginia, the University of Virginia School of Medicine, Eastern Virginia Medical School and the Medical College of Virginia.

(Dr. Colley letter, A5827) (emphasis added). Every single society represents direct competitors of chiropractors and has and had a direct motivation to prevent insurance payment transfers.

What emerged from the conspiracy was a historical and scientific distortion of their content. According to Dr. Scott Haldeman, a recognized authority and a member of the AHCPR panel:

By omitting the AHCPR's definitions of manipulation, Trigon and its Managed Care Advisory Panel materially altered the recommendations of the AHCPR. That alteration created a Trigon guideline that did not recommend the manipulation that is provided primarily by doctors of chiropractic as did the AHCPR Guidelines. A point that became evident from the AHCPR guidelines was that manipulation was the only treatment approach that required a medical physician, in most instances, to make a referral of a patient with uncomplicated low back pain. The inevitable, and obviously intended,

consequence of Trigon's and the Managed Care Advisory Panel's alteration of the AHCPA guideline, is to deprive patients of the benefit from spinal manipulation as practiced by doctors of chiropractic, and to deprive doctors of chiropractic of the opportunity to treat those patients.

(A5672).

III. Additional Overt Acts of the Conspiracy

Trigon and its co-conspirators committed several other acts in furtherance of the continuing conspiracy, most originating prior to 1996 and of which appellants were denied discovery. In 1988, Trigon imposed a \$500 cap on manipulation services, the mainstay of chiropractic care. (A5345). Then, in approximately 1992, Trigon reduced ancillary service reimbursement to chiropractors to 70% of that paid to medical doctors for the same service. (A6337).

In 1996, shortly after the initial dissemination of the guidelines, Trigon dropped the rate from 70% to 60%. (A6337, 6341, 6342). Chiropractors were the only group of Trigon's "physicians" to whom this cut was applied. (A4986, 6296). In 1997, Trigon refused to apply the government's relative value standards, known as the "RBRVS" values, to spinal manipulations by chiropractors, by "leveling" the payment for manipulation of various regions of the spine, regardless of the number of regions treated by the chiropractor. (A6344, 6347).

SUMMARY OF THE ARGUMENT

Appellants submitted direct evidence that Virginia medical societies and medical schools, acting through representatives that they appointed, and Trigon collusively acted to

1. economically disadvantage chiropractors by creating and distributing to more than 90% of Virginia physicians a back problem treatment guideline that distorted a federal guideline to discourage referrals of patients for chiropractic treatment;
2. pay chiropractors 40% less than medical doctors for performing the same services;
3. set payment for chiropractic services ignoring federal methodology that was applied for payment for most other services;
4. place a \$500 cap on payment for chiropractic treatments which history shows was not necessary.

That evidence renders the district court's entry of summary judgment that Trigon did not violate §1 of the Sherman Act, conspire to harm appellant chiropractors in violation of Va. Code Ann. 18.2-499 or the common law of Virginia, or tortiously interfere with the business expectations of chiropractors to be error.

The district court abused its discretion in denying appellants discovery of acts prior to 1996 that demonstrate the formation and duration of the conspiracy that is alleged here, refusing appellants discovery of acts first disclosed by documents that were produced virtually at the close of discovery, and refusing

appellants discovery of the extent of the relationship between medical doctors and Trigon.

The district court erred in dismissing appellant chiropractors' RICO claim by holding that the McCarron-Ferguson Act precluded that claim. The McCarron-Ferguson Act precludes application of a federal statute if it interferes with a state law that regulates the business of insurance. The acts that form the bases of the RICO claim are not within the business of insurance under the Act and application of RICO would not impair state law.

The district court erred in dismissing appellant chiropractors' claim based on the Virginia insurance equality laws by holding that there is no private right of action to enforce those laws. Private rights of action are recognized for similar sections of the Virginia insurance laws, and there is no indication that these sections should be excepted from private actions.

ARGUMENT

I. The Applicable Standard of Review of Summary Judgment

This Court reviews a district court's grant of summary judgment *de novo*, "viewing the facts and inferences drawn therefrom in the light most favorable to the non-movant." *Hawkspere Shipping Co. v. Intamex, S.A.*, 330 F.3d 225, 232 (4th Cir. 2003) (quoting *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001)). The Court "may not make credibility determinations or weigh the evidence." *Edell & Associates, P.C. v. Law Offices of Angelos*, 264 F.3d 424, 435 (4th Cir. 2001). "If after examining the entire record, in light of the controlling legal principles, a reviewing court concludes that material facts remain genuinely in dispute, it must hold the grant of summary judgment improper." *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508 (4th Cir. 2002).

II. Evidence that Trigon Engaged in an Illegal Conspiracy Precludes Summary Judgment

To establish a violation of § 1 of the Sherman Act, appellants must prove the following elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002); *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (*en banc*).

A. Appellants Presented Direct Evidence of Conspiracy

In order to show a conspiracy, appellants must prove that Trigon acted in concert with one or more other persons or entities. *See, e.g., Virginia Vermiculite v. Historic Green Springs*, 307 F.3d 277, 280-81 (4th Cir. 2002); *Oksanen*, 945 F.2d at 702. Concerted action may be shown by “direct or circumstantial evidence that reasonably tends to prove that [Trigon] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 104 S. Ct. 1464 (1984) (emphasis added). Here, direct evidence establishes such concerted action.

Medical societies and schools represented on the Managed Care Advisory Panel (“MCAP”) and Trigon agreed to a crucial act in furtherance of the conspiracy, rewriting the AHCPR guidelines to prevent referrals to chiropractors. Minutes of a meeting of the Managed Care Advisory Panel are direct evidence of a joint commitment to that scheme.

The meeting of the Managed Care Advisory Panel was held on October 25, 1995. Those present were:

Dr. Richardson Grinnan,
Trigon BCBS Chief Healthcare Officer

Dr. Larry Colley,
Trigon BCBS V/P Medical Policy

Dr. Michael Hattwick,
Va. Society of Internal Medicine

Dr. Robert Williams,
Dept. of FP, MCV

Dr. Geoffrey Viol,
American College of Physicians

Dr. Verdain Barnes,
Dept. of IM, EVMS

Dr. Willett LeHew,
Va. Chapter of ACOG

Dr. Latane Ware,
Medical Society of Virginia

Dr. Stuart Solan,
Va. Chapter of AAFP

Dr. Peter Nord,
Peninsula Health Care

Dr. Tony Pelonero,
Trigon Mental Health

Dr. James Carney,
Trigon BCBS

Ms. Pat Maddox,
Trigon BCBS

Ms. Pamela Roberts,
Trigon BCBS

Absent: Dr. Tom Massaro,
UVA

(A5828). Those minutes then memorialize the Panel members' approval of the anticompetitive referral guidelines:

Approval of Practice Guidelines from Regional Committees

* * *

Dr. Hattwick [of the Virginia Society of Internal Medicine]: we need to go over these one by one -- are these meant to be referral guidelines?

Dr. Colley: yes, they are referral guidelines.

Dr. Hattwick: we should emphasize that they are referral guidelines, if they are.

* * *

[Trigon's Guidelines] Unanimously adopted by Committee.

(A5832-33) (emphasis added). Trigon again sought and received approval by the panel of the final published form of the guidelines. (A6964-66).

There is direct -- not circumstantial -- evidence of concerted action between legally distinct entities to publish "non-referral" rather than what should have been "referral" guidelines.

B. The District Court Erred in Finding That the Intracorporate Immunity Doctrine Precludes Conspiracy between Trigon and Individuals

The district court found "that the intracorporate immunity doctrine bars the majority of the plaintiffs' conspiracy allegations in this case because Trigon, as a matter of law, cannot conspire with its employees and agents." (A2081). The

district court apparently applied that finding only to relationships between Trigon and individuals who worked with Trigon, including the medical doctors who were members of the Managed Care Advisory Panel¹. In finding that intracorporate immunity applied the district court committed numerous legal errors and improperly resolved genuine issues of material fact in favor of the movant Trigon.

1. Intracorporate Immunity Is a Narrow Doctrine

The Supreme Court, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984), established the intracorporate immunity doctrine holding that a corporation and its wholly owned subsidiary are incapable of conspiring for purposes of §1 of the Sherman Act. The *Copperweld* decision explained the rationale for the doctrine:

The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Id., 467 US at 769.

In *Oksanen, supra*, this Court joined other circuits in extending the intracorporate immunity doctrine to encompass peer review activities of a hospital and members of its medical staff. In doing so, this Court held that whether

¹ The district court did not apply the intracorporate immunity doctrine to the medical schools and societies that appointed the individuals as their representatives to the MCAP. (A2085-91).

intracorporate immunity applied to a relationship must be determined by examining the substance of the particular relationship. *Oksanen*, 945 F.2d at 703. In *Oksanen*, the Court examined the function of the peer review committee, the relationship of that function to the operation of the hospital, and the decisionmaking authority delegated by the hospital to the peer review committee to conclude that, like the relationship between parent and subsidiary corporations, “a similar unity of interest is present in the relationship between the hospital and its staff, both of which seek to upgrade the quality of patient care.” *Id.* at 703.

2. The District Court Erred in Holding That Nonemployee Individuals on the Managed Care Advisory Panel Were Within the Scope of Intracorporate Immunity

As an initial matter, the district court erred in stating that “Trigon, as a matter of law, cannot conspire with its employees or agents.” (A2081). The existence of a principal-agent relationship between two entities does not by itself provide § 1 immunity. As this Court held, “[c]onsistent with *Copperweld*, [the Court] must examine the substance, rather than the form, of the relationship” to determine whether the intracorporate immunity doctrine applies. *Oksanen*, 945 F.2d at 703.

The district court clearly relied on a finding that Trigon and the non-employee MCAP members had an ongoing relationship that is within the scope of the intracorporate immunity doctrine in deciding that Trigon and the nonemployee

members cannot conspire. (A2082-83). However, the district court provided no supporting functional examination of that relationship as required by this Court's *Oksanen* decision. The record makes clear that such an examination would show that there is no unity of interest between Trigon and the non-employee members of the MCAP that is within the scope of the intracorporate immunity, but rather a joining of independent interests.

Eight of the fifteen members of the MCAP are medical doctors who were neither employees nor officers of Trigon. (A5828). Trigon's Dr. Grinnan described those members as "external physician providers". (A5988). Trigon and the non-employee MCAP members (whether in their individual capacity or as representatives of associations of practicing medical doctors) are clearly "separate economic actors pursuing separate economic interests." Trigon's economic interest as a profit-seeking corporation is to maximize its profits. This is primarily achieved by minimizing payments to providers, including medical doctors and chiropractors. (A4958-59). The medical doctor external providers, both individuals and organizations, have an interest in increasing their own profits by minimizing the payments by Trigon to competitors of the medical doctors.

The relationship between Trigon and the medical doctors is unlike the hospital and medical staff relationship at issue in *Oksanen* where both were responsible for and shared an interest in patient care. *Oksanen*, 945 F.2d at 703.

Trigon does not operate a healthcare facility. It is an economic engine that collects and distributes money. Here, while physician providers have a responsibility for patient care, Trigon disclaims any such responsibility. As Trigon's Chief Medical Officer, William Braccioldieta, M.D., testified:

Q. Does Trigon in any way try to evaluate the effects of its insurance coverages or lack of coverages on the healthcare provided to those that are insured by Trigon policies?

A. No. Again, that's not the business that we're in.

(A4889).

The record shows that the medical doctor external providers who were members of the MCAP are not within the intracorporate immunity of Trigon. The district court's determination that intracorporate immunity applied was not supported by an examination of their relationship with Trigon as required by this Court's *Oksanen* decision and improperly resolved genuine issues of fact in favor of Trigon. That finding was in error.

C. The Low Back Problem Guideline Distributed by Trigon is False and Misleading to the Benefit of Medical Doctors and Detriment of Chiropractors and Patients

The 1994 AHCPR guidelines were recognized as endorsing chiropractic manipulation. In 1996, Trigon and the Virginia State Medical Societies responded to the publication of the AHCPR Guideline by publishing its own "Clinical Practice Guideline" entitled "Managing Low Back Problems in Adults." (A5990,

5992-94). Trigon did not scientifically and independently develop its own treatment guideline to offer recommendations based on independent scientific evaluation as did the panel that developed the AHCPR Guideline. Rather, Trigon relied entirely on the AHCPR Guideline for its medical and scientific validity and simply rewrote that guideline. (A5990, 6942). The revised guideline gutted any “referral” label, removed the identity of the specific (chiropractic) type of manipulation, and made any sort of “manipulation” (even a back rub) an afterthought.

Trigon intended that its Low Back Problem Guideline would influence the treatment of patients having low back problems. (A5990, 5999; 6000, 5832-33). To present a credible basis for influencing treatment of patients, Trigon’s guideline identifies two bases for its authority: “[t]hese guidelines were adapted from the Agency for Healthcare Policy and Research (AHCPR) and are approved and endorsed by Trigon’s Managed Care Advisory Panel.” (A6123). Trigon sought to influence nearly every primary care physician in Virginia by sending the guideline to all its contracting providers -- over 90% of the medical doctors in Virginia. (A5994, 6162-63).

Trigon intended the guideline to influence referral decisions by primary care physicians who initially evaluate a patient having back pain. During the meeting of the MCAP that approved Trigon’s guideline, a member of that panel observed

that the guidelines are a mixture of management and referral guidelines and Trigon's Dr. Colley agreed that these guidelines were referral guidelines. (A5832-33). That observation is consistent with the AHCPR Guideline that clearly implicates referral of patients by its recommendation of manipulation as practiced by chiropractors. As appellants' expert, Dr. Haldeman, stated, "[a] point that became evident from the AHCPR guidelines was that manipulation was the only treatment approach that required a medical physician in most instances, to make a referral of a patient with uncomplicated low back pain." (A5672).

Trigon's guideline is false and misleading for representing that its recommendations are based on the AHCPR Quick Reference Guide. Trigon's rewritten guideline is inconsistent with the AHCPR Guideline's recommendation of manipulation in at least two material respects: (1) the rewritten guideline does not identify the specific type of manipulation performed by chiropractors as the recommended treatment, and (2) the rewritten guideline does not accurately reproduce the AHCPR recommendation of manipulation as a treatment of the back to correct both functional and comfort (pain) problems.

The AHCPR Clinical Practice Guideline recognized that spinal manipulation "includes many different techniques." (A5507). Both AHCPR publications went to great lengths to specifically define the recommended treatment of manipulation as that which chiropractors are specifically trained to provide. (A5654, 5507).

Trigon's rewritten guideline, at most as an afterthought, states only that "manipulation" may be used. That statement encompasses the "many different techniques" referred to by the AHCPR, where the AHCPR excludes all but the manipulation performed primarily by chiropractors.

This was a clear effort to continue the *Wilk* obsession with deterring referrals to chiropractors in any and every way possible. The side effects of drugs are not even considered by Trigon nor are the horrors of unnecessary back surgery detailed in the AHCPR guidelines. (A5478-79).

Dr. Haldeman, a world renowned medical physician (neurologist), who also holds a Ph.D. in neurophysiology and a doctor of chiropractic, served on the AHCPR panel. (A5693-5732, 5670). (A5671). Dr. Haldeman specifically testified that Trigon's guideline is a marked discrepancy and deviation from the AHCPR guideline recommendation of manipulation. (A5672). Dr. Haldeman testified that the effect of Trigon's deviations from the AHCPR Guideline would be to deprive patients seeking care from a physician who followed those guidelines of the benefit of spinal manipulation (relief from pain and improved functionality)

and to deprive chiropractors of the opportunity to treat those patients. (A5671-72).²

D. Trigon’s and Medical Societies’ Development and Distribution of the Rewritten Guideline Is an Unreasonable Restraint of Trade

False and misleading advertising is recognized to have an anticompetitive effect. *Cal. Dental Ass’n v. Federal Trade Com’n*, 526 U.S. 756, 119 S. Ct. 1604, 1613 f.n. 9 (1999). There is no offsetting pro-competitive value to false statements. “False statements about rivals can obstruct competition on the merits and possess no offsetting redeeming virtues.” 3A P. Areeda & H. Hovenkamp, *Antitrust Law 2nd Edition*, § 782(d) at 276 (2002). Trigon’s rewritten guideline is not advertising that can be skeptically regarded as advocating an advertiser’s product or service. Rather, Trigon’s Guideline represents itself as setting out the recommendations of a panel of scientists working under the auspices of a federal agency. The false and misleading statements in Trigon’s rewritten guideline are more harmful to competition than any identifiable advertising could be.

Trigon and the Managed Care Advisory Panel can rightfully be viewed as attempting to coerce or deter primary care physicians from referring patients to

² Trigon submitted no testimony, expert or otherwise, disputing Dr. Haldeman’s testimony. The district court nevertheless found that Trigon’s guideline “follows” the federal guideline and that Dr. Haldeman’s credibility is “very thin.” (A2088). Both resolving a genuinely disputed issue of fact and assessing credibility on summary judgment were error. *Edell*, 264 F.3d at 435.

chiropractors by falsely and misleadingly representing that manipulation practiced by chiropractors is not the specifically recommended manipulation and that manipulation can only possibly be as effective as medication. (Compare A5653 and A6120). Trigon’s rewritten guideline further discourages referral to a chiropractor for manipulation by warning that manipulation may not be a covered treatment.³ “Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.” *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528, 103 S. Ct. 897 (1983).

Preventing or discouraging referrals of patients to chiropractors has been found to be anticompetitive. *Wilk*, 895 F.2d 360, 362. That finding is well supported by the Supreme Court’s view of the scope of acts prohibited by Section 1 of the Sherman Act. “The anti-trust laws are as much violated by the prevention of competition as by its destruction.” *U.S. v. Griffith*, 334 U.S. 100, 107, 68 S. Ct. 941 (1948). Even ignoring the potential serious harm to patients, by attempting to supercede the AHCPR Guidelines with guidelines that falsely and misleadingly represent that they contain the AHCPR guidelines but that do not recommend

³ “Not all contracts cover manipulation, physical methods, exercise or shoe inserts.” (A6120).

chiropractic manipulation as the AHCPR Guideline does, Trigon and the Managed Care Advisory Panel clearly intended to prevent competition between chiropractors who practice manipulation and medical doctors who treat back pain by medication.

The harm to patients who are not offered treatment by chiropractic manipulation is of particular importance in establishing that Trigon's and the Managed Care Advisory Panel's rewritten guideline is an undue restraint of trade.

“Congress designed the Sherman Act as a ‘consumer welfare prescription.’” A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.

N.C.A.A. v. Bd. Of Regents of Univ. Okl., 468 U.S. 85, 107, 104 S. Ct. 2948, 2963 (1984) (Citation and footnote omitted). Primary care physicians who, relying on Trigon's guideline, do not offer patients the option of referral to a chiropractor for manipulation or wrongly inform a patient that the effect of manipulation can at best be no better than medication deprive the patient of the option of chiropractic manipulation as recommended by the AHCPR. This harm to such patients demonstrates the anticompetitive effect of the false and misleading guideline.

E. Appellants' State Law Conspiracy Claims Are Supported by the Same Evidence

For the reasons stated above, the district court's judgment on appellants' state law conspiracy claims should also be vacated.

III. Appellants' Tortious Interference Claim Should Also Have Survived Summary Judgment

As discussed below, appellants' tortious interference with business expectancy claim does not depend on the existence of a conspiracy. At a minimum, genuine issues of material fact exist concerning each of the four elements of that claim, which are: (1) the existence of a business expectancy; (2) the interferor's knowledge of the expectancy; (3) the interferor's use of improper means or methods to interfere with the expectancy; and (4) a loss suffered by appellants resulting from disruption of the expectancy. *Maximus, Inc. v. Lockheed Info. Management Systems Co., Inc.*, 254 Va. 408, 414 (Va. 1997); *Peterson v. Cooley*, 142 F.3d 181, 186 (4th Cir. 1998).

With respect to elements 1 and 2, it is beyond dispute that chiropractors, including the eleven appellant chiropractors, have a reasonable expectation that some people who are covered by Trigon healthcare plans, and who suffer from conditions that may be treated by chiropractors, will seek treatment by a doctor of chiropractic. Trigon recognized that insured persons sought chiropractic care when it set a \$500 cap on chiropractic services, reduced payments to chiropractors by 40%, issued guidelines designed to prevent referrals to chiropractors and refused to follow RBRVS.

With respect to element 3, appellants have presented evidence that Trigon employed at least two different forms of "improper means" to interfere with the

appellant chiropractors' business expectancy. Trigon's participation in the illegal conspiracy to prevent referrals, described in detail above, is sufficient evidence of the required improper means. In addition, even acting alone Trigon's issuance of the misleading guidelines -- which, as discussed above, amounted to deceit and misrepresentation -- constituted an improper means by which to interfere with the chiropractors' business expectancies. *See Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 516 (E.D. Va. 1992) ("The term 'improper methods' has been defined to include violence, threats or intimidations, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of fiduciary relationship.") (emphasis added) (citing *Duggin v. Adams*, 234 Va. 221, 227 (Va. 1987)); *accord, Peterson*, 142 F.3d at 187.

Finally, with respect to the 4th element, appellants have also proffered evidence sufficient to create a genuine issue of material fact concerning the loss caused by Trigon's improper interference. Appellants' expert has estimated that the loss is at least \$65,492,356 for the Virginia chiropractors due to the loss of referrals (i.e., deterred demand) alone, with the total loss of referrals amounting to \$1,558,718 for the eleven appellant chiropractors combined. (A6351, 6374-75, 2116-17). Trigon has not presented any evidence in the summary judgment record to counter appellants' expert's measure of the loss.

Accordingly, the district court erred in granting Trigon's motion for summary judgment on appellants' tortious interference claim.

IV. The District Court Abused Its Discretion by Failing to Allow Discovery Appropriate For This Conspiracy Case

The district court's denials of discovery are reviewed under the abuse of discretion standard. *WLR Foods, Incorp. v. Tyson Foods, Incorp.*, 65 F.3d 1172, 1184 (4th Cir. 1995). The district court abused its discretion by: (1) disallowing appellants discovery for the time period immediately following the formal break-up of the nationwide conspiracy by medical physicians and insurance companies (controlled by medical physicians) to boycott chiropractors; (2) failing to extend and expand the scope of discovery after Trigon produced crucial documents that first disclosed the members of the Managed Care Advisory Panel and rewritten guidelines at the eleventh hour, which had been previously withheld by Trigon since the beginning of discovery; and (3) placing additional unreasonable discovery limitations on appellants. Importantly, appellants requested discovery relief before Trigon filed its summary judgment motion, knowing that Trigon would file such a motion, but all of appellants' requests for discovery relief were categorically denied.

A. Appellants Should Have Been Allowed Discovery For the Period 1988 to 1996

Trigon provided information only from 1996 forward under the reasoning that the statute of limitations precluded discovery prior to that time. As set forth in detail above, however, appellants allege that the conspiracy in the present case is merely a continuation and, at the very least, a residual extension of the “lengthy, systematic, successful, and unlawful” boycott by the American Medical Association of doctors of chiropractic, which was declared illegal in 1987. *Wilk*, 671 F. Supp. at 1478. The head was cut off but the tentacles continue to operate. What the medical physicians and insurance companies could no longer do by outright boycott (after 1987), the appellants allege, the medical physicians and insurance companies did by severely lowering the insurance reimbursements payable to chiropractors and taking other steps to curb the demand for chiropractic services.

Accordingly, appellants asked the district court to require Trigon to answer all discovery requests, interrogatories, and document requests for the period after the nationwide, AMA directed, medical doctor boycott of chiropractors “officially” ended in 1987. Without stating any reason for its decision, the district court denied appellants’ request. This was an abuse of discretion for at least the following reasons: (1) evidence brought to light even by the limited discovery allowed in this case has shown that a great deal of the conspiratorial actions in this case began

prior to 1996; (2) the law is clear that discovery prior to the statute of limitations period in conspiracy cases often provides the most relevant evidence of the formation of the actual conspiracy; and (3) by denying this discovery, the district court effectively precluded appellants from pursuing an entire theory of their case, which this Circuit has found to be improper.

1. Pre-1996 Activities

The limited discovery allowed in this case has revealed that many of the alleged conspiratorial actions originated just after the break-up of the AMA boycott in 1987 and prior to 1996. These actions included not only the false and misleading guidelines, carried out in the 1994-96 period, but also various acts taken to unreasonably lower insurance reimbursements to chiropractors. In that regard, it was in 1988 that Trigon imposed a \$500 cap on manipulation services, the mainstay of chiropractic care. Trigon attempted to mislead appellants during discovery by stating that the cap was 20 years old (A5187) -- i.e. prior to the end of the boycott -- but the discovery process ultimately brought forth the correct date. (A5345). Interestingly enough, it was also in 1988 that Dr. Colley began working at Trigon. (A6137).

Similarly, in approximately 1992 Trigon reduced ancillary service reimbursement to chiropractors to 70% of that paid to medical doctors for the same service. This was dropped again from 70% to 60% in 1996. (A6337, 6341, 6342).

Doctors of chiropractic were the only group of “physicians,” defined by Trigon as “medical doctors, doctors of osteopathy, doctors of chiropractic, dental surgeons, and podiatrists,” so treated. (A4986, 6296).

2. Relevance of Discovery Prior to the Limitations Period

The Supreme Court has held that discovery of matters that occurred prior to a limitations period may be denied only if the information is not, unlike here, otherwise relevant. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352, 985 S. Ct. 2380 (1978) (“it is proper to deny discovery of matter that is relevant...to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case”). In fact, evidence predating the events at issue “may comprise fundamental evidence of liability, for example, when it is necessary for a plaintiff to prove a conspiracy or other form of cooperative action, and the evidence of its formation is from a time long past.” 6 Moore’s Federal Practice, § 26.41[12] (Matthew Bender 3d ed.) (emphasis added). Further, “a discriminatory act that occurred before the limitations period or before the effective date of a statute may constitute relevant background evidence in a proceeding in which a current practice is at issue.” *Id.* (emphasis added). This, of course, is exactly the circumstance here.

3. Discovery May Not Be Denied If it Prevents the Pursuit of an Entire Theory

Denial of discovery was also an abuse of discretion because, by denying discovery for the period 1988-1996, the district court denied appellants the opportunity to present evidence on an entire theory of their case -- i.e., that the present conspiracy was merely a residual effect, or continuation, of the boycott formally ended in 1987. *See Ardrey et al. v. United Parcel Service*, 798 F.2d 679, 682 (4th Cir. 1986) (“Although it is ‘unusual to find an abuse of discretion in discovery matters’, ...a district court may not, through discovery restrictions, prevent a plaintiff from pursuing a theory or entire cause of action.”) (quoting *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618 (5th Cir. 1982)).

B. Appellants Were Prejudiced Due to the Eleventh Hour Disclosure of the Guidelines

Appellants were also denied effective discovery of the facts and circumstances surrounding the Managed Care Advisory Panel’s secret meetings to rewrite and distort the AHCPR guidelines. Specifically, discovery of the medical physician representatives of the Virginia medical societies who sat on that Panel, as well as the anticompetitive effects of Trigon’s distribution of the distorted guidelines, were not disclosed until shortly before the close of discovery even though appellants requested all such information at the outset of discovery.

Appellants' counsel independently learned of the existence of the Managed Care Advisory Panel approximately three weeks before discovery closed. Only after confronting Trigon's counsel did Trigon produce a handful of relevant documents relating to this crucial overt act of the conspiracy and for the first time identified the membership of the panel.⁴ With only approximately two weeks remaining in discovery, appellants' counsel scrambled to issue subpoenas and take the testimony of the medical physician societies finally disclosed as the members of the Panel. Appellants simply had insufficient time to complete adequate discovery of this late-disclosed act of the conspiracy.

All relief that appellants sought from the district court was denied. Specifically, appellants requested that: (1) the discovery period be extended for six months; (2) Trigon be compelled to answer all discovery requests, interrogatories, and document requests for the time period January 1, 1988 to date (that is, to include specifically the time period of 1994-1995 when the AHCPR guidelines were released and the Managed Care Advisory Panel conspired to issue its distorted, anticompetitive version of those guidelines); (3) Trigon be compelled to

⁴ See June 14, 2002 letter from Trigon counsel to appellants' counsel (A5296-97) ("The remaining group of documents at Bates Nos. TR 11140895-1130, was inadvertently missed by Trigon's personnel when the searches for Larry Colley's former files were conducted. This was admittedly a mistake by Trigon. We obviously are disappointed that these files were overlooked and not produced earlier.") (emphasis added).

state clearly why no chiropractor or chiropractic organization was consulted and why their comments were not sought by Trigon when the MCAP published its distorted guidelines; and (4) Trigon be compelled to identify all medical physicians who reviewed, approved, modified, or endorsed the Managed Care Advisory Panel's guidelines on low back pain. (A4433).

The district court denied appellants' first and second requests with no reason stated (A1131-34), and denied the third and fourth requests only on the ground that appellants had reached their limit of allowable interrogatories:

As I have previously ruled, the plaintiffs have reached their limit of allowable interrogatories. Thus, Trigon need not answer the plaintiffs' questions regarding Trigon's low back pain guide and Colley's version of the AHCPR guidelines.

I also deny the plaintiffs' request to extend the discovery period and hence discovery will proceed according to the previously entered scheduling order.

(A1134). The district court's opinion denying this discovery issued on June 26, 2002 and discovery closed on June 28, 2002 (A1093). Appellants had naturally already used their allotted number of interrogatories (25) before learning of the existence of the Panel and its meetings, since appellants only first learned of this information less than 30 days prior to the close of discovery. Nevertheless, the district court further abused its discretion by placing form over substance when it denied appellants' requests for relief on the ground that appellants had "reached their limit of allowable interrogatories." (A1134).

C. Additional Unreasonable Discovery Limitations Were Placed on Appellants

Particularly in view of the above, the district court also abused its discretion by denying additional discovery relief requested by appellants:

1. Appellants requested that Trigon identify the number of medical doctors who hold any position, office, job, duty, or consultation position with Trigon. (A1128). The district court denied this request as irrelevant. (A1131-32). Especially in view of the long-existing conspiracy of medical doctors to boycott the chiropractic profession, and in view of the standard for discovery under Rule 26, Fed. R. Civ. P. (which is not relevance), the number of such medical doctors is indeed relevant to appellants' claims based on conspiracy and therefore should have been discoverable. If the number is small, for example, the conspiracy among Trigon and the Managed Care Advisory Panel members could be confined to the medical society members of the Panel. If the number is large, however, the likelihood increases that other medical physicians and/or other medical societies have been involved in facilitating the conspiracy, which would in turn likely lead to the discovery of other conspiratorial actions by other participating conspirators.

2. Appellants also requested the identity of every insurance billing code for which Trigon pays other providers less than they pay medical doctors for the same services. (A1128). Similarly, the district court denied this discovery request on the ground that such information was "irrelevant to the issues in this case."

(A1132). Surely the co-conspirators' treatment of other providers -- i.e., non-chiropractors who do not, unlike chiropractors, threaten the livelihoods of medical doctors -- is relevant to the motive behind the conspiracy in this case and should have been discoverable. *See, e.g., Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 474 (3rd Cir. 1998) (emphasis added):

Against this background on the roofing market in general and GAF's place in the market in particular, we move to the evidence Rossi adduced that GAR used secret rebates with several of its biggest distributors in northern New Jersey, including Standard, Arzee, and Allied, for that is critical to understanding the motivations of Rossi's horizontal competitors.

* * *

We find this case, as it relates to GAF, Standard, and Arzee, fundamentally unlike *Matsushita*.... In contrast, it is not difficult to divine the likely motive of the three distributors, Standard, Arzee, and Allied, in boycotting Rossi. As Rossi's horizontal competitors, they wanted to rid the market of a price-cutting competitor with a reputation for excellent service and reliability who had refused to cooperate in their price fixing schemes in the past.

See also, One Stop Deli, Inc. v. Franco's Inc., 1993 WL 513298, *11 (W.D. Va. 1993) (Preliminary injunction granted on plaintiff's Business Conspiracy Act claim where the evidence demonstrated that the "prevailing motivation of this conspiracy was an intent to injure One Stop").

3. In addition, appellants requested all files of Trigon's former medical doctor employee (Dr. Colley) who participated in the Managed Care Advisory Panel. (A2888). The district court ruled that "Trigon has produced all of Colley's documents that relate to the chiropractors and I find that other documents are not relevant to this case." (A1133). Trigon has never disclosed, however, what information is contained in these "other" documents. Apparently, until pressed, Trigon withheld the Trigon back problems guidelines and information about the meetings of the MCAP as within the "other" category. That alone demonstrates the necessity of discovery of the remainder of Dr. Colley's files. As the person allegedly primarily responsible for making the decisions concerning the reimbursements for both medical doctors and their competitor chiropractors, and given his pivotal role in the Managed Care Advisory Panel's conspiratorial activities, all of Dr. Colley's files are relevant to the claims in this antitrust lawsuit. Dr. Colley testified that he maintained approximately 6 to 8 lineal feet of files while at Trigon, and only approximately 1 lineal foot (500 pages) of documents that could have come from his files were produced. (A2857, 6180-81).

4. Finally, appellants also requested that Trigon be ordered to produce a knowledgeable, prepared witness to testify pursuant to a 30(b)(6) deposition on topics going directly to the heart of the conspiratorial actions charged in this case (especially including, but not limited to, the activities of the late-disclosed

Managed Care Advisory Panel, the amounts paid by Trigon to each healthcare profession for treating back pain, and Trigon's practices since 1988 of paying chiropractors less than medical doctors for providing the same treatments) (A2888, 1061-63). Appellants had previously taken one 30(b)(6) deposition of Trigon, for which Trigon's designated witnesses were remarkably unprepared. (A2848-52).

In granting the protective order denying appellants the right to take a second 30(b)(6) deposition on different topics, the district court ignored the language of par. 9.b. in the court's Scheduling Order that specifically allowed for a reasonable number of Rule 30(b)(6) depositions of Trigon. (A1090). Instead, the district court completely denied appellants' request on the ground that it would be unreasonably burdensome for Trigon. (A1122-23). The district court, in so holding, did not consider appellants' need for the discovery requested, which, appellants submit, should have been obvious in view of the above. The district court's action here, too, was an abuse of its discretion.

V. THE DISTRICT COURT IMPROPERLY DISMISSED APPELLANTS' CLAIM FOR VIOLATION OF THE CIVIL RICO ACT

This Court reviews *de novo* a district court's dismissal of a claim under Rule 12(b)(6). *Ostrzenski v. Seigel*, 177 F.3d 245, 252 (4th Cir. 1999).

On appeal from an order granting a Rule 12(b)(6) motion to dismiss, this court accepts as true the facts as alleged in the complaint, views them in the light most favorable to the plaintiff, and recognizes that dismissal is inappropriate “unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.”

Id.

Count three of the appellants’ complaint alleges that Trigon violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(a), based on the predicate acts of extortion, mail fraud, and wire fraud. (A400-411).⁵ Based on a misapplication of the analysis set forth in *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 113 S. Ct. 2202 (1993), the district court dismissed appellants’ RICO count as barred by the McCarran-Ferguson Act. Appellants respectfully request that this Court reinstate appellants’ RICO claim.

A. The McCarran-Ferguson Act Does Not Preclude Appellants’ Rico Claim

The first clause of the McCarran-Ferguson Act provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

⁵ See, e.g., *Chinnici v. Central DuPage Hosp. Ass’n*, 1990 U.S. Dist. LEXIS 8164 (N.D. Ill.) (RICO claim upheld based on boycott of chiropractors).

15 U.S.C. § 1012(b). The Supreme Court has held that that clause pre-empts the application of a federal statute if: (1) the federal statute does not specifically relate to the business of insurance; (2) the state statute has been enacted for the purpose of regulating the business of insurance; and (3) the application of the federal statute would invalidate, impair, or supersede the state statute. *Fabe*, 508 U.S. at 501; *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1158 (E.D. Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996). The McCarran-Ferguson Act applies only where all three parts of the inquiry can be answered in the affirmative. *See Fabe* at 501; *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564 (1969). Here, the second and third parts are not met.

For the second part of the inquiry, a law “enacted ... for the purpose of regulating the business of insurance” is one “aimed at protecting or regulating [the] relationship [between insurer and insured], directly or indirectly.” *National Securities*, 393 U.S. at 460. The Court explained:

The statute did not purport to make the States supreme in regulating all activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws “regulating the *business* of insurance.” Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the “business of insurance” does the statute apply. ... The relationship between the insurer and the insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the “business of insurance.” Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers

that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder.

Id. Where a statute protected “the security of and service to be rendered to policyholders, the statute clearly relates to the business of insurance” and thus the McCarran-Ferguson Act bars federal pre-emption. *Fabe*, 508 U.S. at 502 (quoting *National Securities*, 393 U.S. at 462). However, to the extent that the statute attempts “to protect the interests of an insurance company’s shareholders, it did not fall within the scope of the McCarran-Ferguson Act” and application of federal law is not pre-empted. *Id.* at 501-02. Similarly, “to the extent that [a statute] regulates policyholders, it is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance.” *Id.* at 508.

1. As Applied to Trigon’s Acts that Harm Chiropractors, Va. Code Ann. § 38.2-200 Is Not A Law Enacted For The Purpose Of Regulating The Business Of Insurance

Based on an expanded reading of *Fabe*, the district court concluded that “section 38.200, charging the State Corporation Commission (“SCC”) with the execution of insurance laws in the Commonwealth, is clearly aimed at the enforceability of insurance policies and falls within the ‘business of insurance’ as defined in *Fabe*.” (A361) (emphasis added). In so doing, the district court failed

to determine whether those portions of the statute applicable to Trigon's actions were enacted to protect or regulate the relationship between the insurer and insured and thus fall within the "business of insurance." By not distinguishing between Section 38.200's effect on policyholders and non-policyholders, the district court's holding conflicts with *National Securities* and *Fabe*. The "all or nothing" approach the district court applied to Section 38.2-200 was expressly rejected in *Fabe*:

[I]t is the dissent's insistence upon an all-or-nothing approach to this particular statute that is flawed. The dissent adduces no support for its assertion that we must deal with the various priority provisions of the Ohio law as if they were all designed to further a single end. That was not the approach taken by this Court in *National Securities*, which carefully parsed a state statute with dual goals and held that it regulated the business of insurance only to the extent that it protected policyholders.

Fabe, 508 U.S. at 509 n.8. The "all or nothing" approach is also contradictory to the congressional intent as discussed by the Supreme Court.

If Congress had meant generally to preempt the field for the States, Congress could have said either that "no federal statute [that does not say so explicitly] shall be construed to apply to the business of insurance" or that federal legislation generally, or RICO in particular, would be "applicable to the business of insurance [only] to the extent that such business is not regulated by state law."

Humana Inc. v. Forsyth, 525 U.S. 299, 300, 119 S. Ct. 710 (1999) (internal brackets in original).

Trigon's acts of extortion, discrimination, and fraud against the appellant chiropractors do not affect the relationship between the insurer and insured. Any Virginia laws enacted to regulate or control Trigon's acts against the appellant chiropractors are enacted to the benefit of appellant chiropractors. Any incidental benefit conferred upon a policyholder is too tenuous to justify pre-emption of appellants' RICO claim.

To the extent section Va. Code Ann. § 38.2-200 is designed to further the interests of chiropractors, it is not a law enacted for the purpose of regulating the business of insurance. The Court should reverse the district court's dismissal of appellant chiropractors' RICO claim.

B. The Application Of RICO Would Not Invalidate, Impair, Or Supersede The Virginia Insurance Code Chapters At Issue And Would Not Frustrate Any State Or Administrative Policy

Appellant chiropractors' RICO claim does not meet the third prong of the *Fabe* analysis, because it will not invalidate, impair, or supersede state law. *See Fabe*, 508 U.S. at 501. The controlling analysis regarding the application of the third prong of the *Fabe* inquiry to RICO claims was set forth by the Supreme Court in *Forsyth*, *supra*. In *Forsyth*, Nevada insurance law provided for both a public cause of action by the Nevada Insurance Commissioner, and a private cause of action by the insureds to address the challenged conduct at issue. *Id.* at 312. The Court noted that the Nevada insurance laws do not exclude the application of other

state laws, including a common-law private cause of action that provided for punitive damages against the insurer. *Id.* at 312-13. Under those circumstances, the Court stated that “RICO’s private right of action and treble damages provision appears to complement Nevada’s statutory and common law claims for relief.” *Id.* at 313. Because Nevada’s legal system contemplated an action allowing damages equal to or exceeding those available under RICO, there could be no conflict between the state scheme and a federal claim addressing the identical conduct with similar damages.

The district court found that Virginia insurance law, unlike the Nevada statute at issue in *Forsyth*, does not expressly authorize a private right of action. (A365-66). However, the district court allowed appellants’ state law conspiracy claim to survive. (A355-57). Thus, the district court dismissed appellants’ RICO claim because it would “impair” Virginia’s Insurance law, while recognizing that appellants may realize comparable damages in a private action for the same conduct under an independent state conspiracy statute. *See* Va. Code Ann. 18.2-500(a).

Under the controlling *Forsyth* analysis, appellants’ RICO claim does not invalidate, impair, or supersede state insurance laws where a separate private right of action that provides for comparable damages is also available based on the challenged conduct. Appellants’ state law conspiracy action is such an action.

Forsyth therefore clearly dictates that appellants' RICO claim does not impair a state's insurance laws. See *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1099-1100 (10th Cir. 1999).

Since appellants' RICO claim does not frustrate any articulated Virginia policy, or interfere with Virginia's administrative regime, the third prong of the *Fabe* inquiry is not satisfied. Therefore, the first clause of section 2(b) of the McCarran-Ferguson Act does not bar the appellants' RICO claim.

VI. The District Court Also Erred By Ruling That There Was No Private Cause of Action to Enforce Virginia's Statutory Insurance Equality Laws

The district court ruled that there was no private right of action under Va. Code Ann. §§ 38.2-2203, 38.2-3408, 38.2-4221, or 38.2-4312(E). (A367-68). The court's reasoning is that Va. Code Ann. § 38.2-200 charges the Virginia State Corporation Commission with the execution of insurance laws of the Commonwealth (A361). Then citing *A & E Supply Co., Inc. v. Nationwide Mutual Fire Ins. Co.*, 798 F. 2d. 669 (4th Cir. 1986), the district court held in essence that virtually the entire insurance code of Virginia could only be enforced by the State Corporation Commission in regulatory actions brought in the State Corporation Commission. That is clearly not the law of Virginia. *A & E Supply Company* held only that the Virginia Unfair Claim Settlement Practices Act provided no private cause of action, and that there was no first-party bad faith cause of action. *A & E*

Supply deals only with claims of insurance company bad faith. *A & E* does not reach other parts of the insurance code of Virginia.

The four chapters appellants have relied upon are enforceable in Virginia by private action.

A.) Chapter 22 (38.2-2200 *et seq.*) deals with liability insurance policies. That chapter requires that insurers offer “med pay benefits” (Va. Code Ann. § 38.2-2201) and private enforcement thereof is routine, *see Rogers v. Nationwide Mutual Insurance Company*, 222 Va. 345, (Va. 1981) (decided prior to inclusion of chiropractors in the act). Chapter 22 also contains the famous “omnibus” clause setting forth numerous required auto insurance provisions (Va. Code Ann. § 38.2-2204) and the wellspring of a wealth of private enforcement actions. *See Newton v. Employers Liability Assur. Corp.*, 107 F. 2d 164 (4th Cir. 1939), *Maxey v. American Cas. Co.*, 180 Va. 285 (Va. 1942) and dozens of other cases.

Wedged between those two provisions is § 38.2-2203 which appellants relied upon here. If those other provisions of the law are privately enforceable this must be also, unless there is some specific exception – and there is none.

B.) Chapter 34 (38.2-3400 *et seq.*) deals with accident and sickness policies. Va. Code Ann. § 38.2-3405 is the Virginia statute generally prohibiting subrogation, the so-called “collateral sources rule.” This is an area of

unquestioned private action. *See Reynolds Metals Co. v. Smith*, 218 Va. 881 (Va. 1978).

Appellants here rely upon Va. Code Ann. § 38.2-3408, which sets forth who must be paid for mandated benefits. Va. Code Ann. § 32.2-3407 (dealing with preferred provider organizations) states that the providers listed in Va. Code Ann. § 38.2-3408 must be afforded the benefits of Va. Code Ann. § 38.2-3407. Va. Code Ann. § 38.2-3407(B) specifically states that “[t]he Commission shall have no jurisdiction to adjudicate controversies growing out of this subsection,” thus reflecting clear legislative intent that jurisdiction for these claims is to be in a civil court, and enforceable by private causes of action. Appellants’ claim in part is that Trigon has violated Va. Code Ann. § 38.2-3407 and 3408. Again there is a history of private litigation enforcing these provisions. *See Richter v. Capp Care, Inc.*, 868 F. Supp. 163 (E.D. Va. 1994), *aff’d*, 77 F. 3d 470 (4th Cir. 1996).

If there was any doubt about a private cause of action under chapter 34, that is put to rest by Va. Code Ann. § 38.2-3407.15(E), the ethics and fairness portion of this statutory scheme, which specifically provides that a provider is to bring a cause of action for violations before a trier of fact and that the State Corporation Commission is excluded as a trier of fact.

C.) Chapter 42 (Va. Code Ann. § 38.2-4200 *et seq.*) is also relied upon by appellants. This chapter deals with non-stock corporation health service plans (the old, depression-era non-profit type of Blue Cross Blue Shield). Va. Code Ann. § 38.2-4221(D) covers chiropractors, authorizing them to provide care under such insurance plans, and § 38.2-4228 provides that the S.C.C. shall not have jurisdiction to adjudicate such controversies.

D.) Chapter 43 (Va. Code Ann. § 38.2-4300 *et seq.*) covers HMO's and is also relied upon by the appellants. Va. Code Ann. § 38.2-4312 incorporates Va. Code Ann. § 38.2-4221 to include chiropractors as those within the scope of providers for HMO's. Chapter 43 goes back to Va. Code Ann. § 38.2-4221 to pick up the mandated provider/service language, and by implication a private cause of action exists because the same rules apply. The legislature later added Va. Code Ann. § 38.2-4312.1 to cover pharmacies and added the usual provision that the State Corporation Commission had no jurisdiction over these controversies in that section. Clearly the legislature believed other providers already could avail themselves of the jurisdiction of the court system.

The case of *Blue Cross of Va. v. Comm. Ex rel. State Corp. Commission*, 218 Va. 589 (Va. 1977), turned upon a different point but clearly stated that under the statutory scheme jurisdiction to adjudicate controversies growing out of subscription contracts is not in the State Corporation Commission, but in civil

courts. *Id.* at 596. Some of the claims asserted here arise directly from these subscription contracts, particularly the patients' claims against Trigon.

The district court's ruling is an unprecedented expansion of the ruling of *A & E Supply*. The law of Virginia does provide for private enforcement of insurance controversies including specifically enforcement of the statutes appellants have relied upon in this case. If this ruling is not reversed, every medical or chiropractic patient, and every doctor with a complaint under an insurance policy, will have to have the State Corporation Commission bring a regulatory action against the insurer to redress even the simplest wrongs. Surely the legislature has not set up any such scheme, and no Virginia court would so hold.

CONCLUSION

For the above reasons, this Court should reverse the district court's dismissal of counts three (RICO) and eight (Virginia Insurance Equality Laws) of appellants' complaint; vacate the district court's entry of summary judgment as to counts one (conspiracy in violation of § 1 of the Sherman Act), four (tortious interference), and five and seven (state law conspiracy claims); and order the district court to grant appellants the discovery denied them.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "George P. McAndrews". The signature is fluid and cursive, with a large initial "G" and "M".

George P. McAndrews
Steven J. Hampton
Patrick J. Arnold, Jr.
Peter J. McAndrews
Ronald A. Dicerbo
McANDREWS, HELD
& MALLOY, LTD.
500 West Madison Street
Suite 3400
Chicago, IL 60661
(312) 775-8000

CERTIFICATE OF COMPLIANCE

This Brief of Appellants has been prepared using:

Microsoft Word 2000;

Times New Roman;

14 Point Type Face.

EXCLUSIVE of the Table of Contents; Table of Citations; any Addendum containing statutes, rules or regulations; the Certificate of Service; Statement Regarding Oral Argument, this Brief contains 13,834 words.

I understand that a material misrepresentation can result in the Court's striking the brief and interposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line print-out.

A handwritten signature in black ink, appearing to read "George M. Andrews". The signature is fluid and cursive, with a long horizontal stroke at the end.

Signature of Filing Party

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of August, 2003, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Brief of Appellants and Joint Appendix, and further certify that I served, UPS Ground Transportation, the required number of the Brief of Appellants and Joint Appendix to:

Howard Feller
Bryan A. Fratkin
McGUIREWOODS, LLP
1 James Center
901 East Cary Street
Richmond, Virginia 23219

Counsel for Appellees

The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.

Alex L. Jensen
The LEX Group
1108 East Main Street, Suite 1400
Richmond, Virginia 23219